Labor Law § 240 in 2006

By David A. Glazer

New York Labor Law § 240(1) is the plaintiff's attorney's best friend and a defendant's worst nightmare. A violation effectively makes a case damages only and forces the defendants to point fingers at each other. However, after *Blake*,[1] defendants have had stronger arguments that Labor Law § 240(1) should not apply. The year 2006 saw the Courts define Labor Law § 240(1) more strictly to the benefit of defendants.

Limitations Regarding Type of Work

The type of work performed by the plaintiff at the time of the injury determines whether Labor Law § 240(1) applies.[2] The Courts have more closely adhered to the four corners of the statute by limiting the law to situations where the plaintiff was actually involved in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building." In *Jones v. Dannemora*, the plaintiff was gathering sludge from a lagoon when he fell off of a ladder positioned against a trailer that had tumbled forward.[3] The Third Department dismissed the plaintiff's complaint since the plaintiff's work did not constitute altering or repairing under Labor Law § 240(1) because the lagoon was neither malfunctioning nor inoperable due to the sludge and, thus, not a repair.[4] Plaintiff's work comprised a separate phase from the larger repair project—the lagoon system upgrade—and Labor Law § 240(1) "affords no protection to a plaintiff injured before any activity listed in the statute was under way, even where the work is incidental or necessary to a larger project within the purview of the statute."[5] Thus, even though the plaintiff was part of the project which could have been covered by Labor Law § 240(1), the plaintiff himself was not and could not obtain its protections.

The Fourth Department also followed this reasoning in *Schroeder v. Kalenak Painting & Paperhanging, Inc.* The Court found that wallpapering was neither integral nor part of a larger repair project because another entity had already been assigned to conduct all future repair work.[6]

In *Zirkel v. Frontier Commc'n of Am. Inc.*, the plaintiff's complaint was dismissed because while the plaintiff was instructed to remove a utility pole, it fell and struck the plaintiff before he had attached the necessary mechanical device needed to remove the pole.[7] Therefore, the plaintiff was unable to demonstrate that the pole fell during the course of removal and plaintiff failed to satisfy the "hoisted or secured" elements required to recover for an injury resulting from a falling object.[8]

Gravity Redefined

The First Department effectively held that gravity is not enough to create a violation of Labor Law § 240(1). In *Meslin v. New York Post*, the injured worker stepped off of a ground-level scaffold onto a pipe which subsequently rolled and caused the worker to fall into a three-foot hole.[9] The Court found that the accident was not the result of the "extraordinary elevation-related risk" that is contemplated by Labor Law § 240(1).[10] Likewise, in *Trippi v. Main-Huron, LLC*, the Fourth Department held that a metal prop that struck and forced the plaintiff off of a stepladder was not encompassed by the statute because it was situated at the same height as the injured plaintiff and did not constitute an object that fell while being hoisted or secured.[11]

In line with this notion, the Second Department in *Gonzalez v. Turner Construction Co.*, affirmed the trial court's order granting the defendant summary judgment because plaintiff's injuries resulted when he struck a beam while standing on a roof shifting a rope with two other workers standing below roof level.[12] Simply because the injury occurred on a roof, it did not automatically entitle the plaintiff to recover under Labor Law § 240(1).[13] Rather, the Court limited the protection to only gravity-related accidents where objects fall from a great height or from being improperly hoisted or inadequately secured, as opposed to protecting against all remote incidents.[14]

Routine Maintenance

A plaintiff engaged in routine maintenance at the time of his injury will not be afforded the protections of Labor Law § 240(1). The courts further defined this in 2006.[15] In *Arevalo v. NASDAQ Stock Mkt., Inc.*, the plaintiff's Labor Law § 240(1) claim was dismissed because at the time of his fall the plaintiff was conducting a daily inspection of an electric sign.[16] Similarly, in *Broggy v. Rockefeller Group, Bax v. Allstate Health Care Inc.* and *Wein v. Amato*, the Courts found that cleaning the interior windows of a twenty-eight floor commercial building, clearing a smoke hatch of snow and ice, and replacing a boiler's defective safety valve all amounted to mere routine maintenance. Thus, Labor Law § 240(1) will not apply.

Nuances of New York Labor Law § 240(1)

While the above cases outline the basic limits of Labor Law § 240(1), there were a few unique situations that arose and require a closer examination. First, the Court of Appeals further defined *Blake*[17] by expanding the definition of sole proximate cause. *Blake* stated that when the worker is the sole proximate cause of his own accident, then Labor Law § 240(1) will not apply and the case should be dismissed. In *Robinson v. East Medical Center*, a worker fell while using a six-foot ladder when he should have used an eight-foot ladder.[18] The job site had eight-foot ladders that were readily available for the plaintiff

to use. He did not need to speak to his supervisor before changing ladders. He was also aware that he should have used the eight-foot ladder. Thus, the Court of Appeals held that the plaintiff was the sole proximate cause of his own fall because adequate safety devices were provided, but the plaintiff chose not to use them.

In *Molyneaux v. N.Y.*, the Second Department held that the defendants could not be held accountable for the injuries sustained by the plaintiff when he slipped on an unidentified substance that covered the entire scaffold but had never been observed prior to the incident.[19] The court held that the defendants could not be held liable without fault because it would impermissibly turn them into insurers of the workplace. Labor Law § 240(1) is meant to require that owners and employers furnish a safe workplace rather than assign liability without fault. Thus, by providing adequate safety devices, building owners and general contractors can avoid liability under Labor Law § 240(1). An accident on a scaffold is no longer an automatic finding of a violation of Labor Law § 240(1).

More interestingly, in *Woszczyna v. BJW Assoc.*, the court found that where the plaintiff was the sole witness to an accident and the plaintiff's credibility was at issue, the plaintiff could not succeed on a Labor Law § 240(1) summary judgment motion. Thus, a plaintiff's credibility can be used to defend against a motion for summary judgment by a plaintiff.

Finally, the Second Department, in *Rodriguez v. Indus. Assoc.*, found that pulling an electrical cable from a ceiling did not amount to altering within the meaning of the statute because it failed to constitute "a significant physical change to the configuration or composition of the structure."[20] Unfortunately, the *Rodriguez* Court did not provide more guidance into the scope of "a significant physical change." While the pulling of an electrical cable from a ceiling does not represent a significant physical change, the courts have not yet defined what will constitute a significant physical change.

Conclusion

The Appellate Divisions are applying Labor Law § 240(1) more strictly and it should be treated as such. Both plaintiffs and defendants should realize that Labor Law § 240(1) will not apply unless the plaintiff's activity falls within the statute and the injury is actually gravity related. Mere maintenance or modification are not enough for Labor Law § 240(1) to apply even if gravity related. Finally and more importantly, if adequate safety devices are provided and readily accessible to the plaintiff, the plaintiff will lose because of sole proximate cause. Accordingly, defendants now have a greater opportunity to dismiss claims alleging a violation of Labor Law § 240(1).

Endnotes

1. *Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003).
2. *Jones v. Dannemora*, 27 A.D.3d 844, 845, 811 N.Y.S.2d 186, 188 (3d Dep't 2006).
3. *Id.*
4. *Id.*
5. *Id*.
6. 27 A.D. 1097, 1098, 811 N.Y.S.2d 240, 241 (4th Dep't 2006).
7. 29 A.D.3d 1188, 1189, 815 N.Y.S.2d 324, 325 (3d Dep't 2006).
8. *Id.*
9. 30 A.D.3d 309, 310, 817 N.Y.S.2d 279, 281 (1st Dep't 2006); *see also Zirkel*, 29 A.D.3d at 1189, 815 N.Y.S.2d at 325 (Labor Law § 240(1) is not intended to cover all dangers tangentially related to gravity).
10. *Id*.
11. 28 A.D.3d 1069, 1070, 814 N.Y.S.2d 444, 445 (4th Dep't 2006).
12. 29 A.D.3d 630, 631, 815 N.Y.S.2d 179, 180 (2d Dep't 2006).
13. *Id*.
14. *Id.*
15. *Broggy v. Rockefeller Group*, 30 A.D.3d 204, 205, 818 N.Y.S.2d 6, 7 (1st Dep't 2006) (citing *Panek v. Albany*, 788 N.E.2d 616, 758 (2003) (cleaning the eighth floor interior windows falls into the category of routine maintenance)); *Wein v. Amato Prop.*, 30 A.D.3d 506, 507; 816 N.Y.S.2d 370 (replacement of a boiler's safety valve did not amount to repair but rather mere routine maintenance); *Bax v. Allstate Health Care Inc.*, 26 A.D.3d 861, 862, 809 N.Y.S.2d 378, 380 (4th Dep't 2006) (clearing a smoke hatch of snow and ice constituted routine maintenance).
16. 28 A.D.3d 242, 813 N.Y.S.2d. 383, 384 (1st Dep't 2006).
17. *Blake*, *supra* note 1.
18. 6 N.Y.3d 550, 814 N.Y.S.2d 589 (2006).
19. 8 A.D.3d 438, 439, 813 N.Y.S.2d 729, 730 (2d Dep't 2006).
20. 30 A.D.3d 576, 816 N.Y.S.2d 383 (2d Dep't 2006).

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