CONSTRUCTION RISK MANAGEMENT REPORTER

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ContrACT

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Scaffold Law Claims: Clarification of Cleaning

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In October 2013, New York's highest court, and one of the intermediate appellate courts, restricted the scope of New York's "Scaffold Law,"[1] by adopting a four-part test for determining whether a person is engaged in "cleaning" activity within the meaning of the statute.[2]

New York's Scaffold Law imposes a non-delegable duty and absolute liability upon owners and contractors that fail to provide adequate safety devices, under certain specified circumstances, to workers subjected to elevation-related risks. In general, for an injured worker to recover on a Scaffold Law claim, he must have been engaged "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure[3] and 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.[4]

There has been significant debate over the years about the breadth of the statute, with many court decisions expanding the ability of injured workers to successfully bring claims. In *Soto v. J. Crew, Inc.*[5] however, the Court of Appeals declined an opportu-

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Litigation Likely? Don't Even *Think* of Deleting That!

NELL M. HURLEY

If you have been involved in litigation, you may recall receiving a letter from your lawyer warning that all records of the project, including electronic records such as emails, must be preserved. There are good reasons for that and two recent cases highlight the point.

A failure to safeguard evidence, called "spoliation," can result in a court's preventing you from putting in evidence that could help your case, permitting a negative inference to be drawn because of the absence of the materials, or monetary sanctions against you or your attorney.

In the first case, *Murillo v. Porteus*,[1] the defendant owner failed to preserve a table saw alleged to have been used by a worker who was injured because the saw was missing a blade guard. Despite an immediate request by the worker's attorney to keep the saw in its post-accident condition, the owner later admitted that he could not locate it. Because there may have been two saws on the premises, one owned by a contractor and another by the owner, the actual saw used was critical to liability in the case. If the saw belonged to the contractor, the owner had a strong argument that he was not responsible.

Unfortunately, since the saw was no longer available because of the owner's failure to preserve it (or possibly having disposed of or destroyed it), the court allowed a negative inference to be made by the jury. This means that the jury can assume that the absence of the saw means that it would have been adverse to the owner's position that he did not own or control the saw that caused the worker's injuries. The jury can then adopt the injured worker's version of events regarding the ownership and control of the saw, as long as it is reasonable.

A second case, *Hameroff & Sons, LLC v. Plank*,[2] the defendant contractor was prevented from offering evidence of certain defenses involving a payment dispute and a settlement agreement with an owner. The contractor's manager had been told that the owner intended to commence suit yet he subsequently deleted his emails. Further, the contractor had no explanation as to its failure to provide defendant with most emails of its other employees. The court did not buy the contractor's argument that the emails were irrelevant, stating that the relevance of destroyed documents is presumed, if the destruction was intentional or willful, as it was here. Thus, it was proper to preclude the contractor from offering any evidence as to the issues the emails addressed.

The bottom line is that preserving documents, data and materials is extremely important in any situation where there may be a claim or litigation. As these parties found out, the consequences of failure to do so can be serious indeed.

1 108 AD3d 750 [2d Dept 2013].

2 108 AD3d 908 [3d Dept 2013].

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nity to further expand the scope of the law, and instead barred claims brought by individuals involved in commercial cleaning activities that do not require specialized knowledge and skill.

The plaintiff in *Soto* was employed by a commercial cleaning company and was injured when he fell from a four-foot-high step ladder while attempting to dust a six-foot-high display shelf with a pole duster. There was no dispute that the ladder was in proper working condition, that it was properly used, and that the work was not related to construction. The worker's responsibilities were to, among other things, provide daily maintenance at the store, including vacuuming, sweeping, mopping, cleaning bathrooms, emptying garbage, dusting and cleaning windows.

The threshold issue considered by the Court of Appeals was whether the worker engaged in routine and daily cleaning activity is "cleaning" within the meaning of the statute. The worker argued that his activity was covered based on the commercial setting and the elevation-related risk.

Prior to *Soto*, the courts established a distinction between commercial cleaning and residential cleaning. Although residential window cleaning was not protected, commercial window cleaning was protected. Case law has also held that cleaning 35-foot-high miniledges and bulkheads in malls was a covered activity,[6] as was power-washing Plexiglas canopies of a building as part of an exterior cleaning contract.[7]

Despite such 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 regardless of how "mundane."[8] In doing so, the Court adopted a four-factor test to determine whether an activity can be characterized as "cleaning" under the statute, as follows: An activity cannot be characterized as "cleaning" under the statute if the task is

> 1) 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" then the activity is not protected by the statute.[9]

Whether or not an activity constitutes "cleaning" under the statute is to be decided on a case-by-case basis after applying the four-factor test to the totality of the circumstances, without placing undue significance on the presence or absence of any one factor.

With respect to Soto's injury, the court found that the activity undertaken by Soto was not covered within the meaning of "cleaning" because the activity did not require "specialized equipment or knowledge and could be accomplished by a single custodial worker using tools commonly found in a domestic setting."[10] The Court also reasoned that 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.

Two weeks after *Soto* was decided, the Appellate Division, Second Department dismissed a personal injury claim brought by a worker who had fallen from a roof while cleaning gutters at a condominium development. In *Hull v. Field Point Community Association Inc.*,[11] citing *Soto*, the Second Department found that although the plaintiff was cleaning leaves pursuant to a contract between her employer and the condominium association, the work was incidental to regular maintenance, and therefore not covered.

Going forward, those defending against Scaffold Law claims have a strong position to claim that routine activities that do not require specialized equipment or expertise, and which are not related to ongoing construction, are not covered by §240(1). It is now settled that the New York State Legislature did not intend §240(1) to protect every type of cleaning activity performed in the commercial setting. E&D

1 *New York Labor Law §240[1].*

2 *Soto v. J. Crew Inc., 21 N.Y.3d 562 [2013].*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Vasey v. Pyramid Co. of Buffalo, 258 AD2d 906 [4th Dept. 1999].*

7 *Fox v. Brozman-Archer Realty Servs., 266 AD2d 97 [1st Dept. 1999].*

8 *Soto, 21 N.Y.3d at 568.*

9 *Id.*

10 *Id.*

11 *2013 WL 5732383 [2nd Dept. Oct. 23, 2013].*

Oral Promises Not Worth the Paper They're Written On

MATHEW D. BROWN

Reliance on oral guarantees or warranties that differ from what is written on purchase orders or invoices is a mistake. In *West 63 Empire Assooc., LLC v. Walker & Zanger, Inc.* 107 AD3d 586 (1st Dept 2013), the Appellate Division upheld summary judgment in favor of the defendant seller of travertine tile. In *West 63*, the plaintiff, a hotel, sued for breach of implied warranty of merchantability, breach of contract and unjust enrichment because the natural travertine tile purchased was unsuitable for a hotel lobby. The plaintiff hotel claimed the tile seller orally warranted that the tile was suitable for a hotel lobby. The appellate court, putting aside issues relating to whether the plaintiff hotel had standing to sue, held that the seller's disclaimer conspicuously printed on its sales invoice disclaiming all warranties, barred plaintiff's warranty and contract claims and that the existence of the sales contract further barred the hotel's claim for unjust enrichment. The lesson is that an oral guarantee may be worthless if a written agreement or accepted invoice states otherwise. E&D

Small Mistakes On Mechanic's Liens Can Be Fatal

MATHEW D. BROWN

Beware of making small mistakes on a Notice of Mechanics' Lien. While preparing a Notice of Lien may appear to simple, it is fraught with possibilities for mistake that can render the lien invalid.

Recently, in *Matter of Rigano v. Vibar Constr., Inc.*, 109 AD3d 829 (2d Dept 2013), a contractor timely filed a Notice of Lien but misidentified the owner of the property. On appeal, the Appellate Division upheld the dismissal of the lien on the grounds that misidentification of the owner of the property is a jurisdictional defect.

The lesson is that a mechanics' lien can be an effective weapon for a contractor, but only if it is filed in accordance with the governing laws. The following are some (but not all) of the common mistakes that can be fatal to a lien.

1. Filing the lien late. On a private commercial project, a mechanic's lien in New York must be filed within eight months of when the contractor last provided labor or materials. On a public project a mechanics' lien must be filed within thirty days of completion and acceptance of the project.

2. Misidentifying the property. A mechanics' liens must identify the property to which it attaches. For private projects, the lien identifies the address of the real property and attaches to the real property. For public projects, the lien identifies the public project and attaches to the public fund.

3. Misidentifying the contracting parties. Mechanics' lien must identify the parties with whom the lienor contracted for the liened labor and material.

4. Not properly serving the lien. A New York mechanics' lien must be served within 5 days before or 30 days after filing. Service must be by a method identified in the Lien Law.

5. Failing to timely file an affidavit of service. An affidavit attesting to proper service of the lien must be filed within the time period set forth in the Lien Law.

6. Identifying the lienor's principal place of business as a PO Box or as an address outside New York State without including a New York attorney's address. Liens must list the lienor's actual physical address within New York or list the address of the lienor's New York attorney.

7. Misidentifying the owner. A mechanics' lien must properly identify the property owner.

8. If the lienor is a partnership, failing to identify the partners and their addresses.

This is not an exclusive list of potential mechanics' lien defects, but a sample of some of the more common defects that can cause a lien to be invalid. Because it is easy to make a mistake when drafting a Notice of Mechanics' Lien, having an attorney assist in the process is highly recommended. E&D

Labor Law 241(6) Liability Requires Strict Proof of Industrial Code Violations

NELL M. HURLEY

Labor Law Section 241(6) permits recovery by an injured worker where the worker can show that his employer violated New York Industrial Code provisions applicable to the worksite. If the Code provisions were not applicable or the worker cannot show that they were violated, the employer will not be liable under this section of the Labor Law.

In a recent case[1], the injured worker brought suit after he fell on wet plywood while carrying a heavy steel beam. His 241(6) claim was dismissed because all four Industrial Code provisions were found to be inapplicable. The court found that the accident occurred in an open-work area rather that a passageway as required by one provision. Another provision was inapplicable because the worker was found to have slipped on wet plywood and not on debris or tools. A third provision did not apply because the worker did not claim that the plywood itself was defective. Finally, because the plywood was neither a runway nor a ramp, as the Code provision specified, it did not apply to the worker's claim.

If there is an injury on your worksite, be certain to take notice and document the circumstances and the conditions. The details are extremely important in determining potential Code violations under the Labor Law. E&D

1 *Purcell v. Metlife Inc. 108 AD3d 431 [1st Dept 2013].*

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