

To be Argued by:  
PETER L. URRETA  
(Time Requested: 15 Minutes)

---

---

**New York Supreme Court**  
**Appellate Division—First Department**

---

MICHAEL CUTAIA,

*Plaintiff-Appellant-Respondent,*

– against –

THE BOARD OF MANAGERS OF THE  
160/170 VARICK STREET CONDOMINIUM,

*Defendant-Respondent,*

– and –

THE RECTOR, CHURCH WARDENS AND VESTRYMEN OF TRINITY  
CHURCH IN THE CITY OF NEW YORK, MICHILLI CONSTRUCTION, INC.  
and MICHILLI INC.,

*Defendants-Respondents-Appellants,*

– and –

PATRIOT ELECTRIC CORP.,

*Defendant.*

---

*(For Continuation of Caption See Inside Cover)*

---

---

**BRIEF FOR THIRD-PARTY DEFENDANT-RESPONDENT**

---

---

O'CONNOR REDD ORLANDO LLP  
*Attorneys for Third-Party Defendant-  
Respondent*  
242 King Street  
Port Chester, New York 10573  
(914) 686-1700  
purreta@oconnorlawfirm.com

New York County Clerk's Index No. 155334/12

---

---

PRINTED ON RECYCLED PAPER 

---

MICHILLI CONSTRUCTION, INC. and MICHILLI, INC.,

*Third-Party Plaintiffs,*

– against –

A+ INSTALLATIONS CORP.,

*Third-Party Defendant-Respondent.*

---

160/170 VARICK STREET CONDOMINIUM, Improperly named as Board of  
Managers of the 160/170 Varick Street Condominium, THE RECTOR, CHURCH  
WARDENS AND VESTRYMEN OF TRINITY CHURCH IN THE  
CITY OF NEW YORK,

*Second Third-Party Plaintiffs,*

– against –

THE TRAVELERS COMPANIES, INC. d/b/a Travelers Insurance Company  
485 Lexington Avenue  
New York NY 10017,

*Second Third-Party Defendants.*

---

THE BOARD OF MANAGERS OF THE 160/170 VARICK STREET  
CONDOMINIUM, THE RECTOR, CHURCH-WARDENS AND VESTRYMEN  
OF TRINITY CHURCH IN THE CITY OF NEW YORK, MICHILLI  
CONSTRUCTION, INC. and MICHILLI, INC.,

*Third Third-Party Plaintiffs,*

– against –

ATLAS-ACON ELECTRIC SERVICE CORPORATION,

*Third Third-Party Defendant.*

---

THE BOARD OF MANAGERS OF THE 160/170 VARICK STREET  
CONDOMINIUM, THE RECTOR, CHURCH-WARDENS AND VESTRYMEN  
OF TRINITY CHURCH IN THE CITY OF NEW YORK, MICHILLI  
CONSTRUCTION, INC. and MICHILLI, INC.,

*Fourth Third-Party Plaintiffs,*

– against –

FIRST QUALITY MAINTENANCE II, LLC and ALEXANDER WOLF & SON,

*Fourth Third-Party Defendants.*

---

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... ii

PRELIMINARY STATEMENT..... 1

QUESTIONS OF FACT..... 8

STATEMENT OF FACTS..... 9

ARGUMENT

    POINT I

        THE SUPREME COURT PROPERLY DENIED CUTAIA’S  
        MOTION FOR SUMMARY JUDGMENT UNDER LABOR  
        LAW § 240 AS THERE IS A QUESTION OF FACT  
        WHETHER THE WORKER WAS PROVIDED WITH  
        AN ADEQUATE SAFETY DEVICE TO PERFORM  
        HIS  
        WORK..... 12

CONCLUSION ..... 22

PRINTING SPECIFICATIONS STATEMENT ..... 23

**TABLE OF AUTHORITIES**

**New York State Cases:**

Nazario v. 222 Broadway, LLC, 28 N.Y.3d 1054,..... 3, 8, 14, 15, 16, 18  
1056, 1287, 43 N.Y.S.3d 251 (2016).

Jones v Nazareth Coll. of Rochester, 147 A.D.3d 1364, ..... 4, 16  
1365, 46 N.Y.S.3d 357, 358 (4<sup>th</sup> Dept. 2017).

Vukovich v. 1345 Fee, LLC, 61 A.D.3d 533, ..... 12, 13, 14, 15  
878 N.Y.S.2d 15 (1<sup>st</sup> Dept. 2009).

Del Rosario v. United Nations Fed. Credit Union, 104 A.D.3d 515,..... 13, 14, 15  
961 N.Y.S.2d 389 (1<sup>st</sup> Dept. 2013).

Faver v. Midtown Trackage Ventures, LLC, 150 A.D.3d 580, ..... 17  
580, 52 N.Y.S.3d 626 (1<sup>st</sup> Dept. 2017).

Messina v. City of New York, 148 A.D.3d 493,..... 17  
494, 49 N.Y.S.3d 408 (1<sup>st</sup> Dept. 2017).

Plywacz v. 85 Broad St. LLC, 159 A.D.3d 543, 543-544, 72 N.Y.S.3d 80  
(1<sup>st</sup> Dept. 2018) .....17

**State Statutes:**

Labor Law § 240.....*passim*

Labor Law § 241(6).....*passim*

## **PRELIMINARY STATEMENT**

This Labor Law action arises from a construction related accident that occurred on March 26, 2012 wherein Plaintiff Appellant Michael Cutaia claims to have sustained serious injuries as a result of an electrical shock while working from a ladder. Michilli is a general contractor that leased the 11th floor space from Trinity Church in 2011 for use as Michilli's own office space. Michilli requested that A+ Installations do the plumbing work, which A+ Installations did for free it as a courtesy to Michilli's owner.

At the time of the accident, plaintiff Michael Cutaia was accompanied by his "helper" James Alonso, who generally did whatever plaintiff needed him to do. Mr. Cutaia's work that day consisted of cutting pipes in the ceiling and re-routing them to a new location. His boss Mr. Rothenberg directed plaintiff to use the ladders that were on the site when he needed them. Cutaia used a ten-foot, A-frame ladder that was always in that room. Prior to the incident, Mr. Cutaia used this ladder at two different locations in the subject bathroom, in the open position, for a respective five and thirty minutes, without incident.

The third time he set up the ladder, the accident occurred. At that time, the only way he could get the ladder to fit in the space where he wanted to work was to set it up in the closed position, leaning against a wall. Mr. Cutaia ascended the ten-

foot, fiberglass, A-frame ladder which was leaning against the wall in a closed position. The top of the ladder rested on the wall eight to nine feet from the floor. He was on the second or third rung. The pipe he was working on was in the ceiling, directly in front of him, a little above eye level. The ceiling was approximately ten feet tall and was framed out, but did not have any ceiling tiles. Plaintiff worked on this ladder for five to fifteen minutes, without the ladder moving or shifting.

While on the ladder working on the pipe, plaintiff was electrocuted and “then the next thing I remember was getting up off the ground, being on the ground.” He landed two to five feet from where the ladder was placed. Mr. Cutaia did not know how he broke away from the pipe which allegedly electrocuted him, since “[t]he next thing I know I was on the floor.

On prior occasions when he had used an A-frame ladder in the closed position, he had asked someone to hold it. He did not ask anyone to hold it at the time of the accident, since “the ladder was sturdy.”

Michilli's Joseph Renna testified that he responded to the accident site and observed electrical wiring hanging one foot below the piping where Cutaia was working. Mr. Renna performed a subsequent inspection and found that the wire was missing a cap at its splice point.

Plaintiff-Appellant moved for partial summary judgment under Labor Law §

240 and 241(6). Defendant-Respondent A+ Installations partially opposed that portion of plaintiff's motion that sought summary judgment under Labor Law § 240. Plaintiff's motion for summary judgment under Labor Law § 240 was denied by the Amended Order dated August 8, 2018. Plaintiff appeals from the denial of plaintiff's motion for partial summary judgment under Labor Law § 240.

The Respondent submits that Cutaia's appeal should be denied. The Court of Appeals' decision in Nazario v. 222 Broadway, LLC, 28 N.Y.3d 1054, 1056, 1287, 43 N.Y.S.3d 251 (2016) established that a plaintiff's motion for summary judgment under Labor Law § 240 will be denied where there was a fall off of a ladder resulting from an electrical shock, unless there is some evidence that the ladder was defective or additional equipment was required. The fact that the ladder fell, standing alone, cannot be a basis for granting summary judgment since there are questions of fact as to whether the ladder (or the electricity) was the proximate cause of the plaintiff's injuries.

In a recent decision citing the Court of Appeal's decision in Nazario, the Fourth Department decided a case directly on all fours with the facts in Mr. Cutaia's case. In that case, the court states:

At the time of the accident, plaintiff was using a 10-foot A-frame ladder to install flashing around a duct. The ladder was folded shut and leaning against the wall while

plaintiff was using it. Just before the accident, he was using both hands to take a measurement above his head, while standing on "the fourth or fifth rung" of the ladder, which was "at least four feet off the floor." As he extended his tape measure, he felt a strong electric shock to his left arm and he fell off the ladder.

The Fourth Department upheld the denial of plaintiff's summary judgment motion under Labor Law § 240, holding that "[T]here are questions of fact . . . whether . . . the ladder, which was not shown to be defective in any way, failed to provide proper protection, and whether . . . plaintiff should have been provided with additional safety devices." See, Jones v Nazareth Coll. of Rochester, 147 A.D.3d 1364, 1365, 46 N.Y.S.3d 357, 358 (4<sup>th</sup> Dept. 2017).

Further, Mr. Cutaia proffered the affidavit of engineer Robert Fuchs to attempt to provide evidence that the plaintiff should have been provided with additional safety devices. Paragraphs 8 and 9 of the Fuchs affidavit states:

8. Considering the nature of the work assigned to Cutaia, which involved cutting pipes, and preparing them to be re-routed with the use of hand tools at an elevated height, Cutaia should have been furnished with a more stable device equipped with a platform and rails, such as a baker scaffold or man lift. Had Cutaia been provided with a scaffold, or other appropriate device for his work, he would have been protected from falling to the ground when he received an electric shock.

9. Further, the A-frame ladder Cutaia was using was not

anchored, tied down, or otherwise adequately secured to the floor or wall, and there were no other safety devices provided such as a harness or safety belt to prevent Cutaia from falling to the floor. Had the ladder been supported or secured to the floor or wall by anchoring, the ladder would have remained stable when Cutaia was shocked, and he could have been prevented from falling to the floor. Moreover, had other safety devices been provided such as a harness or safety belt, the device would have prevented him from falling to the floor.

The Appellant's expert first contends that Cutaia should have been provided with a scaffold or a manlift to work in the tight space in the bathroom where plaintiff could not even open an A-frame ladder. Mr. Fuchs' affidavit does not explain how or if a scaffold or manlift would fit in such a tight space. As such, a question of fact exists as to whether these devices would have been suitable for the job. Further, he does not address whether a modified or improvised scaffold or manlift that would have fit in such a confined space would have provided the necessary surface area to prevent the plaintiff's fall after having been electrocuted.

Mr. Fuchs further opines that the A-frame ladder Cutaia was using should have been anchored, tied down, or otherwise adequately secured to the floor or wall. This recommendation is based on pure speculation - that when plaintiff was electrocuted, the ladder subsequently shifted or became unstable. There is no testimony by plaintiff that this "sturdy" ladder ever shifted before or at the time of

the incident and he has no recollection as to what actually happened. As such, this is not merely a question of fact, but unwarranted speculation by plaintiff's expert.

Further, Mr. Fuchs does not cite any codes or regulations requiring such measures. In contradiction to Mr. Fuchs' affidavit, OSHA Regulation 1926.1053(a)(19) only requires ladder safety devices on fixed (not portable) ladders when the climb exceeds 24 feet. Given this discrepancy, a question of fact exists and Mr. Fuchs should be subject to cross examination on those issues at trial.

The Appellant's expert also maintains that Mr. Cutaia should have been provided with a harness or safety belt to prevent him from falling to the floor. Based on the plaintiff's testimony, he was no more than six feet off the floor while he was on the ladder, with the piping a little above his head, in arm's reach. Again, OSHA Regulation 1926.1053(a)(19) only requires lifelines (and the accompanying harness) on fixed (not portable) ladders when the climb exceeds 24 feet. In an OSHA Standard Interpretation letter dated January 13, 2000, OSHA explains that "29 CFR 1926.1053(a)(19) states that fall protection must be provided whenever the length of climb on a fixed ladder equals or exceeds 24 feet. A fixed ladder is "a ladder that cannot be readily moved or carried because it is an integral part of a building or structure" (§1926.1050(b)." However, "[n]either the ladder standard (29 CFR 1926, subpart X) nor the fall protection standard (29 CFR 1926, subpart M)

requires fall protection for workers while working on portable ladders.”

With respect to fall arrest systems, OSHA notes;

Several factors must be considered in determining how much distance will be needed for a fall arrest system to work — to prevent the worker from contacting the next lower level. First, under §1926.502(d)(16)(iii), a personal fall arrest system must prevent the employee from contacting the level below. A 6 foot lanyard that incorporates a shock absorbing system may have a total extension of up to about 9½ feet before a fall is completely arrested. Because the lanyard is attached to the body harness at a point that is more than half-way up the body, an additional distance of about 3-4 feet must be added to assure that no part of the employee's body makes contact with the surface.

Given these stated limitations of a fall arrest system at a low elevation, and the fact that OSHA’s regulations do not require such systems when using a portable ladder such as the A-frame ladder involved in the accident, Mr. Fuchs’ contention that this was a requirement is without foundation and must be subject to cross examination at trial, as question of fact exists whether such a device could have avoided the accident and arrested plaintiff’s fall.

As such, there are material issues of fact whether the recommendations made in Mr. Fuchs’ affidavit adequately address the additional or different devices needed for plaintiff to work on this ladder. Plaintiff-Appellant did not meet his burden of

proving, as a matter of law, that Mr. Cutaia was not provided with the adequate equipment to perform his work at an elevation. Therefore, all we are left with is the fact that plaintiff fell off of a “sturdy”, non-defective ladder when he was electrocuted, without any evidence that the ladder failed. As per the holding in Nazario, the Supreme Court properly denied the plaintiff's motion for summary judgment under Labor Law § 240, based on the existence of questions of fact which must be determined by a jury and this appeal should be denied.

### **QUESTIONS PRESENTED**

1. In view of the Court of Appeal's decision in Nazario v. 222 Broadway, LLC, 28 N.Y.3d 1054, 1056, 1287, 43 N.Y.S.3d 251 (2016), can a worker's fall of an unsecured “sturdy” ladder that he worked on for five to fifteen minutes without incident where the worker fell after receiving an electric shock entitled the plaintiff to summary judgment under Labor Law § 240?

The answer is no.

## **STATEMENT OF FACTS**

This Labor Law action arises from a construction related accident that occurred on March 26, 2012 wherein Plaintiff claims to have sustained serious injuries as a result of an electrical shock while working from a ladder. The C-2 accident report indicates that plaintiff was “working in bathroom piping & touched exposed live wire - which caused him to fall off ladder about 4 feet.” (R.1839).

Michilli is a general contractor that leased the 11th floor space from Trinity Church in 2011 for use as Michilli's own office space. (R.1017-1095). Michilli requested that A+ Installations do the plumbing work. (R.829-831). A+ Installations was not paid for the work and did it as a courtesy to Michilli's owner. (R.829-830, 837-838).

At the time of the accident, plaintiff Michael Cutaia was the highest ranking A+ Installations employee present on site on a daily basis. (R.453-454). Plaintiff was accompanied by his “helper” James Alonso, who generally did whatever plaintiff needed him to do. (R.453). Mr. Cutaia's work that day consisted of cutting pipes in the ceiling and re-routing them to a new location. (R.467). His boss Mr. Rothenberg directed plaintiff to use the ladders that were on the site when he needed them. (R.578). Cutaia used a ten-foot, A-frame ladder that was always in that room. (R.471-473). Prior to the incident, Mr. Cutaia used this ladder at two

different locations in the subject bathroom, in the open position, for a respective five and thirty minutes, without incident. (R.475, 480).

The third time he set up the ladder, the accident occurred. (R.489). Plaintiff alleges that the only way he could get the ladder to fit in the space where he wanted to work was to set it up in the closed position, leaning against a wall. (R.490, 503). Mr. Cutaia ascended the ten-foot, fiberglass, A-frame ladder which was leaning against the wall in a closed position. (R.9, 473). The top of the ladder rested on the wall eight to nine feet from the floor. (R.493). He was on the second or third rung. (R.540). The pipe he was working on was in the ceiling, directly in front of him, a little above eye level. (R.497-498, 762). The ceiling was approximately ten feet tall and was framed out, but did not have any ceiling tiles. (R.982, 1160). Mr. Cutaia did a visual inspection and did not see any wires or electrical cables in the vicinity of the pipe he would be working on. (R.498). Plaintiff worked on this ladder for five to fifteen minutes, without the ladder moving or shifting. (R.495, 501, 684). It was "sturdy." (R.784).

While on the ladder working on the pipe, plaintiff was electrocuted and "then the next thing I remember was getting up off the ground, being on the ground." (R.507-508). He landed two to five feet from where the ladder was placed. (R.540). Mr. Cutaia did not know how he broke away from the pipe which

allegedly electrocuted him, since “[t]he next thing I know I was on the floor.” (R.540). He did not know if the ladder remained standing or had fallen. (R.508, 539-540).

On prior occasions when he had used an A-frame ladder in the closed position, he had asked someone to hold it. (R.763). He did not ask anyone to hold it at the time of the accident, since “the ladder was sturdy.” (R.763).

Michilli's Joseph Renna testified that he responded to the accident site and observed electrical wiring hanging one foot below the piping where Cutaia was working. (R.1197). Mr. Renna performed a subsequent inspection and found that the wire was missing a cap at its splice point. (R.1168-1169).

Plaintiff-Appellant moved for partial summary judgment under Labor Law § 240 and 241(6). (R.28). Defendant-Respondent A+ Installations partially opposed that portion of plaintiff's motion that sought summary judgment under Labor Law § 240. (R.1857). Plaintiff's motion for summary judgment under Labor Law § 240 was initially granted by the August 3, 2018 Order of Justice Edmead (R.16) and then denied five days later by the Amended Order dated August 8, 2018. (R.27). Plaintiff appeals from the denial of plaintiff's motion for partial summary judgment under Labor Law § 240. (R.4).

## **ARGUMENT**

### **POINT I**

#### **THE SUPREME COURT PROPERLY DENIED CUTAIA'S MOTION FOR SUMMARY JUDGMENT UNDER LABOR LAW § 240 AS THERE IS A QUESTION OF FACT WHETHER THE WORKER WAS PROVIDED WITH AN ADEQUATE SAFETY DEVICE TO PERFORM HIS WORK**

The plaintiff-Appellant argues that summary judgment under Labor Law § 240 is warranted because plaintiff was not afforded a proper device to perform his work in the ceiling at the time of the incident. The Appellant contends that the safety device provided to Cutaia was an “unsecured A-frame ladder which was clearly inadequate to safely perform his assigned tasks.” However, the ladder was adequate and allowed Mr. Cutaia to perform his work safely for five to ten minutes, up until the point where he was electrocuted. (R.495, 501, 684, 784).

The Appellant maintains that the holding in Vukovich v. 1345 Fee, LLC, 61 A.D.3d 533, 878 N.Y.S.2d 15 (1st Dept. 2009), is directly on point. In Vukovich, a pipe fitter received a shock and fell from the third or fourth rung of a non-defective A-frame ladder. The Supreme Court, Justice Lehner, denied plaintiff's motion for summary judgment under Labor Law § 240, noting:

In the case at bar, there is no proof that the ladder was defective, and issues of fact exist as to whether plaintiff should and could have been provided other safety devices

in the close area where he was working, and whether the absence of appropriate safety devices can be said to be a proximate cause of his injuries under the circumstance where the shock rendered him unconscious.

Justice Lehner's decision noted that all four Appellate Division departments held that summary judgment should be denied under such facts - a worker who is shocked and falls from a non-defective ladder. Vukovich v. 1345 Fee LLC, 2008 N.Y. Misc. LEXIS 10849. However, on appeal to the First Department that decision was reversed, with the Court holding that "[t]he ladder provided to plaintiff was inadequate to prevent him from falling five to seven feet to the floor after being shocked, and was a proximate cause of his injuries." Vukovich v. 1345 Fee, LLC, 61 A.D.3d 533, 534, 878 N.Y.S.2d 15 (1st Dept. 2009).

Similarly, plaintiff also relies on a subsequent case, Del Rosario v. United Nations Fed. Credit Union, 104 A.D.3d 515, 961 N.Y.S.2d 389 (1<sup>st</sup> Dept. 2013). In Del Rosario, plaintiff was standing on an A-frame ladder when he was struck in his face by an energized electrical wire. When he pulled away from the wire, the ladder wobbled and moved, causing him to lose his balance, and fall to the ground. The Supreme Court's denial of summary judgment under Labor Law §240(1) was reversed and summary judgment granted to the plaintiff since the ladder "was inadequate to the task of preventing his fall when he came into contact with the

exposed wire and was a proximate cause of his injury ". Id. at 515.

However, the holdings in Vukovich and Del Rosario were overturned by the Court of Appeals in Nazario v. 222 Broadway, LLC, 28 N.Y.3d 1054, 43 N.Y.S.3d 251 (2016). In Nazario, the First Department held that plaintiff was entitled to summary judgment in a case where plaintiff was caused to fall off a non-defective ladder due to an electrical shock. See, Nazario v. 222 Broadway, LLC, 135 A.D.3d 506, 23 N.Y.S.3d 192, (1<sup>st</sup> Dept. 2016). There, the First Department noted that although "the ladder itself may not have been defective, it is not a requirement that a worker injured by a fall from an elevated height demonstrate that the safety device was defective or failed to comply with safety regulations." Id. at 507.

However, in a concurring opinion by Justice Peter Tom, he states: "While I disagree with the majority's ruling and find there is a question of fact preventing the award of partial summary judgment on plaintiff's Labor Law § 240 (1) claim, I am constrained, based on this Court's precedent, to concur with the court's final disposition." Justice Tom further notes that the First Department's precedents, including Vukovich and Del Rosario (*supra*) cannot be reconciled with the holdings of the Court of Appeals, which had made clear that merely because a worker falls from a safety device does not mean that, under a principle of strict liability, recovery under the statute is available. Id. at 511.

The concurrence states “To be clear, prior to this Court's holdings in Vukovich and Del Rosario, all four Departments were unanimous in finding that a question of fact exists on the issue of liability under Labor Law § 240 (1) when a plaintiff worker falls from an A-frame stepladder as a result of an electrical shock, and where there is no evidence the ladder is defective and no record evidence of the need for another device.” Id. at 51-513. Justice Tom observed that in Nazario, there was no evidence in the record on appeal that defendants failed to provide the plaintiff with proper protection to prevent a fall after sustaining an electric shock. Id. at 512.

The Court of Appeals decision in Nazario reversed the First Department’s holding in a decision that upholds Justice Peter Tom’s analysis: “Plaintiff is not entitled to summary judgment under Labor Law § 240 (1). While using an A-frame ladder, plaintiff fell after receiving an electrical shock. Questions of fact exist as to whether the ladder failed to provide proper protection, and whether plaintiff should have been provided with additional safety devices.” Nazario v. 222 Broadway, LLC, 28 N.Y.3d 1054, 1056, 1287, 43 N.Y.S.3d 251 (2016).

As such, the law in all four departments is clear that a plaintiff’s motion for summary judgment under Labor Law § 240 will be denied where there was a fall off of a ladder resulting from an electrical shock, unless there is some evidence that the ladder was defective or additional equipment was required. The fact that the ladder

fell, standing alone, cannot be a basis for granting summary judgment since there are questions of fact as to whether the ladder (or the electricity) was the proximate cause of the plaintiff's injuries.

In a recent decision citing the Court of Appeal's decision in Nazario, the Fourth Department decided a case directly on all fours with the facts in Mr. Cutaia's case. In that case, the court states:

At the time of the accident, plaintiff was using a 10-foot A-frame ladder to install flashing around a duct. The ladder was folded shut and leaning against the wall while plaintiff was using it. Just before the accident, he was using both hands to take a measurement above his head, while standing on "the fourth or fifth rung" of the ladder, which was "at least four feet off the floor." As he extended his tape measure, he felt a strong electric shock to his left arm and he fell off the ladder.

The Fourth Department upheld the denial of plaintiff's summary judgment motion under Labor Law § 240, holding that "[T]here are questions of fact . . . whether . . . the ladder, which was not shown to be defective in any way, failed to provide proper protection, and whether . . . plaintiff should have been provided with additional safety devices." See, Jones v Nazareth Coll. of Rochester, 147 A.D.3d 1364, 1365, 46 N.Y.S.3d 357, 358 (4<sup>th</sup> Dept. 2017).

Appellant cites three cases decided by this court subsequent to Nazario to

support the proposition that, to establish liability under Labor Law § 240, it is immaterial what the initial event was that caused the the worker to lose balance.

In Faver v. Midtown Trackage Ventures, LLC, 150 A.D.3d 580, 580, 52 N.Y.S.3d 626 (1<sup>st</sup> Dept. 2017), this court held that plaintiff established entitlement to partial summary judgment under Labor Law § 240 when the worker was hit in the arm by an electrical wire that shot out of a section of conduit pipe, causing the unsecured ladder he was standing on to wobble, which resulted in plaintiff losing his balance and falling to the ground. The important distinction in that case was that the plaintiff was not electrocuted and there was no question of fact that the unsecured ladder was the cause of his fall. In Mr. Cutaia's case, there is a question of fact whether it was the unsecured ladder that caused the fall, or the jolt of electricity which coursed through his body, which irrespective of the unsecured ladder, propelled him off the ladder. As such, Faver is distinguishable from the Court of Appeal's holding in Nazario and does not affect the holding in Nazario.

Similarly, in Messina v. City of New York, 148 A.D.3d 493, 494, 49 N.Y.S.3d 408 (1<sup>st</sup> Dept. 2017), the cause of the worker's fall from an unsecured ladder was the pressure plaintiff applied to it while he was demolishing a ceiling. No electricity was involved. Again, in Plywacz v. 85 Broad St. LLC, 159 A.D.3d 543, 543-544, 72 N.Y.S.3d 80 (1<sup>st</sup> Dept. 2018) the precipitating cause of the worker's

fall from an unsecured ladder was a suction grip that had he had secured to a panel came loose. As such, this case is distinguishable from the Court of Appeal's holding in Nazario since electricity was not involved. These three cases reflect that this court recognizes the distinction in such cases being whether the precipitating cause of a worker's fall off an unsecured ladder was an ordinary force arising out the work, which may have been avoided with a secured ladder; or the force created by an electrical shock, which creates a question of fact whether the fall would have occurred whether or not the ladder was secured. As such, these cases are distinguishable from Mr. Cutaia's accident, where he was electrocuted and does not know how he was propelled from the ladder.

Further, Mr. Cutaia proffered the affidavit of engineer Robert Fuchs to attempt to provide evidence that the plaintiff should have been provided with additional safety devices. Paragraphs 8 and 9 of the Fuchs affidavit states:

8. Considering the nature of the work assigned to Cutaia, which involved cutting pipes, and preparing them to be re-routed with the use of hand tools at an elevated height, Cutaia should have been furnished with a more stable device equipped with a platform and rails, such as a baker scaffold or man lift. Had Cutaia been provided with a scaffold, or other appropriate device for his work, he would have been protected from falling to the ground when he received an electric shock.

9. Further, the A-frame ladder Cutaia was using was not

anchored, tied down, or otherwise adequately secured to the floor or wall, and there were no other safety devices provided such as a harness or safety belt to prevent Cutaia from falling to the floor. Had the ladder been supported or secured to the floor or wall by anchoring, the ladder would have remained stable when Cutaia was shocked, and he could have been prevented from falling to the floor. Moreover, had other safety devices been provided such as a harness or safety belt, the device would have prevented him from falling to the floor.

(R.1845).

The Appellant's expert first contends that Cutaia should have been provided with a scaffold or a manlift to work in the tight space in the bathroom where plaintiff could not even open an A-frame ladder. Mr. Fuchs' affidavit does not explain how or if a scaffold or manlift would fit in such a tight space. As such, a question of fact exists as to whether these devices would have been suitable for the job. Further, he does not address whether a modified or improvised scaffold or manlift that would have fit in such a confined space would have provided the necessary surface area to prevent the plaintiff's fall after having been electrocuted.

Mr. Fuchs further opines that the A-frame ladder Cutaia was using should have been anchored, tied down, or otherwise adequately secured to the floor or wall. This recommendation is based on pure speculation - that when plaintiff was electrocuted, the ladder subsequently shifted or became unstable. There is no

testimony by plaintiff that this “sturdy” ladder ever shifted before or at the time of the incident and he has no recollection as to what actually happened. As such, this is not merely a question of fact, but unwarranted speculation by plaintiff’s expert.

Further, Mr. Fuchs does not cite any codes or regulations requiring such measures. In contradiction to Mr. Fuchs’ affidavit, OSHA Regulation 1926.1053(a)(19) only requires ladder safety devices on fixed (not portable) ladders when the climb exceeds 24 feet. (R.1868). Given this discrepancy, a question of fact exists and Mr. Fuchs should be subject to cross examination on those issues at trial.

The Appellant's expert also maintains that Mr. Cutaia should have been provided with a harness or safety belt to prevent him from falling to the floor. Based on the plaintiff’s testimony, he was no more than six feet off the floor while he was on the ladder, with the piping a little above his head, in arm’s reach. Again, OSHA Regulation 1926.1053(a)(19) only requires lifelines (and the accompanying harness) on fixed (not portable) ladders when the climb exceeds 24 feet. (R.1868).

In an OSHA Standard Interpretation letter dated January 13, 2000, OSHA explains that “29 CFR 1926.1053(a)(19) states that fall protection must be provided whenever the length of climb on a fixed ladder equals or exceeds 24 feet. A fixed ladder is "a ladder that cannot be readily moved or carried because it is an integral

part of a building or structure" (§1926.1050(b).” However, “[n]either the ladder standard (29 CFR 1926, subpart X) nor the fall protection standard (29 CFR 1926, subpart M) requires fall protection for workers while working on portable ladders.”

(R.1875). With respect to fall arrest systems, OSHA notes;

Several factors must be considered in determining how much distance will be needed for a fall arrest system to work — to prevent the worker from contacting the next lower level. First, under §1926.502(d)(16)(iii), a personal fall arrest system must prevent the employee from contacting the level below. A 6 foot lanyard that incorporates a shock absorbing system may have a total extension of up to about 9½ feet before a fall is completely arrested. Because the lanyard is attached to the body harness at a point that is more than half-way up the body, an additional distance of about 3-4 feet must be added to assure that no part of the employee's body makes contact with the surface.

(R.1875).

Given these stated limitations of a fall arrest system at a low elevation, and the fact that OSHA's regulations do not require such systems when using a portable ladder such as the A-frame ladder involved in the accident, Mr. Fuchs' contention that this was a requirement is without foundation and must be subject to cross examination at trial, as question of fact exists whether such a device could have avoided the accident and arrested plaintiff's fall.

As such, there are material issues of fact whether the recommendations made

in Mr. Fuchs' affidavit adequately address the additional or different devices needed for plaintiff to work on this ladder. Plaintiff-Appellant did not meet his burden of proving, as a matter of law, that Mr. Cutaia was not provided with the adequate equipment to perform his work at an elevation. Therefore, all we are left with is the fact that plaintiff fell off of a "sturdy", non-defective ladder when he was electrocuted, without any evidence that the ladder failed. As per the holding in Nazario, the Supreme Court properly denied the plaintiff's motion for summary judgment under Labor Law § 240, based on the existence of questions of fact which must be determined by a jury.

### **CONCLUSION**

For all of the reasons set forth above, the order of the Honorable Carol R. Edmead denying Cutaia's motion for summary judgment under Labor Law § 240 should be affirmed in its entirety, together with such other and further relief as this court deems just, proper and equitable.

Dated: Port Chester, New York  
January 2, 2019

  
Peter Urreta

**PRINTING SPECIFICATIONS STATEMENT**

It is hereby certified pursuant to the rules of the Appellate Division (22 NYCRR 1250.8(j)) that the within brief was generated on a computer.

Type: A proportionally spaced typeface was used as follows:

Name of typeface: Times New Roman;

Point size: 14

The margins are one (1) inch on all sides;

The line spacing is double space; and

Word Count: The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, printing specifications statement, or any authorized addendum including statutes, rules, regulations, etc. is 5,330.

Dated: Port Chester, New York  
January 2, 2019