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Trials&TRIBULATIONS

COA limits the scope of the Scaffold Law

Recently, the New York State Court of Appeals in *Soto v. J. Crew Inc.*, __ NY3d __, 2013 WL 5566304 (Oct. 10), established a four-step test to determine whether a plaintiff is engaged in a "cleaning" activity within the meaning of the Scaffold Law. By doing so, the court limited the scope of the statute, and found that "routine" cleaning that does not require any specialized knowledge is not protected.

Facts

Plaintiff Jose A. Soto ("Soto") was employed as a commercial cleaner for a company that had been hired to provide janitorial services for a J. Crew retail store in lower Manhattan. Soto was injured when he fell from a four-foot-tall ladder while dusting a six-foot-high display shelf inside the store.

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Daily Record Columnist

Soto was responsible for the daily maintenance at the store. Each day, Soto would ready the premises for business by vacuuming, mopping, cleaning bathrooms, emptying garbage and other similar activities. After the store opened to the public, Soto would spot clean, tidy shelves, dust, wipe down the entrance doors and sweep debris.

On the date of his accident, an employee of the store noticed that a six-foot-high clothing display shelf was dusty, and asked Soto to clean it. Equipped with a "high duster" (a Swiffer brand duster with a long handle), Soto positioned a four-foot-high A-frame ladder on the floor in front of the shelf. The ladder was in proper working condition and Soto locked the ladder into the open position prior to his climb. As Soto was dusting the shelf, however, he and the ladder fell over, causing Soto to injure his back, knee and elbow.

Soto brought a personal injury lawsuit and sought recovery pursuant to New York State Labor Law §240(1) (hereinafter "§240"), commonly known as the Scaffold Law. After discovery, the defendants moved for summary judgment asserting that Soto's cleaning activities constituted only "routine maintenance" and not the type of cleaning activities protected by §240. Soto argued that because he was engaged in "cleaning" and was required to work at an elevated level, he was afforded the protections of §240.

Disagreeing with Soto, the Supreme Court granted defendants' motion and dismissed the lawsuit. The trial court reasoned that §240 did not apply to workers employed on a daily basis who conduct only routine commercial cleaning, such as "dusting, sweeping, mopping and general tidying," *Soto v. J. Crew Inc.*, 2011 WL 4544707 (Sup. Ct. N.Y. Co. Sept. 22, 2011).

The Appellate Division, First Department, unanimously affirmed, 95 AD3d 731 (1st Dept. 2012), and agreed that "dusting of the shelf constituted routine maintenance and was not the type of activity" protected under §240. Nevertheless, the First Department granted Soto leave to appeal to the Court of Appeals.

The court's decision

If §240 applies to the facts of a case, absolute liability is imposed upon owners and contractors for failing to provide safety devices necessary for workers subjected to "elevation-related risks."

However, in order to recover under §240, a plaintiff must have been engaged in a covered activity — "the erection, demolition, repairing, altering, painting, cleaning or painting of a building or structure," see Labor Law §240(1) (emphasis added). Furthermore, the plaintiff must have suffered an injury as "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential," *Runner v. New York Stock Exch., Inc.*, 13 NY3d 599, 603 (2009).

Prior to its *Soto* decision, the Court of Appeals, in dicta, commented that §240 does not apply to an employee who was injured when he fell from a ladder while cleaning oil and welding residue in a plant, *Dahar v. Holland Ladder and Mfg. Co.*, 18 NY3d 521 (2012). If it did, the court reasoned, "virtually every kind of cleaning task, including every bookstore employee who climbs a ladder to dust off a bookshelf, or every maintenance worker who climbs to a height to clean a light fixture," would be protected by

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§240, a result never intended by the Legislature.

The threshold issue in *Soto*, therefore, was whether a plaintiff engaged in a routine and daily cleaning activity is engaged in "cleaning" within the meaning of the statute. The Court of Appeals observed that, although commercial window washing constitutes "cleaning" within the ambit of §240, routine "household window washing" does not.

The court reasoned that "routine maintenance of that type has been deemed excluded from the statute in recognition of the fact that such a task generally does not involve the type of heightened elevation-related risks that justify extension of the provision's special protection." The court further determined that "cleaning" is not confined merely to commercial window washing tasks because courts in New York have reasonably applied §240 to other types of cleaning projects that present hazards comparable in kind and degree to those presented on a construction site.

For example, cleaning of 45-foot-high ledges in a mall, as part of a large scale cleaning project, is a covered activity, *Vasey v. Pyramid Co. of Buffalo*, 258 AD2d 906 (4th Dept. 1999). Power washing a Plexiglas canopy of a building in furtherance of a contract to clean the exterior of the entire structure is also covered, *Fox v. Brozman — Archer Realty Servs.*, 266 AD2d 97 (1st Dept. 1999), as is the use of sandblaster to clean the exterior of a railroad car, *Gording v. Eastern Ry. Supply*, AD2 NY2d 555 (1993).

Despite these holdings, the Court of Appeals rejected Soto's argument that the New York State Legislature intended to cover all cleaning activities that occur in a "commercial" setting no matter how "mundane." The Court of Appeals outlined a four-factor test, outside the sphere of commercial window washing, to determine if an activity can be characterized as "cleaning" under the statute.

If a "task: 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) ... is unrelated to an ongoing construction, renovation, painting, alteration or repair project" than the activity is not protected by the statute.

Whether or not an activity is "cleaning" is an issue for the court to decide after applying the four-factor test to the facts of a particular case. Additionally, "the presence or absence of any one factor is not necessarily dispositive if, viewed in totality, the remaining considerations militate in favor of placing the task in one category or the other." After analyzing the facts under the aforementioned factors, the court upheld the determination that the activity undertaken by Soto was not "commercial cleaning," even though the cleaning was performed in a commercial setting.

Rather, the dusting of a six-foot-high display shelf is the type of "routine maintenance" that occurs frequently in retail stores. It does not require "specialized equipment or knowledge and could be accomplished by a single custodial worker using tools commonly found in a domestic setting." Further, the "elevation-related risk" involved was comparable to those encountered by homeowners during ordinary household cleaning and the task was unrelated to a construction, renovation, painting, alteration or repair project. As such, the Court of Appeals affirmed the dismissal of Soto's lawsuit.

Because Soto was not engaged in an activity that fell within the purview of §240, the Court of Appeals did not address whether he offered sufficient evidence that he was injured as a consequence of "a failure to provide adequate protection against a risk arising from a physically significant elevation differential."

Citing *Soto*, the Scaffold Law was again recently limited by the Appellate Division, Second Department. In *Hull v. Field Point Community Association Inc.*, 2013 WL 5732383 (2nd Dept. Oct. 23), a worker brought a lawsuit for injuries she sustained when she fell from a roof while cleaning leaves from the gutters of a residence in a condominium development.

The Second Department found that although the plaintiff was cleaning leaves pursuant to a contract between her employer and the condominium association, which required her employer to clean gutters, the work "does not apply to work that is incidental to regular maintenance, such as clearing gutters of debris." This decision further restricts the Scaffold Law and prevents its application to routine elevated gutter work.

Conclusion

Soto created a four-factor test for courts and litigants to utilize when determining whether or not an activity can be characterized as "cleaning," thus triggering the protection of §240. If an activity is routine, does not require specialized equipment or expertise, involves "insignificant elevation risks," and is unrelated to ongoing construction, the safeguards of §240 will not apply.

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