



weeks before the accident occurred.

**Facts and Procedural History**

Since we are reviewing a grant of summary judgment in plaintiff's favor, we state the version of the facts most favorable to defendant that the evidence will support.

Plaintiff was employed in the reconstruction and repair of the Triborough Bridge. His work required him to go up and down wall-like structures known as "forms." A mechanical device called a "man lift" was sometimes available for this purpose, but when it was unavailable employees were expected to climb and to descend by using safety lines affixed to the forms. Employees wore safety harnesses, equipped with lanyards that could be attached to a hook on the safety line. When the lanyard was attached, the safety line would prevent the worker from falling more than a short distance.

With other workers on the Triborough Bridge construction site, plaintiff attended frequent safety talks that included instruction in the use of safety lines. In addition, several weeks before the accident involved in this case, plaintiff's supervisor, Anthony Dellamorte, "caught him" climbing a form without using a safety line. (Dellamorte remembered this incident as "a month and a half" before the accident; plaintiff thought it was "less than a month" before.) Dellamorte explained to plaintiff the need to attach his lanyard to the safety line when climbing, and plaintiff, for the time being, complied.

On the day of the accident, plaintiff was working inside the upper part of a form, applying grease from a bucket to certain rods. He ran out of grease, went down to the ground to refill his bucket, and started to climb up again. The man lift was in use elsewhere, but plaintiff could readily have used a safety line to climb; such a line was attached to the side of the form where plaintiff climbed, some 10 feet away. Near the safety line were horizontal ribs in the structure on which plaintiff could have rested his grease bucket as he went up.

Plaintiff chose not to use a safety line. Instead, he used a "position hook" on his safety harness; this hook was designed not for use in climbing, but to hold plaintiff stationary while he worked. His procedure was to connect the position hook to the form; put his grease bucket on a nearby ledge; climb to the next cross beam; remove the position hook and reinsert it at a higher point; move the grease bucket up a level; and repeat the process. He fell while climbing, from a height of approximately 10 to 15 feet, and was injured.

Plaintiff sued defendant, the owner of the Triborough Bridge, on several theories, including an alleged violation of Labor Law § 240(1). Supreme Court granted summary judgment for plaintiff on the § 240(1) claim, rejecting the argument that plaintiff was a "recalcitrant worker." The Appellate Division, with one judge dissenting, affirmed, holding that "the recalcitrant worker defense is not applicable" because defendant

did not show that plaintiff had "'disobeyed an immediate instruction to use a harness or other actually available safety device'" (quoting Sanango v 200 E. 16th St. Hous. Corp., 290 AD2d 228 [1st Dept 2002]) (emphasis added). The Appellate Division granted leave to appeal on a certified question. We now reverse.

### **Discussion**

\_\_\_\_\_ Labor Law § 240(1) provides in relevant part:

"All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance 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."

As we explained in Blake v Neighborhood Hous. Servs. of New York City, Inc. (1 NY3d 280 [2003]), this section creates a liability that is strict, or absolute, in two senses: the duty it imposes is non-delegable, and thus contractors and owners are liable under the statute whether or not they supervise or control the work; and where an accident is caused by a violation of the statute, the plaintiff's own negligence does not furnish a defense. It is still necessary, however, for the plaintiff to show that the statute was violated and that the violation proximately caused his injury. As we held in Blake, where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability.

Cases upholding the so-called "recalcitrant worker" defense exemplify this rule. The Appellate Division held in Smith v Hooker Chems. & Plastics Corp. (89 AD2d 361, 365 [4th Dept 1982][Simons, J.]) that an owner who has provided safety devices is not liable for failing to "insist that a recalcitrant worker use the devices." Later cases make clear our approval of this holding (see Stolt v General Foods Corp., 81 NY2d 918 [1993]; Hagins v State of New York, 81 NY2d 921 [1993]).

The word "recalcitrant" fits plaintiff in this case well. He received specific instructions to use a safety line while climbing, and chose to disregard those instructions. He was not the less recalcitrant because there was a lapse of weeks between the instructions and his disobedience of them. The controlling question, however, is not whether plaintiff was "recalcitrant," but whether a jury could have found that his own conduct, rather than any violation of Labor Law § 240(1), was the sole proximate cause of his accident. We noted in Blake that "(e)ven when a worker is not 'recalcitrant' . . . there can be no liability under § 240(1) when there is no violation and the worker's actions (here, his negligence) are the 'sole proximate cause' of the accident" (1 NY3d at 290).

Here, a jury could have found that plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made

that choice he would not have been injured. Those factual findings would lead to the conclusion that defendant has no liability under Labor Law § 240(1), and therefore summary judgment should not have been granted in plaintiff's favor.

Accordingly, the order of the Appellate Division should be reversed with costs, plaintiff's motion for summary judgment denied, and the certified question answered in the negative.

\* \* \* \* \*

Order reversed, with costs, plaintiff's motion for summary judgment denied and certified question answered in the negative. Opinion by Judge R.S. Smith. Chief Judge Kaye and Judges G.B. Smith, Ciparick, Rosenblatt, Graffeo and Read concur.

Decided December 21, 2004