What Is An Elevation-Related Risk In The Wake Of *Runner*?

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Until recently, it had been axiomatic that New York's "scaffold law," Labor Law § 240(1), imposes strict liability upon landowners and general contractors, but limited liability to accidents related to the inherent effects of gravity.[1] Generally, an injured worker could not assert a § 240 claim unless he had fallen from an elevated height or had been struck by an object falling from an elevated height.

The landscape changed in 2009, however, when the United States Second Circuit Court of Appeals certified a novel question to the New York Court of Appeals: are injuries caused when a worker was pulled forward and into a device as a result of an object descending a set of stairs protected under § 240 (1)? Yes, held a unanimous Court of Appeals, in *Runner v. New York Stock Exch., Inc.*[2]

In *Runner*, the plaintiff and several co-workers moved a heavy reel of wire down a set of four stairs. To prevent the reel from rolling freely and causing damage, the workers tied one end of a rope to the reel and wrapped the rope around a metal bar placed on the same level as the reel. The plaintiff and two others held the loose end of the rope, essentially acting as counterweights. The reel was heavier than expected, and the plaintiff was pulled horizontally into the bar, injuring his hands as they jammed against it. Thus, the plaintiff never changed elevations, and he was not struck by the actual falling object, the reel. The jury found for defendants, and the trial court set aside the verdict and directed judgment for plaintiff. Defendants appealed, and the Second Circuit certified the question to the Court of Appeals.[3]

The Court of Appeals held:

> 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 of gravity to the object.*[4]

The Court held that the injury to the 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." *Id.* "[T]he 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 (emphasis added).

In determining whether an elevation differential is "significant" versus *de minimis*, the key issues as per *Runner* are the weight of the object and the amount of force it is capable of generating.[5] Thus, in *Runner*, the Court of Appeals expanded the application of § 240 (1) in holding that "the applicability of the statute in a falling object case . . . does not . . . depend upon whether the object has hit the worker," but "rather whether the harm flows directly from the application of the force of gravity to that object."[6]

Since *Runner*, the Appellate Division First Department has struggled with the issue of what constitutes an elevation-related risk. For example, in *Makarius v Port Auth. of N.Y. & N.J.*,[7] a five-justice panel produced three separate opinions regarding the issue of the defendant's liability under § 240 (1). In *Makarius*, the alleged injury occurred when, as plaintiff and one of his coworkers attempted to repair a water pipe, a transformer that had been affixed to the wall, at a height of approximately six to seven feet, fell and struck the head of the plaintiff, who was standing at ground level.[8] The trial court granted plaintiff partial summary judgment on the issue of the defendant's liability.

Although the above facts would appear to present a "falling object" claim, a majority of the First Department panel dismissed the § 240 (1) claim. The court distinguished *Runner*, holding that there was "no

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significant elevation differential" between the injured worker and the falling object because the transformer fell from less than two feet above plaintiff's head.[9] In an opinion dissenting as to this issue, Justices Moskowitz and Freedman maintained that under *Runner*, the accident "fell within the parameters of Labor Law § 240 (1) because a falling object struck plaintiff that a safety device had not adequately secured."[10]

Thereafter, in *DeRosa v Bovis Lend Lease LMB, Inc.*, 96 A.D.3d 652 (1st Dep't 2012), the plaintiff, the driver of a cement-mixing truck, was injured when his shirt became caught on the cement mixer's handle, throwing him up and over the truck. At the time of the accident, the plaintiff had activated switches that put the truck's mixer at full speed and then mounted the right side of the truck's rear fender, which was approximately three feet off the ground, in order to visually assess whether the consistency of the mix was appropriate.[11]

In a 4-1 decision, the First Department reversed an order granting partial summary judgment as to liability under § 240 (1), holding that the plaintiff "was not exposed to an elevation-related risk and his injury did not directly flow from the application of gravity's force."[12] The majority further held that the plaintiff failed to establish that the protection by the type of safety equipment enumerated in the statute was warranted.[13]

Justice Renwick dissented, concluding that as in *Runner*, the risk of the plaintiff's injury is protected under § 240 (1), "i.e., an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against," in part because the plaintiff's job required him to climb to the top of the truck so that he could visually assess whether the consistency of the mix was appropriate for the job.[14]

Accordingly, based on the holdings in *Makarius* and *DeRosa*, it appears that at least three justices in the First Department interpret the holding in *Runner* as being more expansive than their colleagues. This number is significant in light of the fact that the three justices would constitute a majority of an appellate panel in a given case.

In the other departments of the Appellate Division, the issue has thus far not been as divisive, but a few cases are worth defense counsel's consideration. In *Strangio v Sevenson Envtl. Servs., Inc.*,[15] the defendants successfully moved for summary judgment dismissing the plaintiff's Labor Law § 240 (1) claim for injuries sustained from being struck in the face by the handle of a hand-operated hoisting mechanism while he was raising a scaffold. The hoisting mechanism did not change elevations but rather malfunctioned, turned backwards, and struck the plaintiff's face.[16]

On appeal, in a 3-2 decision, the Fourth Department affirmed, reasoning that "the protective device, i.e., the scaffold, adequately shielded plaintiff and his co-workers on the platform from falling to the ground or sustaining other injuries as a result of the unchecked descent of the scaffold."[17] Thus, held the court, "[t]he mere fact that the force of gravity acted upon the hoisting mechanism is insufficient to establish a valid Labor Law § 240 claim inasmuch as plaintiff's injury did not result from an elevation-related risk as contemplated by the statute." *Id.* at 1893-1894. The dissenting justices concluded that because the injury was " 'the direct consequence of the application of the force of gravity to the [cranking mechanism]' . . . and that the risk to be guarded against 'arose from the force of the [scaffold's] unchecked, or insufficiently checked, descent,' the plaintiff had established a valid § 240 (1) claim."[18]

In a brief decision, the Court of Appeals apparently agreed with the dissent and reversed, holding that "[t]riable issues of fact exist as to whether the defendants provided proper protection under Labor Law § 240 (1)."[19] Thus, the Court reiterated that even where neither the injured worker nor the object that struck changed elevations, the resulting injury can still be protected under the statute.

Since *Strangio*, the Fourth Department has applied *Runner* without incident. *Compare, e.g.*, *Signs v Crawford*[20] (§ 240 (1) claim established where metal plate being hoisted by a jib fell and caught plaintiff's glove, causing injury), *Miles v Great Lakes Cheese of N.Y., Inc.*[21] (§ 240 (1) claim established where plaintiff was struck in the head by two scaffold planks, which were being raised approximately from 3.5 feet above the ground, to a level approximately 20 inches higher) and *Dipalma v State of New York*[22] (§ 240 (1) claim established for injuries caused by a "skid box" sliding off forklift and falling approximately "one or two feet," striking plaintiff), with *Bruce v Actus Lend Lease*[23] (no "falling object" claim established under § 240 (1) where roof truss that plaintiff was securing to a building under construction broke apart, striking him and knocking him off ladder) and *Timmons v Barrett Paving Materials, Inc.*[24] (no § 240 (1) claim established where there was no evidence that object that fell

causing injury to plaintiff fell because of the absence or inadequacy of a safety device).

Likewise, a survey of the Second and Third Departments reflects that there have been a few interesting cases regarding this issue. *See e.g.*, *Moncayo v Curtis Partition Corp.*[25] (injury caused by piece of sheetrock that had fallen from the third floor of building under construction not protected under § 240 (1) because sheetrock not being hoisted or secured and did not require hoisting or securing); *Andresky v Wenger Constr. Co., Inc.*[26] (valid § 240 (1) claim established where plaintiff, who was shoveling concrete out of a container raised onto a scaffold was pulled off of scaffold and injured when the container tipped off the edge); *Gutman v City of New York*[27] (order granting summary judgment dismissing complaint reversed where plaintiff allegedly was injured when, while his team was moving a rail, his team lost control, causing it to fall approximately 12 to 16 inches and strike plaintiff); *Mohamed v City of Watervliet*[28] (§ 240 (1) claim properly dismissed where evidence showed that the "falling object," a backhoe bucket, crushed the worker, not because of gravity, but because of its allegedly negligent operation); *Oakes v Wal-Mart Real Estate Bus. Trust*[29] (no liability under § 240 (1) where "falling object," a large truss, allegedly tipped over and fell at ground level, striking and injuring plaintiff, because there was no elevation differential).

In light of the fact that most of the above Labor Law cases involved decisions on motions for summary judgment, such cases, with claims asserting liability under § 240 (1), are worth monitoring to properly prepare defense strategy for owners and general contractors. Specifically, defense counsel should analyze how courts interpret what constitutes a "physically significant elevation differential," and should explore what, if any, new issues arise in this area of Labor Law jurisprudence.

[1] *See generally Rocovich v. Consol. Edison Co.*, 78 N.Y.2d 509, 513 (1991).

[2] 13 N.Y.3d 599, 602 (2009)

[3] Following the Court of Appeals' decision, the order setting aside the verdict and directing judgment for plaintiff was affirmed by the Second Circuit. *See* 590 F.3d 904 (2d Cir. 2010).

[4] *Id.* at 604 (emphasis added).

[5] *See id.* at 605. *See also Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d 1, 10 (2011) (holding that the plaintiff was not precluded from recovery under § 240 (1) where the pipes that struck him were on the same level and fell approximately four feet before striking plaintiff).

[6] *Id.* at 604

[7] 76 A.D.3d 805 (1st Dep't 2010)

[8] *Id.* at 806

[9] *Id.* at 807-808

[10] *Id.* at 815

[11] *Id.* at 653

[12] *Id.*

[13] *Id.* at 653-654

[14] *Id.* at 660-661

[15] 74 A.D.3d 1892 (4th Dep't 2010)

[16] *Id.* at 1894

[17] *Id.* at 1893

[18] *Id.* at 1894 (dissenting opinion), quoting *Runner*, 13 NY3d at 604

[19] *Id.*, 15 N.Y.3d 914, 915 (2010)

[20] 109 A.D.3d 1169, 1169 (4th Dep't 2013)

[21] 103 A.D.3d 1165, 1166 (4th Dep't 2013)

[22] 90 A.D.3d 1659, 1659-1660 (4th Dep't 2011)

[23] 101 A.D.3d 1701, 1701-1702 (4th Dep't 2012)

[24] 83 A.D.3d 1473, 1474 (4th Dep't 2011)

[25] 106 A.D.3d 963 (2d Dep't 2013)

[26] 95 A.D.3d 1247, 1249 (2d Dep't 2012)

[27] 78 A.D.3d 886, 886 (2d Dep't 2010)

[28] 106 A.D.3d 1244 (3d Dep't 2013)

[29] 99 A.D.3d 31, 39-40 (3d Dep't 2012)

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[5] *See Losito v. Manlyn Dev. Group, Inc.*, 85 A.D.3d 983, 925 N.Y.S.2d 643 (2d Dept. 2011); *Lopez v. Boston Props., Inc.*, 41 A.D.3d 259, 838 N.Y.S.2d 527 (1st Dept. 2007).

[6] *Kallem v. Mandracchia*, 2013 N.Y.App. Div. Lexis 7873 (2d Dept. 2013).

[7] *See Collins v. City of New York*, 105 A.D.3d 631, 963 N.Y.S.2d 260 (1st Dept. 2013); *Aton v. West Manor Constr. Corp.*, 100 A.D.3d 523, 954 N.Y.S.2d 76 (1st Dept. 2012).

[8] 96 A.D.3d 500, 949 N.Y.S.2d 7 (1st Dept. 2012).

[9] *Lapidus v. State of New York*, 57 A.D.3d 83, 866 N.Y.S.2d 711 (2d Dept. 2008).