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COURT OF APPEALS
STATE OF NEW YORK

CHRISTOPHER SANATASS and CYNTHIA SANATASS,
Plaintiffs-Appellants,

-against-

CONSOLIDATED INVESTING COMPANY, INC. and CONSOLIDATED INVESTING COMPANY,
Defendants-Respondents,

-and-

NORBERT NATHANSON, HERBERT ROSENBERG as Trustee of the Last Will and Testament of NATHAN SCHULMAN, MARION FELDMAN, CHROMA COPY and DAZIAN LLC,
Defendants.

Index No. 113875/01

CONSOLIDATED INVESTING COMPNY, INC., and CONSOLIDATED INVESTING COMPANY,
Third-Party Plaintiffs,

-against-

CHROMA COPY INTERNATIONAL, INC., CHROMA COPY INTERNATIONAL, L.P., CHROMA COPY INTERNATIONAL, LTD., CHROMA COPY OF AMERICA, INC., and C2 MEDIA, LLC,
Third-Party Defendants.

Index No. 591423/03

BRIEF FOR *AMICUS CURIAE* NEW YORK STATE TRIAL LAWYERS ASSOCIATION

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Preliminary Statement[1]

In an action by a construction worker to recover damages for severe personal injuries under Labor Law §§ 204(1) and 241(6), plaintiffs-appellants ("plaintiffs" or "Sanatass"), appeal to this Court pursuant to CPLR § 5601(a) from a Decision & Order of the Appellate Division, First Department (Andrias, J.P., Nardelli, Williams, Sweeny & McGuire, JJ.), entered March 20, 2007, which affirmed, with two Justices dissenting, an order of the Supreme Court, New York County (Hon. Justice Saralee Evans), dated February 22, 2005. That order, in turn, (i) granted summary judgment in favor of defendants-respondents Consolidated Investing Company, Inc. and Consolidated Investing Company ("defendants" or "Consolidated") on the plaintiffs' claims under Labor Law §§ 240(1) and 241(6); and (ii) denied plaintiffs' cross-motion for summary judgment on the same causes of action. The Decision & Order of the Appellate Division, First Department, is reported at 38 A.D.3d 332 (1st Dep't 2007).

This appeal requires the Court to determine whether a lessor who owns a commercial building may, even while continuing to derive income from the property, wholly disclaim any legal responsibility for the

[1] In the interest of brevity, because the parties have submitted detailed statements of facts we will not do so here.

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site workers' compliance with the provisions of Labor Law § 2400(1) where, as was allegedly the case here, the lessor did not consent to the lessee's performance of the work? This appeal also presents the issue of whether this Court's decision in *Abbatiello v. Lancaster Studio Associates*, 3 N.Y.3d 46 (2004) was, as this Court then specifically said, dictated "by the distinctions between *Celstine* and its progeny and the facts presented here [in *Abbatiello*]" (3 N.Y.3d at 51) or whether the Court will now overrule its decision in *Coleman v. City of New York*, 91 N.Y.2d 831 (1997), *Gordon v. Eastern Railway Supply, Inc.*, 82 N.Y.2d 555 (1993), and *Celestine v. City of New York*, 59 N.Y.2d 938 (1983). Generally, Labor Law § 240(1) imposes nondelegable duties upon owners and contractors, and strict liability results from a violation of the section irrespective of the owner's or contractor's supervision or control over the work. Indeed, this Court has specifically held that "[l]iability rests upon the fact of ownership and *whether [the owner] had contracted for the work or benefited from it are legally irrelevant*." *Gordon v. Eastern Railway Supply, Inc., supra* (emphasis added).

This action was commenced by Christopher Sanatass to recover damages for severe personal injuries he sustained on January 17, 2000 while installing a commercial air conditioning unit and accompanying duct

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work on the 11th floor of a building located at 423 West 55th Street in Manhattan ("the construction site") (42-4, 145, 196-8).[2, 3] On that date Mr. Sanatass, an employee of JM Haley Corporation ("Haley"), went to the construction site along with two other Haley employees (198-9) to install the unit pursuant to instructions he had received from his supervisor, Richard Besher (203). After drilling holes and installing threaded rods to hang the unit Mr. Sanatass and another Haley employee attempted to lift the unit to the rods utilizing cable jacks (214-5, 220). They raised the unit six or seven feet in the air, but before they were able to connect it to the threaded rods the cable jack on Mr. Sanatass's side "gave way," and the unit fell on Mr. Sanatass (217, 220). As Mr. Sanatass described it, the unit "came down on [him]," stopping "about three feet before the ground...If the cable jack had not stopped and it kept going, I would have been dead." (221) Mr. Sanatass did, however, sustain severe back injuries, including lumbar disc herniations and bulges (147).

Following the completion of discovery matters, Consolidated Investing Company, Inc. and Consolidated Investigating Company ("Consolidated" or "defendants") -- the owner of the building where the construction site was located -- moved for summary judgment, contending

[2] Unless otherwise noted, numerical parenthetical references are to pages of the Record on Appeal.

[3] Cynthia Sanatass maintained derivative claims as Christopher's wife.

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(i) that Mr. Sanatass was not a covered person under Labor Law § 240(1); and (ii) even assuming Mr. Sanatass was a covered person, because Consolidated exercised no supervision or control over Mr. Sanatass's work, it could not be liable for his injuries (29-31).[4] Justice Evans granted the defendants' summary judgment motion and the First Department affirmed in a 3-2 decision. In affirming Justice Evans the First Department (Andrias, J.P., Nardelli and Williams, JJ.) found (at CA-12):

> The motion court properly found that Consolidated is not liable to plaintiff pursuant to the relevant sections of the Labor Law because the air conditioning installation was performed without its consent and in violation of the lease, which required prior written approval for any installations. [citations omitted]

In dissent, Justices McGuire and Sweeny noted that liability of an owner under Labor Law § 240(1) attaches whether or not the owner contracted for or benefited from the work and regardless of whether the owner exercised any control over the work being performed (CA-14):

> Labor Law § 240(1) imposes liability on 'all owners' and the duty it imposes 'to provide safe working conditions is nondelegable regardless of control' (*Gordon v. Eastern Ry. Supply,* 82 NY2d 555, 559-560 [1993]). Rejecting the defendant's claim in *Gordon* that it was not liable because it had leased

[4] The defendants also moved to dismiss plaintiffs' Labor Law §§ 200 and 241(6) claims, and Justice Evans granted those portions of the motion, too. Because the First Department unanimously affirmed Justice Evans's decision on the §§ 200 and 241(6) claims, however, they are not part of this appeal.

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> the premises on which the accident occurred to another entity and that it neither contracted for nor benefited from the work performed by the plaintiff, the Court stated that the following principle was controlling: 'Liability [under Labor Law § 240(1)] rests upon the fact of ownership and whether [the owner] had contracted for the work or benefited from it are legally irrelevant' (*id.* at 560; *see Coleman v. City of New York*, 91 NY2d 821 [1997]; *Celestine v. City of New York*, 86 AD2d 592 [1982], *aff'd* 59 NY2d 938 [1983]; *Mejia v. Moriello*, 286 AD2d 667 [2001]; *Seemueller v. County of Erie*, 202 AD2d 1052 [1994]).

The Decision & Order of the First Department should be reversed on the law, the complaint reinstated, and the matter remanded to the Supreme Court, New York County, for further proceedings.

In our Brief, we demonstrate that the Appellate Division erred as a matter of law in finding -- contrary to well-settled precedent from this Court -- that lack of an owner's consent to a renovation project in violation of a lease eviscerates the protections afforded construction workers by Labor Law § 240(1). As noted in Justice McGuire's dissent, and as reiterated throughout this Brief, it has been the rule for at least 30 years that an owner's liability under § 240(1) attaches irrespective of control over the work performed or whether the owner had contracted for or benefited from the work. *Allen v. Cloutier Construction Corporation*, 44 N.Y.2d 290 (1978). In essence, the Appellate Division majority here ruled that

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Consolidated was not an "owner" within the meaning of Labor Law § 240(1) and was not legally responsible for breach of the safeguards mandated by that statute, notwithstanding (i) Consolidated undisputedly owned the building; (ii) the building was not a one or two-family dwelling; (iii) there was, at minimum, a factual issue as to whether the work in issue was renovation work within the ambit of the statute; and (iv) the employer-contractor was selected and hired not by operation of law nor by a municipality, but instead by the very entity to whom Consolidated had leased the premises.

Even more problematic is the Appellate Division's apparent wholesale razing of § 240(1) by holding that an owner and its lessee, by agreement between them, lessen and even entirely eradicate the owner's statutory responsibilities to construction site workers. In contravening such well-settled precedent as *Klein v. City of New York*, 89 N.Y.2d 833 (1996), *Felker v. Corning, Inc.*, 90 N.Y.2d 219 (1997), *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494 (1993), and *Haimes v. New York Telephone Co.*, 46 N.Y.2d 132 (1978), the First Department seems to say that these duties, which were until now non-delegable, *are* delegable. Are artful lease restrictions -- to which neither the disadvantaged worker

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nor his employer are parties -- now sufficient to provide an end run around § 240(1) protections? Isn't that precisely the opposite of "non-delegable"?

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STATEMENT OF QUESTION PRESENTED

I. Did the Appellate Division err in affirming dismissal of the plaintiff's claims under Labor Law § 240(1) where it was undisputed that at the time of his accident (i) the defendant owned the building where the plaintiff's accident occurred; (ii) the building was not a one or two-family dwelling; (iii) there was a factual issue as to whether the work being performed was renovation work within the meaning of the statute; and (iv) the employer-contractor was selected and hired not by operation of law nor by a municipality, but instead by the very entity to whom the defendant had leased the premises?

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POINT

BOTH THE APPELLATE DIVISION AND JUSTICE EVANS ERRED IN DISMISSING MR. SANATASS'S § 240(1) CLAIM WHERE THE UNDISPUTED EVIDENCE REVEALED (i) THE DEFENDANT OWNED THE BUILDING WHERE THE PLAINTIFF'S ACCIDENT OCCURRED; (ii) THE BUILDING WAS NOT A ONE OR TWO-FAMILY DWELLING; (iii) THERE WAS A FACTUAL ISSUE AS TO WHETHER THE WORK BEING PERFORMED WAS RENOVATION WORK WITHIN THE MEANING OF THE STATUTE; AND (iv) THE EMPLOYER-CONTRACTOR WAS SELECTED AND HIRED NOT BY OPERATION OF LAW NOR BY A MUNICIPALITY, BUT INSTEAD BY THE VERY ENTITY TO WHOM THE DEFENDANT HAD LEASED THE PREMISES

A. This Court Has Time And Time Again Said That, With Exceptions Not Claimed To Apply Here, The Duties Imposed By Labor Law § 240(1) Are "Absolute" And "Non-Delegable."

Labor Law § 240(1) provides in pertinent part:

> All contractors and owners...in the...alteration...of a building or structure shall furnish or erect or cause to be furnished or erected...scaffolding, hoists, stays, ladders, slings, hangers...and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

The parameters governing Labor Law § 240(1) have been reiterated on numerous occasions. As this Court wrote in *Klein v. City of New York*, 89 N.Y.2d 833, 834-835 (1996):

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> Labor Law § 240(1) requires that safety devices such as scaffolds be so "constructed, placed and operated as to give proper protection" to a worker. "[T]he legislative history of the Labor Law, particularly sections 240 and 241, makes clear the Legislature's intent to achieve the purpose of protecting workers by placing 'ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor'" (*Zimmer v. Chemung County Performing Arts*, 65 N.Y.2d 513, 520).

The rule has been repeated many times in similarly preemptory language. For instance, in *Felker v. Corning, Inc.*, 90 N.Y.2d 219, 224 (1997), Judge Smith observed that "Section 240(1) of the Labor Law was designed to place the responsibility for a worker's safety squarely upon the owner and contractor rather than on the worker." The duty that the statute imposes upon the owner and general contractor to provide safety devices which give "proper protection" to the worker is "non-delegable." *See, e.g. Almada v. Long Island Lighting Company*, 246 A.D.2d 563, 564 (2d Dep't 1998) (Labor Law § 240 "imposes a nondelegable duty on owners or contractors to provide proper safety devices"); *Del Vecchio v. State of New York*, 246 A.D.2d 498, 499 (2d Dep't 1998) ("Labor Law § 240(1), however, imposes a nondelegable duty on owners and contractors, and absolute liability for violation of that duty.")

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A violation imposes absolute liability upon owners irrespective of whether they exercised supervision or control over the work -- *see, e.g., Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 502 (1993); *Lombardi v. Stout*, 80 N.Y.2d 290, 295 (1992); *Haimes v. New York Telephone Co.*, 46 N.Y.2d 132, 136-137 (1978) -- and without regard for the negligence, if any, of the injured worker so long as the breach was a substantial factor or proximate cause in the chain of events leading to the accident. *See, e.g., Bland v. Manocherian*, 66 N.Y.2d 452, 459-461 (1985); *Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513, 521 (1985); *Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 N.Y.3d 280, 290 (2003).

The legislative purpose of the statute is to protect workers by placing the ultimate and absolute responsibility for safety practices on the owner and general contractor. *See, e.g. Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513 (1991); *Zimmer v. Chemung County Performing Arts*, 65 N.Y.2d 513, 520 (1985); *Koenig v. Patrick Construction Co.*, 298 N.Y. 313, 318 (1948). As such, the statute is to be construed as liberally as possible to accomplish that purpose. *See, e.g., Joblon v. Solow*, 91 N.Y.2d 457, 463 (1998) ("this statute is one for the protection of workmen from injury and undoubtedly is to be construed as liberally as may be for the

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accomplishment of the purpose for which it was thus framed," *quoting from Quigley v. Thatcher*, 207 N.Y. 66, 68 [1912]); *Williamson v. 16 West 57th Street Co.*, 256 A.D.2d 507, 510 (2d Dep't 1998) ("Giving the statute a liberal construction to effectuate the Legislature's intent of protecting workers by imposing absolute liability for their safety upon, among others, building owners…").

Thus, there can be no question in this case that the onus for providing adequate safety equipment at this construction site rested squarely on the shoulders of the owner, Consolidated. It is Consolidated's failure to provide adequate safety devices[5] for Mr. Sanatass that gives rise to liability under § 240(1) as a matter of law.

The significance of this Court's decision in *Gordon v. Eastern Ry. Supply, Inc., supra* must be underscored here. As this Court found (82 N.Y.2d at 559-60):

> Section 240(1) of the Labor Law, often referred to as the 'scaffold law', provides that '[a]ll contractors *and owners* and their agents' engaged in cleaning [or renovating] a building or structure shall furnish or erect proper scaffolding, ladders and similar safety devices to protect employees in the performance of the work. The purpose of the

5 As Professional Engineer Joseph Cannizzo averred, "the '512 A' hoists provided did not give proper protection to Mr. Sanatass, and in addition, the '512 A's' were not the proper equipment for the task of hoisting the weight of the unit he described (1,500-2,500 pounds) since they only had a capacity to lift 500 pounds each, or 1000 pounds in total as per the manufacturer's data)." (358)

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section is to protect workers by placing the 'ultimate responsibility' for worksite safety on the owner and general contractor, instead of the workers themselves. Thus, *section 240(1) imposes absolute liability on owners*, contractors and their agents *for any breach of the statutory duty which has proximately caused injury. The duty imposed is 'nondelegable and * * * an owner is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control'*. We have noted 'that section 240(1) is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed'.

*****

Section 240(1) of the Labor Law, like section 241(6), provides that the statutory duty is nondelegable. It does not require that the owner exercise supervision or control over the worksite before liability attaches. Although sections 240 and 241 had been construed before the 1969 amendment as requiring that an owner or general contractor actually exercise control or supervision before either could be held responsible, when the Legislature amended the Labor Law, as we noted in *Haimes*, it referred to both sections and stated its purpose in redrafting them was to fix 'ultimate responsibility for safety practices * * * where such responsibility actually belongs, on the owner and general contractor'. Thus, the reasoning adopted in *Celestine* is controlling here. *Liability rests upon the fact of ownership and whether Eastern had contracted for the work or benefitted from it are legally irrelevant*.

*****

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> Given the history of section 240 and our affirmance in *Celestine*, we hold that when the Legislature imposed the duties of section 240(1) on '[a]ll * * * owners' it intended to include owners in fee even though the property might be leased to another. (emphasis added in all instances)

Crystal clear from this Court's holding in *Gordon* is that owners' liability is absolute when there is a violation of § 240(1) that proximately causes injury to a worker and that owners' liability under the section is nondelegable. The Appellate Division's holding thus not only pulls the teeth from the *Gordon* decision, but also effectively guts the purpose of the Labor Law -- to protect disadvantaged workers.

B. On this Record, There Was a Sufficient Nexus Between the Defendant and Mr. Sanatass to Impose Liability Under Labor Law § 240(1)

Until July 2004 this Court enunciated a bright-line rule with regard to ownership of property and liability under Labor Law § 240(1): quite simply, an owner could not escape liability under the section by claiming it was an "out of possession" owner, or that it simply owned the fee. The rule had its genesis in *Celestine v. City of New York*, 86 A.D.2d 592 (2d Dep't 1982), *aff'd "for reasons stated in the memorandum at the Appellate Division,"* 59 N.Y.2d 938 (1983), which held that "[l]iability

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arises out of the duties referred to in section 241 and may not be escaped by delegation."

Ten years later this Court revisited the issue in *Gordon v. Eastern Railway Supply, Inc.*, 82 N.Y.2d 555 (1993) and extended the rule to cases arising under § 240(1), holding "[s]ection 240(1) of the Labor Law, like section 241(6), provides that the statutory duty is nondelegable. It does not require that the owner exercise supervision or control over the worksite before liability attaches...Liability rests upon the fact of ownership and whether [the owner] had contracted for the work or benefited from it are legally irrelevant." *Gordon*, 82 N.Y.2d at 560.

If any doubt existed that ownership of the fee gives rise to liability under § 240(1) irrespective of control, this Court reiterated the rule four years later in *Coleman v. City of New York*, 91 N.Y.2d 821, 822-3 (1997):

> In *Gordon v. Eastern Ry. Supply*,...the owner of the property argued that it was not liable because it leased the property...Relying on our earlier decision in *Celestine v. City of New York*...we articulated the bright line rule that 'when the Legislature imposed the duties of section 240(1) on '[a]ll***owners' it intended to include owners in fee even though the property might be leased to another'.
>
> Appellants urge that though technically an 'owner,' the City lacked any ability to protect

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> Authority employees working on the transit system because of the statutory scheme creating the Authority and establishing appellants' lessor-lessee relationship. Appellants claim that they therefore should not fall within the meaning of 'owner' as expressed by Labor Law § 240(1).
>
> The Legislature has, in the past, carved out exceptions from liability for certain owners but it has not created a similar exception for the City. We therefore decline to exempt the City – which is in fact the owner – from the plain word and reach of the statute, leaving that for the Legislature if it so chooses. [citations omitted]

Abbatiello v. Lancaster Studio Associates, 3 N.Y.3d 46 (2004) changed the landscape. In *Abbatiello* this Court refused to impose liability on a premises owner who (i) had no knowledge of the work; *and* (ii) would have been "powerless" to choose a different contractor if it had known about the work. Indeed, this Court further noted that "but for Public Service Law § 228, plaintiff would be a trespasser…and [the owner] would neither owe a duty to plaintiff nor incur liability." Nevertheless, this Court continued to recognize that where there is "some nexus between the [out-of-possession] owner and the worker, whether by a lease agreement or grant of an easement, or other property interest[,]" the owner will still be liable under § 240(1). *Abbatiello, supra* at 51.

Ahmed v. Momart Discount Store, Ltd., 31 A.D.3d 307 (1st Dep't 2006) represented yet a further departure from the general rule

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holding owners liable under § 240(1) regardless of control. In *Ahmed*, the First Department apparently ignored the *Abbatiello* requirement that the property owner lack the power to choose a different contractor if it had known about the work. The Court simply found that the work Mr. Ahmed was doing had not been approved by the property owner "before, during or after the work." *Ahmed, supra* at 307.[6] In so holding the First Department cited three cases -- *Mordkofsky v. V.C.V. Development Corp.*, 76 N.Y.2d 573 (1990) (involving a plaintiff not working for hire); *Whelan v. Warwick Valley Civic and Social Club*, 47 N.Y.2d 970 (1979) (involving an unpaid volunteer worker); and *Brown v. Christopher Street Owners Corp.*, 211 A.D.2d 441 (1st Dep't 1995), *aff'd on other grounds*, 87 N.Y.2d 701 (1995) (involving the one and two-family dwelling exception to § 240(1)). None of those cases leads inexorably to the result in *Ahmed*, and essentially ignores more than 25 years of precedent from this Court.

As Justice McGuire correctly noted here, *Abbatiello* is readily distinguishable from this case. Whereas in *Abbatiello* the premises owner was required pursuant to the Public Service Law to provide access to the plaintiff, Consolidated was in no such position here. The Court will also

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6 Noteworthy here is that Justice McGuire's dissent specifically criticizes *Ahmed*, saying it "was incorrectly decided." *Sanatass*, 38 A.D.3d at 335 fn. 2. Justice Sweeny -- who was on both panels and joined in Justice McGuire's dissent here -- apparently agrees.

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recall that *Abbatiello* specifically held that owners -- even simple fee owners -- remain liable under § 240(1) where the plaintiff can show "some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest." *Abbatiello*, 3 N.Y.3d at 51. In *Abbatiello* there was no such nexus between the owner-lessor of the apartment complex and the lessee who called the cable repairman to the premises. Neither the lessee nor the owner hired Mr. Abbatiello's employer; rather, the owner had no choice but to permit Mr. Abbatiello's access as required by the Public Service Law. Again, as Justice McGuire pointed out in his dissenting opinion, in this case there *is* a nexus between the owner-lessor and the plaintiff in this case: a lease between Consolidated and C2 Media, who hired the plaintiff's employer. As Justice McGuire continued:

> At bottom, the *Abbatiello* holding is narrow and its rationale does not apply here. As did the Court of Appeals in *Coleman*, we should 'decline to exempt [Consolidated] – which is in fact the owner – from the plain word and reach of the statute, leaving that for the Legislature if it so chooses. [citations omitted] *Sanatass,* 38 A.D.3d at 334.

Finally, there is a great distinction between the Mr. Abbatiello's status as a "trespasser" but for Public Service Law § 228 and Mr. Sanatass's status here: Mr. Sanatass was hired to work at the defendants' premises;

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Mr. Abbatiello was not. Seizing upon this distinction only three months after this case was decided, Justice Mazzarelli, concurring "upon constraint of recent precedent" in *Morales v. D&A Food Service*, 41 A.D.3d 352 (1st Dep't 2007), wrote (at 41 A.D.3d at 356-8):

> The lack of knowledge or control by the owner has *never* before been a prerequisite for liability under Section 240(1) of the Labor Law. As discussed by the dissent in *Sanatass*, a case with strikingly similar facts, the Court of Appeals clearly rejected a knowledge or control requirement in *Gordon v. Eastern Ry. Supply*, 82 N.Y.2d 555, 606 N.Y.S.2d 127, 626 N.E.2d 912 [1993].
>
> *****
>
> The only departure from this rule has been *Abbatiello v. Lancaster Studio Associates*, 3 N.Y.3d 46, 781 N.Y.S.2d 477, 814 N.E.2d 784 [2004].
>
> *****
>
> Unlike the plaintiff in *Abbatiello*, the plaintiff here was not a trespasser. And, unlike the owner in *Abbatiello*, Santomero, the owner here, was not 'legally 'powerless' to determine what work was performed on the premises' (*Sanatass, supra*, 38 A.D.3d at 334, 833 N.Y.S.2d 12 [2007]). By contrast, Santomero had full control over its building and responsibility for the acts of its tenants.
>
> In choosing the language of Labor Law § 240(1), the Legislature made specific policy determinations. They decided...to enumerate and define 'owners, contractors, and their agents.' They also decided that these parties would be held strictly

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> liable for injuries suffered while workers were engaging in activities covered by the statute…
>
> The holding in this case clearly frustrates the public policy of the State as expressed by the Legislature. To allow [the defendant], the owner of the building where plaintiff was hurt, to contract away his liability flies in the face of settled principles of law. 'An agreement between two private parties, no matter how explicit, cannot change the public policy of this State'.

Each of the arguments advanced by Justice Mazzarelli is appropriate here. Mr. Sanatass was not a trespasser on the defendants' property, nor was the defendant "powerless" to determine what work was performed on its premises. But the Legislature's intent -- to protect workers by placing the ultimate and absolute responsibility for safety practices on the owner and general contractor, *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513 (1991) -- is clearly frustrated when property owners are permitted to circumvent the statute via private contract.

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CONCLUSION

THE DECISION & ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT, SHOULD BE REVERSED ON THE LAW, THE COMPLAINT REINSTATED INSOFAR AS IT ALLEGES VIOLATIONS OF LABOR LAW § 240(1), AND THE MATTER REMANDED TO THE SUPREME COURT, NEW YORK COUNTY FOR FURTHER PROCEEDINGS CONSISTENT HEREWITH

Dated: November 5, 2007

Respectfully submitted,

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