Recent Decisions concerning "Cleaning" under Labor Law §240

By David P. Feehan

In October 2013 the Court of Appeals clarified the definition of "cleaning" under Labor Law §240. The case of *Soto v J. Crew Inc*., 21 NY3d 562 (2013) presents a test for the determining whether an activity may be characterized as cleaning under the statute. The *Soto* case involved a plaintiff who was performing dusting on a six-foot high display shelf in a J. Crew retail store when he fell from the 4 foot ladder.

The Court stated that, outside the sphere of commercial window washing, which is covered by Labor Law §240(1), an activity cannot be considered cleaning under the statute if it:

(1) is routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises;

(2) requires neither specialized equipment or expertise, nor the unusual deployment of labor;

(3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and

(4) in light of the core purpose of Labor Law § 240(1) to protect construction workers, is unrelated to any ongoing construction, renovation, painting, alteration or repair project"

The Court of Appeals found that the high dusting Mr. Soto was performing met all four factors and granted defendant's motion for summary judgment.

The *Soto* test has been applied in two recent decisions of the Appellate Division, Second Department. The case of *Hull v Fieldpoint Community Association*, 973 NYS2d 334 (2nd Dept. 2013) was decided October 23, 2013. In Hull, the plaintiff was standing on the roof of a condominium cleaning leaves from the gutters when she fell to ground below. She was hired to perform this activity three times a year. The court concluded that the work plaintiff was conducting did not meet the requirements of the four factors they laid out *Soto*, and therefore did not constitute "cleaning" under Labor Law §240(1). As a result the plaintiff's Labor Law §240(1) claim was dismissed.

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On January 22, 2014 the Appellate Division, Second Department issued a decision in the case of *Collymore v 1895 WWA, LLC.,* (2014 NY Slip Op 00320) wherein the Court applied the four prong test as outlined in *Soto* to the plaintiff's work. This work included vacuuming an HVAC duct located in the ceiling of the building when he fell from a ladder. The Court applied the *Soto* test and concluded that the defendant failed to establish that the plaintiff's vacuuming could not be characterized as cleaning. The Court focused on the fact that there was insufficient evidence regarding whether the plaintiff's task was "routine in the sense that it was a type of job that occurs on a daily, weekly or other relatively frequent and recurring basis as part of the ordinary maintenance and care of commercial premises." The Court concluded that the defendant failed to establish that the plaintiff's activity was ordinary maintenance and care rather than cleaning, and denied their motion for summary judgment.

The practice pointer we learn from these decisions is to focus on the timing of the activity or the recurring basis of the activity of the plaintiff. If defendants can establish that the activity of the plaintiff was performed on some type of schedule or recurring basis, the Courts seem to consider this routine or ordinary maintenance satisfying that prong of the *Soto* test. Another factor to be discussed in future cases involving the meaning of the language in *Soto* of an "insignificant elevation risk comparable to those inherent in typical domestic or household cleaning?" The Courts have found that neither a six foot shelf not or a fall from a roof while cleaning gutters was too high. How high will they go before they say the activity is too high?

Also, open to interpretation is "specialized equipment or expertise or the unusual deployment of labor?" At what point will the Court determine what specialized equipment is (vacuum, buffer, or similar device) and would the use of that device be deemed cleaning if performed by in-house maintenance crew, and a covered activity if performed by an outside vendor?

The *Soto* decision was a curtailment of Labor Law §240(1) and helpful to the defense bar. This area of "cleaning" under the Labor Law §240(1) will develop over the years with some carve outs to the general rule and test as outlined by *Soto*. Now the lower Courts and Appellate Divisions will interpret *Soto* and find their own exclusions and factors required to satisfy the test. The line continues to move but now Soto presents a good blue print of the showing required to win a "cleaning" case.

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