

# Queens

## BAR BULLETIN

Queens County Bar Association | qcba.org | 90-35 148th Street, Jamaica, NY 11435 | 718-291-4500

May 2022 | Volume 89, No. 8



### Chutes And Ladders – Recent Cases Involving New York’s “Scaffold Law”

BY HON. GEORGE HEYMANN

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NY Labor Law §240(1), commonly referred to as the “Scaffold Law”, was established to protect workers in the performance of elevation related jobs. This statute contains two separate criteria - the first delineates the specific nature of the work to be performed and the second the type of protection required by the contractor, and/or his or her agents, to the worker(s) when the work is, in fact, being performed. For a worker to successfully prosecute a case under this statute it is necessary that both elements be proven. If it cannot be shown that the task carried out by the worker was covered by the statute, the Scaffold Law is inapplicable. If, however, the task is among the enumerated items set forth therein, the plaintiff must then prove that the failure of the contractor to provide adequate protection during the time the work was performed was the proximate cause of the accident and resulting injury. Generally, at the outset of their case, plaintiffs move for summary judgment on the issue of liability, which, if successful, leaves the amount of damages as the only issue to be resolved.

Labor Law §240(1) reads in relevant part:

“All contractors and owners and their agents ... [1] in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure [2] shall furnish or erect, or cause to be furnished or erected for the purpose of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.” (Emphasis added. The numbers in brackets [ ] were added by the author.)

As to part [1], the courts are often called upon to resolve issues regarding the definition of some of the terms used such as “cleaning” or “structure”. (See, Heymann, “Scaffold Law: A ‘Defining’ Moment”, NYLJ, 6/1/18, p.4, col.4)

In part [2], the phrase “other devices” means that the list as prescribed is not limited so long as the “device” is one that will provide “proper protection” when “furnished” by the employer and utilized by the employee worker.

It should be noted that the scaffold law is a strict liability law which mandates that the contractor has a non-delegable duty to protect the workers by providing the proper safety equipment, as set forth above, during their employment in an elevation related job. Failure to provide such equipment will esstop the contractor from defeating a motion for summary judgment, even if there is negligence on the part of the worker, as there is no contributory or comparative negligence under the Scaffold Law. The contractor’s only defense is to prove that the plaintiff/worker was recalcitrant in his assigned duties, such as not following the directions of his supervisors or refusing to use the protective gear that was provided to him and that his or her actions were ultimately the sole proximate cause of the accident and resulting injuries.

Reading Scaffold Law cases often reminds me of the board game “Chutes and Ladders” where the goal is to reach 100 on the board. If a player lands at the bottom of a ladder during his or her turn, they advance up to a higher position to get closer to the final goal.

**CONTINUED ON PAGE 14**



#### Table of Contents

Chutes And Ladders – Recent Cases Involving New York’s “Scaffold Law” .....	1, 14, 18
Editor’s Note.....	4, 5
President’s Message .....	6
The Non-Immigrant Affidavit of Support, Form I-134- Visiting America? .....	7
The Practice Page.....	8
Immigration Questions .....	9
A Memorial Day Offering .....	10
Annual Dinner Gala and Installation of Officers and Board of Managers .....	11-13

# The Docket

Being the official notice of the meetings and programs listed below. Due to unforeseen events, please note that dates listed in this schedule are subject to change. More information and changes will be made available to members via written notice and brochures. Questions? Please call 718-291-4500.

## CLE Seminar & Event listings

### MAY 2022

Tuesday, May 3  
Thursday, May 5  
Friday, May 6

Wednesday, May 11  
Friday, May 13

Wednesday, May 18  
Thursday, May 19

Friday, May 20

Friday, May 27

Monday, May 30

**CLE:** Ethics Seminar 2022 - Part 1  
Annual Dinner & Installation of Officers - Terrace on the Park  
Meditation Friday with Diana The Happy Lawyer 1:10 pm  
Meeting ID: 817 2134 3753, Passcode: 734189  
**CLE:** Ethics Seminar 2022 - Part 2  
Meditation Friday with Diana The Happy Lawyer 1:10 pm  
Meeting ID: 817 2134 3753, Passcode: 734189  
**CLE:** Update on Discovery 30.30 - 1:00 pm  
**CLE:** Civil Court Update with Supervising  
Judge Frias-Colon 1:00 pm  
Meditation Friday with Diana The Happy Lawyer 1:10 pm  
Meeting ID: 817 2134 3753, Passcode: 734189  
Meditation Friday with Diana The Happy Lawyer 1:10 pm  
Meeting ID: 817 2134 3753, Passcode: 734189  
*Memorial Day – Office Closed*

### JUNE 2022

Monday, June 13

Monday, June 20

**Event:** Tri-County Elder Law Meeting at Nassau Bar Assn  
6:00 pm  
*Juneteenth – Office Closed*

### JULY 2022

Monday, July 4

*Independence Day – Office Closed*

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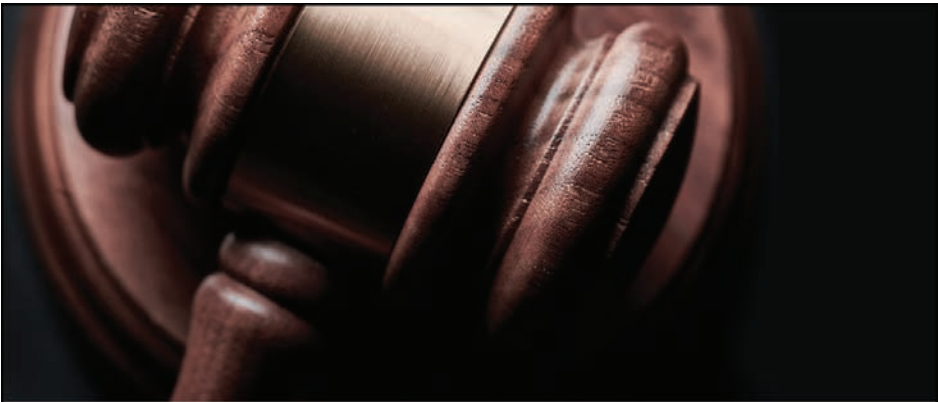
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## Editor's Note

### Book Review:

## Bob Haig's *Business and Commercial Litigation in Federal Courts*, 5<sup>th</sup> Edition

By Paul E. Kerson

Well, Bob Haig has done it again. The 5th Edition of *Business and Commercial Litigation in Federal Courts* (2021) was recently published by Thomson Reuters (f/k/a West Publishing Company) in cooperation with the Litigation Section of the American Bar Association.

It is every bit as good as the 4th Edition, and then some.

Bob has assembled a team of 373 outstanding principal authors from around the legal system: judges, law professors and practicing lawyers. These volumes are a must-read for anyone with a case in the U.S. District Court. The topics covered are breathtaking in scope, including virtually every legal topic that could be raised in a U.S. District Court.

Most important are the three new chapters, Chapter 111, Virtual Currencies, Chapter 178, Climate Change and Chapter 80, Artificial Intelligence.

These are brand new topics of the law that all practitioners must become aware of. For these three chapters alone, this new multi-volume treatise is worth purchasing. It comes in print and electronic editions.

### Artificial Intelligence

Chapter 80, Artificial Intelligence, was written by retired Judge Katherine B. Forrest of the U.S. District Court for the Southern District of New York. Retired Judge Forrest currently specializes in high technology issues in the litigation section of Cravath Swane & Moore, LLP, in New York, New York.

Judge Forrest points out that "various forms of Artificial Intelligence" (AI) are "ubiquitous throughout the legal system".

Most important are her observations concerning the algorithms underlying AI and how difficult they are to understand. She also explores the most important issue of "eDiscovery".

How do we deal with cases with thousands of documents? Is a lawyer expected to read all of this? What are the ethical considerations of a lawyer submitting discovery materials that he or she has not read? Judge Forrest explains "Technology Assisted Review" (TAR).

TAR is a computer program which reads thousands of documents and produces small samples of the most relevant items and disregards "irrelevant" items.

TAR also "produces results that can be validated statistically" and "is at least modestly more accurate and significantly faster than human review". See Haig, Volume 7, Pages 991-992.

Despite TAR, Judge Forrest reminds us that a lawyer has a duty of competence, to communicate, of confidentiality, and to prevent the unauthorized practice of law (See Haig, Volume 7, Pages 991-1005.

Are we really saying that a lawyer can produce documents he or she has never read? For the answer to this question, we turn to the definitive letter written on this subject by your editor in the New York Times of April 7, 2017, "A robot for a lawyer?" See Letter to the Editor from your Editor reprinted here.

As you can see, it was my view in 2017, agreed to by the New York Times editors, that a lawyer's responsibility for his or her clients and their documents cannot be delegated to a machine.

Judge Forrest, in a learned article, takes the opposite view.

It is respectfully submitted that this is a cutting-edge issue which we all must become familiar with as the electronic storage of documents means there are thousands and thousands more documents than there ever were before. Will these choke the legal system?

If a lawyer can submit documents he or she has never read, what does this mean for the legal system?

Can a computer decide what is an irrelevant document for cross-examination purposes? Many random documents that would appear to have nothing to do with the case are very useful for cross-examination, to show that the witness doesn't know anything about the subject at hand, and is thus probably not telling the truth.

One cannot understand these documents without reading all of them. However, to pay lawyers to read thousands of pages of documents means that legal fees will soon become larger than the value of the case!

What do we do about that, TAR in existence to the contrary notwithstanding?

Judge Forrest goes on to explain that AI might be useful in determining whether or not you are going to win the case. Any lawyer who relies on a computer to tell him or her whether he or she is going to win the case is fooling himself, herself and his or her clients. You might as well consult your crystal ball. I always tell clients I left my crystal ball at home.

Judge Forrest goes on to inform us that a protective order can be sought whenever AI is involved with a case. Certainly, this is the basic idea behind CPLR Rule 3103(a) and this idea should certainly be utilized

in U.S. District Court litigation as well pursuant to Federal Rules of Civil Procedure, Rule 26(c).

### Block Chain Technologies

We live in fast changing times. Among the newest inventions in the legal technology field are Bitcoin published in 2009 by Satoshi Nakamoto and Ethereum published in 2015 by Vitalik Buterin. See Haig, Volume 10, Page 342.

In a learned Chapter 111 by Jessie K. Liu, Esq., the former United States Attorney for the District of Columbia, and now a litigation partner in Skadden, Arps, Slate, Meagher & Flom, LLP's Washington office, explains this entire brand-new field of law.

Ms. Liu was joined in preparing Chapter 111 by Alexander C. Dryzlewski, Esq. and Peter B. Morrison, Esq., both also of the Skadden firm. The terms virtual currency, digital currency, cryptocurrency, Bitcoin and Ethereum and thousands of other such computer programs are defined by Ms. Liu, Mr. Dryzlewski and Mr. Morrison as "stores of value or units of exchange that can be transferred on decentralized

CONTINUED ON PAGE 5

5/1/22, 11:32 AM  
The New York Times  
Opinion | A Robot for a Lawyer? - The New York Times  
<https://www.nytimes.com/2017/04/07/opinion/a-robot-for-a-lawyer.html>

LETTER  

### A Robot for a Lawyer?

April 7, 2017

**To the Editor:**

I read "Of Lawyers and Robots" (letter, nytimes.com, April 4) with great interest (and a chuckle).

Shall we have a robot show up at the night arraignment when Junior is locked up for crashing his car and injuring others while texting? Shall the robot counsel Junior in his jail cell and plead with the judge for bail?

Want a robot holding your hand through a bitter divorce proceeding? How about a robot when the siblings are in a vicious dispute over Mom's estate?

And when the business partners are fighting over money (what else?), jeopardizing the jobs of their hundred employees, shall we send in one robot or two?

Paralegals sorting documents into piles is another matter. Computers can help sort. But reading potential documentary evidence and assessing its significance is a lawyer's personal responsibility and cannot be delegated to a machine (unless the client wants to lose the case).

Lawyers hold this society together when serious problems between and among people arise. This is the last profession where artificial intelligence belongs, unless of course, we want artificial justice. We call that dictatorship, and we raise armies against it.

PAUL E. KERSON  
FOREST HILLS, QUEENS

*The writer has been a lawyer for 41 years so far.*

<https://www.nytimes.com/2017/04/07/opinion/a-robot-for-a-lawyer.html?referringSource=articleShare>

## Editor's Note

## Book Review: Bob Haig's *Business and Commercial Litigation in Federal Courts*, 5<sup>th</sup> Edition

### CONTINUED FROM PAGE 4

platforms that create a permanent record of such transactions." See Haig, Volume 10, Page 337.

All of these terms are collectively known as "blockchain technologies" defined as "decentralized peer-to-peer network of computers" see Haig, Volume 10, Page 339.

Individual blockchain units are known as coins or tokens. These coins or tokens are similar to traditional fiat currency such as dollars, euros and yen.

A blockchain is defined as a chain of blocks where "each block contains a list of transactions and is cryptographically linked to the block before it." See Haig, Volume 10, Page 339.

A blockchain ledger is simultaneously located on all computers in its network. These are known as nodes.

In a blockchain, "smart contracts" can be effectuated. A smart contract is "computer code that automatically executes the terms of a contract upon the fulfillment of an agreed condition". See Haig, Volume 10, Pages 339-340.

Digital tokens are accessed through a digital wallet using a user's private key that allows the user to send, receive and transfer digital assets. See Haig, Volume 10, Page 340.

Blockchain transactions have the following advantages over transactions in dollars, euros or yen:

1. There is no single point of failure that can be hacked
2. There is a tamper-evident log.
3. The entire system works on proof rather than trust.
4. There is pseudo anonymity in that the name of the user is not publicly known. See Haig, Volume 10, Page 340.

Well, for all newness of virtual currency, digital currency, cryptocurrency, Bitcoin and Ethereum, it turns out that there is nothing new under the sun at all. The United States Securities and Exchange Commission (SEC) has determined that all of this new technology are actually "investment contracts" regulated by the SEC since the passage of the Securities Act of 1933 and the Securities Exchange Act of 1934, 15 U.S.C. Section 77(k), 77(i) and 78a et seq. The seminal case on the regulation of "investment contracts" whether using computers or not is *SEC v. Howey*, 328 U.S. 293, 66 S. Ct. 1100 (1946).

Also, to the extent of any of these transactions involve commodities, they are regulated by the U.S. Commodities Futures Trading Commission (CFTC) pursuant to 7 U.S.C. Section 1 et seq.

Further, all of these blockchain technologies are regulated by the Financial Crimes Enforcement Network (FinCEN) a bureau of the U.S. Treasury Department pursuant to the Bank Secrecy Act which covers all Money Services Businesses (MSB) pursuant to 12 U.S.C. Section 1951 et seq. and 31 U.S.C. Section 5312 et seq. and 31 CFR Part 1022. What goes around comes around.

But what value is behind Bitcoin, Ethereum, and other digital currencies? The United States Government? No.

The City of New York, the State of New York or other states and cities? No.

Google? No.

Microsoft? No.

Tesla? No.

Apple? No.

Could the answer be Nothing? Nothing at all?

### Climate Change

An extremely topical section of Bob Haig's work is found in Volume 16, Chapter 178, Climate Change, by James Stengel. Mr. Stengel is in the litigation department of Orrick, Herrington and Sutcliffe, LLP in New York.

In chapter 178, Mr. Stengel addresses the question of private climate change litigation.

On August 7, 2021 the Intergovernmental Panel on Climate Change (IPCC) released its sixth assessment report from the Cambridge

University Press in the United Kingdom. This report is chilling and concludes that the continued burning of fossil fuels liberating excess amounts of carbon dioxide and methane raises global temperatures and causes the melting of the ice caps and glaciers, causes rising sea levels and more frequent adverse weather events including droughts, hurricanes and flooding. See Haig, Volume 16, Page 1027. This was the IPCC's sixth report. These findings are not new.

Thus, there has been a wave of litigation seeking to establish the right of citizens, cities, villages, and corporations to prevent climate change. In *American Electric Power v. Connecticut*, 564 U.S. 410, 131 S.Ct. 2527 (2011), the United States Supreme Court rejected this argument.

In *Native Village of Kivilina v. ExxonMobil et al.*, 696 F.3d 849 (9th Cir. 2012), the United States Court of Appeals for the 9th Circuit also rejected this argument because of the existence of the Clean Air Act and the duties of the U.S. Environmental Protection Agency (EPA).

In *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), the United States Court of Appeals for the 5th Circuit also tried to establish a right to a case of this type. However, an en banc hearing was held, and because there was no quorum, the District Court's opinion denying the right to bring such a case was sustained.

While this is the current state of the law, Mr. Stengel predicts that eventually a private right of action for climate changes cases will be established. This is the challenge facing our generation of lawyers.

Bob Haig has done a masterful job illustrating to all of us the cutting-edge issues facing our society and our profession including but not limited to artificial intelligence, virtual currencies, and climate change. His monumental work, *Business and Commercial Litigation in Federal Courts*, 5th Edition, is well worth reading on a regular basis. We should all have a copy in our offices, both print and digital.

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# President’s Message

By Frank Bruno, Jr.

*“Your subconscious mind works continuously, while you are awake, and while you sleep.”*  
— Napoleon Hill

On average the brain weighs 3 pounds with 100 billion neurons; our brain determines how we experience the world. However, most of the brain is not consciously utilized; it is active but on autopilot.

**Subconscious** [ suhb-kon-shuhs ]  
*adjective*  
1.existing or operating in the mind beneath or beyond consciousness: *the subconscious self*. Compare preconscious, unconscious  
2.imperfectly or not wholly conscious: *subconscious motivations*.  
*noun*  
3.the totality of mental processes of which the individual is not aware; unreportable mental activities.

The word subconscious represents an anglicized version of the French word coined in 1889 by the psychologist Pierre Janet, in his thesis, Janet argued that underneath the layers of critical-thought functions of the conscious mind lay a powerful awareness that he called the subconscious mind.

In the strict psychological sense, the adjective is defined as “operating or existing outside of consciousness.

The idea of the subconscious as powerful or a potent creative agency has allowed the term to become prominent in New Thought and self-help literature by notables Emerson, James Allen, Napoleon Hill, Wattles and Haanel, in which investigating or controlling its supposed knowledge or power is seen as advantageous. Take the movie Limitless as a modern-day example. In the New Age community, techniques such as autosuggestion, affirmations and subliminal messages are believed to harness the power of the subconscious to influence a person’s life and real-world outcomes, achieve monetary success even curing sickness.

Your subconscious never rests and is always on duty because it controls your autonomic systems-beating heart, circulating blood and digestion.

The subconscious mind influences conscious living. Your internal life and thoughts, even unconsciously, eventually becomes your reality.

The project is to direct your subconscious mind to create the outcomes you seek. Your task (should you choose to accept it) is to direct your subconscious mind to unlock connections and solutions to your problems and projects.

End your evening routine correctly. Here is my prescription. Three wins then a request.

Each night as I lay in bed before drifting off to sleep, I ask myself “what are my three wins for the day?” Each night I come up with three such victories-small or large. 1. Returned all client telephone calls. 2. Arrived home on time and ate dinner with the family. 3. Filmed a video for my social media platform. Sometimes the win is that I stretched or did push-ups or gave my children a compliment or behaved calmly in the face of danger. Other times it is signed up a new client, ate healthy or texted a friend. I will identify the smallest win and be happy about it. The more wins I identify the more successful I become. Even the most difficult day has many such wins. Onto the request...  
*“Never go to sleep without a request to your subconscious.”*  
— Thomas Edison

It’s common practice for many of the world’s most successful people to intentionally direct the workings of their subconscious mind while they’re sleeping.

How?

Take a few moments before you go to bed to focus on what you are trying to accomplish. Specific is better. Thinking is the key and mentally noting your request is great; writing it down is probably better. More difficult if you are already in bed.

Ask yourself questions related to the focused request. Many requests at the same time diminishes your focus so I keep it simply to one. In any event if more bubble up, write them down. A written dream is a goal. A goal with action steps is a plan. Write down your thoughts, questions, and action steps on paper. Do this before you are under the covers. Once in bed, find your three wins then make your request. As you drift off to deep slumber the balance of your mind will be working for you on your behalf.

While you’re sleeping, your subconscious mind will get to work on those things.

First thing in the morning, when your creative brain is fired up, after the subconscious worked while you slept, write down the thoughts that have bubbled up about those things.

I get so many ideas from this method for the betterment of myself, my family, my practice, and the Bar. Now, the prescription I wrote works wonders but personally don’t always take the medicine. Sometimes, I am not as diligent as I should be with the requests and sometimes forget to document the wins but if I walk the path and mostly mark forward progress, I realize that there is no destination at all just the path itself. Insights and clarity are the result of this practice. And practice is what you must do. Like exercising a physical muscle the subconscious mind must be put through its paces. Work at it and the creative benefits will be amazing.

*“A man cannot directly choose his circumstances, but he can choose his thoughts, and so indirectly, yet surely, shape his circumstances.”*  
— James Allen

As attorneys we are no strangers to deep thinking, problem solving, research and clarifying arguments. Think about your own life with the same rigor. Mentally focus on a request and subconsciously think of a solution. The insight will pop into your head as you wake up or as you are in the shower or on your drive to work. Mental creation precedes physical creation. There is a blueprint before a building.

Your thoughts are the blueprint of the life you are building one day at a time. When you learn to focus the mind as you lay down to sleep on three wins and a request; your conscious and subconscious work for you and cause the conditions in your daily living to achieve your goals.

## THANKS FOR A GREAT YEAR.

Much obliged to all who assisted me in service to the Bar; too many to mention by name but you know who you are. You have my undying support and I am a good friend to have. The support and outreach to me personally and to the Bar Association has been wonderful. The involvement of membership through our meetings, CLE programming and in person events has been amazing. I look forward to the Presidency of Adam Orlow who will take us to unprecedented heights. No doubt he will use the past year as bedrock and build upon it. President Orlow with the Board shall look at this year and improve upon it. We increased outside funding-he will expand it. We diversified -he will expand on that proposition. We had fantastic rapport with the Courts -that will continue to flourish with additional Judicial support and presence. We had more CLE’s and Committee Meetings than ever before and we plan to grow our programming. We had a few in person events-there will be many more. Ever upward.

Thank you for letting me be the President of the QCBA; a long-standing goal and career highlight. I leave on this note. There is only winning and learning. Wins come in big and small shapes. When we don’t win, we learn. I won and learned a lot this year. There is an ever upward spiral -when I win, it feels good, and I like to win and when the win is just out of reach, I learn. I like to learn because it helps me win next time. Please adopt that that vocabulary.

Live in the magic. One moment at a time; one day at a time; all the time. No moment can be taken for granted.



## The Non-Immigrant Affidavit of Support, Form I-134- Visiting America?

Maybe your family or friend can help support your stay!

An Affidavit of Support Form I-134 is a form an individual fills out and signs to accept financial responsibility of another individual who is coming to the United States temporarily. The individual who signs the affidavit of support becomes the sponsor of the individual who comes to the United States during their trip. The purpose of the form is to show USCIS that the visa applicant has sponsorship and therefore will have the means to be in the United States.

When submitting an affidavit of support, a sponsor must show that they have enough income and/or assets to support the travelling nonimmigrant. There is no black and white rule with the amount needed as is the case with permanent resident Affidavits of Support.

What are the pieces of evidence to show sufficient income and financial ability to support an intending nonimmigrant?

- Copies of the intending sponsor's most recent years of tax returns filed with IRS.
- Bank Statements.
- Employment letters
- If there are other sources of legal income that can be listed.

Applicants should recognize that the Sponsor is providing proof that they will take care of and handle expenses and possibly boarding and lodging for the intending immigrant. Its not a preventative affidavit of support, to stop an applicant from becoming a public charge, like with the Affidavit of Support for permanent residents, but an affirmative declaration that an intending non-immigrant has the means and protection to be in the United States during the pendency of their stay.

Moreover, applicants for a non-immigrant are still responsible to show and establish to the satisfaction of a consular officer and a CBP officer that they have the sufficient ties and intent to return to the home country. Therefore, just because you have a non-immigrant Affidavit of Support sponsor, it does not absolve you of your responsibilities, to show nonimmigrant intent as well as other requirements for nonimmigrant visas.

Please consult an experienced Immigration attorney with understanding of consular nonimmigrant visas to see if a Nonimmigrant Affidavit of Support form I-134 would be right for you or your family.

BY DEV B. VISWANATH, ESQ.



**DEV BANAD VISWANATH, ESQ**

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## The Practice Page

# The Note of Issue and Certificate of Readiness

BY HON. MARK C. DILLON

*Serves on the Appellate Division, Second Department*

The Note of Issue and Certificate of Readiness are important documents in litigations. They are actually two separate documents that serve two separate purposes, though they are often imprecisely thought of as one. Before e-filing, the two documents were on opposite sides of the same page. Procedurally, the Certificate of Readiness is actually the first of the two, as no Note of Issue may be filed unless it is preceded by readiness for trial.<sup>1</sup> The Certificate of Readiness is the document that identifies the various forms of discovery that are relevant to a particular action and certifies that all such discovery has been completed. The document is signed and dated by the filing attorney, who certifies that since discovery is completed, the action is ready for trial.

The Note of Issue is the separate document by which a party formally requests that the action, now "ready," be placed on the court's trial calendar. It may be filed any time after issue is first joined, or 40 days after the completion of service of process irrespective of the joinder of issue.<sup>2</sup> The document sets forth necessary information about the requested trial, including whether a jury is sought for some or all of the issues, the nature of the case, the ground for any special preference, and the amount or nature of relief sought. Templates for the Note of Issue and Certificate of Readiness may be found at Uniform Rule 202.21(b) and on-line.

The Note of Issue and Certificate of Readiness are typically filed by plaintiffs, though any party may permissibly do so. The plaintiff, of course, is the party that most wishes to file the Note of Issue and Certificate of Readiness, as doing so is part of the route toward the pot of gold at the end of the rainbow. If the documents are filed before the completion of discovery, the aggrieved party may file and serve any motion to vacate the Note of Issue within 20 days from its service. Since the service time eats into the 20 days, the receiving party should promptly examine the litigation file to determine whether all discovery is, in fact, completed, so that a timely vacatur motion can be made if needed. If vacatur is sought beyond the 20-day deadline, the moving party must demonstrate good cause for the lateness,<sup>3</sup> which is defined as unusual or unanticipated circumstances developed after the Note of Issue was filed.<sup>4</sup> Further discovery may be requested post-Note of Issue, by motion, which a court may grant only upon a showing of "unusual and unanticipated circumstances and substantial prejudice" absent the additional discovery.<sup>5</sup> If a jury is not requested in the Note of Issue but the receiving party prefers having a jury, a jury demand must be served and filed by that other party within 15 days from the service of the Note of Issue.<sup>6</sup> An untimely request for a jury may be sought by motion, which the court has discretion to grant or deny.<sup>7</sup>

A party seeking a trial preference must not only indicate the request on the Note of Issue, but also serve a motion for a preference along with the document. Any other party must file a preference motion

within 10 days of the service of the Note of Issue.<sup>8</sup> There are, of course, filing fees. Uncle Sam takes his chunk of change. The fee for a Note of Issue is \$30.00 where an RJ1 has already been purchased, and \$65.00 for a jury demand.<sup>9</sup> The 120-day CPLR window for making summary judgment motions runs from the filing of the Note of Issue.<sup>10</sup> But the deadline is actually 60 days under the Individual Part Rules of Supreme Court Justices Berliner, Marx, and Zugibe.

The Note of Issue serves a vital role for litigators as a reminder that preparations be commenced for trial. Take these documents seriously. The filer should prepare them carefully. The recipient should scour them for completeness and accuracy, and act upon it accordingly. Take these documents seriously. Not doing so may have profound effects.

*Mark C. Dillon is a Justice of the Appellate Division, Second Department, an Adjunct Professor of New York Practice at Fordham Law School, and an author of CPLR Practice Commentaries in McKinney's.*

<sup>1</sup> *Tirado v Miller*, 75 AD3d 153, 156.

<sup>2</sup> CPLR 3402(a).

<sup>3</sup> Uniform Rule 202.21(e).

<sup>4</sup> *Sposito v Cutting*, 165 AD3d 863, 865.

<sup>5</sup> *Audiovox Corp. v Benyamini*, 265 AD2d 135, 138.

<sup>6</sup> CPLR 4102(a).

<sup>7</sup> *Gonzalez v Concourse Plaza Syndicates, Inc.*, 41 NY2d 414, 416-17.

<sup>8</sup> CPLR 3403(b).

<sup>9</sup> CPLR 8020(a) and (c)(2).

<sup>10</sup> CPLR 3212(a); *Brill v City of New York*, 2 NY3d 648, 652.



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Allen E. Kaye

## Immigration Questions



Joseph DeFelice

Following are excerpts from the National Immigration Forum's *Legislative Bulletin* for Friday, April 22, 2022.

### Biden Administration Faces Pushback on Decision to End Title 42

The Biden administration has received significant pushback on its decision to roll back Title 42 border restrictions by May 23, including from congressional Democrats. At least ten Senate Democrats — including Senator and Chair of the Homeland Security and Government Affairs Committee Gary Peters (D-Michigan) — have called on the administration to delay the end of Title 42 until there is a more concrete plan to replace the policy. A bipartisan bill aimed at extending the use of Title 42 beyond May 23 called the Public Health and Border Security Act of 2022 has received the support of five Senate Democrats and six House Democrats.

Title 42 is a pandemic-era order that both the Trump and Biden administrations have used since March 2020 to rapidly expel arriving migrants without providing them the opportunity to seek asylum. Since its implementation two years ago, immigration officials have used the rule over 1.7 million times to expel migrants. According to an April 19 Axios report, some members of President Biden's inner circle are considering delaying the repeal of the policy past May 23.

Advocacy groups and international organizations have widely criticized the use of the policy at the border. They argue that deportations under Title 42 are inconsistent with international norms and fail to manage the border in an orderly and humane fashion. A recent Human Rights First report revealed that at least 2,886 migrants expelled at the U.S.-Mexico border under Title 42 had been victims of kidnapping, torture, rape, and other violent attacks. Title 42 has

also been subject to multiple legal challenges, resulting in a March 4 decision in the D.C. Circuit Court of Appeals that ruled the administration cannot expel migrant families under Title 42 without first allowing them to seek protection under U.S. law.

The administration has announced a plan to replace Title 42 and address potential increases in migration at the border, including increasing resources and personnel to assist with migrant processing, implementing a new rule to expedite asylum processes, and engaging in bilateral negotiations with other countries in the hemisphere.

### Biden Administration Announces New Streamlined Process to Welcome Ukrainians Fleeing Russia's Invasion

On April 21, the Biden administration announced a new private sponsorship parole program called Uniting for Ukraine to expand the available pathways for Ukrainian citizens who have been displaced by Russia's invasion to come to the United States.

To be eligible, Ukrainians must have a financial sponsor in the United States, and they must have been residents in Ukraine as of February 11, 2022. They must also complete vaccinations and other public health requirements and pass a series of security screenings. Beginning on April 25, 2022, an online DHS portal will allow U.S.-based individuals and entities to apply to sponsor displaced Ukrainians. Those hoping to sponsor will be required to declare their financial support and pass security background checks.

The program is not part of the refugee resettlement system and would instead offer up to two years of humanitarian parole. Parolees would be protected against deportation and be eligible to apply for work

authorization but would not be eligible for other resettlement benefits and assistance that is offered to refugees. Unlike refugees, Ukrainian parolees would also not have a clear path to permanent status.

The program comes on the heels of a March 24 announcement in which President Biden committed to welcoming 100,000 Ukrainian refugees through a variety of legal pathways. Because refugee resettlement and other visa pathways are heavily backlogged, prior to the announcement of the Uniting for Ukraine program thousands of Ukrainians traveled to Mexico and then attempted to apply for protections at the U.S.-Mexico border. Many were welcomed in under parole at ports of entry, while others remain waiting near the border. As part of the administration's April 21 announcement, Ukrainians will be turned away at the border on April 25 and encouraged to instead apply through the Uniting for Ukraine portal. It is unclear what will happen to those who are still waiting in Mexico.

On April 19, the Biden administration also published the designation of Temporary Protected Status (TPS) and Special Student Relief (SSR) authorization for Ukrainians who were present in the U.S. as of April 11, 2022. Special Student Relief is the suspension of certain regulatory requirements by the Department of Homeland Security for F 1 students from parts of the world that are experiencing extraordinary and emergent circumstances.

BY ALLEN E. KAYE AND JOSEPH DEFELICE

*Allen E. Kaye and Joseph De Felice are Co-Chairs of the Immigration and Naturalization Committee of the Queens County Bar Association.*



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# A Memorial Day Offering

- an amazing historical drama

a human interest story

BY LEONARD L. FINZ

May 30 is Memorial Day, a sacred time conceived shortly after the Civil War. It is celebrated with deep solemnity each year in that this special day reflects the final sacrifice made by those in the military who lost their lives in all wars including World War I, World War II, The Korean War, Vietnam, Iraq, and Afghanistan. They died in the performance of their duty while each hero performed the sacred oath, that,

*“I \_\_\_\_\_do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God”.*

Many songs have been written with a patriotic theme, but there is one that soars high above the clouds with its remarkable description, firm admiration, and deep pride of the land called the United States of America. How were some of the most inspirational words and music of such a song created? The back story is so fascinating as to warrant a telling of its history. The title of this musical treasure however, is released at the end of this article. But like Agatha Christie’s “who done it” novels, you must not sneak a peek at the conclusion of this piece until you have read its intriguing narrative. Now, the mystery begins...

In the late 1800’s, a fairly known female author and poet had some of her works published in various newspapers and magazines. She was also a full professor of English at a woman’s college. In addition to her many academic achievements, she was a social activist who advocated aggressively for the rights of women, minorities, and the disadvantaged. She died in 1929, at age 69 and never married.

She always carried a notebook with her in which she would jot down the beauty and splendor of nature that captivated her. Returning to her home after each rendezvous with the mystifying scenery encountered, she would transform her viewing experiences into majestic poetry. Once completed, the poem would usually be published in a weekly or monthly regional newspaper to the delight of its reading audience.

One day, together with several of her colleagues, she went on a trip to Pikes Peak, a towering mountain that rose 14,000 feet toward the sky. When near the summit, she was unabashedly overtaken by the magnificent countryside, the breath-taking million-year-old rock

formations, and the massive picture-book green valleys playing host to stately leafy trees, all of which appeared to be in quiescent peaceful slumber several thousand feet below.

With notebook in hand, she scripted the vast beauty that surrounded her which appeared unbelievably magical. Back at home, she converted her descriptive notes and created a poem that relayed the magnificence that mesmerized her. And as was her custom, she submitted the poem for publication to one of the weekly newspapers that had accepted some of her poetry in the past. What happened next is what sometimes emerges from pure happenstance or unexplainable kismet. And here it is...

We now segue to a male organist and composer of songs who died in 1903. Eleven years before his death, he had written a hymn which was accepted for publication. How he came upon the melody and how he turned it into musical notes is an extraordinary story all by itself and bears recitation...

One sunny afternoon, he visited Coney Island and later was on a ferry that would return him to Manhattan where he lived. The water with its blue cast was calm! The brilliant sun penetrated itself through a large window of the ferryboat! The slight wind carried a lazy but friendly breeze! Tranquility prevailed! And being ever so relaxed, he looked out the window and was suddenly thunder-struck by a musical theme that kept repeating itself in his receptive brain. He had no paper however, upon which he could record the musical notes that were registered so firmly in his mind. Fearing that the melody would quickly escape him, he turned to a passenger seated nearby, and politely asked whether he had any writing paper he could borrow. With great anxiety, he described the imminent importance of memorializing the haunting melody into written musical notes.

The passenger stated regretfully that he could not satisfy the request for writing paper. Viewing the disappointment that shrouded the composer’s face, the passenger surprisingly offered the removable white cuff (commonly worn in those days) from his shirt sleeve to be used in place of writing paper that had been requested. Gratefully accepting the offer, the composer scored the musical theme of the melody that continued to play itself in his mind onto the shirt cuff. What he ultimately composed was a hymn that was ultimately published in 1892. The story continues...

Following the death of the composer in 1903 (who, 70 years later, was inducted into the Song Writer’s Hall of Fame), an unknown publisher by chance came upon the poem written by the professor that was articulated in her trip to Pikes Peak. Already being familiar with the melody written by the composer (while on his ferry ride from Coney Island to Manhattan), the publisher conjured up an unimaginable creation; he joined the professor’s Pikes Peak poem with the composer’s hymn

and even and gave its title. It lay dormant however, for 7 years. It was finally included in a music book published in 1910. The title, lyrics, music, have lived on without change to this day. And now, the secret unfolds...

The writer of the poem was Kathleen Lee Bates. The composer of the hymn was Samuel A. Ward.

I trust you haven’t taken a peek at the ending since it bears the name of an iconic patriotic song. Its title - “America the Beautiful.”

We all know the words of this majestic piece and probably have sung it on many occasions. But at this special time of year – Memorial Day – when, unfortunately we are living in a divided country, perhaps the words, beauty, and message of what the opening stanza of “America the Beautiful” portrays, are salutary and inspirational enough so as to neutralize some of the raw separations within our nation that we are all sadly experiencing. And here it is...

*“America the Beautiful.”*

*Oh, beautiful for spacious skies,  
For amber waves of grain,  
For purple mountain majesties,  
Above the fruited plain!  
America! America!  
God shed His grace on thee,  
And crown thy good, with brotherhood  
From sea to shining sea!*

The historical saga and extraordinary irony of “America the Beautiful” is that Kathleen Lee Bates, the poet, and Samuel A. Ward, the composer, never met!

END OF STORY

*Leonard L. Finz 97, is a former New York State Supreme Court Justice, (Queens County), a decorated WWII Veteran (1st. Lt., Field Artillery, Philippines), inducted into the prestigious U.S. Army OCS Artillery “Hall of Fame”, and most recently inducted into the elite Army OCS “Hall of Fame”, by order of the United States Department of Defense, the author of four published thriller novels, Peer-Reviewed as “One of America’s pre-eminent lawyers”, an active member of the QCBA for 67 years, and the founder of Finz & Finz, P.C.*



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With over twenty-five years as a real estate and business owner, Peter joined Wealthbridge Financial Group.

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Peter earned his BS in Finance from Lehigh University, his MBA in Finance from Fordham University, as well as holds his series 7, 63, and 65 securities registrations. He resides in Atlantic Beach, NY with his wife.

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## Chutes And Ladders – Recent Cases Involving New York’s “Scaffold Law”

BY HON. GEORGE HEYMANN

### CONTINUED FROM PAGE 1

If, however, a player lands at the top of the chute, he or she slides all the way down to a lower number and basically must start all over again. While there are countless ways a worker can get injured on a job, when it comes to elevation related ones, falling off a ladder is one of the primary causes. Was the ladder provided the proper equipment to be used? Was it used properly? As some of the decisions cited below regarding ladders will demonstrate, each of the cases differ. In other situations, workers can be injured by a falling object due to the force of gravity. As case law has evolved over the years, there are situations where the injured worker can be standing on the ground and not elevated at all, yet Labor Law §240(1) has been applied successfully during litigation. The concept of what constitutes elevation is ever changing. (For a review of the seminal cases in this area of law see, Heymann, “The Evolution of Elevation: New York’s Scaffold Law”, NYSBJ, Jan. 2013)

### COURT OF APPEALS – SOLE PROXIMATE CAUSE DEFENSE

On April 28, 2022, the Court of Appeals (“COA”) rendered three opinions regarding the Scaffold Law. Two of the three pertained to accidents and injuries involving the use of A-frame ladders. In all three, however, the Court concluded that the plaintiffs could not recover under Labor Law §240(1). In the first two instances, it was determined that the plaintiffs were the sole proximate cause of their respective accidents. Clearly, these two cases, and recent appellate decisions on this issue as well, will bolster the use of this defense even more in future litigation.

In *Cutaia v. Board of Mgrs. of the 160/170 Varick Street Condominium*, (2022 NY Slip Op 02834), the COA, in a 4-3 split, issued a memorandum decision, which reversed the Appellate Division (“AD”) (1st Dept) and denied plaintiff’s motion for partial summary judgment on his Labor Law §240(1) claim. In this renovation project, the plaintiff was required to reroute pipes in the ceiling of the subject premises. “To reach the pipes, plaintiff used an A-frame ladder; however, because of spatial limitations he had to lean the ladder against the wall in the closed and unlocked position. While standing on the ladder and attempting to connect two pipes plaintiff received an electric shock and fell to the ground” which resulted in severe burns to portions of his body as well as other injuries. Plaintiff had no recollection of the accident, “including whether he lost consciousness, whether the ladder fell to the ground, or whether he was thrown from the ladder after being electrocuted.” The Court agreed with the dissent below stating “[i]ndeed, questions of fact exist as to whether ‘the ladder failed to provide proper protection,’ whether ‘plaintiff should have been provided with additional safety devices,’ and whether the ladder’s purported inadequacy or the absence of additional safety devices was a proximate cause of plaintiff’s accident.”

A lengthy dissent was posited by Wilson, J., wherein he declares that “[t]he electric shock is a red herring”. He states, repeatedly, that while the shock

“precipitated” the plaintiff’s fall, “the inadequate ladder remains a proximate cause of his fall-related injuries... and the fact that a worker was shocked does not negate liability for the defendant’s failure to furnish the protection required by statute”. Here, the A-frame ladder provided to the plaintiff could only be used safely if fully opened in a locked position. Due to space limitations, the plaintiff had no choice but to use it in a closed (folded) position leaning against the wall in an unsecured manner. According to plaintiff’s expert, had the ladder been secured (“anchored to the floor or wall”) it would have remained stable when plaintiff was shocked. No other safety devices were available to the plaintiff. Plaintiff’s fall when suddenly struck by electricity was not the sole proximate cause of the accident but a “contributing factor” and it “did not supersede or displace the inadequate ladder as a proximate cause of [his] fall-related injuries” which was “a foreseeable elevation risk”.

*Bonczar v. American Multi-Cinema, Inc.*, (2022 NY Slip Op 02835), was another memorandum decision wherein the plaintiff was also injured when he fell from a ladder. Here, he was retrofitting a fire alarm system at a movie theater. “After climbing up and down to the third or fourth step of the ladder several times without issue, he began to descend a final time when the ladder shifted and wobbled. Plaintiff fell and was injured.” The Supreme Court (“SC”) granted partial summary judgment on plaintiff’s motion and the AD (4th Dept) reversed, with two justices dissenting. “The court held a factual issue existed as to whether a statutory violation had occurred and if plaintiff’s own acts and omissions, particularly as to the ladder’s positioning and plaintiff’s failure to check the ladder’s locking mechanisms, were the sole proximate cause of his injury.” On remand, a jury returned a verdict in favor of the defendant finding no violation of the statute and that the plaintiff’s failure to position the ladder properly was the sole proximate cause of his injuries. The SC denied plaintiff’s motion to set aside the verdict as against the weight of the evidence and the AD unanimously affirmed. The COA affirmed the AD’s decision, finding that a rational trier of fact could have found in defendant’s favor on the Labor Law §240(1) claim. The COA noted that the nonfinal order of the AD (158 AD3d 1114 [4th Dept 2018]) regarding the motion for summary judgment could not be reviewed as it “did not remove any issues from the case”. The question of proximate cause and liability was left undecided, and the parties had a full opportunity to explore those issues at trial.

Both *Cutaia* and *Bonczar* will prompt a greater effort in motion practice by the contractor/defendants questioning a plaintiff’s own acts and omissions regarding the placement of his or her ladder and the failure to check the locking mechanisms, to establish that said acts and/or omissions were the sole proximate cause of injury. [See, *Singh v. 180 Varick, LLC*, (2022 NY Slip Op 02146 [AD 2nd Dept]), where the defendants established, prima facie, that the plaintiff’s ladder was not defective, that additional safety devices were not required as a matter of law, and that the plaintiff’s actions were the sole proximate cause of the accident.]

As I set forth in the beginning of this article, Labor Law §240(1) has two components: the nature of the work to be performed and the type of equipment that must be provided by a contractor to its employee to ensure that such work can be performed safely. If the job is not one of those enumerated, then the statute is not invoked and there is no strict liability on the contractor, even if the equipment was inadequate to protect the worker.

In its third memorandum decision, *Healy v. EST Downtown, LLC*, (2022 NY Slip Op 02836), the COA reversed the AD, denied the plaintiff’s motion for partial summary judgment and granted defendant’s motion for summary judgment dismissing the Labor Law §240(1) claim. At issue here, was whether the plaintiff’s assigned task [not set forth in the decision] was that of “cleaning” within the meaning of the statute or merely routine maintenance which is not covered. Here, plaintiff’s work was “routine” and did not fall within the ambit of Labor Law §240(1) protection. Work is considered “routine” when 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. This factor does not involve a fact-specific assessment of a plaintiff’s regular tasks - it instead asks whether the type of work would be expected to recur with relative frequency as part of the ordinary maintenance and care of a commercial property. (see, *Soto v. J. Crew Inc.*, 21 NY3d 562, 568-569 [2013]).

### APPELLATE AND TRIAL COURT DECISIONS

In many instances, injuries occur as a result of the force of gravity of a falling object, even where the worker and said object are on the same level (no height differential).

An example of this occurred in *Grigoryan v. 108 Chamber St. Owner, LLC*, (2022 NY Slip Op 02620 [AD 1st Dept]) where the AD unanimously reversed the SC and granted plaintiff’s motion for summary judgment on liability. In this force of gravity case, the plaintiff was injured when he and two coworkers were assigned to run conduits along the wall and ceiling of an approximately 8 by 10-foot fire pump room. As they were looking at the wall and ceiling and deciding how to proceed, plaintiff felt a sharp pain in his leg when a 3-to-4 foot tall, 300-500+ pound fire pump, which had been standing upright on the floor, on its narrower end and unsecured, fell on his leg. Where a load positioned on the same level as the injured worker falls a short distance, labor law section 240(1) applies if the load, due to its weight, is capable of generating significant force. Here, the fire pump was required to be secured against tipping or falling and the failure to secure it was a violation of the statute. The court concluded that this was a foreseeable harm that needed to be protected against.

In *Peters v. Structure Tone, Inc.*, (2022 NY Slip Op 02518 [AD 1st Dept]), the AD modified the SC’s granting of plaintiff’s summary judgment motion and denied same. Working as a carpenter, plaintiff was injured while building a platform in a shaft on the 10th floor of

CONTINUED ON PAGE 18



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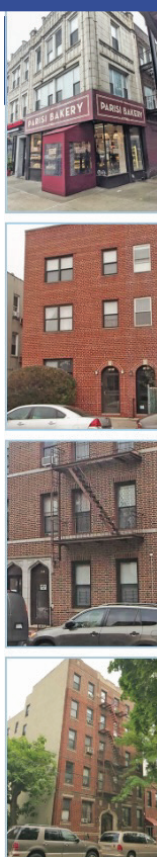
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# Chutes And Ladders – Recent Cases Involving New York’s “Scaffold Law”

BY HON. GEORGE HEYMANN

## CONTINUED FROM PAGE 14

a building in order to frame or box out some pipe in the shaft. As the platform was nearly complete, he heard something, looked up, and was struck by “small bits of concrete, chunks of concrete” like the size of pebbles. Some of this debris struck him and got stuck in his right eye causing injury to his retina, requiring surgery. Plaintiff had been working in this shaft for approximately six weeks starting on the second floor and working his way up to the 10th floor. He testified that “stuff used to rain down” on him while he worked in the shaft. The AD determined that neither party was entitled to summary judgment under Labor Law §240(1) as there were issues of fact as to whether the debris that fell on the plaintiff – “taking into account the elevation differential, the debris’ weight, and the amount of force it could generate (citations omitted) – was a load that required securing for the purposes of the undertaking at the time it fell (citation omitted) and whether his injury was a direct consequence of defendants’ failure to provide adequate protection against a risk arising from a physically significant elevation differential (citation omitted)”. The court rejected the defendants’ argument that the plaintiff was the sole proximate cause of his accident for not wearing goggles since safety goggles are not a protective device within the meaning of the statute.

In *Kuylen v. KPP 107th St., LLC*, (2022 NY Slip Op 01419 [AD 1st Dept]), the plaintiff was working on a building renovation. As he entered one of the building’s apartments to speak with a coworker a stack of 25 to 30 sheetrock boards that had been leaning against the wall fell on him. The defendant/owner of the premises was not entitled to dismissal of plaintiff’s Labor Law § 240(1) claim since the record presents issues of fact as to whether plaintiff’s injuries flowed directly from the application of the force of gravity to the sheetrock, whether the elevation differential was de minimis and whether the combined weight of the sheetrock panels could generate a significant amount of force as it fell causing injury. The AD modified the SC’s granting of defendant’s motion to dismiss and reinstated plaintiff’s claim.

As set forth in *Hayducka v. City of New York*, (2022 NY Slip Op 50425(U) [S Ct, Kings Co]), in order to prevail in falling object cases, the plaintiff must demonstrate that “at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking”. To succeed in a cause of action pursuant to Labor Law §240(1), the plaintiff must establish that an owner or contractor failed to provide appropriate safety devices at an elevated worksite and that such violation of this statute was the proximate cause of his injuries. Here, during the excavation of sidewalks, plaintiff was part of a team that moved and set up steel curbs in preparation for the pouring of concrete. At the time plaintiff was injured he was moving a curb segment attached to a backhoe by a metal chain as instructed by his supervisor. Plaintiff alleged this was not the proper way to perform this duty because you should never use metal on metal when lifting or hoisting but instead use canvas straps. He moved eight curbs without incident, but the ninth one slipped from the chain and fell about three feet onto plaintiff’s right foot. It was about 20 feet long and weighed approximately 500 pounds. The court found that plaintiff was entitled to a judgment as a matter of law; that he was struck by a falling object that was improperly hoisted or inadequately secured, which was the proximate cause of his injuries.

However, a case where the plaintiff was struck by an excavator as he was bringing debris up an earthen ramp and then rolled down the ramp after being struck [does that involve a force of gravity?] did not give rise to a claim pursuant to Labor Law §240(1) because plaintiff’s injuries were not “the direct consequence of a failure to provide adequate protection against a risk from a physically significant elevation differential”. *Herrera v. Kent Ave. Prop. III LLC*, (2022 NY Slip Op 01738 [AD 1st Dept]).

In *Hamm v. Review Assoc., LLC*, (2022 NY Slip Op 01011[AD 2nd Dept]), the plaintiff allegedly fell from a ladder and sustained injuries while he was working at defendant’s premises. He was in the process of placing a security camera back into its plastic protective housing after testing it and the ladder, which he alleged was given to him by one of the defendant’s employees just prior to the accident, slipped and he fell. The camera had not been working for some time prior to the accident and was located approximately 20 feet from the ground and mounted to a concrete cinder block wall. The plaintiff alleged that one of the locks on the side of the ladder had broken off and that the caps that covered the metal feet were missing on one side. He alleged, inter alia, that the accident occurred as a result of a dangerous, hazardous, and/or defective ladder. Here, the court held that “[i]n determining whether a particular activity constitutes repairing [an enumerated task], courts are careful to distinguish between repairs and routine maintenance, the latter falling outside of the scope of section 240(1) (citations omitted). Generally, courts have held that work constitutes routine maintenance where the work involves replacing components that require replacement in the course of normal wear and tear (citations omitted). Where something has gone awry, however, requiring repair, section 240(1) is applicable (citations omitted)”. The AD determined that issues of fact existed and therefore modified the SC’s decision by denying the defendant’s motions for summary judgment granting dismissal of the cause of action alleging violations of Labor Law §240(1). [In a similar vein, while routine maintenance in a non-construction, non-renovation context is not covered under this statute, where a plaintiff’s work is intended to secure the premises in preparation for a renovation project, he is engaged in “altering” the premises within the meaning of the statute and thus protected. *Rooney v. DP Consulting Corp.*, 2022 NY Slip Op 02243 [AD 1st Dept])]

*Finocchi v. Live Nation Inc.*, (2022 NY Slip Op 02680 [AD 4th Dept]), raised the interesting question as to whether an employee who foregoes the use of an available safety device at the direction of his superior can be deemed to be the sole proximate cause for his injuries. “To establish a sole proximate cause defense, a defendant must demonstrate that [the plaintiff] had adequate safety devices available; that [the plaintiff] knew both that they were available and that he [or she] was expected to use them; that [the plaintiff] chose for no good reason not to do so; and that had [the plaintiff] not made that choice he [or she] would not have been injured (citations omitted)”. In this case, plaintiff was injured while loading boxes of rigging equipment into a truck following a concert. A forklift was available for use, but he was instructed by the stage manager to lift the boxes by hand. The SC, after a nonjury trial, dismissed the complaint on the ground that plaintiff’s failure to use an appropriate safety device, in this case a forklift, was

the sole proximate cause of his injuries. The AD reversed. Once the plaintiff was instructed to lift the boxes manually, “plaintiff was under no obligation to demand safer methods for moving the box[es] (citations omitted). To expect plaintiff to refuse the stage manager’s demands overlooks the realities of construction work (citation omitted)”... “When faced with an... instruction to use an inadequate device [or no device at all], many workers would be understandably reticent to object for fear of jeopardizing their employment and their livelihoods”. At most, plaintiffs alleged conduct would amount to no more than comparative fault which is not a bar to recovery under this statute. The AD further rejected the defendant’s contention that the work being performed by the plaintiff was not one enumerated in Labor Law §240(1) since it was ancillary to the demolition of a structure, i.e., the stage, and plaintiff was a member of the demolition team and was, therefore, covered under the statute.

Similarly, as set forth in *Hynson v. State of New York*, (2021 NY Slip OP 51301(U) [Ct of Claims]), “[a] worker’s articulation of a reasonable basis for choosing a different safety device from the one he was given has been found to preclude dismissal of a section 240(1) claim on sole proximate cause grounds”.

## CONCLUSION

Although the number of new cases in this area of law is constant, space limitations militate against writing about them all. The cases discussed above are merely highlights of some of the recent opinions regarding litigation of Labor Law §240(1) claims by workers injured in the performance of their jobs where “elevation” and “force of gravity” provide added risks to the assigned tasks.

At present, New York is still the outlier among the other 49 states that do not maintain a strict liability Scaffold Law. In New York, an injured plaintiff’s contribution to the cause of an accident will not bar recovery unless, and only if, his or her conduct was recalcitrant and/or the sole proximate cause of the accident. Provided that the job is enumerated in the statute or interpreted by the court to fall within one or more of said tasks, the focus then shifts to determine whether the employer provided the appropriate and adequate protection for the specific work to be performed. There is no middle ground to mitigate the employer’s damages once liability has been established. (See, Heymann, *Defending Against the Strict Liability Law of New York’s “Scaffold Law”*, NYLJ, 5/22/20; *Queens Bar Bulletin* May 2020)

As can be seen from a review of the above decisions, until an ultimate determination is rendered, the motion practice by the parties seeking to reach their endgame of scoring a win is always subject to change as the matter winds its way through the appellate process. One moment a party may up (the ladder) and at the very next moment that same party may be down (the chute) as the case draws to its conclusion.

GEORGE M. HEYMANN,

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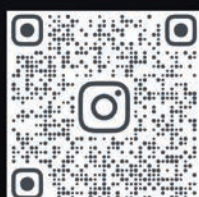
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# Doing Business Has Its Rewards



When you open a new Flushing Bank **Complete Business Checking** account<sup>1</sup>, you could be eligible to receive a gift card and cash bonuses valued up to **\$1,700<sup>2,3</sup>** with our **Business Value Program**.

90-Day Average Balance <sup>1,2</sup>	Business Value Program Balance Bonus Gift Card <sup>1,2</sup>	Business Value Program Activation Bonus <sup>1,3</sup>	Total Business Value Program Bonus
\$15,000 – \$24,999	\$200	\$200	<b>\$400</b>
\$25,000 – \$74,999	\$350	\$200	<b>\$550</b>
\$75,000 – \$149,999	\$600	\$200	<b>\$800</b>
\$150,000 – \$249,999	\$1,000	\$200	<b>\$1,200</b>
\$250,000+	\$1,500	\$200	<b>\$1,700</b>

For more information, visit your local Flushing Bank branch or go to [FlushingBank.com](https://www.FlushingBank.com).

Small enough to know you.  
Large enough to help you.®



1) To qualify for the Business Value Program (BVP) you must be a new Complete Business Checking customer. Certain fees, minimum balance requirements, and restrictions may apply. New account with new money only. Existing checking account customers are not eligible. A new business checking account is defined as any new checking account that does not have any authorized signatures in common with any other existing Flushing Bank business checking account(s). An existing checking customer is defined as anyone who currently has or has had a Flushing Bank checking account within the last 24 months. New money is defined as money not currently on deposit with Flushing Bank. You must deposit a minimum of \$100 to open a Complete Business Checking account. 2) The Business Value Program (BVP) Balance Bonus is limited to one (1) gift card per new Complete Business Checking customer. A minimum opening deposit of \$15,000 is required in the Complete Business Checking account to qualify for the BVP Balance Bonus gift card. The gift card tier is based on the 90-day average balance of the new Complete Business Checking account. The minimum 90-day average is \$15,000 to qualify for the minimum gift card tier. The 90-day average balance tiers and single load 12-month Visa® gift card values are as follows: Tier 1: \$15,000 - \$24,999 a \$200 gift card, Tier 2: \$25,000-\$74,999 a \$350 gift card, Tier 3: \$75,000-\$149,999 a \$600 gift card, Tier 4: \$150,000 - \$249,999 a \$1,000 gift card, and Tier 5: \$250,000+ a \$1,500 gift card. 3) The Business Value Program (BVP) Activation Bonus is limited to one (1) account credit per new Complete Business Checking customer. No minimum balance required to be eligible for the BVP Activation Bonus. You will receive \$100 for the completion of 5 debit card purchases and \$100 for the completion of 5 online banking bill-payments via Flushing Bank's Online Banking portal. Each debit card purchase and each online bill-payment must be \$25 or more and must be completed prior to 60 days after the account is opened. THE MAXIMUM AMOUNT A BUSINESS CHECKING CUSTOMER CAN RECEIVE IS \$200. The compensation will be credited to the checking account on or about the end of the month following the completion of the qualifying transactions. Other fees and restrictions may apply. Notwithstanding the Business Value Program, a minimum deposit of \$100 is required to open the Complete Business Checking account. A 1099 will be issued in the amounts of the gift card received and all bonuses credited to the account. All offers are subject to change and termination without prior notice at any time. Speak with a Flushing Bank representative for more details. Flushing Bank is a registered trademark

