Nassau Lawyer
THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION
June 2013 www.nassaubar.org Vol. 62, No. 10

How Sturdy Is New York's 'Scaffold Law?'

By: Donnalynn Darling

New York's Labor Law §240(1), commonly known as the "Scaffold Law," protects workers who are injured by falling objects or by a fall from an elevated structure. Enacted in 1921, the law imposed liability on anyone who knowingly or negligently erected improper scaffolding. Since then, the law has been expanded many times so that it now covers workers who fall from any elevated structure or are struck by objects due to the absence of safety devices.

But understanding the coverage and scope of this apparently simple law is anything but easy. This article will try to explain this law by examining recent Court of Appeals cases involving Labor Law §240(1).

Labor Law § 240(1) reads in relevant part:
All contractors and owners and their agents, except owners of one and two family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

In *Misseritti v. Mark IV Construc tion Co., Inc.* the court of Appeals disallowed recovery under Labor Law §240(1) when a worker's injury was caused by a falling object whose base stood at the same level as the worker.[1] Specifically, the worker was killed when a masonry wall, located on the same level as the worker, collapsed. Judge Ciparick declined protection under Labor Law § 240(1), stating that this was the type of 'ordinary and usual' peril that workers are "commonly exposed to at a construction site and not an elevation-related risk subject to the safeguards prescribed" by the statute. Unsurprisingly, this became known as the "same level rule."

In 2011, Judge Ciparick refined the "same level rule" by shifting the focus of inquiry to the presence or absence of safety devices. In *Wilinski v. 334 East 92nd Housing Development Fund Corp.* debris from a wall being demolished struck unsecured vertical pipes which, in turn, struck the plaintiff, causing his injuries.[2] Although the base of the pipes were on the same level as the plaintiff, the court declined to apply the "same level rule," distinguishing this case from *Misseritti* by stating "[h]ere, the pipes that caused plaintiff's injuries were not slated for demolition at the time of the accident." In denying defendant's motion for summary judgment, the court held that "[w]hether plaintiff's injuries were proximately caused by the lack of a safety device of the kind required by the statute is an issue for a trier of fact to determine."[3]

But the decision in *Wilinski* was far from unanimous. In his dissent Judge Pigott, together with two other judges, stated that he saw "no reason to stray from the overwhelming and settled body of case law that establishes that section 240(1) does not apply when the base of the falling object is at the same level as the worker and the work being performed."[4] Because he felt the majority too greatly extended the reach of §240(1), he would have dismissed the plaintiff's §240(1) claim.

In *Salazar v. Novalex Contracting Corp.* the court denied recovery to a worker who fell into a hole when the goal of the work was to fill the hole with concrete.[5] This case, decided just one month after *Wilinski*, held that: "it would be illogical to require an owner or general contractor to place a protective cover over, or otherwise barricade, a three- or four foot deep hole when the very goal of the work is to fill that hole with concrete. ... Since the liquid concrete would necessarily fill the trench and pour out over the surrounding floor areas, it would be impractical and contrary to the very work at hand to cover the area where the concrete was being spread, particularly since the settling of concrete requires that the work of leveling be done with celerity."

But again, this holding was not unanimous. In dissent, Judge Lippman wrote:
"The majority misapplies this Court's recent holding in *Wilinski* ... and errs by viewing the evidence in the light most favorable to defendants, rather than in the light most favorable to plaintiff. ... The majority endeavors to create exceptions to Labor Law § 240(1) that should not exist and to narrow arbitrarily the scope of the statute in concluding that it does not apply to this case in which an elevation-related risk was clearly present and the accident, ... could have been prevented by the simple placement of a cover over the trench or a barrier around its perimeter."[6]

If there is a common thread in *Wilinski* and *Salazar* it is that safety devices are required when a mechanism causing an injury is not the subject of the work being performed while conversely, safety devices are not required (thus barring plaintiff from asserting a §240(1) cause of action) when the mechanism of the injury is the actual subject of the work being performed.

Two other recent Court of Appeals decisions also denied summary judgment to plaintiffs:
In *Ortiz v. Varsity Holdings, LLC* the plaintiff's job was to load a dumpster and rearrange construction debris which, he claimed, required him to stand on a narrow ledge of a six foot high dumpster.[7] He was injured when he fell off the ledge. The court, denying both plaintiff's and defendant's motions for summary judgment, cited the existence of factual issues regarding the need for safety equipment to prevent the risk of falling.

Finally, in *Dahar v. Holland Ladder & Mfg. Co.* the court declined to extend protection under Labor Law §240(1) to a manufacturing company employee who suffered injuries from a fall from a ladder while cleaning a product prior to shipping.[8] The court noted that all the cases involving cleaning under Labor Law § 240(1), with one exception, dealt with the cleaning of windows of a building, with or without scaffolding or other devices. The court discussed at length the legislative history of the statute's application to construction and unanimously declined to extend §240(1) to the cleaning of a manufactured product by a factory worker. The court was disinclined to "extend the statute so far beyond the purposes it was designed to serve."

In light of these recent decisions, there is no simple answer as to when Labor Law §240(1) will apply, but when accepting a possible §240(1) matter attorneys must be aware of these latest holdings. Although the decisions may lack a specific trend, it appears that New York courts are leaning toward a

strict interpretation of Labor Law §240(1) and may be limiting the ways in which the application of this statute will allow summary judgment to be granted for injured plaintiffs.

Donnalynn Darling is a partner and chair of the Personal Injury group of Meyer, Suozzi, English & Klein, P.C. in Garden City. Ms. Darling's practice focuses on plaintiff's personal injury trial work including the representation of workers injured as a result of New York State Labor Law violations in construction accidents. Andrew Ricci, JD assisted with this article.

Endnotes

1. 86 N.Y.2d 487, 489 (1995).
2. 18 N.Y.3d 1,11 (2011).
3. *Id.*
4. *Id.* at 15.
5. 18 N.Y.3d 134, 140 (2011).
6. *Id.* at 140-41.
7. 18 N.Y.3d 335, 340 (2011).
8. 18 N.Y.3d 521, 526 (2012).