Court of Appeals of the State of New York

MILIHA FERLUCKAJ,

Plaintiff-Respondent,

-against-

GOLDMAN, SACHS & CO.,

Defendant-Appellant,

-and-

HENEGAN CONSTRUCTION CO., INC.,

Defendant.

GOLDMAN, SACHS & CO.,

Third-Party Plaintiff,

-against-

AMERICAN BUILDING MAINTENANCE CO.,

Third-Party Defendant.

BRIEF ON BEHALF OF THE DEFENSE ASSOCIATION OF NEW YORK, INC. AS *AMICUS CURIAE*

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of New York, Inc.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

CORPORATE DISCLOSURE STATEMENT

The Defense Association of New York, Inc. is a not-for-profit corporation which has no parent companies, subsidiaries or affiliates.

PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of the Defense Association of New York, Inc. as amicus curiae in relation to the appeal which is before this Court in the above-referenced action.

The purposes of the Defense Association of New York, Inc. are to bring together by association, communication and organization attorneys and qualified non-attorneys in the State of New York who devote a substantial amount of their professional time to the handling of litigated cases and whose representation in such cases is primarily for the defense and also those whose practice consists in representing insurance companies, self-insured firms and corporate defendants; to continue to improve the services of the legal profession to the public; to provide for the exchange among the members of this association of such information, ideas, techniques, procedures and court rulings related to the handling of litigation as are calculated to enhance the knowledge and improve the skills of defense lawyers; to elevate the standard of trial practice and develop, establish and secure court adoption or approval of a high standard code of trial conduct in court matters; to support and work for the improvement of the adversary system of jurisprudence in our courts and facilitate and expedite the trial of lawsuits; to initiate a program of education and

information in law schools and emphasizing trial practice for defense attorneys; to inform its members and their clients of developments in the courts and legislatures affecting their practice and by proper and legitimate means to aid in such developments when they are in the public interest; to establish an educational program to disseminate knowledge by means of seminars and other pedagogical methods on trial techniques; to promote improvements in the administration of justice; to encourage prompt and adequate payment of every just personal injury claim and to present effective resistance to every non-meritorious or inflated claim; to advance the equitable and expeditious handling of disputes arising under all forms of insurance and surety contracts; to take part in programs of public education that promote safety and help reduce losses and costs resulting from accidents of all kinds.

This is an action for damages for personal injuries allegedly sustained by plaintiff Miliha Ferluckaj (hereinafter "plaintiff") during the course of her employment with third-party defendant American Building Maintenance Co. (hereinafter "ABM"). Plaintiff was employed by ABM as an office cleaner.

The incident occurred at 32 Old Slip in Manhattan, which is a multi-story building owned by non-party Paramount Group (hereinafter "Paramount"). Plaintiff regularly worked on the 24th and 28th floors of the building. Her regular duties did not include washing or dusting the windows.

On the day of the accident, plaintiff was working overtime on the 29th floor of the building. Her work at the time of the incident consisted of cleaning windows in preparation for occupancy the next day by defendant-appellant and third-party plaintiff Goldman Sachs & Co. (hereinafter "Goldman"). The 29th floor had just been renovated.

Goldman did not engage ABM to perform the window cleaning. Rather, the window cleaning was performed pursuant to an arrangement between Paramount and ABM.

The incident occurred while plaintiff was standing on an office desk cleaning windows. The desk was completely sturdy. It did not move or shake in any way. The incident occurred because plaintiff simply walked off the desk due to her own inattentiveness. Further, there is evidence that plaintiff chose not to utilize stepstools for her work, which she acknowledged were present on the premises.

The Defense Association of New York Inc. respectfully submits that Goldman cannot be held liable under Labor Law §240(1). Goldman, a tenant which did not contract for the window cleaning and which had no authority to control plaintiff's activities, is not a proper defendant in an action brought under this statute. To cast Goldman in liability herein would expand the scope of the statute far beyond that which was intended by the Legislature.

Moreover, plaintiff's own conduct was the sole proximate

cause of the unfortunate incident. The desk was firm, with a steady footing, and plaintiff fell simply because she walked off the edge. Goldman should not be held responsible for plaintiff's own inattentiveness. Additionally, plaintiff's claim is further subverted by her failure to use the stepstools which were available on the premises.

Goldman is entitled to a dismissal.

STATEMENT OF FACTS

The underlying action is one for damages for personal injuries sustained by plaintiff-respondent Miliha Ferluckaj (hereinafter "plaintiff") in an accident which occurred at premises located at 32 Old Slip in Manhattan. Non-party Paramount Group owned the property located at that address (R 439) (References made are to pages of the Record on Appeal unless otherwise noted). Defendant-appellant and third-party plaintiff Goldman Sachs & Company (hereinafter "Goldman") leased several floors in the building (R 439). The incident occurred on the 29th floor of the premises (R 62). That floor was ultimately to be occupied by Goldman, although Goldman had not taken occupancy when the accident occurred.

Plaintiff was injured while in the course of her employment with third-party defendant American Building Maintenance Co. (hereinafter "ABM") (R 108), a company which provided janitorial services at the building. Plaintiff was employed by ABM as a cleaner. Her general job duties included cleaning desks, dusting, vacuuming and emptying garbage, and she typically worked on the 24th and 28th floors of the building located at 32 Old Slip (R 109 & 258). While plaintiff regularly worked on the 24th and 28th floors of the building, she never washed or dusted windows on those floors (R 258).

On March 22, 2001, plaintiff performed her general duties during her regular shift on the 24th floor (R 379). After her

regular shift ended, plaintiff then went to perform overtime work on the 29th floor of the building (R 110 & 263). There was construction ongoing on the floor all week (R 267). Plaintiff's overtime assignment that evening was to clean windows in that new space. Prior to that date, plaintiff had never cleaned windows on any floor at 32 Old Slip (R 265).

The windows on the 29th floor were all the same width and all the same distance from the ground (R 273). Plaintiff began cleaning windows that evening at 12:30 a.m. and cleaned windows until her accident occurred, at approximately 2:30 a.m. (R 272). Plaintiff was working with another lady, Agnes (R 273). Prior to her accident occurring, plaintiff and Agnes had cleaned the windows in three to five offices (R 279). Each time plaintiff got up to the window by "jumping" on top of a desk located adjacent to the windows (R 280). Neither plaintiff nor Agnes ever asked for a stool or ladder to perform their job tasks (R 280), despite the fact that plaintiff was aware ABM had stepstools available at the premises (R 353).

Plaintiff's accident occurred when, while she was cleaning, she fell off the desk she had been utilizing to clean the windows (R 291). More specifically, plaintiff had been cleaning the windows from right to left (R 292). She had been looking straight ahead, moving to her left, and had a rag in her hand touching the window, when all of a sudden she just fell (R 300 & 491). As she moved to her left, her left foot had nothing

underneath it and she fell (R 302). Agnes called plaintiff's name immediately before plaintiff fell (R 357). Plaintiff was asked at her deposition "Okay. Before you took that step, did you look over to the left to see where the desk had ended?" Plaintiff responded "No. I didn't look. I just kept going" (R 402).

The desk did not move or shake in any way (R 354). Rather, it was a firm desk with a firm footing (R 354).

Plaintiff experienced no problem seeing while she was cleaning the office (R 293). Her co-worker Agnes was standing on the same desk as plaintiff when the incident occurred (R 294-295).

According to plaintiff, there was construction ongoing on the 29th floor on the date of her accident (R 309). As aforestated, plaintiff was employed b ABM on the date of her accident. The services provided by ABM at 32 Old Slip in March of 2001 were provided pursuant to a written contract between non-party Paramount and ABM (R 591). The contract between Paramount and ABM provided that "[p]rior to tenant occupancy, contractor shall provide the initial cleaning or [sic] all interior windows for which there will be no charge to Paramount Group, Inc. or tenant. Work to be performed upon request of Paramount Group Inc." (R 677). Accordingly, the cleaning of the windows was provided pursuant to the base building services agreement between Paramount and ABM.

Defendant Henegan Construction Co., Inc. performed the construction work for the interior renovation project that had been ongoing on the 29th floor of 32 Old Slip (R 494-495). Prior to the work being started on the 29th floor, a construction schedule was drawn up which set March 23, 2001 as the date Goldman would be moving into its premises on the 29th floor at 32 Old Slip (R 499). This was one day after plaintiff's accident

While ABM did provide additional services to Goldman at the premises, these additional limited services which Goldman would contract for on the side included pantry maintenance, some carpet care and shampooing, and potentially the waxing of floors (R 442 and 601). Again, window cleaning was part of the base building cleaning specifications that the building, not Goldman, would provide (R 471). Interior window washing services was not part of any of Goldman's service agreements with ABM (R 477).

Before the trial court, various motions were made with respect to plaintiff's Labor Law §§ 200, 200(2), 240(1) and 241(6) claim. Ultimately, the Supreme Court, New York County dismissed plaintiff's Labor Law 240(1) claim. An appeal was taken to the Appellate Division, First Department which modified the Supreme Court's order to the extent of reinstating plaintiff's claim against Goldman pursuant to Labor Law §240(1). At the outset, the Appellate Division, First Department discounted any argument that issues of fact existed as to whether plaintiff's actions were the sole proximate cause of the

incident. In this regard, the court rejected any contention that plaintiff's failure to utilize or ask for a step stool was a cause of this accident, determining that "defendants failed to set forth any evidence regarding availability of the step stool. Furthermore, even if it were clear that a step stool would have been provided had plaintiff requested one, defendants, again, failed to present any evidence as to whether it would have constituted an adequate safety device." 53 A.D.2d 422, 862 N.Y.S.2d 473, 477. The court further went on to determine that any argument that an issue of fact exists as to whether plaintiff's inattentiveness was the sole proximate cause of her accident was equally unavailing since the "sole proximate cause defense does not apply where plaintiff was not provided with an adequate safety device as required by the Labor Law." 53 A.D.3d at 425, 862 N.Y.S.2d at 479. The majority concluded that because the deck that plaintiff was working on at the time of her accident did not constitute an adequate safety device, the defense did not apply. In concurring, Justice Nardelli agreed that plaintiff's activity was a protected one under the Labor Law, but opined that issues of fact existed as to whether plaintiff's own acts were the sole proximate cause of the accident. This was not only because plaintiff was aware of the availability of a step stool but neglected to request one, but because of other factors as well: such as that the desk did not move, shift or wobble; that plaintiff was not looking where she

was going; and that plaintiff could have been distracted by a fellow worker who called her name immediately prior to her fall.

Despite the majority's determination that the sole proximate cause defense did not apply, the Appellate Division, First Department nevertheless declined to award summary judgment to either party because it determined that a question existed as to whether Goldman, as a lessee, could be liable pursuant to §240(1) of the Labor Law. In that regard, the court held as follows:

> That provision enumerates only contractors, owners, and their agents as persons charged with providing protective devices to workers. However, a lessee may have liability as an "owner" under the Labor Law when it has the right or authority to control the work . . . Goldman argues that it had no authority over plaintiff's window cleaning because the work was being performed strictly pursuant to ABM's agreement with the owner. The dissent agrees, submitting that the contract between ABM and the building owner is prima facie evidence that Goldman did not request the work. However, the contract is not dispositive on its face. Accordingly, Goldman did not meet its prima facie burden merely by placing it in the record.

53 A.D.3d at 424, 862 N.Y.S.2d at 428.

Justice Tom, dissenting, noted that there could be no basis upon which liability could be imposed on Goldman, inasmuch as there was no proof that Goldman, a lessee in the building who was a "stranger" to the contract between the building owner and ABM, either contracted for or exercised control over the

cleaning work.

Ultimately, the appeal came before this Court.

POINT I

THE LEGISLATURE DID NOT ENVISION THAT GOLDMAN'S STATUS AS MERELY A LESSEE WOULD EXPOSE IT TO LIABILITY AS THAT OF AN "OWNER" UNDER LABOR LAW §240(1), AND THIS COURT SHOULD DISMISS THE ACTION AGAINST IT

The legislature did not envision a party like Goldman--a lessee--should be subjected to the absolute liability of Labor Law § 240(1). At the time the incident occurred, Goldman had not taken occupancy of the floor. It was scheduled to do so one day after plaintiff's incident. The work plaintiff performed at the time of the incident was under the Paramount-ABM contract. While Goldman had hired ABM on limited occasions, this work only included pantry maintenance, carpet care, and possibly floor waxing. The Paramount-ABM contract specifically provided that window cleaning was included. Therefore, as a lessee that did not contract for the injury-producing work or have the authority to control the work, Goldman should have been dismissed from this action.

No party will dispute that Labor Law §240(1) imposes absolute liability upon and owner, general contractor, or one of their agents where a plaintiff demonstrates a violation of the statute and proximate cause. This Court, however, has set forth some requirements that a plaintiff must first satisfy in order to stand under the umbrella of Labor-Law protection. In order

to come within the special class of workers protected by the statute, a plaintiff must demonstrate that he or she was "both permitted or suffered to work on a building or structure" and that he or she was "hired by someone, be it an owner, contractor or their agent." Whelen v. Warwick Valley Civic and Social Club, 47 N.Y.2d 970, 971, 419 N.Y.S.2d 959, 959 (1979).

The exceptional remedy of absolute liability under the Labor Law is imposed upon an owner, general contractor, or their agent that has failed to provide any safety devices for workers performing tasks enumerated in the statute where the absence of such devices is the proximate cause of the injuries. Zimmer v. Chemung County Performing Arts, Inc., 65 N.Y.2d 513, 493 N.Y.S.2d 102 (1985). Therefore, those parties have a nondelegable duty to provide a safe work place. Russin v. Louis N. Picciano & Sons, 54 N.Y.2d 311, 445 N.Y.S.2d 127 (1981).

While Labor Law §240 imposes a nondelegable duty upon owners and general contractors, it does not define the term "owner." The Second Department previously defined it in Copertino v. Ward, 100 A.D.2d 565, 473 N.Y.S.2d 494 (2d Dep't 1984) and Wendel v. Pillsbury Corp., 205 A.D.2d 527, 612 N.Y.S.2d 678 (2nd Dep't 1994). The Copertino Court looked to the legislative history of the Labor Law and determined that "[t]he 'owners' contemplated by the Legislature are those parties with a property interest who hire the general contractor to undertake the construction work for their behalf." 100 A.D.2d at 566, 473

N.Y.S.2d at 496 (citations omitted). In this case, Goldman did not hire plaintiff or ABM for the work she performed at the time of the incident.

While this Court dismissed plaintiff's claims in Whelen, supra, because he was a volunteer, several appellate courts have applied it to situations similar to this case, i.e., involving a lessee that neither contracted for no directed or controlled the work. Where a party is not named by the statute, i.e., an owner or contractor, it should be strictly construed. To hold otherwise would subject a party to strict liability based solely upon its nexus, however attenuated, to the property. As Labor Law §240(1) is a statute in derogation of the common law as it holds parties liable based solely upon their status as opposed to their actual fault, this strict application is warranted.

In Guzman v. L.M.P. Realty Corp., 262 A.D.2d 99, 691 N.Y.S.2d 483 (1st Dep't 1999), Dragone leased commercial space to United Consulting Services. During construction, plaintiff fell from a ladder when its legs gave way. The First Department noted that §240(1) applied to "contractors and owners." As a lessee, United would be held liable "only where is can be shown that it was in control of the work site." Id. 262 A.D.2d at 99, 691 N.Y.S.2d at 485. The First Department continued that one test of control was where the lessee hired the general contractor.

In Bart v. Universal Pictures, 277 A.D.2d 4, 715 N.Y.S.2d 240 (1st Dep't 2000), the First Department expanded its prior ruling. In Bart, plaintiff was instructed to paint one of the sets of the film "Meet Joe Black" and was injured when he fell 20 feet from the back of the set during his work. The work took place in the Park Slope Armory in Brooklyn. The City of New York--the fee owner--granted permission to use the property under an "Occupancy Permit" to Semaphore Funding--a wholly-owned subsidiary of Universal.

The First Department sought to determine whether plaintiff could maintain his Labor Law claims against Semaphore, which had argued that it was not a proper party. In discussing whether a lessee could be held liable under §240(1), the Appellate Division expanded on its ruling in Guzman with respect to control and ruled that "the right to control the work may be proved by other means, such as contractual or statutory provisions granting such right." Id. 277 A.D.2d at 5, 715 N.Y.S.2d at 242. Because Sempaphore was contractually charged with the right to control the work under the Occupancy Permit, the First Department found that it was a party that could be held liable under §240(1). The First Department echoed this ruling in Zaher v. Shopwell, Inc., 18 A.D.3d 339, 795 N.Y.S.2d 223 (1st Dep't 2005).

The Second Department in Lacey v. Long Island Lighting Co., 293 A.D.2d 718, 741 N.Y.S.2d 558 (2nd Dep't 2002) ruled that the

"key" to determine whether a non-titleholder was an "owner" under the statute was whether the party had the "right to insist that proper safety practices" be followed. Id. 293 A.D.2d at 719, 741 N.Y.S.2d at 559. The court continued that "the right to control the work" was significant, "not the actual exercise" of control. Id. The Second Department reached a similar conclusion in Billman v. CLF Mgmt., 19 A.D.3d 346, 796 N.Y.S.2d 151 (2nd Dep't 2005).

In this case, Goldman did not hire ABM to clean the windows. It had not taken possession of the floor. There was no evidence that it was vested with authority to control plaintiff's activities at the time of the incident. Therefore, dismissal was warranted under these facts.

In construing the term "owner," the courts must look to the issue of control. In Mangiameli v. Galante, 171 A.D.2d 162, 574 N.Y.S.2d 842 (3rd Dep't 1991), plaintiff fell from a ladder as he performed work on a residential housing unit. The ground gave way while he was on the ladder. Plaintiff's employer developed the complex and sold residential units together with the land underneath them and the six inches of land immediately abutting each unit. The remaining land was owned by the defendant's homeowner's association. Plaintiff had leaned his ladder against the unit, but the ladder's feet were on the property owned by the homeowner's association.

The Third Department looked to the Second Department's decision in Copertino, supra, for guidance. The court held that "[t]he key criterion is 'the right to insist that proper safety practices were followed and it is the right to control the work that is significant, not the actual exercise or non-exercise of control'" (citations omitted). Mangiameli, supra, 171 A.D.2d at 163-164, 574 N.Y.S.2d at 843. The homeowner's association did not have authority to contract with plaintiff's employer or have the right to control the work. The Third Department held that "[b]ecause the Association had no ownership interest in the property upon which plaintiff was to perform his work and did not otherwise act in the capacity of an owner, it is not an owner within the meaning of Labor Law §§ 240 and 241." Id. 171 A.D.2d at 164, 574 N.Y.S.2d at 843.

In Sweeting v. Bd. of Coop. Educational Serv., 83 A.D.2d 103, 113, 443 N.Y.S.2d 910, 917 (4th Dep't 1981), lv. to app. den., 56 N.Y.2d 503, 450 N.Y.S.2d 1025 (1982), the court held that "the 'owners' contemplated by the Legislature are those with a property interest who hire the general contractor to undertake construction work on their behalf." Here, Goldman was not such an entity. To apply the Labor Law upon an entity that did not own the property, act as general contractor, or have the right to direct, control, or supervise any of the work would run contrary to the legislative intent of the statute. The statute places a nondelegable duty upon the parties who are in the best

position to ensure a safe work place, the owner and general contractor, not on a party like Goldman.

POINT II

PLAINTIFF'S ACTIONS WERE THE SOLE PROXIMATE CAUSE OF THE ACCIDENT

Although §240 of the Labor Law sets forth a nondelegable duty, the mere involvement of elevational differences at the site of the incident is insufficient to permit the imposition of liability. See, Blake v. Neighborhood Housing Servs. Of New York City, 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003); Narducci v. Manhasset Bay Assoc., 96 N.Y.2d 259, 727 N.Y.S.2d 37 (2001). That elevational difference must exist in tandem with a defendant's breach of the statutory duty imposed by the statute and that breach must be the proximate cause of the injury in order for liability to be imposed. Robinson v. East Medical Ctr., LP, 6 N.Y.3d 550, 814 N.Y.S.2d 589 (2006); Blake v. Neighborhood Housing Servs. of New York City, supra. If the plaintiff's own negligence is the sole proximate cause of the incident, liability cannot lie under the statute. Montgomery v. Federal Express Corp., 4 N.Y.3d 805, 795 N.Y.S.2d 490 (2005); Egan v. Monaduck Constr., 43 A.D.3d 692, 841 N.Y.S.2d 547 (1st Dep't 2007). As this Court has stated, "if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation." Blake, 1 N.Y.3d at 290, 771 N.Y.S.2d at 493.

In the matter at bar, the Appellate Division inappropriately reinstated plaintiff's claim under §240 of the

Labor Law. Assuming arguendo that §240(1) of the Labor Law even applies to Goldman, the evidence before the motion court established that the desk upon which plaintiff was standing provided her with a firm base upon which to work. She testified that the desk did not move and provided her with "firm footing" (R 354). For approximately two to two and one half hours before the accident occurred, plaintiff had been ascending and descending from desks in other offices, cleaning windows in the same manner in which she was working when she fell (R 272-273). By her own admission, plaintiff fell because she failed to notice that the desk was ending despite her need to continue to move laterally (R 402). She testified further that she was distracted immediately before the incident when her co-worker and friend called to her (R 357). Plaintiff's own inattention was the sole proximate cause of her injuries, barring her recovery under §240(1) of the Labor Law. Stark v. Eastman Kodak Co., 256 A.D.2d 1134, 682 N.Y.S.2d 749 (4th Dep't 1998) is instructive in this regard. There, the court's decision was as follows:

> Supreme Court erred in denying those parts of the cross motions of defendant Eastman Kodak Company (Kodak) and third-party defendant Landis & Gyr Powers, Inc. for summary judgment dismissing the Labor Law §240(1) claim. Paul J. Stark (plaintiff) installed a control box and valve on a cooling tower that had been erected on the roof of a building owned by Kodak. Plaintiff believed that he was on the bottom rung of the ladder and was injured when he stepped from the second rung of the ladder

> to the roof, contacting the roof with greater force than he expected. Plaintiff did not fall from the ladder, and he concedes that the ladder was not defective and that it did not move as he descended. Thus, it is undisputed that the actions of plaintiff were the sole proximate cause of his injuries.

256 A.D.2d at 1134, 682 N.Y.S.2d at 749-750 (citations and internal quotation marks omitted).

Notably, Stark was cited with approval by this Court in Blake, supra. Accordingly, as in Stark, the inattentiveness of plaintiff herein was the sole proximate cause of her injuries.

Moreover, plaintiff's nonuse of available proper safety devices is fatal to her claim. See, Robinson v. East Medical Ctr., LP, 6 N.Y.3d 550, 814 N.Y.S.2d 589 (2006); Cahill v. Triborough Bridge and Tunnel Auth., 4 N.Y.3d 35, 790 N.Y.S.2d 74 (2004). For example, in Robinson v. East Medical Center, LP, supra, this Court held that a worker's conscious choice to use a shorter ladder barred his recovery under §240 of the Labor Law because his own negligent actions were the sole proximate cause of his injuries. The plaintiff testified that he knew he needed an eight-foot ladder to complete his work, that he knew those ladders were available for his use and that he regularly retrieved materials he needed to complete his job rather than requesting them from the foreman. He further testified that he chose to use a shorter ladder and stand on the cap (top step) rather than retrieve a longer ladder. In affirming the

Appellate Division's dismissal of his complaint, this Court noted that "there were adequate safety devices -eight-foot ladders- available for plaintiff's use at the job site. Plaintiff's own negligent actions - choosing to use a six-foot ladder that he knew was too short for the work to be accomplished and then standing on the ladder's top cap in order to reach the work - were, as a matter of law, the sole proximate cause of his injuries." 6 N.Y.3d at 555, 814 N.Y.S.2d at 592.

Similarly, in Blake v. Neighborhood Housing Services of New York City, supra, the plaintiff was injured when the upper portion of his own extension ladder, which he had himself erected, retracted while he was working on it. There was no defect in the ladder nor was there any evidence to establish that it had been improperly placed or secured. At trial, the plaintiff testified that he was uncertain "if he had locked the extension clips in place before ascending the rungs" while conceding that the ladder was stable, did not need to be steadied and had no defect that he could identify. Id. at 284, 771 N.Y.S.2d at 485. The jury, in response to the interrogatory asking whether the ladder was constructed and operated so as to protect the plaintiff, responded yes. In affirming the trial court's denial of plaintiff's motion for leave to set aside the verdict, this Court reiterated that absent a statutory violation, where a plaintiff's actions are the sole proximate cause of the incident, there can be no liability under §240(1).

In Cahill v. Triborough Bride and Tunnel Authority, supra, this Court clarified that instructions on use of proper safety equipment need not have been given immediately preceding the accident in order for the plaintiff's own negligent conduct to bar recovery. The plaintiff had attended "frequent safety talks" over the course of his employment on the reconstruction and repair of the Triborough Bridge. 4 N.Y.3d at 38, 790 N.Y.S.2d at 75. He had also been reprimanded several weeks prior to his accident for failing to attach his safety harness to a safety line before scaling the bridgeworks. The accident occurred while he was climbing up a form after refilling his bucket with grease. Rather than climbing up while attached to a safety line, Cahill chose to improvise, attaching, detaching and reattaching a "position hook" while moving the grease bucket from ledge to ledge upwards to the work location. The position hook was not a safety device for use while climbing; rather, it was designed to hold a worker stationary while working. Cahill's improvised safety device failed to protect him and he fell approximately 10 to 15 feet while attempting to climb back up.

In holding that summary judgment was improperly granted to the plaintiff, this Court rejected the argument that the refusal to use a proper safety device must be immediate before a plaintiff's own negligent conduct could serve as a basis for dismissing claims against defendants. The "lapse of weeks

between the instructions and his disobedience of them" was not sufficient to break the chain of causation. 4 N.Y.3d at 39, 790 N.Y.S.2d at 76. Summary judgment in favor of plaintiff was held to have been improperly granted because:

> a jury could have found that plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that he had not made that choice he would not have been injured.

4 N.Y.3d at 40, 790 N.Y.S.2d at 76.

In the matter at bar, plaintiff conceded that she did not ask for a stool or a ladder to assist her in completing her assigned task of cleaning the inside of the windows on the 29th floor (R 116, 353). She stated that she "just jumped on top" of the desk which was adjacent to the window (R 116). Plaintiff did this despite having actual knowledge that her employer had step stools available for her use (R 352-353). She acknowledged that the stepstools were kept in the locker room where she changed into her uniform every night before beginning her shift (R 383). In fact, plaintiff testified that she had, in the past, used the stepstools when doing "high dusting" (R 383-384). The record is bare of any reason for plaintiff's failure to avail herself of the step stool. As in Cahill, supra, "had [s]he not made that choice [to forego the available safety device] she would not have been injured." 4 N.Y.3d at 40, 790 N.Y.S.2d at 76.

Plaintiff's own conduct was the sole legal cause of the incident.

CONCLUSION

For all the foregoing reasons, the order of the Appellate Division should be reversed and the Supreme Court's order should be reinstated.

Dated: Jericho, New York
December 17, 2008

Respectfully submitted,

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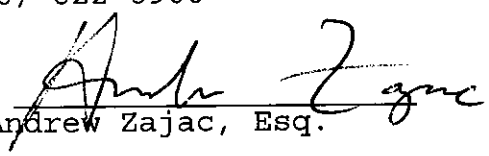
By: 
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