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# An Analysis of 'O'Brien v. Port Authority'

By Robert S. Kelner and Gall S. Kelner | July 25, 2017 at 07:00 PM

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Robert S. Kelner and Gall S. Kelner NYLJ/Rick Kopstein

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*An Analysis of O'Brien v. Port Authority*  
By Robert S. Kelner and Gail S. Kelner

In a recent decision, *O'Brien v. Port Authority of New York and New Jersey*, 29 N.Y.3d 27(2017), a divided Court of Appeals stepped into a battle of the experts in a construction site accident case. Several articles have been written about this case. Contrary to the analysis of some defense counsel, this decision has not resulted in any new law on the scope of Labor Law §240(1). It is a decision narrowly limited to its facts, involving a worker who fell while descending a wet temporary external staircase in the rain. There were conflicting expert opinions as to whether there were structural deficiencies in the stairway, which made it unsuitable as a safety device, or whether it was a proper device which was just wet. The dissent opined that the fact that plaintiff fell down the slippery stairs was sufficient to establish a statutory violation. However, the majority found issues of fact raised by the experts as to whether this temporary external staircase, which did not collapse or break but may have only been wet, was an adequate safety device. There is no basis to attribute significance to the decision beyond its specific facts or to conclude, as certain defense counsel have, that experts should be retained by defendants in all cases involving §240(1) to examine scaffolds and ladders to provide opinions on the adequacy of the safety device.

In *O'Brien*, plaintiff was a worker at the 1 World Trade Center site and responsible for the maintenance of welding equipment. At the time of his accident, he was descending a temporary exterior metal staircase from one work level to another. He testified at his deposition that this metal staircase was wet due to

exposure to the elements, that his foot slipped off the tread of the top step and that he fell down the stairs. He further testified that the stairs were “steep, slippery and smooth on the edges.” Although his right hand was on the handrail, he could not maintain his grip because the handrail was wet. A co-worker confirmed that the stairway was wet. Plaintiff’s expert opined that the stairs were worn-down, slippery, had diminished anti-slip properties and did not comply with established principles of construction safety. These contentions were used by plaintiff to support a cause of action under Labor Law §200, based upon the assertion that defendants had constructive notice of the dangers of this device. In opposition, defendants’ expert opined that the temporary staircase complied with industry standards for indoor and outdoor use, and did not require further anti-skid protection.

Plaintiff alleged causes of action under Labor Law §200 (codification of common law duty to provide a safe work place); Labor Law §241(6) (predicated upon violations of the New York Industrial Code) and under Labor Law §240(1) for the failure to provide protection against elevation related hazards. The resolution of these various causes of action ricocheted back and forth as the case proceeded through the courts and reached the Court of Appeals.

### **The Motion Court**

Because of the dispute between the experts as to the condition of the temporary staircase, the trial court held there were issues of fact for trial under §200. Plaintiff also claimed a violation of §241(6) based upon defendants’ violation of 12 NYCRR 23-1.7(d) for permitting a slipping hazard. Based upon the testimony of plaintiff and

his co-worker, the motion court granted plaintiff's motion for summary judgment under §241(6).

With respect to the motion for summary judgment under §240(1), the trial court recognized that this statute may apply in cases involving falls from temporary stairwells at construction sites as the functional equivalent of falls from a ladder or scaffold. However, focusing on the factual disagreement between the experts, it determined there were issues of fact for trial as to whether this stairway provided proper protection. *O'Brien*, 2013 WL 3775539 (N.Y. County 2013).

### **The Appellate Division**

The results were flipped in the Appellate Division, First Department, 131A.D.3d 823(2015). The court reversed the finding of the motion court with respect to §240(1) and held, with one dissent, that plaintiff was entitled to summary judgment under §240(1). It recognized that a temporary staircase was a device under the statute and that falling down a temporary staircase was the type of elevation-related risk to which §240(1) applies. The court noted that it was irrelevant whether the temporary structure was a staircase, ramp, or passageway in that "it was a safety device that failed to afford him proper protection from a gravity-related risk." In granting summary judgment, the court rejected any contention that issues of fact were raised by the experts, stating:

The fact that the affidavits of plaintiff's and defendant's experts conflict as to the adequacy and safety of the temporary stairs does not preclude summary judgment in plaintiff's favor. A plaintiff is entitled to partial summary judgment on a section 240(1) claim where, as here, stairs prove inadequate to shield him against harm resulting from the force of gravity, and his injuries

are at least in part attributable to the defendants' failure to take mandated safety measures to protect him against an elevation-related risk. *O'Brien*, 131 A.D.3d at 824.

In dissent, Justice David Friedman opined that the record, including the conflicting expert affidavits, gave rise to a question of fact as to whether the accident arose from a violation of the statute. Relying on *Ortiz v. Varsity Holding LLC*, 18 N.Y.3d 335 (2011) he posited that a claim under section §240(1) does not lie where there is no available safety device that could have prevented the accident. If the defense expert was correct and the staircase was merely unavoidably wet, there was simply no way to eliminate all danger of slipping on a wet surface at an outdoor construction site. *O'Brien*, 131 AD3d at 827.

The court reversed the motion court's grant of summary judgment under §241(6), finding issues of fact for trial.

### **The Court of Appeals**

The majority decision of the Court of Appeals in a closely divided 4-3 decision, reversed the granting of summary judgment under §240(1) and held there were issues of fact for trial. The majority was clearly influenced by the battle of the experts in this reversal. Despite the conclusions of some defense attorneys that this case is a clarion call for defendants to bombard the court with experts in all cases involving §240(1), *O'Brien* is not a decision that erodes existing decisional law or changes the approach to such causes of action.

The eloquent dissenting opinion of Judge Jenny Rivera, describing the purpose of §240(1), is very persuasive in asserting that summary judgment for

plaintiff was correctly granted by the Appellate Division in that the stairs proved inadequate to shield him against harm resulting from the force of gravity. However, on the very discrete set of facts before it, the majority concluded that there were issues of fact. The defense expert essentially concluded that the staircase was a proper device, in good repair and in compliance with industry standards. It was just wet. Plaintiff's expert found an array of structural shortcomings. However, the temporary staircase did not break or collapse. The majority found that under this narrow set of circumstances, there were jury issues as to whether the device was structurally deficient as the result of inadequate treads and anti-skid devices, as plaintiff claimed, or just wet from the rain and not defective, as defendant claimed. The three judges in dissent, on the other hand, maintained that:

The staircase failed to adequately protect plaintiff from the risk of slipping and that failure was a proximate cause of his injuries.

The courts have long recognized that a temporary staircase is a device under §240(1). However, unlike the facts in *O'Brien*, many of these cases arose from the collapse or openly defective condition of the device, making it easier to find a *prima facie* violation of the statute. For example, in *McGarry v CVP 1 LLC*, 55 AD3d 441 (1st Dept. 2008), plaintiff was injured when a block from an unsecured cinder block staircase skidded from under his foot. The court held that the staircase was the “functional equivalent of a ladder” which failed. In *Wescott v. Shear*, 161 A.D.2d 925(3rd Dept. 1990), plaintiffs fell from a temporary stairway when a plank became loose. In *Magna v. Fishman Constr. Corp. of Manhattan*, 306 A.D.2d 163 (1<sup>st</sup> Dept.

2003), plaintiff fell down a temporary staircase when it collapsed. In *Keefe v E & D Specialty Stands, Inc.*, 259 A.D.2d 994, (4th Dept. 1999), bleachers were found to be a temporary stairway or the functional equivalent of a ladder where plaintiff fell from an unsecured riser.

### **The Collapse of a Safety Device Is Prima Facie Proof of a Violation of the Statute**

Significantly, the *O'Brien* majority, in distinguishing the facts before it, reiterated the long established principle that where a safety device such as a ladder or scaffold collapses, it did not provide proper protection, giving rise to the presumption that the statute was violated. It also cited to its decision in *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280 (2003) where the Court established that to prevail under §240(1), plaintiff need only prove that the statute was violated, and that the violation in question was a *proximate cause* of the injuries sustained.

However, in addressing the narrow set of facts before it, the *O'Brien* majority cited its earlier decision in *Berg v Albany Ladder Co., Inc.*, 10 N.Y.3d 902, (2008) that the fact that a worker falls at a construction site, in itself, does not establish a violation of Labor Law §240(1). In *Berg*, the court stated that a worker must demonstrate the existence of an elevation-related hazard contemplated by the statute and a failure to provide the worker with an adequate safety device. It further cited *Toefer v. Long Island Railroad*, 4 N.Y.3d 399 (2005) where it found that plaintiff's fall while unloading a flatbed truck was not an elevation related risk within the scope of the statute. These cases articulate the principle, as expressed in *Toefer*, that in

some cases involving falls of workers and objects, the plaintiff may have been exposed “to the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law § 240(1).” *Toefer at 407*. Even earlier in *Rocovich v. Consolidated Edison*, 78 N.Y.2d 509(1991), the Court established that the fact that a worker is injured while working above ground does not necessarily mean that the injury resulted from an elevation-related risk within the scope of section §240(1).

It is very clear that the holding in *O’Brien* was limited to a very specific fact pattern. In essence, the majority found an issue of fact on a narrow case-sensitive issue. Significantly, the court essentially relied upon previously expressed principles of law. The decision does not postulate any new theories of law or suggest any new litigation strategies. The court stated:

As noted above, defendants' expert opined that the staircase was designed to allow for outdoor use and to provide necessary traction in inclement weather. Moreover, defendants' expert opined that additional anti-slip measures were not warranted. In addition, he disputed the assertions by plaintiff's expert that the staircase was worn down or that it was unusually narrow or steep. In light of the above, plaintiff was not entitled to summary judgment on the issue of liability. *O’Brien*, 29 N.Y.3d at 33–34

### ***Zimmer v. Chemung County Performing Arts***

The landmark decision of the Court of Appeals in *Zimmer v. Chemung County Performing Arts*, 65 N.Y.2d 513(1985) established the bedrock principles of liability under Labor Law§240(1). It held that “liability is mandated by the statute without regard to external considerations such as rules and regulations, contracts or custom and usage ” Evidence of industry practice is immaterial under §240(1). This is distinguished from



liability under §241 (6) and § 200 which, unlike §240(1), are not self-executing, but rather, both require reference to outside sources to determine the standard by which a defendant's conduct must be measured. *Zimmer*, 65 N.Y.2d at 523.

The Court in *O'Brien* reaffirmed that liability under §240(1) is not determined by any extrinsic standards. However, the experts for plaintiff and defendants differed as to the adequacy of the device which was provided. The court noted that both experts framed their opinions in terms of whether there had been compliance with industry standards. Following *Zimmer*, the court specifically rejected industry standard as a basis for determining liability under §240(1):

We agree that such compliance would not, in itself, establish the adequacy of a safety device within the meaning of Labor Law §240(1) but we do not read defendants' expert to be so limited.

It is likely that had plaintiff fallen from an equally wet and slippery scaffold or ladder, which are more traditional safety devices, that the outcome in *O'Brien* may have been different. That this was a wet staircase, albeit a temporary one, may well have promoted the majority belief that the accident arose from an ordinary danger of the workplace, if indeed the only defect was that it was slippery from rainwater. This was a closely divided court. In a strong dissent by Judge Rivera, joined by Judges Eugene Fahey and Rowan Wilson, she opined that the majority misunderstood the legislative intent of the statute, which is self-executing, and liability is not to be determined by the types of devices customarily used. She found no reason to evaluate temporary staircases by a more stringent standard than any other device within the scope of §240(1). With more appellate judges between the Appellate Division and the Court of Appeals deciding against the majority's view, we are certain that

this is a case that will be limited to its facts and not a game changer in any way.

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