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Labor Law 240 under attack from the beginning

=Labor Law Section 240 has been the bane of existence of construction contractors across the State of New York. First enacted in 1885, the "Scaffold Law" was intended to protect construction workers from falls from rickety ladders and defective scaffolding. The statute imposed upon owners and contractors the obligation to ensure that workers performing their duties at heights were adequately protected.

It also protects workers from objects falling from heights upon them. The evolution of the statute over the years has caused the business community to perceive it as affording a worker an extraordinary recovery, ignoring the potential fault of the worker himself.

By LOUIS B. CRISTO
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In *Blake v. Neighborhood Housing Services of New York*, 1 NY 3d 280 (2003), the Court of Appeals addressed the scope of the protection afforded and, importantly, the significant exceptions to the rule. Prior to *Blake*, it was held that the negligence of the worker "is of no consequence" in the face of a statutory violation. *Rocovich v. Consolidated Edison Co.*, 78 NY 2d 509 (1991). New York was unique among the states relative to the sheer breadth of this protection.

Only in the event that a worker was deemed to be a "recalcitrant worker" was the owner or contractor insulated from suit. A worker is defined to be recalcitrant when he refuses to utilize available safety equipment, *Gordon v. Eastern Ry. Supply, Inc.*, 606 NYS 2d 127 (1993). The defense was narrowly construed historically. For example, in one case, the plaintiff was repeatedly instructed to use a scaffold rather than a ladder to sandblast railroad cars. The court held that plaintiff's refusal alone did not cause him to be considered recalcitrant. A judgment against the contractor was sustained, *Gordon*, supra.

The strict interpretation of Section 240 often led to some seemingly preposterous results. In the case of *Keane v. Lee*, 591 NYS 2d 521 (2nd Dept 1992), the court declined to permit the contractor to argue that the plaintiff had used marijuana prior to the accident, contributing to his fall. Similarly, in *Haulotte v. Prudential Insurance Company of America*, 698 NYS 2d 24 (1st Dept 1999), the court refused to consider the worker's possible intoxication a cause of the accident where it was not the sole cause of the accident. It is no surprise that construction site owners and contractors had made the repeal of Section 240 their primary mission in life.

Blake and its progeny, however, have been viewed by the defense bar as lending some reason to the resolution of worker fall cases. In one illustrative case, the employee chose to utilize a six-foot stepladder to install a pipe hanger system, notwithstanding the ready availability of eight-foot stepladders on site. He stood on the top cap of the ladder and, of course, lost his balance and fell.

The trial court granted him summary judgment against the contractor. The Appellate Division reversed the decision below and the Court of Appeals affirmed the decision, *Robinson v. East Medical Center, LP*, 814 NYS 2d 589 (2006). The Court of Appeals reasoned that he was well-aware that he was not tall enough to perform the job safely on a six-foot ladder and his choice not to wait for an eight-footer was the sole proximate cause of his fall.

In *Albert v. Williams Lubricant*, 828 NYS 2d 593 (3rd Dept 2006), the plaintiff and his co-worker broke down an extension ladder so they could use both sections of it at the same time separately to perform their work more quickly. Unfortunately, the plaintiff was left using the top section with its rounded fiberglass end as the ladder foot. It slipped. He fell. He was denied recovery.

The worker in *Weinberg v. Alpine Improvements, LLC*, 851 NYS 2d 692 (3rd Dept 2008) claimed that he should have been provided a baker scaffold instead of the stepladder from which he fell. The court disagreed, crediting his fall, rather, to the "cheese-like" substance on the bottom of his boots picked up when he walked through a store deli department only moments before. These more recent decisions will be viewed by the business community (but not the plaintiffs' bar) as lending some needed balance to the interpretation of Section 240.

It is acknowledged by the courts that contractors are responsible for the many risks inherent in the workplace such as uneven floors and the existence of construction debris, which may cause unexpected falls from heights, *Losurdo v. Skyline Associates, LP*, 807 NYS 2d 249 (4th Dept 2005). It is when the worker, himself, alone makes blatantly risky choices that the courts will decline to allow him to pursue a personal injury claim.

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