FRANKEL-Y APPEALING

By Tracy L. Frankel, Esq.

Following appellate decisions involving Labor Law §240(1) claims can be frustrating. Often, it seems that cases with similar fact patterns result in disparate court decisions, depending on the Court, or even the panel of Justices making the determinations. So long as this is the case, counsel must continue to wade the muddy appellate landscape to find those areas of clarity or, at the very least, to find the momentary legal support we crave!

While Labor Law §240(1) claims have been the subject of many court decisions, it is important to evaluate how the Courts determine whether an owner, general contractor or agent has satisfied their duty to provide adequate equipment of the kind enumerated in the statute, and whether alternative equipment can be deemed "readily available" to the plaintiff within the meaning of the statute, so as to defeat summary judgment.

Labor Law §240(1) imposes upon owners, general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites"[1]. To obtain summary judgment on the issue of liability on a Labor Law §240(1) cause of action, a plaintiff is required to demonstrate, prima facie, that there was a violation of the statute, and that the violation was a proximate cause of his or her injuries[2].

One of the factors in evaluating whether a plaintiff is entitled to summary judgment on his or her Labor Law §240(1) claim, is whether appropriate equipment of the kind enumerated in the statute was "readily available" such that the "normal and logical response" for a worker

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[1] Cain v. Ameresco, Inc., 2021 NY Slip Op 03572, ¶ 2 (2nd Dept. 2021), citing Loretta v. Split Dev. Corp., 168 A.D.3d 823, 824 (2nd Dept. 2019); Jones v. City of New York, 166 A.D.3d 739, 740 (2nd Dept. 2018).

[2] Jones, 166 AD3d at 740.

ROSENBAUM & TAYLOR P.C.
7-11 South Broadway, Suite 401
White Plains, New York 10601
(914) 358-4422
www.rosenbaumtaylor.com

would be to retrieve that equipment[3]. Indeed, as was the case in Montgomery v. Fed. Express Corp.[4], if the normal response would have been to retrieve the equipment, the Court of Appeals will uphold a finding that the plaintiff's failure to do so was the sole proximate cause of the accident.

So, how do the Courts evaluate what constitutes "readily available" within the meaning of Labor Law §240(1)? As is the case with many of the factors considered by the Courts in evaluating Labor Law §240 claims, the appellate decisions are varied, seemingly conflicting and, consequently, confounding.

In Montgomery[5], the Court of Appeals held that "readily available" did not require the equipment to be in the "immediate vicinity" of the plaintiff. The fact that ladders were "available at the job site" was sufficient for the Court to find that plaintiff should have retrieved the ladder instead of utilizing a bucket to climb to the motor room above the roof and then jump back down to the roof when leaving the room.

Recently, the Fourth Department in Schutt v. Bookhagen[6], reiterated that "readily available" does not necessarily require that the equipment be in the immediate vicinity of the accident site but held that the plaintiff was entitled to summary judgment on his Labor Law §240(1) claim because he was neither provided with a harness, nor was an available harness "nearby". In so holding, the Court determined that the presence of a safety harness *in the worker's truck* was insufficient to raise an issue of fact as to whether his conduct was the sole proximate cause of the accident. In other words, the Court adhered to a portion of the Court of Appeals' holding in Montgomery but reduced the zone of acceptability to "nearby", to determine that equipment in the worker's truck was not near enough.

Contrast the holding in Schutt with the recent Second Department holding in Garcia v. Emerick Gross Real Estate, L.P. [7], a shifting ladder case, where the Court found that evidence presented, including that plaintiff had his own ladder in his van outside of the worksite, *was*

[3] Montgomery v. Fed. Express Corp., 4 N.Y.3d 805, 806 (2005).
[4] Montgomery, 4 N.Y.3d 805.
[5] Montgomery, 4 N.Y.3d 805.
[6] Schutt v. Bookhagen, 186 A.D.3d 1027 (4th Dept. 2020).
[7] Garcia v. Emerick Gross Real Estate, L.P., 2021 NY Slip Op 04540, ¶ 2, 2021 N.Y.APP.DIV LEXIS 4672 (2nd Dept. 2021).

sufficient to raise a question of fact as to whether plaintiff's failure to use "available" equipment was the sole proximate cause of the accident.

Although the Garcia decision does not identify the evidence of availability presented, a review of the briefs established that the defendant presented proof that plaintiff's employer provided all necessary equipment for plaintiff's work; that plaintiff knew that his employer had different types and sizes of ladders and baker scaffolds; that plaintiff only needed to sign out the equipment; that plaintiff also had a ladder in his van outside of the worksite; and that the ladder plaintiff had been using successfully prior to his choosing the subject ladder, was still located in the basement where he was working. The defendant also submitted the deposition testimony of the employer's owner, who explained that plaintiff's employer forbids employees from using ladders that it does not own, and that the plaintiff did not otherwise have express or implied permission to use the defendant's allegedly defective ladder. Accordingly, the Court found that the owner raised a triable issue of fact as to whether the plaintiff was a recalcitrant worker.

In 2007, the Court of Appeals in Miro v. Plaza Const. Corp[8], left open the possibility that a defendant can successfully utilize the sole proximate cause defense to a Labor Law §240(1) claim where equipment that is not "on site" is, nevertheless, easily retrievable. As a brief background, the First Department had previously held that, "The dissent's view that only ladders that are 'being stored on site' can be deemed readily available' for purposes of Labor Law §240(1) finds no support in the Court of Appeals decision discussed above."[9] The First Department went on to say, "a ladder does not need to be immediately at hand, either spatially or temporally, to be deemed available for purposes of Labor Law §240(1)."

Although the Court of Appeals modified the First Department's order by denying summary judgment to the defendants, it did so solely on the grounds that, "Assuming that the ladder was unsafe, it is not clear from the record how easily a replacement ladder could have been procured.[10]"

[8] Miro v. Plaza Construction Corp., 9 N.Y.3d 948 (2007).
[9] Miro v. Plaza Const. Corp., 38 A.D.3d 454 (1st Dept. 2007).
[10] Miro 9 N.Y.3d 948, 949.

The Miro[11] decision is interesting insofar as the Court not only appears to consider equipment that can easily procured from an outside location to be "readily available" for the purposes of the statute, but also indicates that so long as the equipment can be procured easily from plaintiff's employer, and the worker fails to avail himself of this option then a Labor Law §240(1) claim could be dismissed. Labor Law §240(1) places the duty of providing appropriate equipment on the owner, general contractor, or agent of the owner. In Miro, testimony established that plaintiff could have requested a different ladder from his employer but did not. The First Department, in dismissing the Labor Law §240(1) claim stated as follows in this regard:

> Several recent unanimous decisions of the Court of Appeals establish that, under this principle, a plaintiff who knowingly chooses to use defective or inadequate equipment, notwithstanding being aware that he or she could request or obtain proper equipment, has no claim under *Labor Law §*240(1). In this case, the uncontroverted evidence establishes that plaintiff recognized the undesirability of the fireproofing material on this ladder, knew full well that he could have requested that his employer provide him with a new, clean ladder, and yet—for no apparent good reason—chose not to make such a request. Thus, plaintiff's decision not to request a new ladder, not any violation of Labor Law §240(1), was the sole proximate cause of his accident[12].

This was not a novel issue for the First Department, since, in 2003, it had held that "There is no requirement that the owner or contractor itself procure the ladder or that the ladder be the owner or contractor's property"[13].

The Court of Appeals, having been presented with the First Department decision in Miro, did not disagree with the principle that a plaintiff who chooses to use defective equipment in lieu of requesting offsite equipment from an employer, can be the proximate cause of the accident. The Court of Appeals only modified the First Department's decision so as to deny both plaintiff and defendant's summary judgment motions, because "it is not clear from the record how *easily* a replacement ladder could have been procured."[14]

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[11] Miro 9 N.Y.3d 948, 949.
[12] Miro, 38 A.D.3d 454.
[13] Meade v. Rock-McGraw, Inc., 307 A.D.2d 156, 760 N.Y.S.2d 39 (1st Dept. 2003) (cited only for this principle).
[14] Miro, 9 N.Y.3d 948, 949.

Since Miro, other courts have also found that the availability of a plaintiff's employer's equipment is sufficient to defeat a plaintiff's motion for summary judgment on his or her Labor Law §240 (1) claim. In the recent Second Department decision, Garcia,[15] the Court held that the availability of plaintiff's employer's equipment was sufficient to defeat plaintiff's motion for summary judgment.

The availability of equipment has been the subject of additional recent cases including Ward v. Corning Painted Post Area Sch. Dist.[16] and Portillo v. DRMBRE-85 Fee LLC [17]. In Ward, the Court held that plaintiff failed to meet his initial burden to establish entitlement to judgment on his Labor Law §240 (1) claim, inasmuch as his own submissions raised an issue of fact as to whether his conduct in "refusing to use available, safe and appropriate equipment", such as a forklift or even handing the pour stop to another person on the second level of the worksite, was the sole proximate cause of the accident[18].

Portillo[19] raises the question of whether equipment that is being used by other workers, is still "available" within the meaning of Labor Law §240(1). In Portillo, although the plaintiff used a bucket to perform his ceiling work and the bucket tipped over, the Court found that defendants failed to raise a triable issue of fact as to whether plaintiff was the sole proximate cause of the accident. While the Court's decision did not indicate that it undertook an analysis of the "readily available" argument, implicit in its holding was that plaintiff's five-minute search for alternative equipment was sufficient to determine that equipment was not available and that the existence of a person using that alternative device at the time plaintiff was searching, renders it unavailable.

The holding in Portillo can be interpreted as being at odds with those cases that indicate that just by virtue of others utilizing appropriate equipment at the time a plaintiff is searching for that equipment, does not necessarily render that equipment "not readily available" for the purposes of Labor Law §240(1). For example, in Urias v. Orange County Agric. Soc'y, Inc. [20], the Second Department dismissed the Complaint of a plaintiff who was affiliated with a circus.

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[15] Garcia, 2021 NY Slip Op 04540.
[16] Ward v. Corning Painted Post Area Sch. Dist,192 A.D.3d 1563 (4th Dept. 2021).
[17] Portillo v. DRMBRE-85 Fee LLC, 191 A.D.3d 613 (1st Dept. 2021).
[18] Ward,192 A.D.3d 1563.
[19] Portillo, 191 A.D.3d 613.
[20] Urias v. Orange County Agric. Soc'y, Inc., 7 A.D.3d 515 (2d Dept. 2004), *app. den*. 3 N.Y.3d 605 (2004).

The plaintiff needed a ladder to erect a 16-foot-high sphere. However, the ladder was being used by someone else at the time. The Second Department held that the plaintiff's *failure to wait* for the other person to finish using the ladder and instead choosing an unsafe method of ascending, warranted the dismissal of the plaintiff's action, stating, in pertinent part,

> The plaintiff decided to scale the beams on the wall of the arena *instead of waiting for the ladder.* When he grasped one of the beams, it broke, and he fell approximately 17 feet to the ground. [emphasis added][21].

This act of failing to wait for the ladder was considered an unforeseeable act and the sole proximate cause of the accident. In other words, the choice to use unsafe equipment rather than to wait for others to finish using working equipment has been held to be the proximate cause of injuries stemming from use of the equipment.

Likewise, in Vasquez v. FCE Indus., Ltd[22], the U.S. District Court dismissed plaintiff's Labor Law §240(1) claim on the failure to wait grounds. The plaintiff had fallen to his death after he started to descend a ladder that a co-worker was also using and then began climbing the angle irons instead of waiting for the co-worker to pass him. In determining that the failure to wait was the sole proximate cause of the plaintiff's accident, and in referencing the Second Department case Urias, the Court stated:

> The facts here are not materially different: *rather than wait for Concepcion to finish* descending the access ladder, Medina decided to climb the tank wall; this unforeseeable act cuts off any liability that would otherwise exist under §240(1)[23].

This failure to wait argument was also relied upon by the Court of Appeals in Robinson v. East Med. Ctr.[24] when it affirmed the Appellate Division's order granting the defendant's cross-motion for summary judgment dismissal of the Complaint and denying plaintiff's motion for partial summary judgment on his Labor Law §240(1) claim. In Robinson, the Court of Appeals emphasized that the plaintiff, who lost his balance when he used a six-foot ladder to install pipes that were 12 to 13 feet from the floor, had the opportunity to wait or do other things until other workers stopped using the working equipment. Plaintiff knew that there were

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[21] Id. at 516.
[22] Vasquez v. FCE Indus., Ltd, 2008 U.S. Dist. LEXIS 91767 (E.D.N.Y. 2008), *aff'd* 582 F.3d 293 (2nd Cir. 2009).
[23] Vasquez, 2008 U.S. Dist. LEXIS 91767.
[24] Robinson v. East Med. Ctr., 6 N.Y.3d 550 (2006).

eight-foot ladders on the job site and exactly where they could be found. The Court of Appeals stated as follows in this regard:

> While intimating that all the eight-foot ladders may have been in use at the time of his accident, plaintiff also conceded that his foreman had not directed him to finish the piping in the office suite before undertaking other tasks and testified that there was sufficient other work to occupy him for the rest of the workday. He also testified that on prior occasions he had waited for a ladder to be freed up by other workers. He claims to have asked his foreman for an eight-foot ladder only an hour or two before he started to install the rods in the office suite. Yet he proceeded to stand on the top cap of a six-foot ladder, which he knew was not tall enough for this task, without talking to the foreman again, or looking for an eight-foot ladder beyond his immediate work location. In short, there were adequate safety devices--eight-foot ladders--available for plaintiff's use at the job site[25].

In contrast to the rationale in Vasquez, the Second Department, in Poalacin v. Mall Props., Inc.[26] was not persuaded by the failure to wait argument made by the defendants. There, the plaintiff chose to use a ladder that he knew was broken, because other ladders were being used by other workers at that time. The Second Department reversed the granting of summary judgment to the defendants despite evidence that ladders were kept in various places throughout the site and also in a storage space that was next door to the site. The plaintiff admitted that three of his co-workers were using working, available ladders from the site on the date of the accident and plaintiff observed a hydraulic ladder on the first floor of the site. Moreover, prior to arriving at the site, plaintiff's boss told him that there were hydraulic ladders at the site that could be used for his work. The plaintiff admittedly did not look for A-frame ladders throughout the site, or attempt to retrieve the hydraulic ladder, instead, opting to use a broken ladder that was in the area where his colleagues had selected theirs.

The defendants argued, in part, that the fact that some of the ladders at the site were in use by plaintiff's co-workers did not make them "unavailable" and did not vitiate the obvious fact that those ladders, as well as others throughout the site and next door, were provided. Defendants also argued that with no requirement to complete his work that day, no requirement to work on Thanksgiving Weekend (when the accident occurred), and with seven hours left in the

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[25] Robinson, 6 N.Y.3d 550, 555.

[26] Poalacin v. Mall Props., Inc., 155 A.D.3d 900, 901 (2nd Dept. 2017).

day, it was illogical for the plaintiff to have opted to use a broken ladder without attempting to retrieve another ladder from his employer's business which was 29 minutes away, or have his employer deliver a working ladder.

The Second Department held that, defendants' evidence was insufficient to demonstrate that the plaintiff failed to use an appropriate safety device that was "readily available at the work site," although not necessarily "in the immediate vicinity of the accident," despite being aware that he was "expected to use" such a device[27]. Counsel can have fun reconciling Poalacin with the Second Department's recent decision in Garcia or with the Miro, Vasquez, and Urias decisions. It is what keeps our work interesting.

I would be remiss, if I did not mention that to obtain a dismissal of a Labor Law §240(1) claim based upon the sole proximate cause theory, it is insufficient to simply establish the availability of appropriate safety equipment. A defendant also must show that the plaintiff knew of the availability of the safety devices and unreasonably chose not to use them.[28]

These decisions make clear that significant work must be done during the discovery period to build arguments pertaining to the availability of equipment and the satisfaction of an owner's, general contractor's or agent's duty to provide equipment. Litigators must expand their view of what availability means, explore the ability to obtain equipment in the vicinity, at the job site, outside of the job site, and even how easily the plaintiff can procure equipment from other sources. Litigators should explore the directives given in connection with equipment use, plaintiffs' knowledge of the location of equipment as well as the type of equipment that can be used for the task at issue. Without these details, both plaintiffs and defendants may have difficulty establishing entitlement to summary judgment, a favorable verdict, or favorable appellate determinations.

[27] Poalacin, 155 A.D.3d 900, 907.
[28] Gallagher v. N.Y. Post, 14 N.Y.3d 83, 89 (2010).