APL-2014-00082

Erie County Clerk's Index No. 2005-4074

Court of Appeals

STATE OF NEW YORK

JOSEPH H. SAINT and SHEILA SAINT,

Plaintiffs-Appellants,

against

SYRACUSE SUPPLY COMPANY,

Defendant-Respondent.

BRIEF ON BEHALF OF THE DEFENSE ASSOCIATION OF NEW YORK, INC. AS *AMICUS CURIAE*

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CORPORATE DISCLOSURE STATEMENT

The Defense Association of New York, Inc. is a not-for-profit corporation which has no parent companies, subsidiaries or affiliates.

PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of the Defense Association of New York, Inc. as amicus curiae in relation to the appeal which is before this Court in the above-referenced action.

DANY is a bar association, whose purpose is to bring together by association, communication and organization attorneys and qualified non-attorneys in the State of New York who devote a substantial amount of their professional time to the handling of litigated civil cases and whose representation in such cases is primarily for the defense; to continue to improve the services of the legal profession to the public; to provide for the exchange among the members of this association of such information, ideas, techniques, procedures and court rulings relating to the handling of litigation as are calculated to enhance the knowledge and improve the skills of defense lawyers; to elevate the standards of trial practice and develop, establish and secure court adoption or approval of a high standard of trial conduct in court matters; to support and work for the improvement of the adversary system of jurisprudence in our courts and facilitate and expedite the trial of lawsuits; to initiate a program of education and information in law schools in emphasizing trial practice for defense attorneys; to inform its members and their clients of developments in the courts and

legislatures affecting their practice and by proper and legitimate means to aid in such developments when they are in the public interest; to establish an educational program to disseminate knowledge by means of seminars and other pedagogical methods on trial techniques for the defense; to promote improvements in the administration of justice; to encourage prompt and adequate payment of every just claim and to present effective resistance to every non-meritorious or inflated claim; and to take part in programs of public education that promote safety and help reduce losses and costs resulting from accidents of all kinds.

This is an action to recover damages for personal injuries sustained by plaintiff while he was changing an advertisement on the face of a billboard. This principal issue on this appeal is whether this activity is protected by Labor Law § 240.

DANY respectfully submits that well-established jurisprudence from this Court and the Appellate Division reveals that the Appellate Division herein properly dismissed this action. The task of applying a new advertisement to a face of a billboard has no significant structural effect and is temporary in nature. As such, Labor Law § 240 has no application to this case.

STATEMENT OF FACTS

a. Factual Background

In this action, plaintiffs sought damages for injuries Joseph H. Saint suffered when he fell from the upper catwalk of a billboard located at 2140 Military Road, Tonawanda, New York onto steel beams about ten feet below on April 3, 2003. Record on Appeal, pp. 27-34, 151, 161-162, 505, 946.[1] The land upon which the billboard was erected was owned by defendant-respondent, Syracuse Supply Co., and had been leased to The Lamar Companies, Mr. Saint's employer, who fabricated, erected, and maintained the billboard. (R 514-515)

Mr. Saint had been erecting, repairing, and putting up advertising on billboards for about fifteen years at the time of his accident. (R 56) The billboard where the accident happened consisted of a vertical pipe anchored in the ground to which a steel structure was welded and bolted. (R 62-65, 73) This structure consisted of a steel torque tube (R 62, 64, 487, 940) that supported steel I-beams (R 64) onto which two vertical steel frameworks were mounted. (R 64-65) These frameworks supported twenty panels around which a Superflex vinyl sheet printed with advertising was stretched. (R 65-67) When viewed from below, the frameworks were not parallel, but rather formed a V-shape. (R 940-943) There were three catwalks on each

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1 Citations to the record on appeal are hereinafter designated (R __).

framework, a front lower catwalk, and an upper and lower rear catwalk and each had a safety line. (R 102, 105)

The vinyl was stretched around the panels using ratchet straps. (R 67) The edges of the vinyl were stabilized by bars that slipped into pockets along all four sides of the vinyl. (R 67-68) When the vinyl was larger than the size of the billboard, the vinyl would be glued to an extension consisting plywood sheeting cut to the appropriate shape. (R 703) The extension would be attached to the billboard by nailing the base to the existing panels and bolting a piece of angle iron to the extension and the framework. (R 695-697, 703, 946, 948, 950) To attach the angle iron to the framework, the foot of the angle iron sits on top of a steel stringer while the "shoe" fit underneath the stringer and the foot and shoe would be bolted together forming a "sandwich." (R 703-704) On pages 10-11 of plaintiffs' principal brief, it is acknowledged that such extensions are affixed to the billboard by means of nails and bolts.

Mr. Saint and his co-workers, Joe Coulon, and Bill Dellapenta intended to move the vinyl from one side of the billboard to the other and then put up an oversize vinyl on the side they just cleared. (R 86) Mr. Saint testified that when changing out vinyl, they usually released the ratchet straps, removed the bars, and let the vinyl fall to the lower catwalk.

(R 138) To remove the bars, workers would stand on the upper catwalk, release the ratchet straps, and remove the bars from the upper edge and the sides of the vinyl while a worker on the lower catwalk would remove the bars from the lower edge. (R 138) Since they were going to rotate the vinyl to the other side of the billboard, however, they decided to pull the vinyl up the panels, intending to then cross over to the other face of the billboard and then re-strap the vinyl. Mr. Dellapenta explained that once they pulled up the vinyl, they planned to walk along the catwalk around to the other catwalk to reinstall the vinyl. (R 699)

Before the accident, Mr. Saint removed the bars from the lower edge of the vinyl while his co-workers removed them from the sides and upper edge. (R 139-141, 950) He testified that his co-workers were unable to haul the vinyl up the face of the panels because the wind was blowing the vinyl into the panels causing the vinyl to stick to them. (R 145-146) He tried to help release the vinyl by pulling the bottom edge away from the face of the panels to introduce air behind the vinyl, but Joe and Bill were still unable to pull the vinyl up. (R 147-148) Mr. Saint then climbed up to the upper catwalk to help his co-workers pull the vinyl up. (R 149)

Despite the fact that the wind had plastered the vinyl to the billboard's panels only moments before, according to Mr.

Saint, a gust of wind caused the vinyl to billow up like a sail after he stepped around Mr. Coulon, and before he could clip his lanyard to the safety line. (R 149-150) In the midst of this process, a wind gust somehow caused the vinyl to strike Mr. Saint in the chest, knocking him off the catwalk and onto the I-beams ten feet below. (R 150-151, 951)

b. Procedural Background

Syracuse Supply Co. moved for summary judgment dismissing plaintiffs' amended complaint by notice of motion dated December 22, 2011. (R 14-15) Syracuse argued that it was not an owner under Labor Law § 240, that plaintiff was not engaged in construction work under Labor Law § 240, and that plaintiff's failure to use the safety devices he was provided was the sole proximate cause of his accident. (R 16-24) Syracuse also argued that it had no liability under Labor Law § 200 because it did not supervise or control plaintiff's work. (R 24)

In opposition, plaintiffs contended that Syracuse was an owner, that Mr. Saint was engaged in construction work, and that he was not the sole proximate cause of his accident. (R 988-1002) Plaintiffs also cross-moved for summary judgment by notice of motion dated December 29, 2011. (R 899-900) Plaintiffs contended that the absence of guardrails was violation of Labor Law § 240 and a proximate cause of the accident. (R 902, 911-912)

The Supreme Court denied the motion and cross-motion (R 5-6), but ruled that Syracuse was an owner and Mr. Saint was engaged in construction work. (R 6) In its memorandum decision, the court ruled that the extension being installed was a significant physical change to the billboard and that the task Mr. Saint was engaged in at the time of the accident was ancillary to the installation of the extension. (R 10-11)

On appeal, the Appellate Division, Fourth Department, reversed, reasoning that "applying a new advertisement to the face of a billboard does not constitute the 'altering' of a building or structure for purposes of section 240" but is "'more akin to cosmetic maintenance or decorative modification,' and is thus not an activity protected under section 240." Saint v. Syracuse Supply Co., 110 A.D.3d 1470, 1471 (4th Dep't), rearg. den., 112 A.D.3d 1385 (2013). Plaintiffs moved in this Court for leave to appeal and that motion was granted. 22 N.Y.3d 866 (2014).

POINT I

THIS COURT SHOULD REJECT PLAINITFFS' ATTEMPT TO RESTRICT THE APPLICATION OF MUNOZ

This Court is once again called upon to address the interpretation and application of Labor Law §240 (1), and specifically the term "altering" appearing therein. Although the limitation of that term was addressed generally in Joblon v. Solow, 91 N.Y.2d 457 (1998), and in the specific context of a billboard-related accident in Munoz v. DJZ Realty, LLC, 5 N.Y.3d 747 (2005), plaintiff here seeks to broaden the rule addressed in Joblon and restrict the application in Munoz virtually to its facts.

Before addressing this effort, it is important to recognize, as this Court has virtually from the inception of Labor Law 240 and its predecessor, that while that statute is intended to be liberally applied *within its intended sphere of application*, the strict liability provisions of the statute were purposefully limited to statutorily specified activities. Thus, in Schapp v. Bloomer, 181 N.Y. 125 (1905), the Court refused to apply the Labor Law as it then read to a fall from a scaffold where plaintiff was in the process of marking with a straightedge where shafting for machinery was to be hung (Id. at 126-7). At common law, the Court noted, there would be no

liability. Since the statute spoke of scaffolding "in the erection, repairing, altering or painting of a house, building or structure," the Court determined that applying the statute's strict liability outside of those contextual limitations, such as to the hanging of shafting, "would practically extend it to all cases in which scaffolds are used. This would be an unauthorized departure from the rule of construction to which we have called attention" Id. at 128.

The statute has changed in focus (from liability of the employer to that of the owner) and terminology over the last 100 years. Yet, the specification of limited, identified activities to which the statute applies continues to this day, now "the erection, demolition, repairing, altering, painting, cleaning or pointing" of a building or structure. And the same analysis, restricting the application to those activities fairly falling within those specified activities, without expanding their definition to encompass all forms of work-related activities, is manifest in the many decisions of this Court in this area.

Thus, for example, the construction of a huge concrete mold in preparation for the construction of a septic tank was not deemed included in the statutory term "erection . . . of a . . . structure" (Jock v. Fein, 80 N.Y.2d 965 [1992]); routine household window cleaning, pre-shipment cleaning of a product, or store display dusting is not within the intendment of the

statutory term "cleaning" (Soto v. J. Crew, Inc., 21 N.Y.3d 562 [2013]; Dahar v. Holland Ladder & Mfg. Co., 18 N.Y.3d 521 [2012]; Brown v. Christopher St. Owners Corp., 87 N.Y.2d 938 [1996]; Connors v. Boorstein, 4 N.Y.2d 759 [1958]); maintenance, including replacement of components "that require replacement in the course of normal wear and tear," does not fall within the term "repairing" (Esposito v. New York City IDA, 1 N.Y.3d 526, 528 [2003]; see, Abbatiello v. Lancaster Studio Assocs., 3 N.Y.3d 46, 52 [2004]); and inspections undertaken prior to (Martinez v. City of N.Y., 93 N.Y.2d 322 [1999]), or subsequent to (Beehner v. Eckerd Corp., 3 N.Y.3d 751 [2004]), repairs are likewise outside the scope of the terms "erecting" or "repairing."

The common thread underlying these decisions is the public policy-based recognition that the extraordinary strict liability provisions of Labor Law § 240 are not intended to be applied outside of the specific defined activity, reasonably interpreted.

Thus, this Court's eschewing in Joblon, supra, 91 N.Y.2d at 464-5, of a broad definition of the term "altering" to include any change to a structure, fell well within the established precedent of this Court. As in the application of other specified activities (see, Soto, supra; Dahar, supra), the Court's deliberate curtailment of the conduct falling within

"altering" was necessary to prevent overly-expansive application of the statute beyond the intendment of the Legislature, "tantamount to a ruling that all work related falls off ladders will fall within Labor Law Section 240" (91 N.Y.2d at 464). Joblon's adoption, instead, of a rule that altering "requires making a significant physical change to the configuration or composition of the building or structure" (Id., at 465, emphasis in the original) thus serves the salutary purpose of preventing owners from becoming insurers of the safety of all workers on their premises (see, Smith v. Shell Oil Co., 85 N.Y.2d 1000 [1995] [changing a light bulb not "altering"]).

Munoz, supra, was accordingly not a departure at all from the mainstream decisional law in this Court. Its recognition that "Plaintiff's activities may have changed the outward appearance of the billboard, but did not change the billboard's structure" (Id., 5 N.Y.3d at 748) was simply another application of the established policy, restricting Labor Law § 240 to identified activities properly falling within its scope. And plaintiff's efforts here to distinguish Munoz because at some subsequent point some slight addition was to be made to the billboard to accommodate a substitute film covering, no more renders this an "altering" than did the correctional activities undertaken to the malfunctioning cable box in Abbatiello, supra, render that activity a "repairing." The court below was right

to restrict the application of the statutory term; this Court should do likewise.

POINT II

WHERE PLAINTIFF WAS INJURED WHILE REPLACING ADVERTISEMENT COPY ON A BILLBOARD IN SUCH A MANNER AS TO NOT SIGNIFICANTLY ALTER THE PHYSICAL CONFIGURATION OF THE STRUCTURE, THIS COURT'S PRECEDENT MANDATES REJECTION OF PLAINTIFF'S EFFORT TO EXPAND THE SCOPE OF LABOR LAW § 240(1) TO INCLUDE ANY ACTIVITY THAT RESULTS IN A CHANGE TO A BUILDING OR STRUCTURE

While there is no dispute that plaintiff fell from an elevated worksite, the Appellate Division correctly held that because the work in which plaintiff was engaged was not within the scope of the protected activities, liability could not attach under Labor Law § 240(1). Plaintiff was injured while moving a vinyl advertising panel between two interconnected billboards. [R 86]. As this Court held in Munoz v. DJZ Realty, LLC, 5 N.Y.3d 747 [2005], such an activity is *not* a protected activity under Labor Law § 240(1). Even if this Court were to consider that the activity in which plaintiff was engaged went beyond the act of moving a vinyl advertisement from one side of a billboard to another because, at some point later that day, another advertisement was to be installed on the billboard which included temporary extensions, the temporary extensions did not constitute a *significant* change to the physical integrity of the billboard structure. Therefore, under this Court's established jurisprudence, plaintiff's activities did not fall within the

scope of activities protected under Labor Law § 240(1) and this Court should affirm the Fourth Department's decision dismissing the amended complaint.

Plaintiff's arguments notwithstanding, the protections of Section 240(1) of New York's Labor Law are not limitless. While having "repeatedly observed that the purpose of the statue is to protect workers by placing ultimate responsibility for safety practices on owners and contractors instead of on workers themselves[,]" this Court has also concluded that the protections only apply when the type of work in which the injured plaintiff was engaged is within the scope of the legislative decree. Panek v. County of Albany, 99 N.Y.2d 452, 457 [2003] (internal citations omitted). Thus, and as fully shown in Point I of this brief, although the statute is to be broadly construed, when the work performed was not "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure," this Court has not hesitated to hold the statutory protections of Labor Law § 240(1) inapplicable. See,also, Chizh v. Hillside Campus Meadows Assocs., LLC, 3 N.Y.3d 664 [2004] (replacing torn window screen not protected activity); Gibson v. Worthington Div. of McGraw-Edison Co., 78 N.Y.2d 1108, 1109 [1991](inspecting damage to roof for the purpose of submitting a competitive estimate for repair project not enumerated activity under statute); Martinez

v. City of New York, 93 N.Y.2d 322, 362 [1999](locating asbestos in buildings in anticipation of undertaking asbestos remediation not within ambit of statute); c.f. Prats v. Port Authority of New York and New Jersey, 100 N.Y.2d 878, 881-882 [2003](inspecting works as completed during an ongoing construction project protected activity under statute).

In the brief span of seven years, this Court decided four cases in which the definition of "alteration" in Labor Law Section 240(1) was at the core of the dispute. Munoz v. DJZ Realty, LLC, 5 N.Y.3d 747 [2005]; Panek v. County of Albany, 99 N.Y.2d 452 [2003]; Weininger v. Hagedorn & Co., 91 N.Y.2d 958 [1998]; Joblon v. Solow, 91 N.Y.2d 457 [1998]. Beginning with Joblon, the Court clarified that for an activity to constitute an "alteration" and therefore worthy of Labor Law 240(1)'s strict liability protections, the work must constitute "a significant physical change to the configuration or composition of the [structure]" upon which the work was being performed. Joblon, 99 N.Y.2d at 461. The Joblon Court found a significant physical change when the plaintiff was engaged in creating a new conduit for wiring from one room to another, through a concrete block wall, in order to permit the hanging of an electric clock in a room without a power source. Id. Specifically, the plaintiff, with the assistance of a co-worker, "tap[ped] into an existing power source in the utility room, [ran] wires encased

in conduit to the site of the hole in the wall of the utility room, [broke] through the wall separating the rooms with a hammer and chisel, and ultimately direct[ed] the wires through the wall." Id. The creation of a new hole between the rooms where none had existed previously was a significant physical change sufficient to allow this Court to conclude that an "alteration" of the type intended by the legislature to be covered by the statute had occurred.

The Joblon Court expressly rejected an argument that a mere "change" to the building or structure was sufficient to qualify as "alteration" under the statute. Id. at 464. That rule, previously adopted by the Third Department in Cox v. International Paper Company, 234 A.D.2d 757, was held untenable by this Court as it could be interpreted as rendering even the most insignificant of activities covered by Labor Law § 240(1) as well rendering other provisions of the statute redundant:

> [W]e are concerned that allowing every change in a structure to qualify as an alteration gives the statute too broad a reach. A task as simple and routine as hammering a nail could, literally taken, be viewed as a change in the structure. . . . Moreover, treating every change in the structure as an alteration would render superfluous such statutory terms as "painting" and "pointing," which could be read as changes to a structure.

Id. at 464-465. The Joblon Court also noted that such a broad reading was at odds with prior precedent since changing

light bulbs or cleaning windows would also constitute a "change:"

> Nor would defining every change in a structure as an alteration hold true to our precedents. Although the Cox court attempted to distinguish Smith v. Shell Oil Co., (85 N.Y.2d 1000), a fair application of plaintiff's rule to that case - where we concluded that a worker injured while changing a light bulb on an illuminated sign was involved only in routine maintenance and stated no claim under Labor Law § 240(1) - would result in liability. To remove and replace a burnt-out bulb, strictly speaking, is to change the sign. Similarly, the minimal cleaning of windows we deemed beyond the reach of the statute in Brown v. Christopher St. Owners Corp., (87 N.Y.2d 938, rearg denied, 88 N.Y.2d 875) also might well be an alteration under such a definition. Such routine maintenance and decorative modifications should fall outside the reach of the statute.

Id. at 465.

This Court concluded that defining "alteration" as a "significant physical change to the configuration or composition of the building or structure" effectuated the intent of the legislature to provide protection to certain workers, was in accord with existing precedent and excluded from the statute's extraordinary protections those simple, routine tasks previously determined to be outside the scope of the statute. Id.

This definition was applied in Joblon's companion case, Weininger v. Hagedorn & Company, in which this Court affirmed the Appellate Division's holding that the plaintiff was engaged

in "alterations" when he was running computer and telephone cable through newly created holes in a ceiling to bring access to newly leased space from existing office space. Weininger, 91 N.Y.2d at 959-960 (rev'd on other grounds).

Five years later, this Court held that the removal of installed equipment in anticipation of a building's demolition also constituted an "alteration" within the statute's scope. Panek v. County of Albany, 99 N.Y.2d 452 [2003]. While affirming lower court determinations that the removal of two 200 pound air handlers from an air traffic control tower that was slated for demolition did not constitute "demolition," this Court nonetheless concluded that the plaintiff was within the scope of Labor Law Section 240(1)'s protection because the work in which he was engaged was an "alteration" to a building. Id. at 457. The plaintiff was charged with removing the air handlers, which were attached to an I-beam on the second floor ceiling of the decommissioned tower. Id. at 455. The work involved not only removal of the air handlers themselves, but also "dismantling of the electrical and plumbing components of the cooling system, and the use of a mechanical lift to support the weight of the air handlers." Id. at 457. This Court concluded those activities resulted in a "substantial modification" to the tower, sufficient to fall within the ambit of "alteration." Id.

In stark contrast to Joblon, Weininger and Panek, in 2005, this Court concluded that changing an advertisement on a billboard does not warrant the protections afforded to construction workers by Labor Law Section 240(1). In Munoz v. DJZ Realty, LLC, this Court held that such an activity is "more akin to cosmetic maintenance or decorative modification than to 'altering' for the purpose of Labor Law § 240(1)." 5 N.Y.3d 747, 748 [2005]. The plaintiff fell from a ladder while preparing to place a new advertisement from a billboard located on the roof of a defendant's building. 15 A.D.3d 363, 364 [2d Dep't 2005]. In concluding that the plaintiff could not sustain a cause of action under Section 240(1), the Munoz Court implicitly rejected the Second Department's conclusion that changing a billboard was not akin to changing wallpaper but rather similar to painting the exterior of a house, Id. at 366 - 367, and implicitly adopted the dissent's position that changing of a billboard advertisement when advertisers changed to be akin to changing wallpaper in a vacant apartment between tenancies. Id. at 369.

Since this quartet of cases were decided, the Appellate Divisions have properly concluded that work which, at best, minimally modifies a structure does not constitute "alteration." See, Amendola v. Rheedlen 125th Street, LLC,105 A.D.3d 426, 427 [1st Dep't 2013](holding that the installation of shades, which

included securing brackets to the ceiling, did not constitute "alteration"); Anderson v. Schwartz, 24 A.D.3d 234, 235 [1st Dep't 2005](holding that the attachment of a temporary sign to the exterior of a building did not constitute "alteration," despite having been bolted to the building); Azad v. 270 5th Realty Corp., 46 A.D.3d 728, 729-730 [2d Dep't 2007](patching holes in gutters caused by animals was routine maintenance); Bodtman v. Living Manor Love, Inc., 105 A.D.3d 434 [1st Dep't 2013](attaching a temporary sign to a building's roof, including drilling "a few" holes into the roof did not constitute "alteration"); Hodges v. Boland's Excavating and Topsoil, Inc., 24 A.D.3d 1089, 1091 [3d Dep't 2005](since structure could be used both with and without the chute, plaintiff injured while attaching chute was not "altering" structure entitling him to the protection of Labor Law Section 240(1)); Holler v. City of New York, 38 A.D.3d 606, 607 [1st Dep't 2007](installation of a hoist motor to move scenery in preparation for a new show was "more in the nature of 'routine maintenance' done outside the context of construction work."); Lavigne v. Glens Falls Cement Co., 92 A.D.3d 1182, 1183[3d Dep't], leave to appeal denied, 19 N.Y.3d 813 [2012](replacing cable did not affect the structural integrity of the building and therefore was not an activity covered by Labor Law Section 240(1)); Len v. State, 74 A.D.3d 1597, 1601-1602 [3d Dep't 2010](moving the movable components of

a dam to facilitate the removal of debris was not alteration); Maes v. 408 W. 39 LLC, 24 A.D.3d 298, 300[1st Dep't 2005](removal of a large vinyl banner from the side of a building not "alteration," notwithstanding that bolts anchoring the banner had to be removed); Panico v. Advanstar Commun., Inc., 92 A.D.3d 656, 658 [2d Dep't 2012](hanging a light fixture not a significant physical change to the structure); Pantovic v. YL Realty, Inc., 117 A.D.2d 538 [1st Dep't 2014](feeding the exhaust tube of a portable air conditioning unit through a pre-existing duct hole does not constitute "alteration"); Rodriguez v. 1-10 Indus. Assoc., LLC, 30 A.D.3d 576, 576-577 [2d Dep't 2006](pulling electrical cable from a ceiling was not "alteration"); Ventura v. Ozone Park Holding Co., 84 A.D.3d 516, 517 [1st Dep't 2011](removing garage door motor from its box is routine maintenance and not alteration); Wormuth v. Freeman Interiors, Ltd., 34 A.D.3d 1329, 1330 [4th Dep't 2006](hanging window treatments is not "alteration"); Zolfaghari v. Hughes Network Sys., LLC, 99 A.D.3d 1234, 1235 [4th Dep't 2012](removing a satellite dish by unplugging a cord, loosening a small number of bolts, and lifting the dish from the face plate that remained attached to the building was not "alteration"). Most recently, the Second Department concluded that a plaintiff who installed painted panels onto the walls of a building was not entitled to

the protections of Section 240(1). Adika v. Beth Gavriel Bukharian Congreg., 119 A.D.3d 827 [2d Dep't 2014].

Indeed, when faced with claims that replacing billboard advertisements fell within the ambit of Labor Law Section 240(1), lower courts have properly rejected those claims as being barred by Munoz. For example, in Hatfield v. Bridgedale, LLC, the Second Department affirmed the motion court's dismissal plaintiff's 240(1) claim, holding that a plaintiff injured while applying an advertisement to a billboard's face was not altering the billboard. 28 A.D.3d 608, 609 [2d Dep't 2006].

However, when *significant* change has occurred or was to occur as a result of the plaintiff's actions, lower courts have properly concluded that an "alteration" had taken place, entitling the injured plaintiff to the heightened protections of Labor Law § 240(1). LaGiudice v. Sleepy's, Inc., 67 A.D.3d 969, 970-971 [2d Dep't 2009](installing electric exit signs by drilling through cinder blocks, opening electrical panels, pulling cable through ceilings, and possibly cutting the ceiling spline constituted "alteration"); Wade v. Atlantic Cooling Tower Servs.,Inc., 56 A.D.3d 547, 548-549 [2d Dep't 2008](dismantling and removing a permanently installed sprinkler system was "alteration"); Santiago v. Rusciano & Sons, Inc., 92 A.D.3d 585, 586 [1st Dep't 2012](boarding over windows of a vacant building was "alteration"); Enge v. Ontario Cty. Airport Mgmt. Co., LLC,

26 A.D.3d 896, 898 [4th Dep't 2006] (running telephone wires from one location to another, including drilling holes in walls to facilitate same, constituted "alteration"). In each of these cases, the activity in question involved a permanent, physical change to the building or structure, such as drilling holes through cinder blocks or completely removing a permanently installed fixture.

In the instant matter, the plaintiffs asks this Court to expand the definition of "alteration" elucidated in Joblon because the advertising copy which plaintiff had not yet begun to install included a temporary attachment which extended beyond the frame of the permanent panels. [R 187]. Were this Court to do so, it would be removing "significant" from the rule set forth in Joblon, and adopting the very rule rejected therein: a rule which would permit any change, no matter how insignificant, to qualify as an "alteration."

The temporary and insignificant nature of the change that plaintiff and his co-workers had not even begun to install on the date of the accident is well-supported in the record. Plaintiff testified that the extensions which were included on the advertising copy to be installed later on in the work day were comprised of wood, nails, vinyl, angle iron and glue. [R 180]. The temporary nature of the extensions which were on the

billboard copy that was to be installed at some point during the work day was conceded by the plaintiff at his deposition:

> Q. Okay, when you put up an extension on a billboard, or a 14-by-48, and you use the nail and the angle iron and the bolt, when you take down the copy with the extensions, does [*sic*] the angle iron and the bolt and the nail come out?
>
> A. Yes.

[R 185]. Plaintiff testified further that all components of the extension are removed when the copy is removed. [R 185, 193]. The structure upon which the copy is placed remains but the extensions are removed. [R 193]. The activity in which plaintiff may have engaged at some point later that day (installation of advertising copy including extensions) is akin to the installation of shades, window treatments or decorative paintings, which involve minimal changes to the structure involved, primarily through the attachment of screws or nails. See, Wormuth v. Freeman Inter., Ltd., 34 A.D.3d 1329, 1330 [4th Dep't 2006]; See, also, Amendola v. Rheedlen 125th Street, LLC, 105 A.D.3d 426, 427 [1st Dep't 2013](holding that the installation of shades, which included securing brackets to the ceiling, did not constitute "alteration"); Adika v Beth Gavriel Bukharian Congreg., 119 A.D.3d 827 [2d Dep't 2014](concluding that a plaintiff injured while installing paintings on wooden panels depicting certain religious holidays was not "altering" the premises). The extensions in the case at bar were to be

attached with nails and bolts, which would be removed when the copy including the extensions was removed, which is strikingly similar to the activity of installing or removing a vinyl banner on the exterior of a building, an activity also recognized as not *significantly* changing the physical configuration or composition of the structure on which the banner is displayed. Maes v. 408 W. 39 LLC, 24 A.D.3d 298, 300 [1st Dep't 2005].

As the activity in which plaintiff was engaged (moving existing advertising copy from one side of the structure to the other) resulted in no change to the physical structure of the billboard, and as the activity in which the plaintiff was to have engaged later in the work day (installing new advertising copy including temporarily attached extensions), would not have significantly changed the physical composition or configuration of the structure upon which he worked, the Fourth Department reached the proper conclusion. This Court should not disturb that finding by retreating from the Joblon Court's clear holding that a change to a building's or structure's configuration or composition must be significant in order to qualify as an "alteration" under Section 240(1).

Moreover, the temporary nature of changing the face of a billboard removes this activity from the ambit of Labor Law § 240(1). Belding v. Verizon New York, 14 N.Y.3d 751 (2010). In Belding, this Court held that applying bomb blast film to a

lobby window was a protected activity. In so doing, this Court stated that "[t]he effects of this one-time security enhancement distinguish the activity from affixing an advertisement on a billboard, a more frequent change that has less structural effect." 14 N.Y.3d at 752, citing Munoz.

The Appellate Division correctly dismissed this action.

CONCLUSION

For the foregoing reasons, the order appealed from should be affirmed.

Dated: Jericho, New York
December 11, 2014

Respectfully submitted,

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