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# Recent Labor Law §240(1) Decision—Fourth Department

*By James M. Merlino*

The New York Court of Appeals decisions in Runner v. New York Stock Exchange, et al. and Wilinski v. 334 East 92nd Housing Development Fund Corp. continue to have ripple effects throughout the Appellate Division Courts. Recently, the Appellate Division, Fourth Department issued a decision in the case of DiPalma v. State of New York once again affirming, and to some degree expanding, the decisions in Runner and Wilinski.

In DiPalma the plaintiff was injured when a large "skid box" containing concrete debris slid off of a forklift truck thereby striking the plaintiff who was standing on a work platform. The skid box fell from a height of approximately 1-2 feet from the forklift. The defendants argued that Labor Law §240(1) was not applicable because there was "no significant height differential" between the skid box and the platform onto which it fell. The Fourth Department rejected the defendant's argument and stated that its "core premise" in a Labor Law §240(1) analysis is that a "defendant's failure to provide workers with adequate protection from reasonably preventable **gravity related** accidents will result in liability." The court held that the plaintiff's injury "**flowed directly from the application of the force of gravity**" to the object that struck him. The Court went on to cite Runner directly and noted that "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential."

As with the recent Court of Appeals decision of Wilinski v. 334 East 92nd Housing Development Fund Corp., the Courts are continuing to focus on the actual object that fell rather than where it fell from. In DiPalma the Court specifically considered the weight of the skid box and its contents coupled with the "potential harm" that it could cause, rather than the distance that it fell, in determining if the injury flowed directly from the force of gravity. The Court of Appeals conducted a similar analysis in Wilinski which involved a case where the plaintiff was injured when two unsecured, metal pipes measuring four inches in diameter and ten feet in length, fell and struck the plaintiff. The pipes in the Wilinski case were standing in an area where construction work was being performed. They toppled over after being struck by debris from a nearby wall that was being demolished. The defendants argued that there was no Labor Law §240(1) liability because the pipes were situated on the same level as the plaintiff when they toppled over.

**Continued on Page 2**

## Recent Labor Law §240(1) Decision—Fourth Department

*Continued from Page 1*

The Court of Appeals in Wilinski rejected the "same level" argument holding that the elevation differential could not be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent. The Court specifically cited the Runner decision holding that the height differential could not be described as de minimis given the "amount of force the pipes were able to generate over their descent. Thus, **plaintiff suffered harm that flowed directly from the application of the force of gravity to the pipes**."

Going forward we will need to obtain specific information regarding weight, dimensions and overall size of the particular object that struck a plaintiff. We will then need to analyze whether the plaintiff's injury was "the direct consequence of defendants' failure to provide adequate protection against that risk."

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90 A.D.3d 1659, 2011 N.Y. Slip Op. 09724

90 A.D.3d 1659
Supreme Court, Appellate Division, Fourth Department, New York.

Jeffrey DiPALMA, Claimant–Respondent,
v.
STATE of New York, Defendant–Appellant. (Claim No. 111910.).

Dec. 30, 2011.

**Synopsis**

**Background:** Construction worker commenced Labor Law and common-law negligence action seeking damages for injuries he sustained in work accident on property owned by state. The Court of Claims, Jeremiah J. Moriarty, III, J., entered judgment in worker's favor, and state appealed.

**Holdings:** The Supreme Court, Appellate Division, held that:
1 inconsistencies between worker's deposition testimony and his trial testimony were not so significant as to render his trial testimony incredible as matter of law;
2 there was sufficient elevation differential to support claim under Scaffold Law; and
3 there was sufficient evidence to support finding that state violated regulation regarding disposal of debris on construction sites.

Affirmed.

Appeal from a judgment of the Court of Claims (Jeremiah J. Moriarty, III, J.), dated November 26, 2010 in a personal injury action. The judgment determined defendant to be 100% liable pursuant to Labor Law § 240(1) and § 241(6).

**Attorneys and Law Firms**

Rupp, Baase, Pfalzgraf, Cunningham & Coppola, LLC, Buffalo (R. Anthony Rupp, III, of Counsel), for Defendant–Appellant.

Cantor, Lukasik, Dolce & Panepinto, P.C., Buffalo (Stephen C. Halpern of Counsel), for Claimant–Respondent.

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ.

**Opinion**

MEMORANDUM:

***1 1 2** Claimant commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when a large "skid box" containing concrete debris slid off of a forklift and struck him. Following the liability portion of a bifurcated trial, the Court of Claims determined that defendant, the property owner, was liable for claimant's injuries pursuant to Labor Law § 240(1) and § 241(6). Defendant contends that the court should have applied the falsus in uno doctrine and discredited claimant's trial testimony concerning the way in which the accident occurred because that testimony differed in some respects from claimant's deposition testimony. We reject that contention. The falsus in uno doctrine permits a factfinder to disregard entirely the testimony of a witness who has willfully testified falsely with respect to any material fact. The doctrine, however, is "not mandatory," and the court is free to credit any part of a witness's testimony that it deems true and disregard what it deems false (*People v. Johnson,* 225 A.D.2d 464, 464, 639 N.Y.S.2d 802; *see Accardi v. City of New York,* 121 A.D.2d 489, 490–491, 503 N.Y.S.2d 818). The inconsistencies identified by defendant are not so significant as to render claimant's trial testimony incredible as a matter of law, and the court's determination to credit that testimony, at least in part, is entitled to deference (*see Ring v. State of New York,* 8 A.D.3d 1057, 778 N.Y.S.2d 396, *lv denied* 3 N.Y.3d 608, 785 N.Y.S.2d 26, 818 N.E.2d 668; *Goncalves v. State of New York,* 1 A.D.3d 914, 767 N.Y.S.2d 743; *see generally Northern Westchester Professional Park Assoc. v. Town of Bedford,* 60 N.Y.2d 492, 499, 470 N.Y.S.2d 350, 458 N.E.2d 809). We note that claimant's trial testimony was consistent with that of the other witnesses who were present when the accident occurred.
**3** Defendant further contends that Labor Law § 240(1) is inapplicable because there was no significant height differential between the skid box and the platform onto which it fell, where claimant was working at the time of the accident. We reject that contention. The "core premise" of our Labor Law § 240(1) jurisprudence is "that a defendant's failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability" (*Wilinski v. 334 East 92nd Hous. Dev. Fund Corp.,* 18 N.Y.3d 1, 4). Here, similar to the plaintiff in *Wilinski,* claimant "suffered harm that

90 A.D.3d 1659, 2011 N.Y. Slip Op. 09724

'flow[ed] directly from the application of the force of gravity' " to the object that struck him (*id.*). Moreover, "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v. New York Stock Exch., Inc.,* 13 N.Y.3d 599, 603, 895 N.Y.S.2d 279, 922 N.E.2d 865), and the experts who testified on behalf of both parties agreed that the failure to use a protective device to secure the skid box to the forklift was improper. Although the skid box fell only one or two feet before it struck claimant, in light of the weight of the skid box and its contents, as well as the potential harm that it could cause, it cannot be said that the elevation differential was de minimis (*see id.* at 605, 895 N.Y.S.2d 279, 922 N.E.2d 865).

***2 4** We also reject defendant's contention that the court erred in determining that it was liable under Labor Law § 241(6). The section 241(6) cause of action was based on an alleged violation of 12 NYCRR 23–2.1(b), pursuant to which "[d]ebris shall be handled and disposed of by methods that will not endanger any person employed in the area of such disposal or any person lawfully frequenting such area." We have previously held that 12 NYCRR 23–2 .1(b) is sufficiently specific to support liability under section 241(6) (*see Coleman v. ISG Lackawanna Servs., LLC,* 74 A.D.3d 1825, 902 N.Y.S.2d 480; *Kvandal v. Westminster Presbyt. Socy. of Buffalo,* 254 A.D.2d 818, 678 N.Y.S.2d 185). It is undisputed that claimant was injured while in the process of removing debris and, contrary to defendant's contention, it is not necessary for claimant to have been struck by debris for the regulation to apply (*see Coleman,* 74 A.D.3d 1825, 902 N.Y.S.2d 480). In any event, the record contains evidence that claimant was in fact struck by debris that fell out of the skid box, in addition to the skid box itself.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

**Parallel Citations**

2011 WL 6848481 (N.Y.A.D. 4 Dept.), 2011 N.Y. Slip Op. 09724

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922 N.E.2d 865, 895 N.Y.S.2d 279, 2009 N.Y. Slip Op. 09310

13 N.Y.3d 599
Court of Appeals of New York.

Victor J. RUNNER, Respondent,
v.
NEW YORK STOCK EXCHANGE, INC., et al., Appellants.

Dec. 17, 2009.

**Synopsis**

**Background:** Worker brought suit against property owner and contractor, seeking damages, under scaffold law, for amputation of several of his fingers while he used makeshift pulley to lower heavy reel of wire down small stairway separating two levels of split-level hallway. Following jury verdict for defendants, the United States District Court for the Southern District of New York, Thomas P. Griesa, J., set aside verdict. Appeal was taken after parties agreed to settlement with right to appeal. The United States Court of Appeals for the Second Circuit, José A. Cabranes, Circuit Judge, 568 F.3d 383, certified questions as to types of elevation-related injuries covered by scaffold law.

**Holding:** Addressing issue of apparent first impression for the court, the Court of Appeals, Lippman, Chief Judge, held that worker's injuries were direct consequence of failure to provide adequate protection against risk arising from physically significant elevation differential and, thus, were covered by scaffold law, even though case involved neither "falling worker" nor "falling object."

Certified question, as recast, answered in the affirmative.

**Attorneys and Law Firms**

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Sacks and Sacks, LLP, New York City (Scott N. Singer of counsel), for respondent.
Fiedelman & McGaw, Jericho (Andrew Zajac and Dawn C. DeSimone of counsel), Rona L. Platt, Brendan T. Fitzpatrick, David B. Hamm and Timothy J. Keane for ***280** Defense Association of New York, Inc., amicus curiae.

**Opinion**

***601 **866 OPINION OF THE COURT**

Chief Judge LIPPMAN.

The Second Circuit Court of Appeals, in the course of considering defendants' appeal from a judgment imposing liability upon them pursuant to section 240(1) of New York's Labor Law, has certified to us two questions respecting the applicability of that statute. We now answer that the statute is applicable under the circumstances here presented.

The trial evidence showed that plaintiff suffered serious and permanent injuries to both of his hands while performing tasks in connection with the installation of an uninterruptible power system on defendant New York Stock Exchange's premises. The manner in which the injuries were sustained is undisputed. ***602** Plaintiff and several coworkers had been directed to move a large reel of wire, weighing some 800 pounds, down a set of about four stairs. To prevent the reel from rolling freely down the flight and causing damage, the workers were instructed to tie one end of a 10–foot length of rope to the reel and then to wrap the rope around a metal bar placed horizontally across a door jamb on the same level as the reel. The loose end of the rope was then held by plaintiff and two coworkers while two other coworkers began to push the reel down the stairs. As the reel descended, it pulled plaintiff and his fellow workers, who were essentially acting as counterweights, toward the metal bar. The expedient of wrapping the rope around the bar proved ineffective to regulate the rate of the reel's descent and plaintiff was drawn horizontally into the bar, injuring his hands as they jammed against it. Experts testified that a pulley or hoist should have been used to move the reel safely down the stairs and that the jerry-rigged device actually employed had not been adequate to that task.

The jury, having been instructed that liability pursuant to Labor Law § 240(1) could not be assigned unless plaintiffs injuries had been attributable to a gravity-related risk, and having found that no such risk had been implicated, returned a verdict for defendants. A motion by plaintiff to set aside the verdict ensued. In granting the motion and directing judgment for the plaintiff upon his Labor Law § 240 claim, the District Court found, as a matter of law, that the movement of the reel down the stairs

922 N.E.2d 865, 895 N.Y.S.2d 279, 2009 N.Y. Slip Op. 09310
presented a gravity-related risk; that an adequate safety device had not been used to manage the risk; and that that failure had been a substantial factor in causing plaintiffs injury.

Defendants appealed, and the Second Circuit, after its initial review of the matter, certified to us these questions:

> "I. Where a worker who is serving as a counter-weight on a makeshift pulley is dragged into the pulley mechanism after a heavy object on the other side of a pulley rapidly descends a small set of stairs, causing an injury to plaintiff's hand, is the injury (a) an 'elevation related injury,' and (b) directly caused by the effects of gravity, such that section 240(1) of New York's Labor Law applies?
> "II. If an injury stems from neither a falling worker nor a falling object that strikes a plaintiff, does ***603** liability exist under section 240(1) of New York's Labor Law?" (568 F.3d 383, 389 [2009].)

While these inquiries are not inapropos, we think the dispositive inquiry framed by our cases does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker. Rather, the single ****867 ***281** decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential.

Labor Law § 240(1) provides 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."

**1** **2** It is plain that a device precisely of the sort enumerated by the statute was not "placed and operated as to give proper protection" to plaintiff, a person employed in the alteration of a building and thus within the statute's stated protective ambit. The breadth of the statute's protection has, however, been construed to be less wide than its text would indicate. As is here relevant, it is generally agreed that the purpose of the strict liability statute is to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction worksite elevation differentials, and, accordingly, that there will be no liability under the statute unless the injury producing accident is attributable to the latter sort of risk (*see Rocovich v. Consolidated Edison Co.,* 78 N.Y.2d 509, 514, 577 N.Y.S.2d 219, 583 N.E.2d 932 [1991] ). The trial court was of the view that plaintiff's accident arose from such a risk: the reel had to be moved from a higher to a lower elevation and the danger to be guarded against plainly arose from the force of the very heavy object's unchecked, or insufficiently checked, descent.
**3** Defendants contend to the contrary that the accident was not sufficiently elevation-related to fall within section 240(1)'s ***604** scope. The occurrence, they note, did not involve the traversal of an elevation differential either by plaintiff or an object that hit him, and they urge that gravity must operate directly upon either the plaintiff or upon an object falling upon the plaintiff if there is to be Labor Law § 240(1) liability. In support of this view, defendants point out that in *Ross v. Curtis–Palmer Hydro–Elec. Co.,* 81 N.Y.2d 494, 501, 81 N.Y.2d 494, 618 N.E.2d 82 [1993] we observed that "the 'special hazards' [covered by section 240(1) ] are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (*see, DeHaen v. Rockwood Sprinkler Co.,* 258 N.Y. 350, 179 N.E. 764)," and that in *Narducci v. Manhasset Bay Assoc.,* 96 N.Y.2d 259, 267, 727 N.Y.S.2d 37, 750 N.E.2d 1085 [2001], we noted that "Labor Law § 240(1) applies to both 'falling worker' and 'falling object' cases." But in referring to these familiar scenarios in which section 240(1) liability may arise, neither decision purports exhaustively to define the statute's protective reach. Rather, the governing rule is to be found in the language from *Ross* following closely upon that just quoted, where we elaborated more generally that "Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person* ****868** " *****282** (*Ross,* 81 N.Y.2d at 501, 601 N.Y.S.2d 49, 618 N.E.2d 82).

Manifestly, the applicability of the statute in a falling object case such as the one before us does not under this essential formulation depend upon whether the object has hit the worker. The relevant inquiry—one which may be answered in the affirmative even in situations where the object does not fall on the worker—is rather whether the harm flows directly from the application of the force

922 N.E.2d 865, 895 N.Y.S.2d 279, 2009 N.Y. Slip Op. 09310

of gravity to the object. Here, as the District Court correctly found, the harm to plaintiff was the direct consequence of the application of the force of gravity to the reel. Indeed, the injury to plaintiff was every bit as direct a consequence of the descent of the reel as would have been an injury to a worker positioned in the descending reel's path. The latter worker would certainly be entitled to recover under section 240(1) and there appears no sensible basis to deny plaintiff the same legal recourse.

In certifying its questions to us, the Second Circuit observed that "[d]efendants offer a litany of illustrative cases highlighting various limitations on section 240(1) ... none of which address the material facts of the instant case" ***605** (568 F.3d 383, 387 [2009] ). And, indeed, we have not, until now, addressed a factual progression which, although not following one of the two scenarios defendants would have us deem exhaustive, nonetheless involves an injury directly attributable to a risk posed by a physically significant elevation differential.

The elevation differential here involved cannot be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent. And, the causal connection between the object's inadequately regulated descent and plaintiff's injury was, as noted, unmediated—or, demonstrably, at least as unmediated as it would have been had plaintiff been situated paradigmatically at the rope's opposite end. It is in this respect that this case differs from *Toefer v. Long Is. R.R.,* 4 N.Y.3d 399, 795 N.Y.S.2d 511, 828 N.E.2d 614 [2005], upon which defendants rely. There, the injury was the result of a concatenation of circumstances resulting in the "inexplicabl[e]" launch of an object—not a falling object—in plaintiff's direction (*id.* at 408, 795 N.Y.S.2d 511, 828 N.E.2d 614); it was not, as here, the direct consequence of a failure to provide statutorily required protection against a risk plainly arising from a workplace elevation differential.

Accordingly, the first certified question, as recast, should be answered in the affirmative and the second certified question left unanswered, as unnecessary.

Judges CIPARICK, GRAFFEO, READ, SMITH, PIGOTT and JONES concur.

Following certification of questions by the United States Court of Appeals for the Second Circuit and acceptance of the questions by this Court pursuant to section 500.27 of the Rules of Practice of the Court of Appeals (22 NYCRR 500.27), and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified questions answered in accordance with the opinion herein.

Parallel Citations

13 N.Y.3d 599, 922 N.E.2d 865, 895 N.Y.S.2d 279, 2009 N.Y. Slip Op. 09310

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18 N.Y.3d 1, 2011 N.Y. Slip Op. 07477

18 N.Y.3d 1

THIS DECISION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS.

Court of Appeals of New York.

Antoni WILINSKI et al., Respondents–Appellants,
v.
334 EAST 92ND HOUSING DEVELOPMENT FUND CORP. et al., Appellants–Respondents.

Oct. 25, 2011.

**Synopsis**

**Background:** Worker brought action against building owner and others, seeking to recover damages for injuries he allegedly sustained when, while engaged in demolition of a wall, he was struck in the head by two large pipes that had been standing unsecured following removal of floor and ceiling above and toppled over when they were hit by debris from another wall undergoing demolition. The Supreme Court, New York County, Debra A. James, J., 2009 WL 803448, granted summary judgment in favor of worker on issue of liability, and denied defendants' cross-motion for summary judgment dismissing the complaint. Defendants appealed. The Supreme Court, Appellate Division, 71 A.D.3d 538, 898 N.Y.S.2d 15, affirmed as modified, and leave to appeal was granted.

**Holdings:** The Court of Appeals, Ciparick, J., held that:
1 a worker who sustains an injury caused by a falling object whose base stands at the same level as the worker is not categorically barred from recovery under the scaffold law, abrogating *Brink v. Yeshiva Univ.*, 259 A.D.2d 265, 686 N.Y.S.2d 15, *Matter of Sabovic v. State of New York*, 229 A.D.2d 586, 645 N.Y.S.2d 860, and *Corsaro v. Mt. Calvary Cemetery*, 214 A.D.2d 950, 626 N.Y.S.2d 634;
2 fact issue as to whether worker's injuries were proximately caused by the lack of a safety device precluded summary judgment on his scaffold law claim;
3 worker was not required to show that the pipes fell or collapsed due to wind pressure or vibration to state a Labor Law claim under regulation providing that parts of a building may not "be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration," abrogating *German v. City of New York*, 14 Misc.3d 1204(A), 2006 WL 3717684, *Maternik v. Edgemere By the Sea Corp.*, 19 Misc.3d 1118(A), 2008 WL 1056916, and *Gonzalez v. Fortway LLC*, 22 Misc.3d 1115(A), 2009 WL 211789; and
4 fact issue as to whether owner and contractor complied with regulation requiring ongoing inspections during hand demolition operations or whether their non-compliance caused worker's accident precluded summary judgment on worker's Labor Law claim.

Affirmed as modified.

Pigott, J., filed opinion dissenting in part, in which Graffeo and Read, JJ., concurred.

**Attorneys and Law Firms**

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**Opinion**

***4 OPINION OF THE COURT**

CIPARICK, J.

**1** Some New York courts have interpreted our decision in *Misseritti v. Mark IV Constr. Co.*, 86 N.Y.2d 487, 634 N.Y.S.2d 35, 657 N.E.2d 1318 (1995) to preclude ***5** recovery under Labor Law § 240(1) where a worker sustains an injury caused by a falling object whose base stands at the same level as the worker. We reject that interpretation and hold that such a circumstance does not categorically bar the worker from recovery under section 240(1). However, in this case, an issue of fact exists as to whether the worker's injury resulted from the lack of a statutorily prescribed protective device.

**I.**

On September 28, 2005, at approximately 8:30 a.m., plaintiff Antoni Wilinski1 and other workers were demolishing brick walls at a vacant warehouse located on premises owned by defendant 334 East 92nd Housing Development Fund Corp.2 Previous demolition of the ceiling and floor above had left two metal, vertical

plumbing pipes unsecured. The pipes were each four inches in diameter and rose out of the floor on which plaintiff was working to a height of approximately 10 feet.3 The pipes were to be left standing until their eventual removal. Earlier that morning, plaintiff voiced concerns to his supervisor that leaving the pipes standing during demolition of the surrounding walls could be dangerous. Nevertheless, no safety measures were taken to secure the pipes. Shortly thereafter, debris from a nearby wall that was being demolished hit the pipes, causing them to topple over. The pipes fell approximately four feet and landed on plaintiff, who is five feet, eight inches tall. The first pipe knocked plaintiff's hard hat off from his head, then struck his right shoulder and arm, cutting his elbow. The second pipe struck plaintiff's uncovered head, cutting it and causing a concussion. Plaintiff suffered serious and lasting injuries to his shoulder, arm and spine, as well as neuropsychological injuries.

Plaintiff commenced suit alleging violations of Labor Law § 240(1) and Labor Law § 241(6), the latter pursuant to ***6** 12 NYCRR 23–3.3(b)(3) and (c). Plaintiff moved for summary judgment on his section 240(1) claim and defendants cross-moved for summary judgment seeking dismissal of plaintiff's claims. Supreme Court granted plaintiff's motion for summary judgment and denied defendants' motion in its entirety (2009 N.Y. Slip Op. 30605[U], 2009 WL 803448 [2009] ). The court held that plaintiff suffered a gravity-related injury and had established entitlement to judgment as a matter of law by demonstrating that the absence of a statutorily enumerated safety device proximately caused his injury. The court also held that defendants were subject to duties under 12 NYCRR 23–3.3(b)(3) and (c), which provided a sufficient predicate for liability under Labor Law § 241(6).

The Appellate Division modified the order of Supreme Court by denying plaintiff's motion for summary judgment and by partially granting defendants' summary judgment motion to the extent of dismissing plaintiff's section 240(1) claim (*Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.,* 71 A.D.3d 538, 539, 898 N.Y.S.2d 15 [1st Dept.2010] ). Relying on our decision in *Misseritti,* the court stated that the accident was "not the type of elevation-related accident that [the statute] is intended to guard against ... Since both the pipes and plaintiff were at the same level at the time of the collapse the incident was not sufficiently attributable to elevation differentials to warrant imposition of liability" (*id.* [internal quotation marks omitted] ). The court otherwise affirmed Supreme Court's denial of defendants' motion to dismiss plaintiff's section 241(6) claims (*see id.*).

The parties each moved at the Appellate Division for leave to appeal to this Court. In separate orders granting those motions, the Appellate Division certified the following question: "Was the order of this Court, which modified the order of the Supreme Court, properly made?" For the reasons that follow, we modify the court's order and answer in the negative.

## II.

### Plaintiff's Labor Law § 240(1) Claim

**2** **3** Labor Law § 240(1) mandates that building owners and contractors

> "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 ***7** 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."

The statute imposes absolute liability on building owners and contractors whose failure to "provide proper protection to workers employed on a construction site" proximately causes injury to a worker (*see Misseritti,* 86 N.Y.2d at 490, 634 N.Y.S.2d 35, 657 N.E.2d 1318). Whether a plaintiff is entitled to recovery under Labor Law § 240(1) requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies (*see Roco-vich v. Consolidated Edison Co.,* 78 N.Y.2d 509, 513, 577 N.Y.S.2d 219, 583 N.E.2d 932 [1991] ["violation of the statute cannot establish liability if the statute is intended to protect against a particular hazard, and a hazard of a different kind is the occasion of the injury" (internal quotation marks omitted) ] ).

Our jurisprudence defining the category of injuries that warrant the special protection of Labor Law § 240(1) has evolved over the last two decades, centering around a core premise: that a defendant's failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability. Beginning in *Rocovich,* we stated that section 240(1)'s contemplated hazards are

> "those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required

> work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (78 N.Y.2d at 514, 577 N.Y.S.2d 219, 583 N.E.2d 932).

In *Rocovich,* the plaintiff was injured at his work site when his right ankle and foot accidentally became immersed in hot oil in a 12–inch–deep trough (*see id.* at 511, 577 N.Y.S.2d 219, 583 N.E.2d 932). We denied recovery, finding it "difficult to imagine how plaintiff's proximity to the 12–inch trough could have entailed an elevation-related risk which called for any of the protective devices of the types listed in section 240(1)" (*id.* at 514–515, 577 N.Y.S.2d 219, 583 N.E.2d 932). Subsequently, in *Ross v. Curtis–Palmer Hydro–Elec. Co.,* 81 N.Y.2d 494, 601 N.Y.S.2d 49, 618 N.E.2d 82 (1993), we refined *Rocovich,* stating that the reach of Labor Law § 240(1) is "limited to such specific gravity-related accidents as [a worker] falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*id.* at 501, 601 N.Y.S.2d 49, 618 N.E.2d 82).

***8** In *Narducci v. Manhasset Bay Assoc.,* 96 N.Y.2d 259, 727 N.Y.S.2d 37, 750 N.E.2d 1085 (2001), though we noted that section 240(1) applies to both "falling worker" and "falling object" cases, we declined to impose liability where a plaintiff was cut by a piece of glass that fell from a nearby window pane (*id.* at 266, 727 N.Y.S.2d 37, 750 N.E.2d 1085). We concluded that "[t]his was not a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected" and that the absence of such a device "did not cause the falling glass here" (*id.* at 268–269, 727 N.Y.S.2d 37, 750 N.E.2d 1085). Therefore, the accident was outside the scope of section 240(1) (*see id.*).

In *Misseritti,* we applied a similar rationale. The plaintiff's decedent in that case sustained severe injuries, leading to his eventual death, when a completed, concrete firewall collapsed on top of him (*see* 86 N.Y.2d at 489, 634 N.Y.S.2d 35, 657 N.E.2d 1318). Before the wall collapsed, "decedent and his co-worker had just dismantled the scaffolding used to erect the completed fire wall and ... [m]asons had not yet vertically braced the wall with the ... planks it had on the work site" (*id.* at 491, 634 N.Y.S.2d 35, 657 N.E.2d 1318). We held that section 240(1) did not apply to those facts, as the firewall did not collapse due to a failure to provide a protective device contemplated by the statute (*see id.*). We determined that, in fact, the kind of braces referred to in section 240(1) are "those used to support elevated work sites not braces designed to shore up or lend support to a completed structure" (*id.*). Thus the firewall's collapse, though tragic in its consequences, was simply "the type of peril a construction worker usually encounters on the job site" (*id.*).

Intermediate appellate courts have cited *Misseritti* as support for the proposition that a plaintiff injured by a falling object has no claim under section 240(1) where the plaintiff and the base of the object stood on the same level (*see e.g. Brink v. Yeshiva Univ.,* 259 A.D.2d 265, 686 N.Y.S.2d 15 [1st Dept.1999] [citing *Misseritti* and holding that the collapse of an interior chimney at the same floor level as plaintiff was not attributable to elevation differentials to warrant the imposition of liability]; *Matter of Sabovic v. State of New York,* 229 A.D.2d 586, 587, 645 N.Y.S.2d 860 [2d Dept.1996] ["the wall which collapsed was at the same level as the work site and is not considered a falling object for purposes of Labor Law § 240(1)"]; *Corsaro v. Mt. Calvary Cemetery,* 214 A.D.2d 950, 950, 626 N.Y.S.2d 634 [4th Dept.1995] [holding that a concrete form standing at ground level and estimated between 12 and 20 feet high was not a falling object because it was at the same level as the work site and not an elevation-related risk] ). Here, the Appellate Division also relied on *Misseritti* in holding that the collapse of the pipes, like ***9** the collapse of a wall, was not an elevation-related accident and stated that "[s]ince both the pipes and plaintiff were at the same level at the time of the collapse the incident was not sufficiently attributable to elevation differentials to warrant imposition of liability" under section 240(1) (*Wilinski,* 71 A.D.3d at 539, 898 N.Y.S.2d 15 [internal quotation marks omitted] ). Defendants urge the Court to endorse the "same level" rule now by affirming the lower court's dismissal of plaintiff's section 240(1) claim.

We do not agree that *Misseritti* calls for the categorical exclusion of injuries caused by falling objects that, at the time of the accident, were on the same level as the plaintiff. *Misseritti* did not turn on the fact that plaintiff and the base of the wall that collapsed on him were at the same level. Rather, just as in *Narducci,* the absence of a causal nexus between the worker's injury and a lack or failure of a device prescribed by section 240(1) mandated a finding against liability (*see Misseritti,* 86 N.Y.2d at 490–491, 634 N.Y.S.2d 35, 657 N.E.2d 1318; *Narducci,* 96 N.Y.2d at 268–269, 727 N.Y.S.2d 37, 750 N.E.2d 1085). Thus, we decline to adopt the "same level" rule, which ignores the nuances of an appropriate section 240(1) analysis.4

Moreover, the so-called "same level" rule is inconsistent with this Court's more recent decisions, namely *Quattrocchi v. F.J. Sciame Constr. Corp.,* 11 N.Y.3d 757, 866 N.Y.S.2d 592, 896 N.E.2d 75 (2008) and *Runner v. New York Stock Exch., Inc.,* 13 N.Y.3d 599, 895 N.Y.S.2d

279, 922 N.E.2d 865 (2009), neither of which are cited by the dissent. In *Quattrocchi*, we articulated for the first time that liability is not limited to cases in which the falling object was in the process of being hoisted or secured (*see* 11 N.Y.3d at 759, 866 N.Y.S.2d 592, 896 N.E.2d 75). Next, in *Runner,* the Court had occasion to apply section 240(1) to novel factual circumstances that did not involve a falling worker or falling object (*see* 13 N.Y.3d at 605, 895 N.Y.S.2d 279, 922 N.E.2d 865). ***10** In *Runner,* the plaintiff was injured while he and coworkers moved an 800 pound reel of wire down a flight of four stairs (*see id.* at 602, 895 N.Y.S.2d 279, 922 N.E.2d 865). The workers were instructed to tie one end of a 10–foot length of rope to the reel and then to wrap the rope around a metal bar placed horizontally across a door jamb on the same level as the reel (*see id.*). The plaintiff, acting as a counterweight, held the loose end as other workers pushed the reel down stairs (*see id.*). As the reel descended, the plaintiff was pulled horizontally into the bar, injuring his hands as they jammed against it (*see id.*). After a review of our precedents, we concluded that

> "the dispositive inquiry framed by our cases does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker. Rather, *the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential* " (*id.* at 603, 895 N.Y.S.2d 279, 922 N.E.2d 865 [emphasis added] ).

As the "elevation differential ... [could not] be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent" (*id.* at 605, 895 N.Y.S.2d 279, 922 N.E.2d 865), we held the defendants liable under Labor Law § 240(1) for using a "jerry-rigged device" rather than hoists or pulleys as provided under the statute (*see id.* at 602, 605, 895 N.Y.S.2d 279, 922 N.E.2d 865).

**4** **5** Applying *Runner* to the instant case, we hold that plaintiff is not precluded from recovery under section 240(1) simply because he and the pipes that struck him were on the same level. The pipes, which were metal and four inches in diameter, stood at approximately 10 feet and toppled over to fall at least four feet before striking plaintiff, who is five feet, eight inches tall. That height differential cannot be described as de minimis given the "amount of force [the pipes] w[ere][ ]able [to] generat[e]" (*id.* at 605, 895 N.Y.S.2d 279, 922 N.E.2d 865) over their descent. Thus, plaintiff suffered harm that "flow[ed] directly from the application of the force of gravity to the [pipes]" (*id.* at 604, 895 N.Y.S.2d 279, 922 N.E.2d 865; *see also Rocovich,* 78 N.Y.2d at 514, 577 N.Y.S.2d 219, 583 N.E.2d 932). However, though the risk here "ar[ose] from a physically significant elevation differential" (*Runner,* 13 N.Y.3d at 603, 895 N.Y.S.2d 279, 922 N.E.2d 865), it remains to be seen whether plaintiff's injury was "the direct consequence of [defendants'] failure to provide adequate protection against [that] risk" (*id.*).

***11** In this regard, this case is distinguishable from *Misseritti* in a significant way: while, in *Misseritti,* the kinds of protective devices section 240(1) prescribes were shown to be inapplicable to the circumstances of the decedent's injury, here, neither party has met its burden with respect to that issue. Plaintiff asserts, but does not demonstrate, that protective devices such as blocks or ropes could have been used to secure the pipes and prevent the accident. Defendants assert, but fail to demonstrate, that no protective devices were called for.

Moreover, there is an important distinction between the facts of this case and other cases where summary judgment has been granted in defendants' favor. Here, the pipes that caused plaintiff's injuries were not slated for demolition at the time of the accident. This stands in contrast to cases where the objects that injured the plaintiff's were themselves the target of demolition when they fell (*see e.g. Brink,* 259 A.D.2d at 265, 686 N.Y.S.2d 15). In those instances, imposing liability for failure to provide protective devices to prevent the walls or objects from falling, when their fall was the goal of the work, would be illogical. Here, however, securing the pipes in place as workers demolished nearby walls would not have been contrary to the objectives of the work plan.

We conclude, therefore, that while there is a potential "causal connection between the object[s'] inadequately regulated descent and plaintiff's injury" (*Runner,* 13 N.Y.3d at 605, 895 N.Y.S.2d 279, 922 N.E.2d 865), neither party is entitled to summary judgment on plaintiff's Labor Law § 240(1) claim. Whether 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.

## III.

## Plaintiff's Claims Under Labor Law § 241(6)

**6** Plaintiff's remaining claims arise under

241(6), which provides:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

As the statute is not self-executing, a plaintiff must set forth a violation of a specific rule or regulation promulgated pursuant ***12** to it (*see Ross,* 81 N.Y.2d at 503, 601 N.Y.S.2d 49, 618 N.E.2d 82). In this case, plaintiff invokes 12 NYCRR 23–3.3(b)(3), which provides: "Walls, chimneys and other parts of any building or other structure shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration."

**7** Defendants contend that this regulation is inapplicable to the instant matter because neither wind pressure nor vibration caused the pipes to fall, collapse or become weakened. Defendants argue that the Appellate Division's interpretation of the regulation—specifically, that "[a] fair reading of the section ... leads to the conclusion that the phrase 'by wind pressure or vibration,' does not attach to the words 'fall' or 'collapse,' but only to the immediately preceding words, 'be weakened' " (*Wilinski,* 71 A.D.3d at 539, 898 N.Y.S.2d 15)—is incorrect and contradicts the purpose of the regulation.

While lower courts ruling on this issue have largely adopted defendants' proposed reading of the regulation (*see German v. City of New York,* 14 Misc.3d 1204[A], 2006 N.Y. Slip Op. 52406[U], *5, 2006 WL 3717684 [Sup. Ct., N.Y. County 2006]; *Maternik v. Edge-mere By–The–Sea Corp.,* 19 Misc.3d 1118 [A], 2008 N.Y. Slip Op. 50763[U], *7 n. 11, 2008 WL 1056916 [Sup. Ct., Kings County 2008]; *Gonzalez v. Fortway LLC,* 22 Misc.3d 1115[A], 2009 N.Y. Slip Op. 50132[U], *7, 2009 WL 211789 [Sup. Ct., Kings County 2009] ), we believe that the Appellate Division's interpretation is the better one. Thus, we affirm the court's finding that plaintiff is not required to show that the pipes fell or collapsed due to wind pressure or vibration to state a claim under 12 NYCRR 23–3.3(b)(3).

**8 9** Plaintiff's second section 241(6) claim arises under 12 NYCRR 23–3.3(c), which provides:

> "During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means."

"The thrust of this subdivision is to fashion a safeguard, in the form of 'continuing inspections,' against hazards which are created by the progress of the demolition work" (*Monroe v. City of New York,* 67 A.D.2d 89, 100, 414 N.Y.S.2d 718 [2d Dept.1979] ). Here, defendants failed to meet their burden of showing either that they complied ***13** with the regulation or that their noncompliance did not cause plaintiff's accident. Thus, we conclude that the courts below properly denied summary judgment to defendants on plaintiff's Labor Law § 241(6) claims.

Accordingly, the order of the Appellate Division should be modified, without costs, in accordance with this opinion and, as so modified, affirmed, and the certified questions answered in the negative.

PIGOTT, J. (dissenting in part).

Because the majority runs far afield from this Court's Labor Law § 240(1) precedent, I dissent.

To prevail on a motion for summary judgment on the issue of liability under Labor Law § 240, a plaintiff must demonstrate that his or her injuries resulted from "dangerous conditions posed by elevation differentials" at a work site (*Misseritti v. Mark IV Constr. Co.,* 86 N.Y.2d 487, 491, 634 N.Y.S.2d 35, 657 N.E.2d 1318 [1995] ), and that the elevation-related risk occurred "*because of* the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci v. Manhasset Bay Assoc.,* 96 N.Y.2d 259, 268, 727 N.Y.S.2d 37, 750 N.E.2d 1085 [2001] ).

At the time of the accident, plaintiff was demolishing the walls of a warehouse building. In front of the brick wall that plaintiff was demolishing were two metal plumbing pipes, approximately 8 to 10 feet in height stretching vertically from the floor on which plaintiff was standing. Two workers, using hammers and crowbars, demolished an adjacent wall about four feet away from plaintiff, causing that wall to collapse into the pipes. The pipes toppled onto plaintiff causing injury.

On this record, plaintiff has not demonstrated his entitlement to summary judgment because he failed to articulate either an elevation-related risk or an

enumerated safety device that would have prevented his injuries. To the contrary, in my view, defendants are entitled to summary judgment since the uncontested facts establish that plaintiff's injuries were not the result of a hazard contemplated by section 240(1).

In *Misseritti,* we ruled that the injuries sustained, caused by the collapse of a completed fire wall, were not the result of an elevation-related accident subject to the protections of section 240(1), because the plaintiff failed to demonstrate that "the decedent was working at an elevated level at the time of his tragic accident" and it could not "be said that the collapse of a completed fire wall is the type of elevation-related accident that section 240(1) is intended to guard against" (86 N.Y.2d at 491, 634 N.Y.S.2d 35, 657 N.E.2d 1318). ***14** Likewise, in *Melo v. Consolidated Edison Co. of N.Y.,* 92 N.Y.2d 909, 680 N.Y.S.2d 47, 702 N.E.2d 832 (1998), the plaintiff and a coworker were attempting to cover a trench with a heavy steel plate, which was attached, by a chain with a hook, to the shovel of a backhoe. As the plate was being moved to the trench, its edge was resting on the ground or slightly above it. When the hook unfastened and the plate fell over, the plaintiff sustained injuries. We upheld the dismissal of the plaintiff's section 240(1) claim, explaining that the statute was not implicated because "[t]he steel plate was not elevated above the work site" (*id.* at 911, 680 N.Y.S.2d 47, 702 N.E.2d 832).

These principles were reinforced in *Capparelli v. Zausmer Frisch Assoc., Inc.*, decided at the same time as *Narducci,* wherein the plaintiff cut his right hand and wrist when he attempted to stop a falling light fixture from hitting him while stationed halfway up a ladder. There, we concluded that the plaintiff's claim did not fall within the ambit of section 240(1), stating that the statute does not apply when "there [is] no height differential between [the] plaintiff and the falling object" (96 N.Y.2d at 269, 727 N.Y.S.2d 37, 750 N.E.2d 1085).

The vertical plumbing pipes in this case are akin to the completed fire wall in *Misseritti* and the steel plate in *Melo.* It is of no moment that the pipes rose at least four feet above the plaintiff's height, since it is undisputed that the base of the pipes were at the same level as plaintiff and his work site.

Nor did plaintiff demonstrate that an enumerated safety device would have prevented the accident from occurring. In his motion for summary judgment, plaintiff merely claimed that defendants failed to provide him with an enumerated safety device to adequately secure the pipes. But that's not enough. To merit summary judgment on the issue of liability under section 240(1) plaintiffs must show that there was a specific, enumerated safety device that would have prevented the accident. Here, plaintiff offered only conclusory statements, thereby failing to demonstrate an issue of fact warranting trial.

In denying defendants' motion for summary judgment, the majority adds confusion and uncertainty to our decisions in *Misseritti, Narducci*, and *Melo* and to the reasonable interpretation given them by the Appellate Divisions (*see e.g. Brink v. Yeshiva Univ.,* 259 A.D.2d 265, 686 N.Y.S.2d 15 [1st Dept.1999]; *Matter of Sabovic v. State of New York,* 229 A.D.2d 586, 587, 645 N.Y.S.2d 860 [2d Dept.1996]; ***15** *Corsaro v. Mt. Calvary Cemetery,* 214 A.D.2d 950, 950–951, 626 N.Y.S.2d 634 [4th Dept.1995] ).* I see 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. Therefore, I would affirm the Appellate Division order.

Chief Judge LIPPMAN and Judges SMITH and JONES concur with Judge CIPARICK; Judge PIGOTT dissents and votes to affirm in a separate opinion in which Judges GRAFFEO and READ concur.

Order modified, etc.

Parallel Citations

2011 WL 5040902 (N.Y.), 2011 N.Y. Slip Op. 07477

Footnotes

1 Halina Wilinski is also a plaintiff, having sued derivatively. We will refer only to the injured worker as plaintiff.

2 Defendant 334 East 92nd Housing Development Fund Corp., (the HDFC) owned the premises located at 334 East 92nd Street in Manhattan. The HDFC executed a nominee agreement in favor of defendant East 92nd Street Senior Housing Limited Partnership, which, in turn, retained defendant Empire Developers Corp. (Empire) as general contractor. Empire hired Gramercy Group, Inc. (Gramercy) as subcontractor to demolish a vacant warehouse on the property. Gramercy employed plaintiff as a demolition worker.

3 In his deposition testimony, plaintiff stated that the pipes were two different heights, the shorter ranging from 8 to 10 feet and the taller ranging from 10 to 12 feet. Plaintiff's coworker testified that he did not want to estimate the height of the pipes but stated that "they went up a good way."

4 Some lower courts have already reached this conclusion. For example, in *Brown v. VJB Constr. Corp.,* 50 A.D.3d 373, 857 N.Y.S.2d 56 (1st Dept.2008), the plaintiff was injured when a 1,000 pound slab that fell from a defective clamp as it was being hoisted by a forklift landed at ground level and then tipped over, pinning the plaintiff's wrist between the slab and a wall (*see id.* at 374, 857 N.Y.S.2d 56). Defendants had argued, based on *Misseritti,* that because the "[plaintiff] admit[ted] that at the time of the accident, he worked at the same level as the stone panel being installed" the court should affirm the dismissal of plaintiff's section 240(1) claim (*see* brief for defendant-respondent and second third-party defendant-respondent in *Brown v. VJB Constr. Corp,* 50 A.D.3d 373, 857 N.Y.S.2d 56 [2008], available at 2007 WL 5830407, *14–18). The Appellate Division aptly rejected that argument, finding it "of no consequence that the ultimate destination of the slab was the same level where the forklift was positioned, or where [the] plaintiff was standing" (*Brown,* 50 A.D.3d at 377, 857 N.Y.S.2d 56). Had the court accepted the defendants' same level defense, mere circumstance would have arbitrarily precluded what we agree was clearly a viable claim under section 240(1).

* The majority cites *Brown v. VJB Constr. Corp.,* 50 A.D.3d 373, 857 N.Y.S.2d 56 (1st Dept.2008) as evidence that the Appellate Division has begun to reject the "same level" rule. That is not the case. The concrete slab in *Brown* fell from a height of three feet (*id.* at 376, 857 N.Y.S.2d 56), and therefore that case does not involve a situation were the base of the object is at the same elevation as plaintiff.

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