

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

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JAN MATEJKOWSKI,

*Plaintiff, Respondent,*

*against*

HILTON HOTELS CORPORATION, et ano.,

*Defendant, Appellant.*

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In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Bayne, J.), dated February 4, 2005, which granted the defendant's motion for summary judgment dismissing the complaint.

**I. ISSUES AND SHORT ANSWERS**

Appellant raises two main issues<sup>1</sup>:

1. Does a genuine question of fact exist as to whether Hilton provided to Respondent a safety device that afforded "proper protection" under the meaning of NY Labor Law 240 (1)?

**NO.** Appellant failed to present evidence sufficient to create a triable issue of fact. All of the evidence in the record points to the conclusion that the ladder could not have been used to execute the required asbestos removal and was therefore not a proper safety device under 240(1), this evidence is uncontroverted.

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<sup>1</sup> Although appellant separates its arguments into three main points of contention, as Respondent notes (Respondent's Brief pg. 9) these three points essentially condense into the two noted.

2. Assuming a proper safety device under NY Labor Law 240 (1) was not provided by Appellant, does a genuine question of fact exist as to whether the proximate cause of Respondent's injuries was his own decision to conduct asbestos removal in a "foolhardy" fashion by climbing on top of a ventilation unit and not asking for guidance, as instructed?

**YES.** Under prior case law clear questions of fact exist as to whether Appellant was the proximate cause of his own injury. These questions are created by evidence provided in the Cwikla affidavit. For example: when and if safety meetings were conducted in regards to asbestos removal at the Hilton job site, what information, if any, was supplied to Appellant at such meetings, and whether additional safety materials were reasonably available to Appellant at the job site.

## **II. FACTUAL AND PROCEDURAL BACKGROUND:**

On March 18<sup>th</sup>, Respondent, Jan Matejokski, a laborer trained in asbestos removal and an employee of Hazardous Elimination Corp. (HEC) engaged in the task of removing asbestos from the employee cafeteria of the New York Hilton Hotel (R. 76, 148). Specifically, Respondent had been assigned to remove asbestos from an area of the cafeteria that contained a small room that housed an air conditioner unit (R. 138).

Several hours after Respondent began working, there came a point when he needed to gain access to pipes running along the ceiling of the air conditioner room, which were insulated by asbestos and were to be removed (R. 88). Respondent used an A-frame ladder, provided to him by Appellant, to get on top of the ventilation system that was housed in the air conditioner room to gain access to the pipes (R. 84). There had been no scaffolding or rigging previously set up in the room (R.84-85). The permanent ceiling contained low hanging beams, which created a

space of approximately 40 centimeters between the top of the ventilation system and the hanging beams (R. 85). Respondent stated that the only way he could access and rip down the asbestos insulation located around the piping was to lie on top of the ventilation unit on his back and scrape between the beams (R. 85-88). While Respondent was lying on top of the ventilation system, he attempted to maneuver himself in such a way as to gain access to the top of one of the beams (R. 85-88). While doing so he placed his hand on and applied his weight to a portion of the “drop ceiling” which had not been previously removed (R. 85-88). Since this was a non-load bearing drop ceiling, it could not support Respondent’s weight and Respondent fell through the ceiling and injured himself (R. 93-95). Respondent states the drop was approximately two and a half meters to the floor (R. 83).

During the fall Respondent became lodged in-between the wall and the ventilation system (R 100-101). He remained in this position for a minute or two until his boss was able to maneuver about the room and pull Respondent out from behind the ventilation system (R 100-101). Respondent states two other workers tried but were unable to come to Respondent’s aid because they were too large to maneuver about the room (R. 100). Andrzej Kalinowski, Respondent’s co-worker, stated that the room itself “was only a little larger than the air conditioner unit” (R. 20). Cwikla, Respondent’s supervisor, stated “had plaintiff asked me for direction, I would have instructed him to use scaffold that was available” (R. 203). He also stated that Respondent acted on his own, with no direction from himself or HEC, and that HEC had made ladders, scaffolding and plywood sheeting available and on the job site (R. 203).

Specifically, he stated in his affidavit:

*“Immediately prior to the beginning of the asbestos removal, HEC held a safety meeting with all of its workers who were on the subject of the job site. Additionally, safety meetings were held regularly. One issue addressed at the meeting was that if any employee needed direction, guidance, or needed additional equipment or safety devices they were to ask their immediate supervisor directly” (R. 202).*

Judge Bernadette Bayne of the Kings Supreme Court granted Matejkowski's motion for summary judgment. The lower court observed that Labor Law § 240(1) "places the responsibility for safety practices and safety devices on owners and general contractors and their agents who are best situated to bear that responsibility" (R. 6). The lower court found "uncontroverted testimony ... that plaintiff's employer failed to provide him with any of the enumerated safety devices in order for him to fully perform his assigned task" (R. 7). The court stated "although a ladder was furnished by Hazardous, plaintiff, in order to effectively reach the area around the overhead beams, had to utilize the unit as a platform" (R. 7). The court claimed that Cwikla's "unsupported and speculative version of how the accident occurred" failed to raise an issue of fact (R. 8). Further, the court ruled that "the fact that he may have received safety instructions raises no issue of fact as to whether plaintiff was a recalcitrant worker" and that there is no burden for workers to guarantee their own safety by constructing or placing safety devices for their own protection (R. 8-9).

### **III. ANALYSIS:**

#### **Legal Standards Summary Judgment and Appellate Review**

The proponent of a summary judgment motion must make a prima facie showing of entitlement to a judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see Winegrad v. New York University*, 64 N.Y.2d 851, 853). The opposing party may not solely rely on its pleadings, on conclusory factual allegations, or on conjecture as to the facts that discovery might disclose (*see Gray v. Darien*, 927 F.2d 69, 74 [2d Cir.1991]). Rather, the opposing party must present specific evidence supporting its contention that there is a genuine material issue of fact (*see Celotex Corp.*, 477 U.S. at 324; *Twin Lab. Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568 [2d Cir.1990]). To show such a "genuine

dispute,” the opposing party must come forward with enough evidence to allow a reasonable jury to return a verdict in its favor (*see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 [1986]).

The Court’s role when faced with a summary judgment motion “is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party” (*Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9,11 [2d Cir.1986]).

Specifically, to have a Labor Law § 240(1) summary judgment motion successfully granted the plaintiff must provide evidence sufficient to eliminate any reasonable issue of triable fact and establish (1) that § 240(1) was violated as a matter of law, and (2) that the violation of the statute was a proximate cause of the accident. *Benton v. Brookfield Properties Corp.*, 2004 WL 1335908, at \*8 (S.D.N.Y.,2004). On review, the appellate court typically conducts a *de novo* review of orders granting or denying summary judgment. LITGTORT § 31:27.

**1- Did Judge Bayne error in finding that Appellant failed to raise a genuine question of fact as to whether the 6-foot A-frame ladder supplied by Hilton to Respondent provided “proper protection” as a safety device under NY Labor Law 240 (1) for the asbestos removal he was to conduct?**

Appellant’s main argument on this point relies on the fact that Respondent never attempted to use the provided ladder to perform his work by placing it and opening it in the air conditioner room. However, in order to create a question of fact on this issue, Appellant must rely on something more than mere speculation or possibilities regarding room and ladder measurements, of which they are the best party to provide. Further, whether the safety device supplied provided the “proper protection” does not depend on whether the ladder could merely have been opened in the room, but rather as the lower court held whether the ladder could have been used to fully complete the work assigned.

The opposing party of a summary judgment motion must present *specific evidence* supporting its contention that there is a genuine material issue of fact and not solely rely on conclusory factual allegations or conjecture as to the facts that further discovery might disclose. (*Gray*, 927 F.2d 69 at 74). Appellant here does not provide such evidence. Instead it relies on repetition<sup>2</sup> and speculation as to what one might possibly find if the Hilton's air-conditioner room is measured and compared against the measurements of the A-frame ladder provided to Respondent. All of the evidence that is available in the record points to quite the opposite of Appellant's contention, namely that the ladder could not have been used to execute the required asbestos removal and this evidence is uncontroverted by Appellant. The only piece of evidence that can be read to provide direct support for Appellant's position is a statement from Cwikla where he states "the ladder provided to plaintiff was the proper device for this type of work" (R. 202). However, when read in context it seems Cwikla is merely suggesting with this statement that in general an A-frame ladder is the appropriate device for overhead asbestos removal, because he also states specifically in his affidavit that given Appellant's particular situation in the air conditioner room, he "would have instructed him to use a scaffold that was available" and not a ladder (R. 203). Ultimately, Appellant has not provided a single piece of specific evidence to support its claim.

Respondent's co-worker explained that the air conditioner room in which Respondent was assigned to work in "was only a little larger than the air conditioner unit" itself (R. 20). Respondent stated that "between the beams and the ventilator, there may have been maybe a space of maybe 40 centimeters. You could only lie to access that" (R. 85). According to

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<sup>2</sup> Appellant repeats its main argument that Respondent never attempted to open the ladder in the air conditioner room over ten separate times throughout its filings (Appellant Brief 5, 7, 8, 9; Appellant Reply Brief 1, 2, 3, 4, 5, 6, 7).

Respondent the air conditioner room was so small that when he fell he was lodged in-between the wall and air conditioner unit, in a space approximately 2 and ½ feet wide or smaller (R. 132-133). Respondent testified that two of his co-workers were too large to even fit into the area of the room where he had become stuck and therefore could not come to his rescue (R. 133). At the very least given the respondent's testimony about the room, the ladder could not have been operated against the wall where the respondent fell. Corroborating testimony reveals that at best this space was only 2 and ½ feet from the wall. Perhaps it was possible, for the ladder to have been used elsewhere in the room— however this is not enough to raise a triable issue of fact. Since at least one side of the room was inaccessible by using the ladder, the “safety device” provided by Hilton could not have enabled Respondent to fully perform his work in the assigned area.

Taking the evidence on the whole, and drawing all reasonable inferences in favor of defendants, the non-moving party, Judge Baynes's ruling that a proper safety device under § 240(1) was not provided is fully supported by the record. Defendants failed to raise a triable issue of material fact. The record provides uncontroverted evidence the ladder was not the appropriate device for the task at hand. Also, worthy of note is the fact that Appellant did not introduce any evidence to the contrary (room and ladder dimensions, blue prints, independent expert testimony etc. – yet the Appellant is in the best position to gather this information). In fact Appellants did not even ask one single question of Matejokski regarding his choice not to use the provided ladder or the size of the air-conditioner room itself<sup>3</sup> during his examination before trial. Yet, the theory repeatedly advanced in Appellant's filings is dependent on the answers to these very questions.

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<sup>3</sup> Although the room dimensions of the cafeteria are inquired about (R. 99), there is no inquiry into the actual size of the air conditioner room.

**2- Did Judge Bayne error in finding that appellants failed to raise a genuine question of fact as to whether the proximate cause of Respondent's injuries was his own decision to conduct asbestos removal in a "foolhardy" fashion by climbing on top of a ventilation unit and not asking for guidance from his supervisor, as instructed and granting summary judgment to plaintiff on this issue?**

Initially the parties dispute the precedential meaning of *Blake v. Neighborhood Hous. Serv.*, 1 N.Y.3d 280 (2003). Appellant argues that *Blake* provides support for the proposition that in the situation where a plaintiff is solely to blame for their injury it necessarily means there has been no statutory violation (Appellant Brief 14). Respondent argues that Appellant's reliance on *Blake* is misplaced and *Blake* does not provide a defense where *there is a statutory violation* (Respondent Brief 16).

Although Respondent is correct to point out that on the particular facts of *Blake* there was no statutory violation, *Blake's* general language and subsequent cases do establish that there is merit to Appellant's contention that if a plaintiff is the sole cause of their injury then the proximate cause element required to prove a § 240(1) violation cannot be established (*see Cahill v. Triborough Bridge and Tunnel Authority*, 790 N.Y.S.2d 74, 76, where the New York Court of Appeals interprets the holding in *Blake* to mean "where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability," *see also Gallagher v. New York Post*, 55 A.D.3d 488, 489 [1<sup>st</sup> Dept 2008] for the same interpretation of *Blake* by the First Department). In *Cahill*, a bridge repair worker chose not to use available safety lines when his work required wall-climbing, even after being instructed to do so weeks earlier by his supervisor. The NY Court of Appeals ruled "where an employer has made available adequate safety devices and an employee has been instructed to use them, the employee may not recover under Labor Law § 240 (1) for injuries caused solely by his violation of those instructions, even though the instructions were given several weeks before the accident occurred." The court framed the

controlling question in the case as “whether a jury could have found that his own conduct, rather than any violation of Labor Law § 240 (1), was the sole proximate cause of his accident.”

As noted above, there is a two pronged test for finding liability under § 240(1). First, there must be a statutory violation and second, the statutory violation must have been the proximate cause of the injury (*Benton v. Brookfield*, 2004 WL 1335908 at \*4). Therefore, even if an employer does not “furnish or erect” safety devices in such a way that they are “placed and operated as to give proper protection,” as 240(1) requires, a factual inquiry is often still required to determine whether the lack of the device’s placement was the proximate cause of the injury. Most courts will find a statutory violation if the device is not immediately set in place or installed at the work site (*see for e.g. Heath v. Soloff Construction, Inc.*, 107 AD2d 507,512 [4<sup>th</sup> Dept. 1985] “an owner and contractor do not fulfill their statutory obligation ... by demonstrating that there was present somewhere at a job site a [safety device] which might have been used by a worker for the safer performance of his assigned work. The statute requires more than that and so must we.”). However, New York courts still address questions of immediacy of access to the safety device at the job site and whether particular safety meetings were held and what instructions were provided as an inquiry under the proximate cause prong rather than the statutory violation prong (*see Gallagher v. New York Post*, 55 A.D.3d 488, [1<sup>st</sup> Dept 2008]).

As Respondent correctly notes in its brief, the case law teaches that general instructions to ask for any additional devices a worker might need without more do not satisfy § 240(1) (*Gordon v. Eastern Ry. Supply, Inc.*, 82 N.Y.2d 555, 563 [1993]), and that the duty to provide proper safety equipment cannot be delegated to the worker (*Berndt v. Aquavello*, 139 AD2d 920 [4<sup>th</sup> Dept. 1988]). It is also clear that contributory negligence is not a bar to recovery (*see Koenig v. Patrick Construction Corp.*, 298 NY 313, 318-19 [1948] “contributory

negligence, as a defense to an action predicated on violation thereof, is ruled out.”). Yet, there still exists a point where the worker’s own behavior and decisions can rise above mere contributory negligence to a level of complete responsibility. At this point the plaintiff and their actions and not the failure of the employer to provide proper safety devices are deemed to be the sole proximate cause of the accident and recovery under § 240(1) is denied (*see Gallagher, 55 A.D.3d 488*).

In *Gallagher*, the plaintiff, an ironworker, sued to recover for injuries under NY Labor Law 240 (1). The plaintiff’s project manager testified that he had weekly meetings with safety specialists and that the workers were required to use certain safety devices such as lanyards, cables and harnesses when they were working in open areas. (*Gallagher, 55 A.D.3d 488 at 490*). He testified these devices were available on the job site (*id*). The court ruled that the training provided “consisted of more than ‘[m]ere generic statements of the availability of safety devices’ and is sufficient, at this juncture, to raise issues of fact as to whether plaintiff was provided with adequate safety devices, was instructed to use them, and declined to do so, rendering his actions, or lack thereof, the sole proximate cause of his injuries” (*id at 492*).

In *Montgomery v. Federal Express Corp*, 4 N.Y.3d 805 [2005] the New York Court of Appeals affirmed a reversal by the appellate division of a grant of summary judgment on liability under a Labor Law § 240 (1) claim. The plaintiff, an elevator worker employee, sustained injury when he jumped down from a motor room to the roof-level of a building. Instead of retrieving an available ladder, the plaintiff used an overturned bucket to access the motor room and then jumped back down on his own accord injuring his knee (*Montgomery, 4 N.Y.3d 805 at 806*). The court ruled since ladders were readily available, plaintiff’s “*normal and logical response*” should have been to go get one. Since the plaintiff’s choice to use a bucket to climb up, and then

to jump down, was the sole cause of his injury, he is not entitled to recover under Labor Law § 240 (1) (*id*).

In *Robinson v. East Medical Center, LP*, 6 N.Y.3d 550 [2006], the court clarified the line between contributory negligence and sole proximate cause further. The plaintiff, a journeyman plumber, was injured while installing a pipe hanger system in a medical complex. At some point the plaintiff began installing the system in an area that had 12 to 13 foot ceilings. The plaintiff was provided with a 6-foot ladder and chose to use this ladder to carry out the task (*Robinson, LP*, 6 N.Y.3d 550 at 552). The 6-foot ladder proved inappropriate for the task and the plaintiff slipped and fell from the ladder (*id*). The New York Court of Appeals reasoned that the plaintiff:

*“... knew there were eight-foot ladders on the job site and ‘knew what part of the garage [the eight-foot ladders] were in’; and that, prior to ascending the six-foot ladder in the office suite, he did not look in the garage for an eight-foot ladder, or follow up his request to the foreman, or seek out fellow workers who might have been using an eight-foot ladder to ask for the ladder when they were finished with it, as he had on prior occasions” (id at 553).*

The court went on to rule that:

*“In short, there were adequate safety devices, eight-foot ladders available for the 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” (id at 555).*

Furthermore, in *Robinson*, the plaintiff had even asked his foreman for the 8-foot ladder a few hours before the accident but the court noted he never followed up with this request. Also, the court found relevant that the plaintiff conceded that his foreman had not directed him to finish the piping, and that there was enough other work to keep him busy on the job site (*id* at 553).

The present facts, as presented by Appellant, are strikingly similar to *Robinson*. Here, according to evidence provided by Appellant in the form of the Cwikla affidavit, Respondent had access to proper safety equipment and chose not to retrieve it. Appellant also claims that

Respondent did not consult his supervisor and instead chose to conduct his work in an unorthodox and unsafe manner (R 202-203). Although the trial court stated that Cwikla's affidavit was unsupported and speculative as to "how the accident occurred," the portions of the Cwikla affidavit that relate to the work environment itself, such as safety meetings held, and general work-area conditions, are presumably based on Cwikla's direct knowledge and observations as the job-site supervisor. In *Robinson*, the plaintiff did not retrieve one of the 8-foot ladders that were available from the community garages at the job site, and instead chose to use a 6-foot ladder that was not proper for the task at hand. Similarly, here Appellants argue Respondent did not seek out available scaffolding or work platforms as instructed to.

A recent New York Law journal article concluded, after analyzing dozens of § 240(1) cases including the *Cahill* decision, that courts focus on several factual inquiries when determining if the worker-plaintiff was the sole and proximate cause of their own injury (Ehrlich, Julian D., *Establishing Proximate Cause in Construction Site Accidents*, N.Y.L.J. 4, (col. 1) [3/13/2009]). The article stated "defendant's should focus their investigation and discovery on the specificity of pre-accident instructions, including whether workers were directed to request proper safety devices, plaintiff's attendance and sign-ins at safety meetings, the proximity of safety equipment to the [injury] location, alternative methods available and the choices the plaintiff made... experts should be considered to establish that the devices were appropriate and what plaintiff's normal and logical response should be given the risks associated with a given task" (Ehrlich, N.Y.L.J. 4). As can be seen from the relevant authority when enough factors cut against the workers behavior, a finding of worker proximate cause is proper.

However, this is a factual inquiry that often turns on the answer to inquires such as those above, listed in the Ehrlich article. In the instant case there is a fair degree of uncertainty

regarding the answers to a number of questions that could help determine whether Hazardous complied with § 240(1) or not. Some of these questions include: What type of scaffolding, work platforms or other safety devices were available at the site? Would the available safety devices have easily installed into the air-conditioner room? Would any of the available equipment have provided the proper safety to Respondent's for the job at hand? What specifically was discussed at the safety meetings?<sup>4</sup> How many meetings were there? Did Respondent attend? How easy was it to request scaffolding at the job site? Who was required to set up the scaffolding? How far in advance must the scaffolding have been requested? Was there enough work to keep the defendant busy if he had to wait for scaffolding? Was defendant specifically directed to work on the air conditioner room? However, the proper forum to shed light on such uncertainty is the discovery process since these are factual issues.

Ultimately, the court is faced with deciding whether the statements made in Cwikla's affidavit are enough to raise above generic statements of the availability of safety devices as in *Gordon* to something more significant in the vein of *Gallagher* and *Cahill* sufficient to create an issue of triable fact. As the NY Court of Appeals noted in *Montgomery*, when faced with § 240(1) cases, courts should consider what a "normal and logical response" is to the given situation would be in determining whether the worker himself is the proximate cause of his own injury.

Evaluating the Cwikla affidavit in the light most favorable to Appellants, a question of fact is created. If, as Cwikla suggests, regular safety meetings were held where specific instructions were provided to the workers and the safety materials were readily available and

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<sup>4</sup> Further, Respondent does not speak English fluently only Polish, as evidenced by the fact he needed an interpreter to conduct his examination before trial. Whether what was discussed at the meetings was effectively communicated to Respondent may also be a relevant line of inquiry, however at this point this inquiry is beyond any issue either party briefed.

easy to install at the job site, a reasonable jury could find that a “normal and logical response” to plaintiff’s situation would have been to follow the provided safety protocol and consult with a supervisor, or retrieve the available safety devices before climbing on top of the air conditioner unit.

#### **IV. CONCLUSION:**

The record provides uncontroverted evidence that the ladder provided was not the appropriate device for the task at hand. The lower court ruling that a proper safety device under § 240(1) was not provided is fully supported by the record, and therefore, defendants failed to raise a triable issue of material fact on this point. However, it does appear that the lower court erred in not specifically addressing the proximate cause inquiry and instead exclusively focusing on the issue of whether there was a statutory violation. In doing so, the court ignored applicable § 240(1) proximate cause precedent. The claims made in the Cwikla affidavit, taken in the light most favorable to Appellants, present sufficient evidence for a reasonable trier of fact to determine that the actions taken by Respondent were the proximate cause of his own injuries.