NEW YORK APPELLATE DIGEST, LLC

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The First Department determined plaintiff’s motion for summary judgment in this Labor Law 240 (1) ladder-fall action was properly denied as against the alleged general contractor, Edler. There was a question of fact whether Edler was a general contractor and whether Edler had the authority to supervise safety conditions:

To be found a “general contractor” for purposes of establishing liability pursuant to Labor Law § 240(1), plaintiffs must show that Edler had the ability to control the activity bringing about the injury and the authority to correct unsafe conditions … . Here, plaintiffs failed to establish, as a matter of law, that Edler had the ability to control [plaintiff’s employer’s] work at the premises or stop the work. The record reflects that although Edler was hired to “supervise” the project, Edler did not hire, retain or pay any of the contractors working at the premises … . Moreover, the homeowner testified that he “assume[d]” that Edler had safety responsibilities and that it was his understanding that Edler had the authority to stop work on the job site if an unsafe condition arose. However, Edler’s principal denies that he had the authority to stop the work at the premises, and the agreement between Edler and the homeowner does not specifically confer upon Edler the authority to stop the work if an unsafe condition was observed … . Rather, it provides that part of Edler’s “site supervision” responsibilities included supervising “day to day operations” of the site and trade. An issue of fact remains as to whether this includes supervision of the safety conditions. Uzeyiroglu v Edler Estate Care Inc., 2019 NY Slip Op 03285, First Dept 4-30-19

PLAINTIFF DID NOT SUBMIT EVIDENCE SUFFICIENT TO PIERCE THE CORPORATE VEIL AND HOLD A MEMBER OF DEFENDANT LLC PERSONALLY LIABLE, PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT AGAINST THE LLC MEMBER PERSONALLY SHOULD HAVE BEEN DENIED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the motion for summary judgment in this construction accident case against a member of defendant LLC should not have been granted. The motion papers did not support piercing the corporate veil to reach the LLC member (Albaliya) personally:
As a limited liability company, Nadlan is a separate legal entity from its members (see Limited Liability Company Law § 609). “A member of a limited liability company cannot be held liable for the company’s obligations by virtue of his [or her] status as a member thereof” … .

“However, a party may seek to hold a member of an LLC individually liable despite this statutory proscription by application of the doctrine of piercing the corporate veil” … . “Generally, . . . piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff’s injury” … . Singh v Nadlan, LLC, 2019 NY Slip Op 03100, Second Dept 4-24-19

**ALTHOUGH CLAIMANT WAS INJURED WHEN METAL POLES BEING HOISTED BY A CRANE SLIPPED OUT OF A CHOKER AND STRUCK HIM, CLAIMANT DID NOT SUBMIT EXPERT OPINION EVIDENCE RE: THE CAUSE AND DID NOT ELIMINATE QUESTIONS OF FACT RE: WHETHER HIS CONDUCT IN SECURING THE POLES WAS THE SOLE PROXIMATE CAUSE, CLAIMANT’S MOTION FOR SUMMARY JUDGMENT IN THIS LABOR LAW 240 (1) ACTION PROPERLY DENIED (SECOND DEPT).**

The Second Department determined claimant was not entitled to summary judgment on his Labor Law 240 (1) cause of action. Claimant had secured metal posts with a choker. When the posts were lifted by a crane, they slipped out of the choker and struck claimant, cause traumatic brain injury. Claimant did not submit any expert opinion evidence. Defendant alleged claimant’s conduct was the sole proximate cause of the accident:

To prevail on a motion for summary judgment in a Labor Law § 240(1) “falling object” case, the claimant 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 …. Labor Law § 240(1) “does not automatically apply simply because an object fell and injured a worker; [a] plaintiff must show that the object fell . . . because of the absence or inadequacy of a safety device of the kind enumerated in the statute” … .

Here, the claimants failed to establish their prima facie entitlement to judgment as a matter of law. The evidence submitted by the claimants was insufficient to establish that the posts fell due to the absence or inadequacy of an enumerated safety device, and the claimants further failed to eliminate all triable issues of fact as to whether
the claimant’s conduct was the sole proximate cause of the accident … . Houston v State of New York, 2019 NY Slip Op 03032, Second Dept 4-24-19

PLAINTIFF WAS ENGAGED IN ROUTINE MAINTENANCE, NOT REPAIR, WHEN HE FELL FROM AN ELEVATED FORKLIFT, DEFENDANT’S MOTION FOR SUMMARY JUDGMENT IN THIS LABOR LAW 240 (1) ACTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff injured engaging in routine maintenance of an HVAC unit, not repair. Therefore defendant’s motion for summary judgment in this Labor Law 240 (1) action should have been granted. Plaintiff fell from a forklift which was used to lift him up to HVAC unit in the ceiling:

“In determining whether a particular activity constitutes repairing,’ courts are careful to distinguish between repairs and routine maintenance, the latter falling outside the scope of section 240(1)” … . “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”” … .

At his deposition, the plaintiff testified that before the accident occurred, he determined that a belt was missing from the heating unit. Then, according to the plaintiff, while he was in the process of lowering a panel to see whether the pilot light to the heating unit was on or off, he slipped and fell. The plaintiff testified that, based on his experience, there was nothing extraordinary or unusual about a belt needing to be replaced or a pilot light going out on a heating unit. … [The] evidence showed that the plaintiff’s work “involved replacing components that require replacement in the course of normal wear and tear” and did not constitute “repairing” or any other enumerated activity … . Dahlia v S&K Distrib., LLC, 2019 NY Slip Op 03023, Second Dept 4-24-19
FALL FROM A LADDER WHICH WAS NOT SECURED, AND WHICH SHOOK AND THEN KICKED OUT FROM UNDER PLAINTIFF, ENTITLED PLAINTIFF TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff’s motion for summary judgment on his Labor Law 240 (1) cause of action in this ladder-fall case should have been granted:

“Although [a] fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240(1),’ liability will be imposed when the evidence shows that the subject ladder was . . . inadequately secured and that . . . the failure to secure the ladder was a substantial factor in causing the plaintiff’s injuries’” . . . Here, the plaintiff established, prima facie, that Labor Law § 240(1) was violated and that the violation was a proximate cause of his injuries . . . Through his deposition testimony, the plaintiff demonstrated his prima facie entitlement to judgment as a matter of law on the issue of liability under that statute when he testified that a carpentry foreman directed him to retrieve the subject ladder, which the plaintiff ascended without a spotter, and which shifted and shook before the bottom “kicked out,” causing him to fall . . . DeSerio v City of New York, 2019 NY Slip Op 02679, Second Dept 4-10-19

PLAINTIFF WAS NOT ABLE TO DEMONSTRATE DEFENDANTS-HOMEOWNERS DIRECTED HIM TO REMOVE HIS BOOTS WHILE WORKING, PLAINTIFF SLIPPED AND FELL ON STAIRS BECAUSE HE WAS WEARING ONLY SOCKS, DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 200 CAUSE OF ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendants-homeowners’ motion for summary judgment should have been granted in this Labor Law 200 action. Someone told plaintiff to take off his boots while working in the home and he slipped and fell on the stairs. Plaintiff did not demonstrate that it was the defendants who told him to remove his boots:

Plaintiff claims that he was injured after slipping and falling on slippery stairs because he was directed to remove his boots while working. Defendants established prima facie that they did not exercise supervisory control over the means and methods of plaintiff’s work . . . Their principals, the homeowners, testified that they were not home on the day of the accident and that they never asked any workers to remove their boots. In opposition,
plaintiff failed to raise an issue of fact as to whether the man from whom he received the instruction to remove his boots had apparent authority to direct his work … . Plaintiff was unable to identify the man, the man’s employer, or the man’s relationship to the homeowners. Moreover, plaintiff testified that at first he refused to take his boots off. Plaintiff called his supervisor who warned him that if he did not remove his boots he would be fired. As such, plaintiff’s supervisor gave the ultimate direction to remove his boots, which establishes that the employer exercised supervisory control over the injury-producing work.

The record also shows that the stairs were not in a dangerous condition … . Plaintiff himself testified that there were no observable defects on the stairs, that they were not wet, and that they were free of chips and cracks. He admitted that he slipped solely because he was wearing socks with no boots … . Antonio v West 70th Owners Corp., 2019 NY Slip Op 02626, First Dept 4-4-19

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UNLOADING STEEL PLATES USED TO COVER EXCAVATED AREAS AT A CONSTRUCTION SITE WAS A COVERED ACTIVITY UNDER LABOR LAW 240 (1) (FIRST DEPT).

The Second Department determined plaintiff was properly awarded summary judgment on his Labor Law 240 (1) cause of action. Plaintiff was injured unloading a two-ton steel plate used to cover excavated areas at a construction site. The defendant’s argument that the plate was not unloaded for construction work, but rather for storage, was rejected:

Plaintiff made a prima facie showing that the work he was performing as an employee of Clean at the time of his accident was covered under section 240(1). There is no dispute that plaintiff was injured in the course of unloading an approximately two-ton steel plate at a construction site owned by defendant Con Ed, after transporting the plate to the site by truck. Witnesses consistently indicated that Clean routinely unloaded steel plates at the site for the purpose of covering areas excavated for electrical work. Clean performed this work pursuant to a contract that required it to provide steel plates at excavation sites owned by defendant including the subject site, and also required Clean to perform work ancillary to other tasks enumerated under Labor Law § 240(1) such as removing construction-related debris and installing barricades for excavation work … . Moreover, plaintiff performed this work on an active construction site while another worker on the site was building a removable roof for a transformer vault.

Clean failed to raise triable issues of fact as to whether plaintiff’s work was covered by Labor Law § 240(1). It does not avail Clean to assert that plaintiff unloaded the plate merely for the purpose of storage. The Court of Appeals has rejected an interpretation of Labor Law § 240(1) that “would compartmentalize a plaintiff’s activity
THERE WAS CONFLICTING EVIDENCE WHETHER PLAINTIFF, WHO HAD NO MEMORY OF THE ACCIDENT, FELL FROM AN A-FRAME LADDER OR A SCAFFOLD, BOTH WERE DEEMED INADEQUATE SAFETY DEVICES AND PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined that the conflicting evidence, indicating plaintiff either fell from an A-frame ladder or from a scaffold, did not preclude summary judgment in plaintiff’s favor on his Labor Law 240 (1) cause of action. Plaintiff had no memory of the accident. The court reasoned that both the step ladder and the scaffold constituted an inadequate safety device under the circumstances:

As to the “ladder version,” although plaintiff has no specific recollection of the ladder moving, he also testified that, immediately before the fall, he was standing on the second to the last rung up, with his hands over his head toward the duct, which he could barely reach. Such testimony establishes prima facie that the ladder did not provide proper protection for plaintiff . . . . Because the record is clear that the ladder did not prevent him from falling, his inability to identify the precise manner in which he fell is immaterial . . . . As to the “scaffold version,” it is undisputed fact that the scaffold from which plaintiff purportedly fell had no guardrails. This fact establishes prima facie that it was an inadequate safety device . . . . Under either version, defendants have not raised a triable issue of fact as to whether plaintiff’s negligence was the sole proximate cause of his accident . . . . Ajche v Park Ave. Plaza Owner, LLC, 2019 NY Slip Op 02456, First Dept 4-2-19
DEFENDANT WAS NOT AN ALTER EGO OF PLAINTIFF’S EMPLOYER, PLAINTIFF WAS NOT DEFENDANT’S SPECIAL EMPLOYEE, PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION BASED UPON THE ALLEGATION THE LADDER MOVED FOR NO APPARENT REASON, NOTWITHSTANDING EVIDENCE PLAINTIFF MAY HAVE SAID HE PLACED THE LADDER ON A DROP CLOTH (SECOND DEPT).

The Second Department, modifying Supreme Court, determined defendant’s affirmative defenses alleging it was an alter ego of plaintiff’s employer and plaintiff was its special employee, thereby insulating defendant from anything other than liability under the Workers’ Compensation Law, should have been dismissed. Summary judgment was properly awarded to plaintiff on his Labor Law 240 (1) cause of action. Plaintiff alleged the ladder he was on moved for no apparent reason. The fact that plaintiff apparently told a co-worker that he set the ladder on a drop cloth merely raised a question of his contributory negligence, which is not a defense to a Labor Law 240 (1) action:

“Labor Law § 240(1) imposes a nondelegable duty upon owners and general contractors to provide safety devices to protect workers from elevation-related risks” … . The sole proximate cause defense applies where the plaintiff, acting as a “recalcitrant worker,” misused an otherwise proper safety device, chose to use an inadequate safety device when proper devices were readily available, or failed to use any device when proper devices were available …. Contributory negligence on the part of the worker is not a defense to a Labor Law § 240(1) cause of action … .

Here, the plaintiff made a prima facie showing of entitlement to … judgment as a matter of law on the issue of liability on the Labor Law § 240(1) cause of action, by submitting evidence that the ladder on which he was standing moved for no apparent reason, causing him to fall … . In opposition to the plaintiff’s prima facie showing, the defendant failed to raise a triable issue of fact as to whether the plaintiff’s own acts or omissions were the sole proximate cause of his injuries …. Contrary to the defendant’s contention, the deposition testimony of the plaintiff’s coworker implying that, after the accident, the plaintiff might have told the coworker that the plaintiff had set the ladder up on top of a drop cloth, even if true, would render the plaintiff only contributiorily negligent, a defense not available under Labor Law § 240(1) … . Salinas v 64 Jefferson Apts., LLC, 2019 NY Slip Op 02370, Second Dept 3-27-19
DEFECTIVE A-FRAME LADDER ENTITLED PLAINTIFF TO SUMMARY JUDGMENT IN THIS LABOR LAW 240 (1) ACTION, STATEMENTS IN MEDICAL RECORDS WERE INADMISSIBLE HEARSAY (SECOND DEPT).

The Second Department determined plaintiff was entitled to summary judgment in this Labor Law 240 (1) action. Plaintiff fell from an A-frame ladder which had a defective locking mechanism. The court noted that the evidence in the medical records did not raise a question of fact because the statements in the records were not admissible. The hearsay statements were not attributable to the plaintiff and had nothing to do with treatment:

The plaintiff’s deposition testimony established, prima facie, that the defendant, as the general contractor, violated Labor Law § 240(1) by providing a ladder with a defective lock, which caused the ladder to collapse and the plaintiff to fall to the ground … .

… [T]he notations in the hospital records upon which the defendant relies were not attributed to the plaintiff. As the defendant failed to offer evidence sufficiently connecting the plaintiff to the statements in the hospital records, the party admission exception to the hearsay rule does not apply … . Moreover, none of the notations were germane to the plaintiff’s diagnosis or treatment and, at trial, would not be admissible for their truth under the business records exception to the hearsay rule (see CPLR 4518 … ). While hearsay statements may be used to oppose motions for summary judgment, they cannot, as here, be the only evidence submitted to raise a triable issue of fact … .


PLAINTIFF WAS INJURED WORKING ON AN HVAC SYSTEM, THE WORK WAS ROUTINE MAINTENANCE, NOT COVERED BY LABOR LAW 241 (1) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff’s work on an HVAC system was routine maintenance, not covered by Labor Law 241 (6):

The plaintiff allegedly injured his back when he was performing a seasonal “start-up” of a cooling tower on the defendant’s HVAC system, which consisted of transitioning the HVAC system from heating to cooling. The company the defendant was employed by had done this work on a yearly basis for the past 10 years. As part of the work, the plaintiff and his coworker needed to reinstall a circulation pump on the HVAC tower, which had been removed for the winter months. To do so, the plaintiff tied a rope around the circulation pump, which
weighed approximately 100 pounds, passed the rope over the top of an overhead beam, and pulled from the other side to raise the pump about three to five feet off the ground so his coworker could install it in the cooling tower. The plaintiff held the pump in the air for about 20 or 25 minutes while his coworker attempted to install it, but felt pain in his back and was unable to hold it any longer. The plaintiff allegedly needed back surgery as a result of the incident. …

Although maintenance work performed in connection with construction, demolition, or excavation work is included under Labor Law § 241(6), “[r]outine maintenance is not within the ambit of Labor Law § 241(6)” … . The Labor Law “does not cover routine maintenance in a nonconstruction, nonrenovation context” … . Byrnes v Nursing Sisters of the Sick Poor, Inc., 2019 NY Slip Op 01736, Second Dept 3-13-19

THAT THE LADDER WAS NOT DEFECTIVE DID NOT MATTER, THE LADDER WAS NOT AN ADEQUATE SAFETY DEVICE UNDER THE CIRCUMSTANCES AND THE LADDER WAS NOT ADEQUATELY SECURED, PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION PROPERLY GRANTED (FIRST DEPT).

The First Department determined plaintiff’s motion for summary judgment on his Labor Law 240 (1) cause of action was properly granted. The ladder was deemed an inadequate safety device because plaintiff had to step off the ladder onto display cases to do his work. The fact that the ladder was not defective was not dispositive because the ladder was not secured:

Plaintiff, who fell from a ladder while installing light fixtures in [the] building, was forced to install a portion of the light by standing on display cases approximately 20 feet high, and then returning to the top of the ladder to finish that portion of the installation, which was located partially over the cases. While attempting to maneuver himself into position on the ladder, he lost his balance and fell. Whether the ladder shook prior to his fall or during that period in time when he was attempting to recover his balance is of no moment, since the ladder was an inadequate safety device for the work being performed … . The claim … that plaintiff was the sole proximate cause of his accident is unpersuasive, since plaintiff’s stance was necessary to perform the work … . It also does not avail defendants that the ladder was not defective, since it is undisputed that the ladder was unsecured, and the worker who had been holding the ladder walked away only minutes before the accident … . Nieto v CLDN NY LLC, 2019 NY Slip Op 01537, First Dept 3-5-19
The First Department determined plaintiff was not engaged in work covered by Labor Law 240 (1) when he fell from a ladder:

Although plaintiff injured his elbow when the ladder he was using in defendant’s building fell over, he is not entitled to relief under Labor Law § 240(1) since he was not engaged in construction-related activity at the time of his accident … . Plaintiff’s actions of opening a splice box affixed to the wall and splicing telephone wires therein while on a service call for a customer of his employer did not constitute an alteration of the building, but rather routine maintenance … . Spencer v 322 Partners, L.L.C., 2019 NY Slip Op 01523, First Dept 3-5-19

The Third Department determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) claim. Plaintiff’s leg fell through a one foot wide, twelve feet long, gap in the elevated platform he was working on. The fact that plaintiff could have fallen all the way through the gap entitled him to summary judgment. Although there may have been boards to cover the gap nearby, there was no evidence plaintiff was directed to cover the gap with the boards:

The opening presented an elevation-related risk, rather than a usual and ordinary danger of working on a construction site, because it was of sufficient size that claimant could have fallen entirely through to a lower level; therefore, Labor Law § 240 (1) applies to this accident because it was caused by a failure of the suspended metal deck — which was functioning as a scaffold — to provide adequate protection, even though claimant did not fall entirely through the opening … . …

… [T]here is no evidence in the record that claimant received any instruction or directive that would establish that he knew that he was responsible for either covering any openings, or requesting that they be covered by coworkers, before beginning work (see id.). Accordingly, we conclude that the Court of Claims properly
QUESTION OF FACT WHETHER STOCKING SHELVES WAS PART OF A LARGER RENOVATION PROJECT AND THEREFORE A COVERED ACTIVITY UNDER LABOR LAW 240 (1) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that defendant’s motion for summary judgment in this Labor Law 240 (1) action should have been denied. Plaintiff was stocking shelves when he fell 20 feet. There was a question of fact whether stocking shelves was part of the larger renovation project and therefore covered under Labor Law 240 (1):

… [T]he warehouse defendants’ submissions failed to demonstrate, as a matter of law, that the plaintiff’s activity in stocking shelves was not performed as part of the larger renovation project that he had been hired to complete on the premises, including assembly of the shelving structures and other tasks attendant to preparing the warehouse to receive … stock merchandise … . Bonilla-Reyes v Ribellino, 2019 NY Slip Op 01193, Second Dept 2-20-19

PLAINTIFF, WHO WAS HIRED TO MONITOR ASBESTOS LEVELS AT THE WORK SITE, AND WHO FELL AT THE SITE, WAS ENGAGED IN AN ACTIVITY COVERED BY THE LABOR LAW (SECOND DEPT).

The Second Department determined defendant’s motion for summary judgment on the Labor Law 240 (1) and 200 causes of action should not have been granted. Plaintiff was hired to test the air for asbestos at the construction site. He fell when he stepped on a milk crate which was allegedly used by workers to access a scaffold. The court noted that the type of inspection work done by the plaintiff was covered by the Labor Law:

Whether inspection work falls within the purview of Labor Law §§ 240(1) and 241(6) “must be determined on a case-by-case basis, depending on the context of the work” … . Here, the plaintiff, an environmental technician tasked with ensuring that asbestos was properly removed from the school, was a “covered” person under Labor
La §§ 240(1) and 241(6) because “his inspections were essential, ongoing, and more than mere observation” … . Channer v ABAX Inc., 2019 NY Slip Op 01053, Second Dept 2-13-19

INJURY FROM A FALLING BLOCK AND CHAIN USED TO REPLACE A ROLL UP DOOR WAS COVERED UNDER LABOR LAW 240 (1) BUT NOT UNDER LABOR LAW 241 (6) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant was entitled to summary judgment on his Labor Law 240 (1) cause of action, but defendant was entitled to summary judgment on the Labor Law 241 (6) cause of action. “The plaintiff allege[d] that he was injured … when a differential block and chain fell onto his head as he and his coworkers were preparing a hoisting apparatus to remove and replace a broken roll-up gate on the defendants’ premises:”

“[T]he statutory requirement that workers be provided with proper protection extends not only to the hazards of building materials falling,’ but to the hazards of defective parts of safety devices falling from an elevated level to the ground” … . Here, the defendants are liable whether the plaintiff’s coworker accidently dropped the differential while preparing to use the hoisting apparatus to remove the old roll-up gate, or the differential fell because it was inadequately secured … .

However, unlike Labor Law § 240, which includes repair work, Labor Law § 241(6) is limited to those areas in which construction, excavation, or demolition work is being performed (compare Labor Law § 240[1], with Labor Law § 241[6]). In this case, Labor Law § 241(6) is inapplicable because the plaintiff was not performing work in the context of construction, demolition, or excavation … . Barrios v 19-19 24th Ave. Co., LLC, 2019 NY Slip Op 01046, Second Dept 2-13-19
PLAINTIFF SLIPPED AND FELL ON ICE INSIDE THE BUILDING SHE WAS WORKING IN, THE JURY COULD RATIONALLY CONCLUDE THE ICE WAS THE RESULT OF NEGLIGENCE ON THE PART OF SOMEONE INVOLVED IN THE CONSTRUCTION PROJECT, THE MOTION TO SET ASIDE THE VERDICT AS BASED ON LEGALLY INSUFFICIENT EVIDENCE IN THIS LABOR LAW 241 (6) ACTION WAS PROPERLY DENIED (SECOND DEPT).

The Second Department determined defendant’s motion to set aside the verdict as based on legally insufficient evidence was properly denied in this Labor Law 241 (6) action. Plaintiff’s job was removing asbestos from a building. After getting out of her asbestos suit in the decontamination room and walking in the interior of the building she slipped and fell on ice. The Second Department held that the jury could have rationally concluded someone participating in the construction project was negligent:

We agree with the Supreme Court’s determination denying that branch of the defendant’s motion pursuant to CPLR 4404(a) which was to set aside the jury verdict as based on legally insufficient evidence and for judgment as a matter of law. There was a valid line of reasoning and permissible inferences which could have led a rational jury to conclude that the negligence of some party to, or participant in, the construction project caused the plaintiff’s injuries … . The jury could have credited the plaintiff’s trial testimony that she slipped on a large patch of ice on the floor of a building that did not have heating on a cold January day, and therefore, rationally conclude that “someone within the chain of the construction project was negligent in not exercising reasonable care, or acting within a reasonable time, to prevent or remediate the hazard, and that plaintiff’s slipping, falling and subsequent injury proximately resulted from such negligence” … . Bocanegra v Chest Realty Corp., 2019 NY Slip Op 01048, Second Dept 2-13-19

CLASSIFICATION OF THE PROPERTY AS COMMERCIAL IN TAX FILINGS DID NOT PRECLUDE THE APPLICABILITY OF THE ONE-OR-TWO-FAMILY HOME EXEMPTION TO LABOR LAW 240 (1) (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined that defendant’s (Artifact’s) motion for summary judgment on the Labor Law 240 (1) cause of action should have been granted. The one-or-two-family home exemption applied, even though the property was classified as commercial in tax filings:
Contrary to plaintiff’s contention, Artifact’s classification of the property as commercial in certain tax filings does not estop it from relying upon the exemption in this action … . The Internal Revenue Code’s definition of a residential property is considerably narrower than the scope of the one- or two-family home exemption to liability under section 240 (1) … , and, as such, Artifact’s tax declarations are not ” logically incompatible’ ” with its current reliance upon that exemption … . Wood v Artifact Props., LLC, 2019 NY Slip Op 01030, Fourth Dept 2-8-19

PLAINTIFF, WHO WAS SWEEPING THE FLOOR WHEN HE WAS STRUCK BY BY A PIECE OF A SKIDLOADER USED TO HOIST A MOTOR, WAS NOT ENGAGED IN AN ACTIVITY COVERED BY LABOR LAW 240 (1), 241 (6) OR COMMON LAW NEGLIGENCE (SECOND DEPT).

The Second Department determined that plaintiff’s Labor Law 240 (1), 241 (6) and common law negligence causes of action were properly dismissed. Plaintiff was sweeping the floor at an auto wrecking ship when “a piece of a skidloader being used to hoist a car engine broke and fell onto him:”

Labor Law § 240(1) is applicable to “the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.” The dismantling of a vehicle unrelated to a building or a structure is not a protected activity under that statute … . Further, the sweeping being performed by the plaintiff at the time of the accident cannot be characterized as “cleaning” within the meaning of the statute, as it was the type of routine maintenance that occurs in any type of premises, did not require specialized tools, and could be accomplished “using tools commonly found in a domestic setting”… . Thus, the defendant established its prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 240(1) cause of action. In opposition, the plaintiff failed to raise a triable issue of fact.

Labor Law § 241(6) only provides protection “to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed”… . The plaintiff was not engaged in construction or excavation at the time of the accident, and the “the mere act of dismantling a vehicle, whether a boat, a car or otherwise, unrelated to any other project, is not the sort of demolition intended to be covered by Labor Law § 241 (6)” … . Thus, the defendant established its prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 241(6) cause of action. In opposition, the plaintiff failed to raise a triable issue of fact.
The defendant also established its prima facie entitlement to judgment as a matter of law dismissing the common-law negligence cause of action. The defendant’s submissions demonstrated, prima facie, that the defendant did not supervise or control the work, and the injury-causing defect was the result of the methods being used by Jet to remove and transport a car engine … . Guevarra v Wreckers Realty, LLC, 2019 NY Slip Op 00859, Second Dept 2-6-19

PLAINTIFF WAS STRUCK BY A PIECE OF UNSECURED PLYWOOD WHICH FELL, PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff’s motion for summary judgment on his Labor Law 240 (1) cause of action should have been granted. Plaintiff was struck a a piece of plywood after the supporting vertical post was removed:

Labor Law § 240(1) imposes upon owners, general contractors, and their agents a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites …. To prevail on a motion for summary judgment in a Labor Law § 240(1) “falling object” case, 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 …. Labor Law § 240(1) does not automatically apply simply because an object fell and injured a worker; a plaintiff must show that the object fell because of the absence or inadequacy of a safety device of the kind enumerated in the statute … .

Here, the plaintiff established his prima facie entitlement to judgment as a matter of law through the submission of his deposition testimony and the affidavit of a coworker who witnessed the accident. These submissions established that the plaintiff was hit by an unsecured [*2]four-by-eight-foot plywood sheet that fell from the first floor ceiling onto the plaintiff as he was walking underneath … . Passos v Noble Constr. Group, LLC, 2019 NY Slip Op 00893, Second Dept 2-6-19
EXPERT TESTIMONY PROPERLY PRECLUDED BECAUSE OF LATE NOTICE, NEW TRIAL REQUIRED BECAUSE JURY WAS NOT INSTRUCTED ON MITIGATION OF DAMAGES (FOURTH DEPT).

The Fourth Department determined defendants in this Labor Law 240 (1) action were properly precluded from offering expert testimony because of late notice. The Fourth Department further determined that the jury should have been instructed on mitigation of damages, requiring a new trial:

… [T]he court determined that there was a willful failure to disclose because, prior to jury selection, defendants’ attorneys knew that they intended to present testimony from the psychiatric expert, but they did not disclose the expert until the day after jury selection began, which violated the court’s directive that defendants disclose an expert as soon as they knew of said expert. Although the record establishes that plaintiff was aware of the possibility that defendants would call an expert psychiatrist, he was prejudiced by the tardiness of the disclosure both because it impaired his ability to discuss the relevant issues during jury selection and because it hamstrung his opportunity to retain an expert psychiatrist of his own. Thus, based on the evidence in the record supporting the court’s determination that defendants had engaged in purposeful gamesmanship by withholding the information, and the resulting prejudice to plaintiff, we conclude that the court did not abuse its discretion in precluding the proposed expert testimony … .

We agree with defendants that the court erred in failing to instruct the jury on mitigation of damages insofar as it applied to past and future lost wages… . Here, plaintiff’s physicians unanimously agreed that he was capable of working in a light duty or sedentary setting and, although he did obtain work shortly after being advised by a doctor to seek job training, there is a question, under the circumstances, of whether the part-time job that he took was a reasonable mitigation of his damages. Flowers v Harborcenter Dev., LLC, 2019 NY Slip Op 00749, Fourth Dept 2-1-19
DEFENDANT, AN OUT OF POSSESSION LESSEE OF THE PROPERTY WHERE PLAINTIFF WAS INJURED, WAS NOT AN OWNER WITHIN THE MEANING OF LABOR LAW 240 (1) AND 241 (6), DEFENDANT’S MOTION FOR SUMMARY JUDGMENT DISMISSING THOSE CAUSES OF ACTION WAS PROPERLY GRANTED (FOURTH DEPT).

The Fourth Department determined defendant demonstrated it was not an owner of the property where plaintiff was injured and therefore was entitled to summary judgment dismissing the Labor Law 240 (1) and 241 (6) causes of action. Defendant had leased the property from the state and then subleased the property to a non-party (EDGE). EDGE hired Jersen, the construction company for which the injured plaintiff worked:

It is well established that, for purposes of Labor Law §§ 240 (1) and 241 (6) liability, “the term owner’ is not limited to the titleholder of the property where the accident occurred and encompasses a [party] who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for [its] benefit’ “…. ” [The owner] is the party who, as a practical matter, has the right to hire or fire subcontractors and to insist that proper safety practices are followed’ “…. Thus, “[t]he key factor in determining whether a non-titleholder is an owner’ is the right to insist that proper safety practices were followed and it is the right to control the work that is significant, not the actual exercise or nonexercise of control’ ” … . …

In his affidavit, Jersen’s project manager averred that defendant was neither a party to nor involved with the negotiation of the construction contract between EDGE and Jersen; the project manager never saw any employees or representatives of defendant on site during the project; Jersen employees were not permitted to take orders from anyone other than an authorized Jersen representative; and defendant had no authority or control over Jersen employees working on the project. Those averments are consistent with the construction contract, which defined EDGE as the “[o]wner” and Jersen as the “[c]ontractor,” and provided that Jersen, as the “[c]ontractor,” was solely responsible for instituting and supervising all safety precautions and protections. Contrary to plaintiffs’ contention, the mere fact that the sublease between defendant and EDGE required defendant’s approval of the plans and specifications for the project work does not raise a material issue of fact where, as here, defendant did not contract to have the project work performed and the sublease “did not vest [defendant] with authority to determine which contractors to hire, . . . control the [project] work or . . . insist that proper safety practices [be] followed’ ” … . Ritter v Fort Schuyler Mgt. Corp., 2019 NY Slip Op 00769, Fourth Dept 2-1-19
REMOVING ICE AND SNOW FROM THE ROOF OF A COMMERCIAL BUILDING IS COVERED UNDER LABOR LAW 240 (1), IT DOESN’T MATTER WHETHER PLAINTIFF WAS INJURED FROM THE FALL FROM THE BUCKET OF THE BACKHOE OR FROM BEING STRUCK BY THE BACKHOE (WHICH WAS BEING USED TO LIFT PLAINTIFF TO THE ROOF), PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED (FOURTH DEPT).

The Fourth Department determined plaintiff’s motion for summary judgment on his Labor Law 240 (1) cause of action was properly granted. Plaintiff fell from the bucket of a backhoe which was being used to lift him to the roof, where he was to remove snow and ice:

Labor Law § 240 (1) “applies where an employee is engaged in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure’ ” … . We conclude that, contrary to defendant’s contention, the removal of snow and ice from the roof of a commercial building, under these circumstances, constitutes a form of “cleaning,” thereby bringing it within the ambit of Labor Law § 240 (1) … .

We reject defendant’s contention that plaintiff was not injured by an elevation-related risk within the scope of Labor Law § 240 (1). Plaintiff established the necessary elements for liability under section 240 (1) by submitting evidence that he suffered “harm directly flowing from the application of the force of gravity to an object or person”… , and defendant did not raise a question of material fact… .

… [P]laintiff is entitled to summary judgment irrespective of whether his injuries were caused by the fall itself or by being struck by the backhoe in the moments immediately following the fall. “To establish a prima facie case plaintiff need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable; it is sufficient that he demonstrate that the risk of some injury from defendants’ conduct was foreseeable” … . “Thus, a plaintiff merely has to demonstrate that he or she was injured when an elevation-related safety device failed to perform its function to support and secure him from injury”… . Here, the safety equipment provided to plaintiff did not prevent him from falling; thus, the core objective of Labor Law § 240 (1) was not met … . Plaintiff’s injury was a normal and foreseeable consequence of the failure of the safety equipment … . Burns v Marcellus Lanes, Inc., 2019 NY Slip Op 00801, Fourth Dept 2-1-19
PLAINTIFF FELL ABOUT NINE FEET FROM ONE FLOOR TO ANOTHER, PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff fell from one floor to another, a distance of about nine feet:

There is no dispute that plaintiff fell from the seventh floor to the sixth floor of the building on which he was working, a distance of approximately nine feet. Further, it is undisputed that there were no safety harnesses or other safety devices for plaintiff to use. “Thus, the fact that the parties offered different versions of plaintiff’s accident makes no difference with respect to defendants’ liability under Labor Law § 240(1). Under either version, defendants . . . failed to secure an area at a construction site from which a fall could occur, thereby exposing the injured worker to an elevation-related risk” . . .

However, the motion court properly denied the cross motion of defendants/third-party plaintiffs on the Labor Law §§ 241(6), 200, and common-law negligence claims, since there are triable issues of fact as to exactly how, where and why the underlying incident occurred . . . . Cashbamba v 1056 Bedford LLC, 2019 NY Slip Op 00690, Second Dept 1-31-19

ALLEGATION THE LADDER PLAINTIFF WAS USING SHIFTED FOR NO APPARENT REASON ENTITLED PLAINTIFF TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION (SECOND DEPT).

The Second Department determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action based upon the allegation the ladder he was using shifted for no apparent reason:

The plaintiff made a prima facie showing of entitlement to judgment as a matter of law through his deposition testimony, demonstrating that the ladder on which he was working shifted for no apparent reason, causing him to fall . . . . In opposition, the defendants failed to raise a triable issue of fact . . . . Vicuna v Vista Woods, LLC, 2019 NY Slip Op 00635, Second Dept 1-30-19
PLAINTIFF WAS INJURED UNLOADING A TRUCK, HIS MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff’s motion for summary judgment on the Labor Law 240 (1) cause of action should have been granted. Plaintiff was injured when a truck was being unloaded:

A hydraulic lift was being used to lower the flooring materials in pallets, or “skids,” weighing approximately 2,500 to 3,000 pounds, from the bed of the truck to the ground, an elevation of approximately four feet. One of the skids, which had been loaded onto the lift, fell off the lift and struck the plaintiff. …

"Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person” … . The plaintiff’s evidence established, prima facie, that the … defendants violated Labor Law § 240(1) by failing to provide an appropriate safety device to secure the subject materials as they were being lowered, and that this failure was a proximate cause of the plaintiff’s injury … . Ramos-Perez v Evelyn USA, LLC, 2019 NY Slip Op 00629, Second Dept 1-30-19

PLAINTIFF’S DECEDEENT WAS NOT ENGAGED IN CONSTRUCTION WORK COVERED BY LABOR LAW 240 (1) AND 241 (6) WHEN A BRIDGE FORM HE WAS UNLOADING FELL ON HIM, PLAINTIFF MADE A SUFFICIENT SHOWING OF LONG-ARM JURISDICTION TO WARRANT DISCOVERY (THIRD DEPT).

The Third Department determined the Labor Law 240 (1) and 241 (6) causes of action were properly dismissed because plaintiff's decedent was not involved in construction work when a 2500 pound bridge form fell on him. The court further found that plaintiff had made a sufficient showing that long-arm jurisdiction may apply to Spillman, the manufacturer of the bridge form, to allow discovery:

In support of her claimed violations of Labor Law §§ 240 (1) and 241 (6), plaintiff alleged that, at the time that decedent sustained the fatal injuries, he had been unloading a bridge form that had been delivered to the
manufacturing facility operated by LHV so that it could be used in the manufacture and fabrication of construction materials that would be eventually used during unspecified construction at an unspecified construction site. As Supreme Court aptly concluded, these allegations “do not support any contention that the work being done at the time of the incident was, in any manner, an integral part of an ongoing construction contract or was being performed at an ancillary site, incidental to and necessitated by such construction project, where the materials involved were being readied for use in connection with a covered activity,” so as to bring it within the ambit of Labor Law § 240 (1) … . …. 

For the same reasons, plaintiff’s factual allegations did not support a conclusion that decedent's injuries occurred in an “area[] in which construction, excavation or demolition work [was] being performed” (Labor Law § 241 [b]) and, thus, Supreme Court's dismissal of plaintiff's Labor Law § 241 (6) claim was proper … . …. 

Viewing the facts in the light most favorable to plaintiff as the nonmoving party, we agree with Supreme Court that the foregoing provided the “sufficient start” required to warrant further discovery on the issue of whether personal jurisdiction may be properly exercised over Spillman under CPLR 302 (a) (3), while also comporting with federal due process requirements … . Archer-Vail v LHV Precast Inc., 2019 NY Slip Op 00341, Third Dept 1-17-19


The Second Department determined plaintiff’s (Loretta’s) motion for summary judgment in this Labor Law 240 (1) action was properly denied, and the trial court properly denied plaintiff’s motion to set aside the defense verdict. Apparently plaintiff alleged the A-frame latter toppled over when he was attempting to install a pipe. The facts of the case were not discussed, but there were questions of fact whether the ladder was an adequate safety device and, if not, whether the ladder was the proximate cause of the fall:

We agree with the Supreme Court’s determination to deny that branch of the plaintiffs’ motion pursuant to CPLR 4404(a) which was to set aside the verdict and for judgment as a matter of law, as there was a valid line of reasoning and permissible inferences which could have led a rational jury to conclude that the ladder furnished to Loretta was adequate to protect him from the hazards arising from his work. The jury could have credited
Loretta’s deposition and trial testimony that he did not remember if he was twisting the vertical pipe at the time of the accident, as well as the trial testimony of the plaintiff’s engineering expert that, if the ladder did not topple over as Loretta was twisting the vertical pipe, the expert’s opinion that the ladder was an inadequate safety device would be different, to rationally conclude that the plaintiffs did not meet their burden of demonstrating that the ladder was an inadequate safety device. We also agree with the court’s determination to deny that branch of the plaintiffs’ motion which was to set aside the verdict as contrary to the weight of the evidence. A fair interpretation of the evidence could have led the jury to reach its verdict that the ladder was an adequate safety device. Accordingly, we agree with the court’s denial of the plaintiffs’ motion pursuant to CPLR 4404(a) . . . Loretta v Split Dev. Corp., 2019 NY Slip Op 00265, Second Dept 1-16-19

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**PLAINTIFF’S DEPOSITION TESTIMONY INDICATED HIS FALL FROM AN A-FRAME LADDER WAS NOT CAUSED BY A DEFECT IN THE LADDER, PLAINTIFF LOST HIS BALANCE WHILE HOLDING A PIECE OF SHEETROCK, LABOR LAW 240 (1) CAUSE OF ACTION PROPERLY DISMISSED (SECOND DEPT).**

The Second Department determined the Labor Law 240 (1) cause of action against the homeowner (Recio) was properly dismissed. Plaintiff alleged he fell from the third rung of a six-foot A-frame ladder. Plaintiff’s deposition testimony demonstrated the ladder did not fail. Plaintiff simply lost his balance while holding a piece of sheetrock:

Recio demonstrated her prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 240(1) cause of action by submitting, inter alia, the plaintiff’s deposition testimony, which showed that the ladder from which the plaintiff fell was not defective or inadequate and that the ladder did not otherwise fail to provide protection. The evidence showed that the plaintiff fell because he lost his balance . . . Pacheco v Recio, 2019 NY Slip Op 00291, Second Dept 1-16-19
QUESTIONS OF FACT WERE RAISED ABOUT DEFENDANT CON ED’S AUTHORITY AND RESPONSIBILITIES IN THIS LABOR LAW 241 (6) AND 200 ACTION, IN PART BY THE TERMS OF A CONTRACT, CON ED’S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED, PLAINTIFF WAS USING AN EXCAVATOR WHEN IT TIPPED OVER INTO A CREEK (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant Con Ed’s motion for summary judgment in this Labor Law 241 (6), Labor Law 200 and common law negligence action should not have been granted. Plaintiff was using an excavator in a narrow, sloped area when the excavator tipped over into a creek. The terms of a contract raised questions of fact about Con Ed’s supervisory authority and responsibilities:

Con Ed did not demonstrate, prima facie, that Industrial Code § 23-4.2(c), which requires supervision for certain excavation work, was inapplicable here, nor did it demonstrate, prima facie, that this regulation was not violated … . Further, Con Ed did not demonstrate, prima facie, that Industrial Code §§ 23-4.2(a) and 23-4.4(a), which require, inter alia, proper footing for certain work using excavators and similar equipment, were inapplicable here, or that these regulations were not violated in this case … . Con Ed also did not demonstrate, prima facie, that Industrial Code §§ 23-9.4(c), and 23-9.5(a), which require, inter alia, the use of shoring and/or temporary sheeting for certain excavation work, were inapplicable here, or that these regulations were not violated in this case … . Further, Con Ed did not show that any alleged violations of the aforementioned regulations did not constitute a proximate cause of the occurrence … . Any comparative negligence on the part of the plaintiff does not preclude liability founded upon a violation of Labor Law § 241(6) … .

There are “two broad categories of actions that implicate the provisions of Labor Law § 200” … . The first category involves worker injuries arising out of alleged dangerous or defective conditions on the premises where the work is performed … . In those circumstances, “[f]or liability to be imposed on the property owner, there must be evidence showing that the property owner either created a dangerous or defective condition, or had actual or constructive notice of it without remedying it within a reasonable time” … . “The second broad category of actions under Labor Law § 200 involves injuries occasioned by the use of dangerous or defective equipment at the job site” … . A property owner will be held liable under this category only if it possessed the authority to supervise or control the means and methods of the work … . The requisite supervision or control exists for Labor Law § 200 purposes when the property owner bears responsibility for the manner in which the work is performed … . “The determinative factor is whether the party had the right to exercise control over the work, not whether it actually exercised that right”” … . Moscati v Consolidated Edison Co. of N.Y., Inc., 2019 NY Slip Op 00112, Second Dept 1-9-19
CONTRACT RAISED QUESTIONS OF FACT WHETHER CONSTRUCTION MANAGER HAD SUFFICIENT AUTHORITY AND CONTROL TO BE HELD LIABLE FOR A FALL FROM A SCAFFOLD IN THIS LABOR LAW 200, 240 (1) AND 241 (6) ACTION (SECOND DEPT).

The Second Department determined there was a question fact whether defendant construction manager (Walsh) exercised sufficient supervision and control to be liable for plaintiff’s injury when he fell from a scaffold in this Labor Law 200, 240 (1) and 241 (6) action:

A construction manager of a work site is generally not responsible for injuries under Labor Law §§ 200, 240(1), or 241(6) unless it functions as an agent of the property owner or general contractor in circumstances where it has the ability to control the activity which brought about the plaintiff’s injury … . Here, a triable issue of fact exists as to whether Walsh had the authority to supervise or control the activity that brought about the plaintiff’s injury … . Among other things, in a “Project Management Services Proposal” agreement (hereinafter the agreement) entered into between Walsh and Bakers Dozen, Walsh agreed, inter alia, to provide certain services as “agent” of Bakers Dozen. The agreement further stated that, during the construction implementation phase, Walsh would “[i]ssue directives, clarifications and notices” and “monitor the site as required to maintain the progress of construction work.” Maurisaca v Bowery at Spring Partners, L.P., 2019 NY Slip Op 00109, Second Dept 1-9-19
PLAINTIFF, WHO IS DEFENDANT’S SON, FELL FROM A LADDER WHEN ATTEMPTING TO INSPECT A DAMAGED CHIMNEY ON DEFENDANT’S RENTAL PROPERTY, QUESTIONS OF FACT ABOUT WHETHER PLAINTIFF WAS AN EMPLOYEE OR A VOLUNTEER, WHETHER THE INSPECTION WAS COVERED BY THE LABOR LAW, AND WHETHER DEFENDANT SUPERVISED PLAINTIFF’S WORK PRECLUDED SUMMARY JUDGMENT ON THE LABOR LAW 240 (1), 241 (6), 200 AND COMMON LAW NEGLIGENCE CAUSES OF ACTION (THIRD DEPT).

The Third Department determined that questions of fact about (1) whether plaintiff was an employee or a volunteer, (2) whether the inspection work came within the scope of Labor Law coverage, and (3) whether defendant supervised plaintiff’s work giving rise to Labor Law 200 or common-law negligence liability. Plaintiff is defendant’s son and lives with defendant. Defendant owns rental property next door. Defendant set up a ladder for plaintiff at the rental property and asked him to inspect the chimney because pieces of it had fallen to the ground. Plaintiff and the ladder fell when he attempted to inspect the chimney. Plaintiff brought Labor Law 240 (1), 241 (6), 200 and common-law negligence causes of action:

… [D]efendant’s testimony … established that she directed plaintiff on what to do when he inspected the chimney, had previously paid him for repairs and would have paid him if he had carried out the chimney cap repairs. We agree with Supreme Court that this testimony presents a triable issue of fact as to whether plaintiff was a volunteer or an employee within the meaning of the Labor Law and the Industrial Code …. …

As plaintiff and defendant both anticipated that plaintiff would carry out the repair if his inspection revealed that this would be feasible, this record does not permit a determination as a matter of law that the chimney inspection was “a separate phase easily distinguishable from” the actual repair, and thus outside the statutory protection … .

Although defendant asserts that she did not supervise plaintiff’s work and did not tell him how to use the ladder, her own testimony establishes that the ladder belonged to her and that she put it in place — allegedly on uneven ground — without plaintiff’s participation, directed him to use the ladder, and told him what to do in inspecting the chimney. Thus, there is a triable issue of fact as to whether defendant exercised supervisory control over the manner and methods by which plaintiff performed the task of inspecting the chimney … . Doskotch v Pisocki, 2019 NY Slip Op 00017, Third Dept 1-3-19
PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED, THE SCAFFOLD TILTED OR COLLAPSED CAUSING EVERYTHING IN IT TO CRASH ONTO HIM (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff’s motion for summary judgment on his Labor Law 240 (1) cause of action should have been granted:

Plaintiff’s established entitlement to judgment as a matter of law in this action where plaintiff Steven Kind was injured when one end of a scaffold that he and a coworker were using to wash exterior windows on a building dropped out from under him and the scaffold came to rest at an angle, causing everything in it to crash down on him. The tilting or collapse of the scaffold was prima facie evidence of a violation of Labor Law § 240(1) …, and plaintiffs were not required to demonstrate a specific defect … .

In opposition, defendants failed to raise a triable issue of fact as to whether plaintiff’s actions were the sole proximate cause of the accident. The conclusion of the Department of Labor investigator that the scaffold tilted because plaintiff and his coworker caused a safety line to become caught in a spool for the scaffold’s suspension cables was speculation unsupported by the evidence … . Furthermore, defendant Titanium Scaffold Services, Inc., which contracted to maintain the scaffold, was an agent for purposes of the Labor Law. Kind v 1177 Ave. of the Ams. Acquisitions, LLC, 2019 NY Slip Op 00029, First Dept 1-3-19