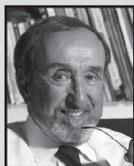


# Real Estate Journal

COVERING ALL OF LONG ISLAND, NEW YORK CITY AND UPSTATE NEW YORK

## Liability under “Scaffold Law” may be alleviated in New York

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One of the biggest sources of litigation involving owners of residential and commercial property in New York emanates from what is known as the “Scaffold Law” (Labor Law § 240(1)).

This statute affords protection to construction site workers who are exposed to the risks of working at elevated heights. See *Blake v. Neighborhood Housing Service of New York City, Inc.*, 1 N.Y.3d 280, 287, 771 N.Y.S.2d 484, 487 (2003). The statute was designed to prevent gravity-related accidents by imposing strict liability upon owners, contractors and their agents upon proof that inadequate safety precautions proximately caused the injury. See, *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513, 577 N.Y.S.2d 219, 221 (1991). Liability is imposed regardless of the degree of control over the work performed, *Haines v. New York Telephone*, 46 N.Y.2d 132, 136-137, 412 N.Y.S.2d 863, 865 (1978), and regardless of the injured party’s own comparative negligence or assumption of risk. *Zimmer v. Chemung County Performing Arts*, 65 N.Y.2d 513, 521, 493 N.Y.S.2d 102, 105 (1985).

Once it has been established that there has been a violation under the statute, regardless of the existence of negligence, then vicarious liability will be imposed on either the owner of the property, the general contractor or both. The Scaffold Law does not require that a worker be performing work at the location of the building or structure at the time of the

injury and it is sufficient for liability purposes if the work being performed is necessary and incidental to, or an integral part of, the erection of the building or structure. It is sufficient if the work being performed is necessary and incidental to, or an integral part of, the erection of the building or structure. The statute applies only to circumstances where there are risks related to elevation differentials.

The Scaffold Law has been problematic to owners and contractors alike throughout the years because of the strict/absolute liability standard which is imposed. Many attorneys, judges and employers have interpreted this statute to mean that any employee injured from a fall from height automatically presumes liability is imposed against the owner or contractor. The debate over the exact meaning of strict/absolute liability has been substantially clarified by the recent Court of Appeals holding in *Blake v. Neighborhood Housing Services* (cited above).

The court noted that the words strict or absolute liability do not appear anywhere in Labor Law § 240(1) or in any of its predecessors. It was the Court in 1923, and not the lawmakers, that began to use this terminology holding that employers had an “absolute duty” to furnish safe scaffolding and would be liable when they failed to do so and injury resulted. A few years later, the Court, for the first time, worded the concept as “absolute liability.” The Courts have also described liability under Labor Law § 240(1) as “absolute” in

the sense that owners or contractors who are not actually involved in construction can be held liable regardless of whether they exercise supervision or control over the work. In 1990, intending the same meaning as absolute liability in Labor Law § 240(1) contexts, the Court of Appeals introduced the term “strict liability” and from that point on used the terms interchangeably. Until the decision in *Blake*, many parties in lawsuits involving the Scaffold Law did not even challenge whether they were liable as they believed it was a forgone conclusion that the court would hold against them.

### The statute applies only to circumstances where there are risks related to elevation differentials.

Given the varying meanings of strict or absolute liability over the years, it is not surprising that the concept has generated a good deal of litigation. The terms may have 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. That, however, is not the law. “[N]ot every worker who falls at a construction site, and not any object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1).” *Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259 (2001). The mere fact that an employee fell off the scaffolding surface is insufficient, in and of itself, to establish that the device provided by the employer did not provide proper protection.

The *Blake* case also clarified that the Scaffold Law imposes liability only on contractors, owners or their agents. An agency relationship for purposes of Labor Law § 240(1) arises only when work is delegated to a third party who obtains the authority to supervise and control the job. Where responsibility for the activity sur-

rounding an injury was not delegated to the third party, there is no agency liability under the statute. An example of someone not liable under the Scaffold Law would be a lender providing financing for a project because its only role is ensuring that the contractor would complete the financed work. This portion of the holding is meaningful in that commercial lenders should be able to easily remove themselves from cases brought under this cause of action.

Although the Scaffold Law imputes liability to owners on construction projects on their property, owners can recover damages from its contractor/subcontractor due to the protections afforded by common-law indemnification. For example, a property owner, who had been held strictly liable under Scaffold Law in lawsuit brought by worker after he fell from temporary staircase, could recover the full amount that it paid to the injured work from subcontractor through common-law indemnification. Common-law indemnification allows property owners to shift entire burden of loss to actual wrongdoer.

Additionally and more importantly, in order to be fully protected from paying damages on a Scaffold Law claim, property owners should ensure that they include a provision in their form contract which sets forth that in the event of liability being strictly held against the property owner, the contractor/subcontractor will indemnify the owner “to the fullest extent permitted by law.” So long as the property owner was not an active wrongdoer and did not exercise any actual control or supervision of the work, the owner will be able to recover from the contractor/subcontractor all damages which it may be required to pay out to the injured worker by way of indemnification.

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