

Labor Law Update

In Blake v. Neighborhood Housing Services of New York, Inc., 771 N.Y.S.2d 44 (2003), it appeared that the Court of Appeals might have imposed a new type of Labor Law Section 240(1) standard which would be helpful to those defending labor law claims. Based upon a recent lower court decision interpreting Blake, it appears that the answer is not so clear cut and will likely involve much further litigation.

By way of background, Blake involved a self-employed contractor working alone on the renovation of a two family home in the Bronx. Defendant Neighborhood Housing Services of New York City (NHS) was a not for profit lender providing low cost financing to facilitate the project. NHS also assessed the scope of work and the amount of the loan and gave the homeowner a list of contractors choose from. The homeowner chose the plaintiff from a list of contractors provided by NHS.

During the renovation, the plaintiff set up an extension ladder, which he owned and used frequently. The plaintiff testified that the ladder was steady, had rubber shoes, and was in proper working condition. Nevertheless, while the plaintiff was in the process of scraping rust from a window, the upper portion of the ladder retracted and he suffered an ankle injury.

The plaintiff sued both the homeowner and NHS alleging a violation of Labor Law Section 240(1). The claim against NHS was based on the theory that it was strictly liable as a statutory agent under 240(1) for failure to provide a proper workplace and mandated safety equipment.

Both defendants moved for summary judgment. NHS argued that it was not a statutory agent, that there was no evidence that the ladder was defective, and that the plaintiff's actions were the cause of the accident. The Court granted the homeowner's motion based on the exclusion in the law for the owners of one or two family homes, however it denied NHS's motion.

At trial, the plaintiff conceded that he could not identify a defect in the ladder, that it was stable and there was no reason to have steadied it during use. He also testified that he was not sure if he had locked the extension clips in place before climbing the ladder. The jury found that NHS did have the authority to direct and control the plaintiff's work and that the "ladder was so constructed and operated so as to give **proper protection** to the plaintiff." The jury essentially found that the accident occurred because of the plaintiff's own negligence. The plaintiff moved to set aside the verdict and direct one in his favor, arguing that Labor Law Section 240(1) is a strict liability statute. The trial court denied the plaintiff's motion and the Appellate Division affirmed.

In tracing the history of the scaffold law back to its origins in 1885, the Court of Appeals noted that the legislature had never explicitly barred contributory negligence as a defense. The defense of contributory negligence was eliminated by the Court of Appeals in 1948 in an effort to carry out the purposes of the law, i.e. placing responsibility for work place accidents on owners and contractors.

The Court went on to note that while it is commonly stated that the statute provides for "strict liability", it is not the same theory as that used in cases involving defective products or ultra hazardous activities. The Court stated that speaking of labor law cases in those terms had "given rise to the mistaken belief that a fall from a scaffold or ladder, in and of itself, results in an award of damages to the injured party".

The Court went on to state:

"Put differently, an accident alone does not establish a Labor Law Section 240(1) violation. This Court has repeatedly explained that "strict" or "absolute" liability is necessarily contingent on a **violation** of Section 240(1)... moreover causation must be established."

In addressing the claim of Mr. Blake, the court held that the ladder was undisputably in

proper working order and no further devices were necessary. As such, the Court found that there was no violation of 240(1). Additionally, the issue was not whether the plaintiff was comparatively negligent, which would be impermissible, but whether the plaintiff was solely negligent. In cases such as Blake where the plaintiff was the “sole proximate cause” of the accident, recovery based upon an alleged violation of Section 240(1) is impermissible.

In reading the Blake decision, one can get the impression that the Court of Appeals is signaling a more defense oriented approach to the Labor Law. While Blake has been cited by a number of subsequent cases, it was not discussed in any significant manner until the recent decision of Robinson v. The City of New York, 2004 N.Y. Misc. Lexis 842 (Supreme Court, Bronx County).

Robinson presents the usual myriad of Labor Law issues with the novel nuance of whether the Court of Appeals decision in Blake imposed a new Labor Law Section 240(1) standard. In Justice Victor’s words, the issue was whether:

“The Court of Appeals, in Blake announced a departure from the former controlling mandate that Section 240 is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed, and from the imposition of strict liability.”

Judge Victor apparently believed that Blake was more a reflection of the limited review power of the Court of Appeals, rather than a dilution of the strict obligations imposed upon owners and contractors to afford proper protection to construction workers who are exposed to elevation related risks. Judge Victor stated that while providing an excellent analysis of the history and purposes of the Labor Law, Blake did not change the Labor Law landscape.

Robinson involved a plaintiff who fell approximately 30 feet from a three story scaffold during construction of a building being built for the Department of Transportation and the City of New York. According to the plaintiff, the scaffold was not equipped with safety railings and the

record did not indicate that the plaintiff was supplied other safety devices such as a harness. Immediately before the accident, one of plaintiff's co-workers was operating a "lull" machine which functioned in a manner similar to a fork lift and which was used to hoist construction materials onto the scaffold. Immediately before the accident, the plaintiff's co-worker had entangled the lull with a 200 volt line. The plaintiff's co-worker requested that plaintiff assist him with this problem. Immediately before the accident, the plaintiff positioned himself so he was straddling the scaffold and the platform of the lull machine. At that point, the plaintiff received an electrical shock and was "frozen" to the lull machine momentarily and unable to get back onto the scaffold. He then fell to the ground, receiving injuries.

Defendant City of New York argued that the accident was not the result of the failure of a safety device, or the lack of handrails on the scaffold, but was instead was solely the result of the plaintiff's own negligence. The City's argument essentially was the "sole proximate cause" argument which was successful in Blake.

Justice Victor, in discussing the sole proximate cause defense, stated that it is not as broad as it may seem from reading Blake:

"the sole proximate cause defense must logically be limited to the situation where a worker has been provided with proper protection, and the worker thereafter, through intentional misuse of the safety device, or via other egregious misconduct, neutralizes the protections afforded by the safety device".

The Court went on to state that "every inquiry by the Court into proximate cause must then necessarily include a review of the scope of the hazards and the protections intended to be covered by Section 240." Once the plaintiff makes a showing that he or she was subjected to one of the hazards covered by Section 240, the burden shifts to the defendant to provide evidentiary proof in admissible form sufficient to establish that proper protection was afforded, but rendered ineffective

as a result of the intentional or culpable conduct on the part of the plaintiff.

With regard to the claim of Mr. Robinson, the Court held that there were missing safety devices, namely guard rails and a safety harness. Additionally, while the plaintiff's actions in straddling the scaffold and the lull machine could have made safety railings irrelevant, the safety harness still could have prevented the plaintiff's fall. As such, there was at **least an issue of fact** as to whether the plaintiff was the sole proximate cause of his injuries.

With regard to the meaning of the Blake decision, Justice Victor pointed to Court of Appeals limited scope of review. Specifically, Justice Victor noted that the Court of Appeals was bound by the findings of fact of the lower court, that all the evidence showed that the ladder was so constructed and operated to give Mr. Blake proper protection and was the sole cause of the injury. Having been presented with those factual findings, the Court of Appeals had no legal or factual basis for the imposition of absolute liability on the defendants. It was beyond the Court's power to do anything but affirm the Appellate Division's affirmance of the jury's verdict. The Court went on to state that everything in the Blake decision is a mere reiteration of already well established principals of law and history and purposes of Labor Law Section 240. If the Court of Appeals had imposed liability on the defendants in such a case, it would have been inconsistent with the statutory goals, since the accident was not caused by a deficient safety device, or in the way the safety device was placed.

Despite the explanation given in Robinson, it is likely that defense counsel will seize on the Blake decision and argue that plaintiff's actions were the sole proximate cause of the injuries. It is likely that we will see a number of such cases in the future and will keep you advised.

Surveillance Tapes

In several past issues we discussed the Court of Appeals rulings with regard to the exchange of surveillance tapes. The seminal case in this area is Tran v. New Rochelle Hospital Medical Center, 756 N.Y.S.2d 509 (2003), which held that the defendants must exchange surveillance tapes prior to conducting the deposition of the plaintiff. The Court revisited the issue of surveillance tapes in Zegarelli v. Hughes, 756 N.Y.S.2d 674 (2004), which dealt with whether a defendant satisfies the requirements of the CPLR by exchanging a copy of a surveillance tape.

Zegarelli was an automobile accident case in which the plaintiff claimed an injury to his lower back which caused him significant pain and limited his daily activities. During the discovery phase of the litigation, an investigator retained by the defendant videotaped the plaintiff shoveling snow. The taping was done using a handheld 8 millimeter camera which the investigator ultimately copied onto a VHS tape. Approximately one year before trial, defendant's counsel provided the plaintiff with a copy of the VHS tape.

During the trial, the plaintiff testified that he shoveled snow, "very rarely". Defendant then called the investigator, who testified that he observed the plaintiff, that the exhibit showed to him was a copy of a videotape he had made of his observations, that the tape fairly and accurately showed what he observed and that the tape had not been edited. Plaintiff's counsel objected to the tapes admissibility, arguing that he did not know if the 8 millimeter tape correctly reflected what was on the VHS tape because he did not have an opportunity to review it. The Supreme Court sustained the objection on the ground that "the tape was not made available to the plaintiff by the defendant in anticipation of trial or during discovery". The Appellate Division affirmed the Supreme Court's ruling.

The Court of Appeals begins its analysis by citing CPLR Section 3101(i) which essentially states that there shall be full disclosure of all surveillance tapes, including outtakes, rather than only those portions a party intends to use. The Court noted that the legislature enacted this section in response to its holding in DiMichel v. South Buffalo Ry. Company, 590 N.Y.S.2d (1992), which attached a qualified privilege to all surveillance tapes. The purposes of Section 3101(i) was to remove the privilege and make surveillance tapes subject to the same rules as any other type of discovery. In doing so however, the Court held that Section 3101(i) did not go any further, and did not require parties making disclosure of surveillance tapes to be more forthcoming than they would with an ordinary discovery material. The section may be satisfied by telling the party seeking discovery where the materials are and providing a reasonable opportunity for that party to look at them and make copies, however it is often more convenient, and very common for the producing party simply make copies and send them to the other side. It is understood in such circumstances that the originals must be available for inspection on request.

The Court went on to note that defendant's counsel followed the customary procedure by sending a copy of the tape to plaintiff's counsel. The exchange specifically disclosed that it was a copy (though, as the Court notes, the plaintiff would have been unlikely to assume that he was being sent the original). The Court went on to note that the plaintiff could not show the difference between the 8 millimeter original and the VHS copy was of any significance and more significantly, if plaintiff's counsel wanted to compare the two, he had more than a year to do so before trial.

Article 16

Salamone v. Wincaf Properties, Inc., 777 N.Y.S.2d 37 (1st Dept. 2004), presented the First Department with an interesting question regarding the interplay between Article 16 and a defendant whose liability is entirely vicariously under the Labor Law. The plaintiff in Salamone sustained

devastating injuries when he fell through an unfinished room while working on a construction site as an employee of third party defendant Bronte Construction. The plaintiff sued the owner of the property, Wincaf Properties, Inc. under Labor Law Section 240(1). Wincaf in turn brought a third party action against Bronte and T.O.M.I. Construction, another contractor that worked on the project.

Following a trial, a jury found Wincaf Properties 45% responsible for the happening of the accident, T.O.M.I. 40% responsible and the plaintiff's employer, Bronte, 15% responsible. The jury awarded the plaintiff \$1.7 million in damages for pain and suffering, which, following post trial motions, the Court found inadequate and ordered a new trial unless the parties stipulated to an award totaling \$2.3 million. In the same post trial motion, the Court also granted Wincaf a directed verdict on its claim for common law indemnification against Bronte and T.O.M.I., but denied Wincaf's motion in so far as it sought to set aside the verdict finding it 45% at fault.

The post trial order was appealed and the First Department affirmed as to the damages and indemnification issues, but modified the order to the extent of granting Wincaf's motion to set aside the verdict insofar as to vacate the jury's apportionment of fault and to substitute therefore the finding that Wincaf's liability was purely vicarious pursuant to Labor Law Section 240(1). The case was remanded for a new trial for the purposes of reapportioning liability between the defendants, other than Wincaf.

Ultimately, the parties agreed to the damages award of \$2.3 million and judgments were ultimately entered. At some point after judgment was entered, a motion was submitted by Bronte to modify the portion of the judgment granting Wincaf indemnification based on the limitations of CPLR Article 16. Bronte contended that, because its equitable share of fault for the accident was less than 50%, CPLR Article 16 limited Wincaf's ability to obtain indemnification from Bronte to

Bronte's equitable share of the fault. That motion was denied, based on CPLR 1602(2)(ii), which provides in pertinent part, the limitations of Article 16 shall "not be construed to impair, alter, limit, modify, enlarge, abrogate or restrict... any... right of indemnification available to or conferred upon any defendant for any negligent or wrongful act or omission."

Following the disposition of that motion, the parties continued to negotiate an allocation of fault between the defendants, in order to avoid the necessity of a new trial. Ultimately, the parties stipulated that 78.25% of the fault would be allocated to T.O.M.I. and 21.75% of fault would be allocated to Bronte. Bronte's counsel however indicated that although Bronte was agreeing to that allocation, it adhered to its position that it was not obligated to completely indemnify Wincaf, based upon CPLR Article 16.

Bronte moved to renew its prior motion to resettle the judgment, arguing that the Court of Appeals decision Rangolan v. County of Nassau, 96 N.Y.2d 42 (2001), had changed the law and as such Bronte should be limited to its equitable share of the non-economic damages. That motion was granted by the trial court which found that the Rangolan decision established that CPLR Section 1602(2)(ii) no longer rendered the limitations of Article 16 inapplicable to a party's claim for indemnification.

The First Department began its analysis by quoting CPLR Section 1602(2)(ii), which is quoted above. The Court noted that the plain meaning of the section indicates that Wincaf's common law right of indemnification against Bronte should operate just as it would have operated had Article 16 never existed. In other words, it appeared that Article 16 was not intended to cause any change in the long standing rule of indemnification. Notwithstanding the plain meaning, Bronte on its renewal motion, persuaded the lower court that the plain meaning of the statute could not survive the Court of Appeals decision in Rangolan. Rangolan, did not specifically address CPLR

Section 1602(2)(ii), but rather addressed Section (iv) of the same subdivision which states that Article 16 does not apply to the defendants who are liable by reason of a delegable duty. Specifically, Rangolan held that a vicariously liable defendant (as Wincaf is in this case) is not permitted to invoke Article 16 to divest itself of liability for the fault of the tortfeasor from whose conduct the vicarious liability is derived. The First Department did not adopt the lower court's reasoning that Rangolan changed the law at all. The First Department held that both the CPLR Section 1602(2)(ii) and Section 1602(2)(iv) did not create any exceptions to Article 16, but simply clarified that Article 16 was not intended to interfere with the operation of certain pre-existing legal principles, such as common law indemnification. In addition to according the plain meaning of the statute, the outcome also served to shift liability from non-culpable to culpable defendants, which was consistent with the general intent of Article 16 as a whole. Adopting the position put forth by Bronte would have the effect of preventing a non-culpable defendant, like Wincaf, from shifting its liability to culpable a defendant like Bronte.