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Labor Law-Construction Law 2019

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The First Department, reversing Supreme Court, determined that defendants' motion for summary judgment on the Labor Law 240 (1), 241 (6) and 200 causes of action should have been dismissed. Plaintiff's work was not "altering" within the meaning of Labor Law 240 (1) and was not part of the general contractor's (Greenlight's) contract with the apartment owners (the Dixons):

Because plaintiff Martin Topoli's work installing window shades at the time of the accident does not constitute "altering" within the meaning of Labor Law § 240(1), that claim is dismissed …. The Labor Law § 241(6) claim is also dismissed, since plaintiff's work is separate and distinct from the larger construction project … . Third-party defendants and apartment owners, Rebecca Dixon and Adam Dixon, modified the contract with general contractor Greenlight Construction Management Corp. to remove the provision and installation of window treatments from the scope of its work. The Dixons directly contracted with plaintiff's employer for the installation of the window shades after the construction work was completed and they had moved in to the apartment. Greenlight's return to the work site after the completion of construction, done to accommodate the Dixons' new desire for larger window valances, was limited in nature and separate from plaintiff's work. Topoli v 77 Bleecker St. Corp., 2019 NY Slip Op 07537, First Dept 10-22-19

ALTERING, DEFINITION OF.

REMOVING PORTABLE LIGHTING EQUIPMENT IS NOT 'ALTERING' A STRUCTURE WITHIN THE MEANING OF LABOR LAW 240(1), DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff (McCarthy) was not engaged in activity covered by Labor Law 240 (1) when he fell from the roof of a broadcast booth when removing portable lighting:

… [T]he defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 240(1), through the submission of, inter alia, a transcript of McCarthy's deposition testimony, which demonstrated that the work McCarthy was performing did not constitute "altering" within the meaning of the statute. McCarthy testified that his work consisted of, inter alia, bringing in and removing portable lighting equipment. McCarthy testified that one of his coworkers had attached the scrim, which is a "double-weave fabric" that is used to equalize lighting levels during filming, to the exterior of the domestic broadcast booth using C-clamps, which are screw-based clamps, and rope. McCarthy testified that on the day of the accident, he walked along the ledge outside of the broadcast booth, cut the rope holding the scrim, removed the scrim, and placed those items in the hallway. He testified that he went back out on the ledge to retrieve three C-clamps, which were screwed into the roof, and fell backwards onto the stadium below. McCarthy's work of bringing in and removing portable lighting equipment did not constitute altering of any building or structure … . Further, under these circumstances, the placement of a lighting scrim, secured to the exterior of the broadcast booth with screw-based C-clamps, involved no significant physical change to a structure … . McCarthy v City of New York, 2019 NY Slip Op 05121, Second Dept 6-26-19

ALTERING, DEFINITION OF.

THERE IS A QUESTION OF FACT WHETHER PLAINTIFF'S WORK CONSTITUTED 'ALTERING' WITHIN THE MEANING OF LABOR LAW 241 (6); ACTION AGAINST OUT-OF-POSSESSION LANDLORD PROPERLY DISMISSED, NO SUPERVISORY CONTROL OF THE WORK (FIRST DEPT).

The First Department, reversing Supreme Court, determined the defendant's motion for summary judgment should not have been granted in this Labor Law 241 (6) action. But action against the out-of–possession landlord was properly dismissed because the landlord did not exercise and supervisory control over the work:

Plaintiff alleges that he was injured while installing a refrigeration condenser unit at premises owned by Boss and leased by Antillana. We find that the motion court improperly granted Antillana's motion for summary judgment dismissing the Labor Law § 241(6) claim. Plaintiff was engaged in an activity within the purview of Labor Law § 241(6). Plaintiff worked at the subject premises during the build-out installing three refrigeration system condensers, which weighed about 3000 pounds and had to be moved with a forklift. Three weeks after the store was opened, plaintiff was asked to install an additional condenser which weighed about 200 pounds. The president of Antillana acknowledged that there had been a renovation project underway at the premises before plaintiff's accident.

We find that there is an issue of fact whether the subsequent installation of the condenser constituted an "alteration" of the premises, which falls within the ambit of "construction" work under Labor Law § 241(6) … .

We also find triable issues of material fact as to whether Antillana violated 12 NYCRR 23-1.25(d), (e)(1), (e)(3), and (f), relied upon by plaintiff to support his Labor Law § 241(6) claim. Rodriguez v Antillana & Metro Supermarket Corp., 2019 NY Slip Op 07714, First Dept 10-29-19

CONSTRUCTION, DEFINITION OF.

PLAINTIFF WAS KILLED WHEN A HEAVY PIECE OF EQUIPMENT HE WAS WELDING FELL; ALTHOUGH THE EQUIPMENT WAS FABRICATED FOR A POWER PLANT BEING CONSTRUCTED IN NEW HAMPSHIRE, PLAINTIFF WAS NOT ENGAGED IN CONSTRUCTION WORK WITHIN THE MEANING OF LABOR LAW 240 (1) (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined plaintiff was not involved in an activity covered by Labor Law 240 (1) when he was pinned and killed by a piece of equipment he was welding. Plaintiff was engaged in fabricating a rotor compartment which was to be installed in a power plaint in New Hampshire. Plaintiff and the dissent argued plaintiff's work was part of the New Hampshire construction project:

We conclude that defendants thus established that decedent was not engaged in a covered activity under Labor Law § 240 (1) inasmuch as he was performing his "customary occupational work of fabricating" and welding a rotor compartment "during the normal manufacturing process" at the plant in Wellsville, and was not involved in the construction project in New Hampshire nor involved in renovation or alteration work on the plant in Wellsville … . Preston v APCH, Inc., 2019 NY Slip Op 06236, Fourth Dept 8-22-19

CONSTRUCTION, DEFINITION OF.

PLAINTIFF, WHO FELL THROUGH A HOLE IN A HOUSE UNDER CONSTRUCTION, WAS NOT ENGAGED IN CONSTRUCTION WORK COVERED BY LABOR 240 (1) OR 241 (6), PLAINTIFF WAS MEASURING WINDOWS FOR FUTURE INSTALLATION OF WINDOW TREATMENTS (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined that plaintiff, who fell through a hole in a house under construction, was not engaged in an activity covered by Labor Law 240 (1) or 241 (6) when he fell. Plaintiff was measuring windows for future installation of window treatments, which is not construction work. There were questions of fact on the negligence and wrongful death causes of action however:

… [T]he work of measuring windows for the future installation of window treatments is not a protected activity under Labor Law § 240 (1). The work did not involve a "significant physical change to the configuration or composition of the building or structure" … , was not "performed in the context of the larger construction project" … , and was not "necessary and incidental to the construction of the home" … . …

The work being performed by decedent was not protected work under Labor Law § 241 (6) inasmuch as decedent " was not involved with [any] construction' "… , and the window treatment work was separate and "distinct from the construction work" … . Acox v Jeff Petroski & Sons, Inc., 2019 NY Slip Op 03480, Fourth Dept 5-3-19

CONSTRUCTION, DEFINITION OF.

PLAINTIFF'S DECEDENT 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

CONSTRUCTION, DEFINITION OF.

QUESTION OF FACT WHETHER SNAKING A WIRE ABOVE CEILING TILES IS 'CONSTRUCTION' WITHIN THE MEANING OF LABOR LAW 241(6); SUPREME COURT REVERSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's Labor Law 241(6) cause of action should not have been dismissed. Plaintiff was injured while snaking a wire about ceiling tiles. Supreme Court held the work was not "construction" within the meaning of the statute and the First Department disagreed:

Labor Law § 241(6) requires owners, contractors and their agents to provide a safe workplace for workers performing "construction, excavation or demolition work." "In determining what constitutes construction' for purposes of the statute we look to the Industrial Code which, as relevant here, defines construction to include alteration of a structure" … .

We find that an issue of fact is raised as to whether plaintiff was altering the structure when he was pulling cable above the drop ceiling … . In his deposition plaintiff stated that, in order to access the cable, plaintiff pushed a ceiling tile "over to the next tile." He described his work at the time of the accident as "going up into the ceiling . . . to figure out where we were going with the cable." Plaintiff had been provided with a saw to cut holes in the wall and ceiling when necessary. … [A]s "running cables" is considered to be a "significant physical change" to fall within the purview of alteration and not "routine" maintenance, there remains a question of fact as to whether plaintiff's work constituted an alteration within the meaning of Labor Law § 241(6). Emery v Steinway, Inc., 2019 NY Slip Op 09368, First Dept 12-26-19

COVERED ACTIVITY, ASBESTOS MONITORING.

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 Law §§ 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

COVERED ACTIVITY, RENOVATION.

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

COVERED ACTIVITY, SWEEPING.

PLAINTIFF, WHO WAS SWEEPING THE FLOOR WHEN HE WAS STRUCK BY BYA 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

ELEVATION HAZARD, SUPERVISE AND CONTROL.

PLAINTIFF'S INJURY DID NOT INVOLVE THE TYPE OF ELEVATION HAZARD CONTEMPLATED BY LABOR LAW 240 (1) AND DEFENDANTS DID NOT EXERCISE A LEVEL OF SUPERVISORY CONTROL SUFFICIENT TO TRIGGER LIABILITY UNDER LABOR LAW 200 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's injury did not involve the type of elevation hazard covered by Labor Law 240 (1) and defendants did not exercise the level of supervisory control necessary for liability under Labor Law 200:

The plaintiff allegedly was injured when a metal plate, which was used to cover an excavated trench located on the roadway, struck the plaintiff as it was being removed from the roadway surface. * * *

… [T]he defendants established their prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 200 and common-law negligence causes of action by their submissions, which demonstrated that they only had general supervisory authority over the plaintiff's work … . …

"The contemplated hazards [of Labor Law § 240(1)] are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" … . The defendants established, prima facie, that the plaintiff's injury did not result from the type of elevation-related hazard contemplated by Labor Law § 240(1) … . Lombardi v City of New York, 2019 NY Slip Op 06763, Second Dept 9-25-19

ELEVATION HAZARD.

INJURY FROM A CHAIN-LINK FENCE AT A CONSTRUCTION SITE WHICH BLEW OVER ONTO PLAINTIFFS NOT COVERED BY LABOR LAW 240 (1) OR 241 (6); QUESTIONS OF FACT RE: LABOR LAW 200 AND COMMON LAW NEGLIGENCE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants were entitled to summary judgment dismissing the Labor Law 240 (1) and 241 (6) causes of action. Plaintiffs were injured when a chain link fence blew over on them, an incident not covered by Labor Law 240 (1) or 241 (6). However, there were questions of fact re: the Labor Law 200 and common law negligence causes of action:

… [D]efendants … made a prima facie showing of their entitlement to judgment as a matter of law … by demonstrating that the chain-link fence was not an object being hoisted or an object that required securing for the purposes of the undertaking, and that the fence did not fall because of the absence or inadequacy of an enumerated safety device … . Gurewitz v City of New York, 2019 NY Slip Op 06384, Second Dept 8-28-19

ELEVATION HAZARD.

PLAINTIFF INJURED HIS NECK ATTEMPTING TO THROW A HEAVY HOSE TO AN AREA 15 TO 20 FEET ABOVE HIM, THE INJURY WAS NOT CAUSED BY AN ELEVATION-RELATED RISK COVERED BY LABOR LAW 240 (1) (SECOND DEPT).

The Second Department determined defendants' motion for summary judgment on the Labor Law 240 (1) cause of action was properly granted. Plaintiff injured his neck attempting to throw a hose to an area 15 to 20 feet above him:

Labor Law § 240(1) imposes strict liability on building owners and contractors for failure to provide proper protection against elevation-related hazards … . At the time that the plaintiff was injured, he was standing on the ground level, moving a 100-pound hose. Although the accident tangentially involved elevation, it was not caused by any elevation-related risk contemplated by the statute … . Clark v FC Yonkers Assoc., LLC, 2019 NY Slip Op 03948, Second Dept 5-22-10

EXEMPTION, ONE OR TWO FAMILY HOME.

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

FALLING OBJECTS, BLOCK AND CHAIN.

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

FALLING OBJECTS, CHAIN HOIST.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS LABOR LAW 240 (1) ACTION SHOULD HAVE BEEN GRANTED, DESPITE PLAINTIFF'S AFFIDAVIT WHICH, IN PART, CONTRADICTED HIS DEPOSITION TESTIMONY (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this Labor Law 240 (1) action should have been granted, despite an affidavit from the plaintiff which, in part, contradicted his deposition testimony. Plaintiff was struck from above by the chain in a chain hoist system:

Supreme Court correctly concluded that plaintiff Jose Goncalves's affidavit submitted in support of the motion should not be considered to the extent that it averred that he was struck by the entire chain hoist system, which contradicted his deposition testimony that he was struck only by the chain itself … . However, the affidavit was consistent with his prior testimony that he was struck by the chain from above, and the record contains no evidence to the contrary. Accordingly, plaintiffs demonstrated that the chain hoist system at issue failed, causing Goncalves to be struck by an object – either the chain hoist system or just the chain itself – from above, and thereby established their prima facie entitlement to summary judgment on the Labor Law § 240(1) claim … . Goncalves v New 56th & Park (NY) Owner, LLC, 2019 NY Slip Op 08265, First Dept 11-14-19

FALLING OBJECTS, CRANE COLLAPSE.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED IN THIS CRANE-ACCIDENT CASE; THE ESPINAL 'LAUNCHED AN INSTRUMENT OF HARM' CAUSE OF ACTION AGAINST THE COMPANY WHICH REFURBISHED AND MAINTAINED THE CRANE SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law 240 (1) cause of action should have been granted in this crane-accident case. The First Department also held that the negligence action against the company (Hoffman) which refurbished and maintained the crane, based upon the Espinal "launched an instrument of harm" theory, should not have been dismissed:

The collapse of a crane constitutes a prima facie violation of Labor Law § 240(1) … . A plaintiff need not be directly injured by a portion of the crane for the Labor Law to apply — injuries that occur while trying to avoid being struck during a hoisting accident may qualify … . While plaintiff's testimony at his deposition varied somewhat from his 50-h testimony, he repeatedly cautioned that the accident happened so fast it was difficult for him to describe exactly how it occurred. In any event, no matter which version is accepted, Labor Law § 240(1) applies to the … defendant … .

Hoffman refurbished the subject crane one year before the accident and performed maintenance on it several times thereafter. Although a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third person … , an exception exists where a contractor who undertakes to perform services pursuant to a contract negligently creates or exacerbates a dangerous condition so as to have "launched a force or instrument of harm" (Espinal v Melville Snow Contrs., 98 NY2d 136, 141-142 [2002] …). Hoffman failed to adequately address the findings of the independent crane company that conducted the post-accident investigation, which concluded that several maintenance and repair issues contributed to over wear on the crane's wire ropes … . DeGidio v City of New York, 2019 NY Slip Op 07218, First Dept 10-8-1

FALLING OBJECTS, EXTERIOR SHEETROCK.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION IN THIS FALLING OBJECT CASE; QUESTION OF FACT ON HIS LABOR LAW 241 (6) CAUSE OF ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) "falling object" cause of action:

The record reflects that plaintiff was on a temporary exterior platform on the 21st floor of a building under construction, when he was struck and injured by a falling piece of DensGlass, an exterior sheetrock material, which matched the size of a missing piece of sheetrock one floor above. Plaintiff was in the process of dismantling the bridge that was linked to the exterior hoist elevator.

Plaintiff established his entitlement to judgment as a matter of law on the issue of liability on his Labor Law § 240(1) claim based on the record evidence that a piece of the exterior facade of the building still under construction fell on him, that workers were performing patch work to the DensGlass on the floors above plaintiff, and that the exterior facade was not complete … . Furthermore, defendants' cross motions for summary judgment

dismissing the § 241(6) claim should have been denied because there is a triable issue of fact as to whether the area where the accident occurred was "normally exposed to falling material or objects" requiring that plaintiff be provided with "suitable overhead protection" (see 12 NYCRR 23-1.7[a][1] …). Garcia v SMJ 210 W. 18 LLC, 2019 NY Slip Op 08791, First Dept 12-10-19

FALLING OBJECTS, FREE-STANDING BRACE.

ALTHOUGH THE FREE-STANDING BRACE FRAME WAS AT THE SAME LEVEL AS PLAINTIFF AT THE TIME IT FELL OVER, PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION (FIRST DEPT).

The First Department determined that, although the brace frame and plaintiff were at the same level, the injury caused by the free-standing brace frame tipping over was covered by Labor Law 240 (1):

The brace frames … , which stood at least 12 feet tall and weighed approximately 1,500 pounds, were not connected to the excavator bucket or any other device either to hold them upright once the connector pins were removed or to lower them slowly to the ground. When plaintiff removed the last connector pin, the brace frame fell and struck him.

Contrary to defendants' contention, this evidence establishes prima facie that the activity in which plaintiff was engaged is covered under Labor Law § 240(1). Although plaintiff and the brace frame were at the same level at the time of the accident, the work plaintiff was doing posed a substantial gravity-related risk, because the falling of the brace frame away from the formwork panel would have generated a significant amount of force … .

An engineer employed by defendant Peri Formwork Systems, Inc., the manufacturer of the formwork structure, testified that if a formwork structure was disassembled on the ground, then the brace frames had to be secured by a crane before removing them, and if the formwork structure was standing upright, then each individual component had to be secured by a crane. He said that an unsecured brace frame freestanding in the air would pose a hazard to any worker standing nearby. Encarnacion v 3361 Third Ave. Hous. Dev. Fund Corp., 2019 NY Slip Op 07746, First Dept 10-29-19

FALLING OBJECTS, HOISTED POSTS, SOLE PROXIMATE CAUSE.

ALTHOUGH CLAIMANT WAS INJURED WHEN METAL POSTS 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 POSTS 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

FALLING OBJECTS, PLYWOOD.

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

FALLING OBJECTS, SCAFFOLD TIPPED.

SCAFFOLD TIPPED PINNING PLAINTIFF'S HAND AGAINST A WALL; SPECULATIVE EVIDENCE DID NOT RAISE A QUESTION OF FACT ABOUT PLAINTIFF'S ACTIONS BEING THE SOLE PROXIMATE CAUSE; 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 plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action. A scaffold tipped and pinned his hand against a wall, and plaintiff's actions did not constitute the sole proximate cause of the injuries:

Plaintiff is entitled to partial summary judgment on his Labor Law § 240(1) claim. Regardless of whether plaintiff's hand was struck by the beam of the scaffold or the counterweights placed on the scaffold, this matter falls within the purview of Labor Law § 240(1). Plaintiff's injuries were the direct result of the application of the force of gravity to the scaffold and the counterweights, and, although the scaffold and counterweights fell a short distance after the scaffold tipped, the elevation differential was not de minimis, as their combined weight of over 2,400 pounds was capable of generating a great amount of force during the short descent … .

The scaffold was a load that required securing for the purpose of plaintiff's undertaking … . Contrary to defendants' contention, the counterweights were not a safety device provided to secure the equipment being tied to the bracket, but were to balance a scaffold that would later be suspended from it.

Furthermore, the record establishes, as a matter of law, that plaintiff was not the sole proximate cause of his injuries. Plaintiff and his coworker both testified that there was slack in the tieback at the time of the accident. Their foreman's testimony that the scaffold tipped over due to overtightening of the tieback by plaintiff is speculative, as he did not witness the accident. The reports and expert affidavit submitted by defendants concluding that the accident was caused by overtightening are also speculative. In any event, even accepting the defense's proof, it is still insufficient to raise an issue of fact as to sole proximate causation, since the record established that the scaffold tipped over in part due to being inadequately secured, raising only comparative negligence by plaintiff … . Ortega v Trinity Hudson Holding LLC, 2019 NY Slip Op 07743, First Dept 10-29-19

FALLING OBJECTS, SCAFFOLDS.

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:

Plaintiffs 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

FALLING OBJECTS, STACKED SCAFFOLDS, DE MINIMUS.

PLAINTIFF, WHO IS FIVE FOOT SEVEN, WAS INJURED WHEN A SIX FOOT HIGH STACK OF SCAFFOLDS PARTIALLY FELL ON HIM, THE HEIGHT DIFFERENTIAL WAS DEEMED DE MINIMUS, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS LABOR LAW 240 (1) ACTION WAS PROPERLY GRANTED (THIRD DEPT).

The Third Department determined defendant's motion for summary judgment in this Labor Law 240 (1) action was properly granted. Plaintiff, who is five feet seven inches tall, was injured when a six-foot high stack of scaffold partially fell over. The difference between the plaintiff's height and the height of the stacked scaffolds was deemed de minimus:

In a previous appeal from an order deciding the parties' motions for summary judgment, we determined that the scaffolding frames, estimated to be about six feet tall, established an elevation differential, but that questions of fact remained as to plaintiff's actual height, "the number of scaffolds stacked in the pile that collapsed, the weight of each scaffold and the manner in which the scaffold(s) struck plaintiff" … . These details are significant because "[i]n determining whether an elevation differential is physically significant or de minimus, we must consider not only the height differential itself, but also 'the weight of the [falling] object and the amount of force it was capable of generating, even over the course of a relatively short descent'" … . …

To support their motion, defendants submitted the affidavit of Ernest Gailor, an engineer. Gailor opined that "the [five]-inch differential between the top of . . . plaintiff's head and the maximum height of [the] frames . . . did not significantly contribute to the 'total' force at impact of the offending frame as it struck plaintiff." * * *

In our view, defendants' submissions established a prima facie basis to conclude that the elevation differential here was de minimus and that plaintiff's claim falls outside the scope of Labor Law § 240 (1). Wright v Ellsworth Partners, LLC, 2019 NY Slip Op 04803, Third Dept 6-13-19

FALLING OBJECTS, SUPERVISE AND CONTROL, OWNER, DEFINITION OF.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION, A CABLE TRAY FELL ON HIS HEAD FROM THE TOP OF TWO LADDERS, A SUBCONTRACTOR WAS LIABLE BECAUSE THE CONTRACT DELEGATED THE AUTHORITY TO CONTROL THE WORK TO THE SUBCONTRACTOR, THE LESSEE WAS LIABLE AS AN "OWNER" WITHIN THE MEANING OF LABOR LAW 240 (1) (FIRST DEPT).

The First Department determined plaintiff's motion for summary judgment on his Labor Law 240 (1) cause of action was properly granted. A cable tray that was on top of two ladders fell on plaintiff's head. The court further noted that USIS was liable as an agent of the owner because the subcontract delegated the authority to control the work to USIS, and AECOM. the lessee, was liable as an "owner" within the meaning of Labor Law 240 (1):

The cable tray that fell on plaintiff's head from atop two ladders was an object that required securing to prevent it from falling … . The distance the tray fell was not de minimis and "the harm to plaintiff was the direct consequence of the application of the force of gravity" upon the unsecured cable tray … . Moreover, securing the cable tray against falling would not have been contrary to the purpose of the work … .

Supreme Court correctly concluded that USIS Systems was liable under Labor Law § 240(1) as an agent of the owner … . Here, the terms of the subcontract by which USIS Systems subcontracted the work to USIS Electric demonstrate that USIS Systems had been delegated authority to direct and control the work … . Moreover, as premises lessee which contracted for the work, AECOM was an owner within the meaning of Labor Law § 240(1) … . Tropea v Tishman Constr. Corp., 2019 NY Slip Op 03533, First Dept 5-7-19

FALLING OBJECTS, UNLOADING TRUCK.

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

FALLING OBJECTS, UNLOADING TRUCK.

UNLOADING A HEAVY AIR CONDITIONING COIL FROM A TRUCK IS AN ACTIVITY COVERED BY LABOR LAW 240 (1) (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined that unloading a heavy coil from and truck was an activity covered by Labor Law 240 (1):

Plaintiff was injured when an air conditioning system coil that weighed at least 300 pounds and was being transported secured to two dollies fell on his leg as he and three coworkers unloaded it from a truck. After plaintiff and his coworkers had brought the coil to ground level on the truck's lift gate and were attempting to move it off the lift gate, a wheel of a dolly became caught in a gap on the lift gate, and the coil tipped over.

In view of the weight of the coil and the amount of force it was able to generate, even in falling a relatively short distance, plaintiff's injury resulted from a failure to provide protection required by Labor Law § 240(1) against a risk arising from a significant elevation differential … . Moving the coil safely required either hoisting equipment or a device designed to secure the coil against tipping or falling over … . Ali v Sloan-Kettering Inst. for Cancer Research, 2019 NY Slip Op 07544, First Dept 10-22-19

FALLING OBJECTS, UNLOADING TRUCK.

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 and exclude from the statute's coverage preparatory work essential to the enumerated act" … . Saquicaray v Consolidated Edison Co. of N.Y., Inc., 2019 NY Slip Op 02460, First Dept 4-2-19

FALLING PERSONS, BACKHOE BUCKET, COVERED ACTIVITY, ICE AND SNOW REMOVAL.

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

FALLING PERSONS, EXIT WITH NO STAIRWAY, SOLE PROXIMATE CAUSE.

PLAINTIFF FELL WHEN HE ATTEMPTED TO LEAVE A TRAILER THROUGH THE EXIT WHICH DID NOT HAVE A STAIRWAY ATTACHED, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) AND 200 CAUSES OF ACTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that defendant's motion for summary judgment on the Labor Law 240 (1) and 200 causes of action should not have been granted on the ground plaintiff's action was the sole proximate cause of his injury. There were two exits to the trailer plaintiff was in, one had a stairway attached and one did not. Plaintiff fell to the ground when he attempted to use the exit with no stairway:

Defendants failed to establish as a matter of law that plaintiff's actions were the sole proximate cause of the accident, i.e., that there was a staircase by which plaintiff could have exited the trailer, that he knew that a staircase was available and that he was expected to use it, that he chose for "no good reason" not to use it and that, if he had not made that choice, he would not have been injured … . For the same reason, we conclude that the court erred in granting defendants' motion and cross motion with respect to the claims under Labor Law § 200 and common-law negligence … . Dziadaszek v Legacy Stratford, LLC, 2019 NY Slip Op 08029, Fourth Department 11-8-19

FALLING PERSONS, FALL TO THE FLOOR BELOW.

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

FALLING PERSONS, INVERTED BUCKET.

PLAINTIFF'S LABOR LAW 240(1) AND 241(6) CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED; PLAINTIFF FELL ATTEMPTING TO USE AN INVERTED BUCKET TO STEP UP TO AN ELEVATED PLATFORM (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's Labor Law 240(1) and 241(6) causes of action should not have been dismissed. Plaintiff fell attempting to use an inverted bucket to access an elevated platform:

The protection of Labor Law § 240(1) encompasses plaintiff['s] … fall while trying to access an elevated work platform by stepping up onto an inverted bucket, an inadequate safety device that failed to provide proper protection … . Moreover, defendants failed to cite any evidence rebutting the affidavit by plaintiff's foreman stating that stairs or other access points to the work platform were either restricted or blocked by materials. Because no safety devices were available to plaintiff to access the platform, as a matter of fact and law, plaintiff's attempt to use the inverted bucket cannot be the sole proximate cause of his accident … .

Because no stairways, ramps, or runaways were available to plaintiff to access the platform, he was entitled to summary judgment on his Labor Law § 241(6) claim predicated upon Industrial Code (12 NYCRR) § 23-1.7(f) … . Ferguson v Durst Pyramid, LLC, 2019 NY Slip Op 09388, First Dept 12-26-19

FALLING PERSONS, LADDERS, COVERED ACTIVITY, SUPERVISE AND CONTROL.

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

FALLING PERSONS, LADDERS, ELECTRIC SHOCK.

FALL FROM A FOLDED, UNSECURED A-FRAME LADDER AFTER PLAINTIFF RECEIVED AN ELECTRIC SHOCK ENTITLED PLAINTIFF TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION, SUPREME COURT REVERSED, TWO-JUSTICE DISSENT (FIRST DEPT).

The First Department, reversing Supreme Court, over a two-justice dissent, determined plaintiff, who fell from a folded, unsecured A-frame ladder after receiving an electric shock, was entitled to summary judgment on his Labor Law 240 (1) cause of action. The majority distinguished a Court of Appeals decision involving a properly opened and locked A-frame ladder which fell over when plaintiff was shocked:

The "safety device" provided to plaintiff was an unsecured and unsupported A-frame ladder that was inadequate to perform the assigned task. The ladder could not be opened or locked while plaintiff was performing his task, and the only way plaintiff could gain access to his work area on the ceiling at the end of the room was by folding up the ladder and leaning it against the wall. It is undisputed that the ladder was not anchored to the floor or wall. There were no other safety devices provided to plaintiff. Plaintiff's expert opined that had the ladder been supported or secured to the floor or wall by anchoring, it would have remained stable when plaintiff was shocked. He further opined that given the nature of plaintiff's work, which involved cutting pipes and the use of hand tools at an elevated height, plaintiff should have been furnished with a more stable device such as a Baker scaffold or a man lift. …

The fact that the fall was precipitated by an electric shock does not change this fact. This case is distinguishable from Nazario v 222 Broadway, LLC (28 NY3d 1054 [2016]), relied on by the dissent. The plaintiff in Nazario fell while "holding the ladder, which remained in an open locked position when it landed" … . Thus, there was no evidence that the ladder was defective or that another safety device was needed. Here, on the other hand, it is undisputed that the ladder provided was not fully open and locked, nor was it otherwise secured, as plaintiff's expert opined it ought to have been. Cutaia v Board of Mgrs. of the Varick St. Condominium, 2019 NY Slip Op 03458, First Dept 5-1-19

FALLING PERSONS, LADDERS, SCAFFOLDS.

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

FALLING PERSONS, LADDERS.

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

FALLING PERSONS, LADDERS.

ALTHOUGH PLAINTIFF ALLEGED THAT THE A-FRAME LADDER TOPPLED OVER, 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, THE TRIAL COURT PROPERLY DENIED PLAINTIFF'S MOTION TO SET ASIDE THE DEFENSE VERDICT (SECOND DEPT).

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

FALLING PERSONS, LADDERS.

CONFLICTING TESTIMONY ABOUT WHETHER A CO-WORKER WAS HOLDING THE LADDER PLAINTIFF WAS USING PRECLUDED SUMMARY JUDGMENT IN THIS LABOR LAW 240 (1) ACTION (SECOND DEPT).

The Second Department determined conflicting testimony concerning whether the ladder plaintiff was using was being held by a co-worker raised a question of fact in this Labor Law 240 (1) action:

… [T]he plaintiff submitted, among other things, a transcript of his deposition testimony and a transcript of a workers' compensation board hearing, which included the testimony of the plaintiff and his coworker. The plaintiff testified at his deposition and at the hearing that the ladder shifted, causing him to lose his footing, and that nobody was holding the ladder at the time of the accident. His coworker gave a different account. The coworker testified that he was standing at the bottom of the ladder, holding it, when he felt the ladder jolt. Whether the ladder was being stabilized at the time of the accident presents a triable issue of fact … . Accordingly, "the plaintiff's own submissions demonstrated that there are triable issues of fact as to how this accident occurred and it cannot be concluded, as a matter of law, that the alleged failure to provide the plaintiff with proper protection proximately caused his injuries" … . Lozada v St. Patrick's R C Church, 2019 NY Slip Op 05971, Second Dept 7-31-19

FALLING PERSONS, LADDERS.

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 … . Gomez v Kitchen & Bath by Linda Burkhardt, Inc., 2019 NY Slip Op 02070, Second Dept 3-20-19

FALLING PERSONS, LADDERS.

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 contributorily 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

FALLING PERSONS, LADDERS.

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

FALLING PERSONS, LADDERS.

FALL FROM A SCAFFOLD WHICH DID NOT HAVE GUARD RAILS ENTITLED PLAINTIFF TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION (FIRST DEPT).

The First Department determined a fall from a scaffold which did not have guard rails entitled plaintiff to summary judgment on his Labor Law 240 (1) cause of action, noting that comparative negligence is not a defense:

Plaintiff was injured in a fall from a scaffold. It is undisputed that the scaffold he was supplied with and directed to use lacked guard rails and that he fell off when the scaffold tipped. Plaintiff was not provided with any other safety devices. This evidence establishes prima facie a violation of Labor Law § 240(1) … .

In opposition, defendants failed to raise an issue of fact. Contrary to defendants' claim, the alleged failure to unlock the wheels does not raise an issue of fact … . Plaintiff's fall from the scaffold, without guard rails or other protective devices, was a proximate cause of the accident … . Camacho v Ironclad Artists Inc., 2019 NY Slip Op 05475, First Dept 7-9-19

FALLING PERSONS, LADDERS.

MERELY LOSING ONE'S BALANCE AND FALLING FROM A LADDER DOES NOT GIVE RISE TO LIABILITY UNDER LABOR LAW 240 (1) (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff was not entitled to summary judgment in this Labor Law 240 (1), 241 (6) and 200 action. There were questions of fact about how the accident happened, whether the plaintiff was employed by a defendant, whether that defendant was employed by the owner, and whether defendant had authority or control over the site or plaintiff. In addition neither the complaint nor the bill of particulars cited a specific Industrial Code violation. The court noted than merely losing one's balance and falling off a ladder does not give rise to liability under Labor Law 240 (1):

A defendant is not liable on a Labor Law § 240 (1) cause of action unless it is an owner or "a general contractor or an agent of an owner or general contractor with the authority to supervise and control the work of . . . the injured plaintiff" … and, in order for the statute to apply, "a plaintiff must demonstrate that he [or she] was both

permitted or suffered to work on a building or structure and that he [or she] was hired by someone, be it owner, contractor or . . . agent [thereof]" … . …

Defendant would not be liable under Labor Law § 240 (1) if plaintiff merely lost his balance and fell off a ladder … . … Pelonero v Sturm Roofing, LLC, 2019 NY Slip Op 06327, Fourth Dept 8-22-19

FALLING PERSONS, LADDERS.

NEITHER PLAINTIFF NOR DEFENDANTS WERE ENTITLED TO SUMMARY JUDGMENT IN THIS "FALL FROM AN A-FRAME LADDER" CASE (SECOND DEPT).

The Second Department determined both plaintiff's and defendants' motions for summary judgment were properly denied. The plaintiff was cutting brackets which held up an air duct with an electric saw when the duct came down and plaintiff fell off an A-frame ladder. The fact that plaintiff fell from a ladder did not, standing alone, warrant summary judgment on plaintiff;s Labor Law 240 (1) cause of action. The defendants did not demonstrate that the ladder provided proper protection or that plaintiff's conduct was the sole proximate cause of the accident:

… [T]he plaintiff failed to demonstrate, prima facie, that the subject ladder was an inadequate safety device for the work in which he was engaged at the time of his alleged accident … . The mere fact that the plaintiff fell from a ladder does not, in and of itself, establish that proper protection was not provided … . The opinion of the plaintiff's expert failed to establish that the ladder that was provided was an inadequate safety device … .

… [D]efendants failed to establish their prima facie entitlement to judgment as a matter of law on that branch of their cross motion which was for summary judgment dismissing the Labor Law § 240(1) cause of action. The defendants' expert's affidavit, in which the expert opined that the subject ladder "was so constructed, placed and operated as to give proper protection," is conclusory and unsupported by evidence in the record. The defendants also failed to demonstrate, prima facie, that the plaintiff's conduct was the sole proximate cause of his fall because he allegedly failed to use scaffolding that was readily available at the job site … . In addition, the defendants failed to establish, prima facie, that the plaintiff's conduct was the sole proximate cause of his fall because he allegedly improperly positioned the ladder … , did not ask his coworker to cut the bracket for him … , and did not demand that his foreman provide scaffolding … . Orellana v 7 W. 34th St., LLC, 2019 NY Slip Op 04711, Second Dept 6-12-19

FALLING PERSONS, LADDERS.

NO NEED TO SHOW LADDER WAS DEFECTIVE; ENOUGH TO SHOW PLAINTIFF WAS NOT PROVIDED WITH ANY EQUIPMENT TO ENSURE THE LADDER REMAINED UPRIGHT (FIRST DEPT).

The First Department determined plaintiff's motion for summary judgment in this Labor Law 240 (1) ladder-fall case was properly granted. The court noted there was no need to show the ladder was defective, only that nothing was provided to keep the ladder upright while plaintiff was using it:

Whether plaintiff slipped from the rung of the ladder or the ladder tipped over as he sought to steady himself while descending it, plaintiff's testimony established prima facie that defendant failed to provide a safety device to insure that the ladder would remain upright while plaintiff used it to perform his statutorily covered work; plaintiff was not required to show that the ladder was defective (Labor Law § 240[1] …).

In opposition, defendant failed to raise an issue of fact as to whether plaintiff's placement of the ladder where he could fall or step onto a stack of sheetrock was the sole proximate cause of his accident, since it presented no evidence that the appropriate equipment was available to plaintiff … . Moreover, because plaintiff established that defendant failed to provide an adequate safety device to protect him from elevation-related risks and that that failure was a proximate cause of his injuries, any negligence on plaintiff's part in placing the ladder near the sheetrock is of no consequence … . Pierrakeas v 137 E. 38th St. LLC, 2019 NY Slip Op 08539, First Dept 11-26-19

FALLING PERSONS, LADDERS.

PLAINTIFF, WHO WAS USING HIS OWN LADDER WHEN IT SLID CAUSING HIM TO FALL, WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION (SECOND DEPT).

The Second Department determined plaintiff's motion for summary judgment on his Labor Law 240 (1) cause of action in this ladder-fall case was properly granted. The rolling stairway provided to plaintiff was not high

enough to reach the control box for a door which was stuck open. So plaintiff used his own ladder which slid to the side causing him to fall 10 or 12 feet:

Labor Law § 240(1) provides that building owners and contractors shall furnish, or cause to be furnished, safety devices which are "so constructed, placed and operated as to give proper protection [to workers]" … . "To establish liability pursuant to Labor Law § 240(1), a plaintiff must demonstrate a violation of the statute and that such violation was a proximate cause of his or her injuries" … . A building owner may be held liable for a violation of Labor Law § 240(1) even if it did not exercise supervision or control over the work … .

Here, the plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability on the Labor Law § 240(1) cause of action … by demonstrating that he was injured when he fell while using an unsecured ladder, which unexpectedly collapsed and caused his injuries, without the benefit of any safety devices to prevent such a fall … . Jara v Costco Wholesale Corp., 2019 NY Slip Op 08664, Second Dept 12-4-19

FALLING PERSONS, LADDERS.

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

FALLING PERSONS, LADDERS.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION IN THIS LADDER-FALL CASE SHOULD HAVE BEEN GRANTED; THE PROPERTY OWNER WAS ENTITLED TO COMMON LAW INDEMNITY (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) claim in this ladder-fall case, and the property owner, Church of God, was entitled to common law indemnity because plaintiff's work was supervised by his apparent employer, Belfor:

Plaintiff's testimony that the ladder wobbled, flipped, and flopped, causing him to fall, sets forth a prima facie violation of Labor Law § 240(1) … . Defendants failed to adduce any evidence rebutting plaintiff's showing, making summary judgment appropriate.

Plaintiff testified that he was using a Belfor ladder at the time of his fall. Belfor's deponent, who had no knowledge of the accident, conceded that Belfor had ladders on site, and could not say whether plaintiff's employer, the subcontractor who furnished labor for the cleaning and debris removal portion of the project, also brought ladders. There were no other subcontractors on site. Belfor's deponent also testified that Belfor had a site supervisor, the only Belfor employee on site that day, and that he would have been "in the thick of it," and not performing paperwork or similar administrative tasks. Plaintiff, who wore a Belfor uniform at Belfor's behest, testified that Belfor employees were "the bosses," ordering him around. This evidence, taken together, is sufficient to establish that Church of God made a prima facie showing of entitlement to common law indemnity … . Rivera-Astudillo v Garden of Prayer Church of God in Christ, Inc., 2019 NY Slip Op 07033, First Dept 10-1-19

FALLING PERSONS, LADDERS.

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

FALLING PERSONS, OWNER, DEFINITION OF.

PLAINTIFF FELL THROUGH AN INADEQUATELY PROTECTED HOLE IN DEFENDANT'S BUILDING WHEN HE (APPARENTLY) WAS DOING WORK ON BEHALF OF HIS EMPLOYER, APPARENTLY A TENANT IN THE BUILDING; PLAINTIFF SHOULD HAVE BEEN AWARDED SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION AGAINST THE BUILDING OWNER; BUT PLAINTIFF PRESENTED NO PROOF HIS EMPLOYER HAD ASSUMED THE DUTIES OF AN AGENT OF THE OWNER FOR SUPERVISION OF HIS WORK, THEREFORE SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) ACTION AGAINST THE EMPLOYER WAS PROPERLY DENIED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that plaintiff's Labor Law 240 (1) cause of action against the building owner should have been granted, but his Labor Law 240 (1) cause of action against his employer, Bright Way, was properly denied because plaintiff presented no proof Bight Way acted as the owner's agent. Apparently Bright Way occupies the owner's building. Plaintiff is a salesman for Bright Way. Plaintiff was instructed to run a thermostat wire on the second floor of the building when he fell 15 feet through an inadequately protected hole:

Labor Law § 240(1) "imposes liability only on contractors, owners or their agents" (…see Labor Law § 240[1]). "An agency relationship for purposes of section 240(1) arises only when work is delegated to a third party who obtains the authority to supervise and control the job"… . "Where the owner or general contractor delegates to a third party the duty to conform to the requirements of the Labor Law, that third party becomes the statutory agent of the owner or general contractor" … . "The key question is whether the defendant had the right to insist that proper safety practices were followed" … . "[U]nless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law" … .

Here, the plaintiff's evidence failed to establish, prima facie, that Bright Way was an agent of the property owner or one of its contractors at the site. The evidence proffered by the plaintiff in support of his motion did not establish that Bright Way had been delegated the "duty to conform to the requirements of the Labor Law"… , that Bright Way "had the right to insist that proper safety practices were followed" at the construction site … , that Bright Way had "broad responsibility" to coordinate and supervise "all the work being performed on the job

site" … , or that Bright Way had requested or been granted authority by the owner or contractor to supervise and control the work in the area where the accident occurred … . Yiming Zhou v 828 Hamilton, Inc., 2019 NY Slip Op 04752, Second Dept 6-12-19

FALLING PERSONS, PLATFORMS.

ALTHOUGH PLAINTIFF DID NOT FALL ALL THE WAY THROUGH THE GAP IN THE ELEVATED PLATFORM WAS WIDE ENOUGH TO HAVE ALLOWED HIM TO FALL THROUGH, PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION (THIRD DEPT).

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 determined that claimant was not the sole proximate cause of the accident … . . Santos v State of New York, 2019 NY Slip Op 01479, Third Dept 2-28-19

FALLING PERSONS, PLATFORMS.

CONFLICTING EVIDENCE WHETHER THE PLYWOOD WHICH FLEXED CAUSING PLAINTIFF TO FALL WAS OVER A THREE-FOOT DEEP HOLE OR TRENCH; LABOR LAW 240 (1) AND 241 (6) CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court determined the Labor Law 240 (1) and 241 (6) causes of action should not have been dismissed. There was conflicting evidence whether the plywood which flexed causing plaintiff to fall was over a three-foot deep hole or trench:

… [T]here was conflicting deposition testimony regarding whether the plywood was, under the circumstances, the functional equivalent of a scaffold meant to prevent the plaintiff from falling into a three-foot-deep hole or trench … . …

… [T]he regulation which plaintiff alleges was violated concerns structural runways, ramps, and platforms (see 12 NYCRR 23-1.22[b]), which is a regulation that sets forth specific standards of conduct sufficient to support a Labor Law § 241(6) cause of action … . Similar to the plaintiff's Labor Law § 240(1) cause of action, the conflicting deposition testimony … raised a triable issue of fact as to whether there was insufficient bracing under the plywood … . Davies v Simon Prop. Group, Inc., 2019 NY Slip Op 05955, Fourth Dept 7-31-19

FALLING PERSONS, PLATFORMS.

PLAINTIFF FELL FROM AN UNGUARDED ELEVATED PLATFORM; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 200 CAUSE OF ACTION SHOULD HAVE BEEN DENIED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiffs' motion for summary judgment on the Labor Law 240 (1) cause of action should have been granted, and defendants' motion for summary judgment on the Labor Law 200 cause of action should not have been granted in this "fall from an elevated platform" case:

Plaintiff electrician was injured when he fell from an elevated concrete platform on his work site that did not have safety rails or stairs, and over which he was repeatedly required to traverse to access an electrical panel to do his work. This accident falls within the ambit of Labor Law § 240(1), because plaintiff's injuries were the direct consequence of a failure to provide adequate protection, such as a guardrail or stairs, to prevent the risk posed by the physically significant elevation differential … .

Since plaintiffs' Labor Law § 200 claim is premised upon [defendant's] alleged notice and failure to remedy the dangerous condition of materials stored haphazardly on the platform where plaintiff fell, it should have been sustained … . Coombes v Shawmut Design & Constr., 2019 NY Slip Op 06455. 9-10-19

FALLING PERSONS, PLATFORMS.

QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT ON MOST (BUT NOT ALL) OF THE CAUSES OF ACTION IN THIS LABOR LAW 240 (1), 241 (6), 200, COMMON-LAW NEGLIGENCE AND INDEMNIFICATION ACTION STEMMING FROM A FALL INVOLVING A MAKESHIFT PLATFORM PLAINTIFF WAS USING TO INSTALL SPRINKLERS; THE DECISION HAS GOOD SUMMARIES OF THE ELEMENTS OF ALL OF THE CAUSES OF ACTION (SECOND DEPT).

The Second Department, in a substantive decision which explains the elements of Labor Law 240 (1), 241 (6), 200, common-law negligence and indemnification causes of action, determined questions of fact precluded summary judgment on most of the causes of action. Plaintiff was installing sprinklers and fell when he was attempting to position a plank he was using as a platform to stand on. With respect to Labor Law 240 (1), the court wrote:

Here, the [defendants] failed to demonstrate, prima facie, that the plaintiff was the sole proximate cause of his fall and subsequent injuries … . Although they submitted evidence that there were ladders at the site and available to the plaintiff, and that the plaintiff used one such ladder in order to climb to the top of the wall, they also submitted the plaintiff's deposition testimony, which demonstrated the existence of triable issues of fact as to whether the plaintiff was recalcitrant or whether he was following his supervisor's instructions and performing the work in the only way possible. In addition, the plaintiff and [defendant] employees testified at their respective depositions that, although [defendant] was aware that the dropped ceiling grids had been installed prior to the sprinklers, no one from [defendant], which had the authority to stop any unsafe work practices, sought to stop the plaintiff from working as he did. Thus, we agree with the Supreme Court's determination denying those branches of the motions of [defendants] which were for summary judgment dismissing the cause of action alleging a violation of Labor Law § 240(1) … .

However, we agree with the Supreme Court that the plaintiff failed to demonstrate his prima facie entitlement to judgment as a matter of law on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1) … . Triable issues of fact exist as to whether the [defendants] should have provided safety devices or whether the plaintiff's act in erecting and using a scaffolding board was a recalcitrant act which was the sole proximate cause of his injury. Graziano v Source Bldrs. & Consultants, LLC, 2019 NY Slip Op 06477, Second Dept 9-11-19

FALLING PERSONS, SCAFFOLDS, PROXIMATE CAUSE.

PLAINTIFF'S INJURIES WERE NOT CAUSED BY A DEFECT IN THE SCAFFOLD OR A FAILURE TO PROVIDE AN ADEQUATE SAFETY DEVICE, LABOR LAW 200, 240 (1) AND 241 (6) CAUSES OF ACTION PROPERLY DISMISSED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Tom, over an extensive two-justice dissent, determined that plaintiff's Labor Law 200, 240 (1) and 241 (6) causes of action were properly dismissed. Plaintiff was injured attempting to enter a building through a window from a scaffold, a prohibited method of entry. There was evidence plaintiff dislocated his shoulder trying to pull himself up to the window, and there was (possibly conflicting) evidence plaintiff fell backwards onto the scaffold. The majority concluded that in either scenario the injury was not caused by a defect in the scaffold or a failure to provide an adequate safety device, and therefore was not compensable:

Plaintiff's claim was correctly dismissed because defendants demonstrated as a matter of law that plaintiff's injury was not proximately caused by a violation of section 240(1). Plaintiff's own actions were the sole proximate cause of his injuries. Plaintiff conceded that scaffold stairs were available to him to descend several floors and reenter the building. Further, as already noted, he admitted during his deposition that he knew he was not supposed to climb through the [*5]window and that it would have been safer to use the scaffold stairs. On appeal, he essentially argues, inter alia, that reentry via the scaffold stairs would have taken more time and would have been an inconvenience. Plaintiff also admitted to unhooking his safety line in order to climb through the window cut-out. Under the circumstances, adequate safety devices were available for plaintiff's use at the job site, and his own actions in unhooking his safety line and climbing through the window were the sole proximate cause of his injuries … .

Because plaintiff's actions were the sole proximate cause of his injuries, the claims for common-law negligence and violation of Labor Law § 200 were also properly dismissed … .

Plaintiff also failed to raise an issue of fact as to a violation of the Industrial Code, as required to support the claim under Labor Law § 241(6) … . Industrial Code (12 NYCRR) § 23-1.7(d), which requires that an employer "not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition," clearly does not include a crossbar, such as the one from which plaintiff allegedly slipped, because it is limited to "working surfaces." While a scaffold platform on which workers stand and work would seemingly come within the provision, structural crossbars which simply hold the

scaffold together are not working surfaces required for standing or walking … . Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp., 2019 NY Slip Op 06142, First Dept 8-13-19

FALLING PERSONS, SCAFFOLDS, SUPERVISE AND CONTROL.

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

FALLING PERSONS, SCAFFOLDS.

ALTHOUGH PLAINTIFF POSITIONED THE SCAFFOLD SUCH THAT IT TIPPED WHEN A WHEEL WENT THROUGH A HOLE IN A DRAIN GRATE, HE WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, over a dissent, determined that plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action. Plaintiff had positioned the scaffold on a drain grate and the scaffold tipped when a wheel went through a hole in the grate:

"[T]he relevant and proper inquiry is whether the hazard plaintiff encountered . . . was a separate hazard wholly unrelated to the hazard which brought about [the] need [for a safety device] in the first instance" … . Here, it is undisputed that the scaffold on which plaintiff was standing tipped over because one of its wheels was placed over an open floor drain hole. The fact that the scaffold tipped and plaintiff fell to the ground "demonstrates that it was not so placed . . . as to give proper protection to [him]" … . We therefore conclude that plaintiff's accident was caused by an elevation-related risk as contemplated in section 240 (1) … .

We reject defendant's contentions that the sole proximate cause of the accident was plaintiff's failure to observe the drain hole and position the scaffold in such a manner to avoid it. "[T]here can be no liability under [Labor Law §] 240 (1) when there is no violation and the worker's actions . . . are the sole proximate cause' of the accident" … , and "[a] defendant is entitled to summary judgment dismissing a Labor Law § 240 (1) cause of action or claim by establishing that . . . the plaintiff's conduct was the sole proximate cause of the accident" … . Plaintiff submitted the testimony of four witnesses, including the project superintendent of the subcontractor that installed the drain and the project manager and superintendent of the subcontractor that installed the concrete floor and curing blanket. Each testified that a temporary cover should be placed over an open drain during the installation of the concrete floor, and therefore plaintiff established that a statutory violation, i.e., the placement of the scaffold over the improperly covered drain hole, was a proximate cause of the accident … . Thus, even assuming, arguendo, that plaintiff was negligent in failing to observe the drain hole and positioning the scaffold over it, we conclude that his "actions . . . render him [merely] contributorily negligent, a defense unavailable under [Labor Law § 240 (1)]" … . "Because plaintiff established that a statutory violation was a proximate cause of [his] injury, [he] cannot be solely to blame for it' " … . Wolf v Ledcor Constr. Inc., 2019 NY Slip Op 06263, Fourth Dept 8-22-19

FALLING PERSONS, SCAFFOLDS.

PLAINTIFF FELL FROM A SCAFFOLD WHICH HAD NO RAILINGS, PLAINTIFF DID NOT NEED TO DEMONSTRATE THE SCAFFOLD WAS DEFECTIVE, PLAINTIFF PROPERLY GRANTED SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION (FIRST DEPT).

The First Department determined plaintiff's motion for summary judgment in this Labor Law 240 (1) scaffold-fall case was properly granted. The scaffold had not railings and plaintiff fell when the scaffold tipped because one of its wheels went through the floor. The court noted that plaintiff was not required to show that the scaffold was defective:

It is undisputed that the scaffold he was supplied with and directed to use lacked railings, and that he fell off when the scaffold tipped as one wheel broke through the floor on which it was standing. Plaintiff was not provided with any other safety devices. This evidence establishes prima facie a violation of Labor Law § 240(1) … . Plaintiff was not required to show that the scaffold was defective … . Martinez-Gonzalez v 56 W. 75th St., LLC, 2019 NY Slip Op 04111, First Dept 5-28-19

FALLING PERSONS, SCAFFOLDS.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS SCAFFOLD-COLLAPSE CASE SHOULD HAVE BEEN GRANTED IN THIS LABOR LAW 240 (1) ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff's motion for summary judgment in this scaffold-collapse, Labor Law 240 (1) action should have been granted. The defendant did not raise a question of fact whether plaintiff's omission (failure to use clips) was sole proximate cause of the movement of the scaffold and the fall:

… [T]he collapse of the scaffold, for no apparent reason, gave rise to "a prima facie showing that the statute was violated and that the violation was a proximate cause of the worker's injuries" … . …

[Defendant] St. Gerard argued that the plaintiff failed to utilize clips to secure the working platform to the frame of the scaffold, and that this conduct was the sole proximate cause of the accident. However, St. Gerard's

evidence was insufficient to raise a triable issue of fact as to whether the plaintiff failed to use clips and whether any failure to use clips constituted the sole proximate cause of the accident. In this regard, St. Gerard relied solely on the affidavit of the plaintiff's supervisor, Danny Simile, dated nearly 2½ years after the accident, in which Simile averred that "[t]here were no clips at the accident location." Simile's affidavit did not explain whether, when, or in what manner he had undertaken a search for clips. Significantly, the absence of clips was not noted in any of three incident reports prepared by Simile shortly after the accident. Additionally, Simile averred, in mere conclusory fashion, that had clips been used to secure the working platform, "the working platform would be secure and it would not move, slide out or fall." This bare assertion was insufficient to raise a triable issue of fact as to whether any absence of clips was the sole proximate cause of the accident. Indeed, Simile also averred that if the platform had been "properly seated' or decked'" it would be "secure" and would not "move, slide out or fall." There was no evidence presented that the platform had been improperly "seated" or "decked." Cruz v Roman Catholic Church of St. Gerard Magella in Borough of Queens in the City of N.Y., 2019 NY Slip Op 05763,

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FALLING PERSONS, TRUCKS.

PLAINTIFFS FELL FROM A LIFT TRUCK WHICH WAS STRUCK BY A BUS, SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED; HEARSAY ALONE WILL NOT DEFEAT A MOTION FOR SUMMARY JUDGMENT (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiffs' motion for summary judgment on the Labor Law 240 (1) cause of action should have been granted, noting that hearsay alone will not defeat a summary judgment motion:

Plaintiffs … established prima facie that defendants are liable for their injuries under Labor Law § 240(1) by submitting evidence that they fell to the ground and were injured when the lift truck upon which they were working moved when it was struck by a passing bus … . Moreover, the lift truck, which was being used as an elevated work platform, lacked a guardrail to prevent … . In opposition, defendants failed to raise an issue of fact. They rely instead on hearsay evidence as to how the accident may have occurred. Such hearsay evidence alone is insufficient to defeat a motion for summary judgment … . South v Metropolitan Transp. Auth., 2019 NY Slip Op 07213, First Dept 10-8-19

FALLING PERSONS, WALLS.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED; PLAINTIFF FELL FROM A WALL UNDER CONSTRUCTION AND HAD NOT BEEN PROVIDED WITH A HARNESS; DEFENDANT'S EXPERT'S AFFIDAVIT WAS SPECULATIVE (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. Defendant's expert's affidavit was deemed speculative because it was not based upon record evidence. Defendant's argument that further discovery might reveal defenses was rejected, in part, because defendant was not diligent in pursuing discovery:

Plaintiff established prima facie entitlement to partial summary judgment on his Labor Law § 240(1) claim with his deposition testimony, photographic exhibits and expert's opinion, which showed that he fell from a 10-foot high sidewalk bridge that he was helping to assemble on defendant's property, when a pile of heavy wooden planks shifted and struck him on the legs, causing him to lose his balance. Plaintiff testified that the side barriers for the sidewalk bridge were not yet built, and he was not supplied with a safety harness to protect him from gravity-related harm … . …

Defendant's argument that plaintiff's motion for partial summary judgment was premature where its expert opined that depositions of the contractor's personnel yet to be taken might yield evidence that plaintiff was supplied with a fall-arrest safety harness, and that he was recalcitrant in not using it, lacks factual support in the record, and as such, the expert's opinion in that regard is speculative and non-probative … . The mere hope that additional discovery may lead to sufficient evidence to defeat a summary judgment motion is insufficient to deny such a motion … . The record further shows that defendant had a reasonable opportunity to pursue discovery … , and defendant has not shown that it was diligent in pursuing discovery in this case … . Singh v New York City Hous. Auth., 2019 NY Slip Op 08272, First Dept 11-14-19

INDUSTRIAL CODE, DESIGNATED PERSON.

INDUSTRIAL CODE PROVISION WHICH REFERRED TO THE REQUIREMENT THAT A 'DESIGNATED PERSON' OPERATE A POWER BUGGY IS SPECIFIC ENOUGH TO SUPPORT A LABOR LAW 241 (6) CLAIM, PLAINTIFF WAS STRUCK BY A POWER BUGGY OPERATED BY SOMEONE WHO WAS NOT A 'DESIGNATED PERSON' (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Singh, over a two-justice dissent, determined that an Industrial Code provision requiring that a power buggy be operated by a "designated person" was specific enough to support a Labor Law 241 (6) claim. Plaintiff was injured when he was struck in the back by a power buggy operated by someone who was horsing around and fell off the buggy before it struck plaintiff. The First Department searched the record and awarded summary judgment to the plaintiff:

We agree with the dissent that the regulation's requirement that a "trained and competent operator . . . shall" operate the power buggy is general, as it lacks a specific requirement or standard of conduct. However, since the term "designated person" has been held to be specific, 12 NYCRR 23-9.9(a) is a proper predicate for a claim under Labor Law § 241(6).

The dissent's concern that we are exposing a defendant to liability for injury caused by a power buggy operated by an unauthorized person is misplaced … . We note that the Court of Appeals has reiterated that, while the duty imposed by Labor Law § 241(6) may be "onerous[,] . . . it is one the Legislature quite reasonably deemed necessary by reason of the exceptional dangers inherent in connection with constructing or demolishing buildings or doing any excavating in connection therewith'" … , and that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" … .

Moreover, liability under Labor Law § 241(6) "is dependent on the application of a specific Industrial Code provision and a finding that the violation of the provision was a result of negligence" … .

The fact that the operating engineer was "horse playing" prior to operating the power buggy does not absolve defendant from liability under Labor Law § 241(6) … . Toussaint v Port Auth. of N.Y. & N.J., 2019 NY Slip Op 04302, First Dept 5-30-19

INDUSTRIAL CODE, ELECTRICITY, FAILURE TO SHUT OFF.

QUESTION OF FACT WHETHER OWNER/GENERAL CONTRACTOR FAILED IN THEIR NONDELEGABLE DUTY TO SHUT OFF THE ELECTRICITY IN A BUILDING UNDERGOING DEMOLITION; PLAINTIFF RECEIVED AN ELECTRIC SHOCK WHEN HE STRIPPED INSULATION FROM AN ELECTRIC CABLE; PLAINTIFF'S LABOR LAW 241(6) CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department determined the property owner/general contractor's motion for summary judgment on the Labor Law 241(6) cause of action should not have been granted. Plaintiff received an electric shock when cutting away the insulation of an electric cable as part of a demolition project. Plaintiff was to make the wiring in the office safe and was going to test the voltage of the wires lying on the floor when he received the shock:

… [T]he court erroneously granted defendants' motion with respect to the Labor Law § 241 (6) claim against them insofar as that claim is predicated upon alleged violations of 12 NYCRR 23-1.13 (b) (4) and 23-3.2 (a) (2) and (3), and we therefore modify the order accordingly. The first of those provisions of the Industrial Code states that "[n]o employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means" (12 NYCRR 23-1.13 [b] [4] …). The latter provisions state, inter alia, that electric lines must be "shut off and capped or otherwise sealed" before any demolition project begins (12 NYCRR 23-3.2 [a] [2] …) and, if it is necessary to maintain an electric line during demolition, "such lines shall be so protected with substantial coverings or shall be so relocated as to protect them from damage and to afford protection to any person" (12 NYCRR 23-3.2 [a] [3]). Defendants failed to meet their initial burden of establishing that they "did not violate the regulations, that the regulations are not applicable to the facts of this case, or that such violation was not a proximate cause of the accident" … . We conclude that there are issues of fact whether, inter alia, defendants' failure in their nondelegable duty to shut off the electricity was a proximate cause of the accident … . Winters v Uniland Dev. Corp., 2019 NY Slip Op 05440, Fourth Dept 7-5-19

INDUSTRIAL CODE, EXCAVATOR TIPPED OVER.

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

INDUSTRIAL CODE, GRINDER WITH NO SAFETY GUARD.

PLAINTIFF WAS INJURED USING A GRINDER WHICH DID NOT HAVE A SAFETY GUARD, THE LABOR LAW 241 (6) CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's Labor Law 241 (6) cause of action should not have been dismissed. Plaintiff was injured using a grinder that did not have a safety guard:

Industrial Code (12 NYCRR) § 23-1.5(c)(3), which provides that "[a]ll safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged," applies to the instant action and is sufficiently specific to support a section 241(6) claim … . Here, plaintiff testified that he was given a hand-held grinder from which the safety guard had been removed by his employer to install an over-sized disc blade. Plaintiff was then instructed to use this grinder to cut concrete, over his objections, and was injured when the grinder got stuck, kicked back, knocked him to the ground, and cut into his foot. This testimony raises a triable issue of fact as to whether defendant breached its nondelegable duty "to provide reasonable and adequate protection and safety" to plaintiff … . Contreras v 3335 Decatur Ave. Corp., 2019 NY Slip Op 04663, First Dept 6-11-13

INDUSTRIAL CODE, ICE ON FLOOR.

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

INDUSTRIAL CODE, SLIPPERY FLOOR.

BROWN PAPER ON TOP OF GREEN DUST ALLEGEDLY CONSTITUTED A SLIPPERY CONDITION ON THE FLOOR CAUSING PLAINTIFF'S SLIP AND FALL, PLAINTIFF'S LABOR LAW 241 (6) AND 200 CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department determined plaintiff's Labor Law 241 (6) and 200 causes of action should not have been dismissed. Plaintiff alleged brown paper on top of green dust (used to keep down dust) created a dangerous slippery condition which caused his slip and fall:

The motion court improperly dismissed plaintiff's Labor Law § 241(6) claim predicated on Industrial Code (12 NYCRR) § 23-1.7(d). The alleged presence of green dust on the floor created a triable issue as to whether a "foreign substance" created a slippery condition on the floor, in violation of this Code section, and whether such condition caused plaintiff's accident … .

Plaintiff's Labor Law § 200 and common-law negligence claims should similarly be reinstated as the court should not have analyzed plaintiff's accident under the manner and means standard, but should instead have applied the dangerous condition standard … . The green dust was a dangerous condition that existed prior to plaintiff's arrival at the job site it was not part of the work plaintiff was performing … . As such, there are triable issues of fact as to whether the general contractor … had notice of the hazardous condition of the floor … . In addition, the owner … failed to demonstrate the absence of actual or constructive notice of the hazardous condition on its part, since it failed to point to any probative evidence on this issue … . DeMercurio v 605 W. 42nd Owner LLC, 2019 NY Slip Op 03550 First Dept 5-7-19

MAINTENANCE, DEFINITION OF.

PLAINTIFF WAS DOING ROUTINE MAINTENANCE WHEN HE FELL FROM A LADDER, NOT COVERED BY LABOR LAW 240 (1) (FIRST DEPT).

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

MAINTENANCE, DEFINITION OF.

PLAINTIFF WAS ENGAGED IN ROUTINE MAINTENANCE SO HIS FALL FROM A LADDER WAS NOT ACTIONABLE PURSUANT TO LABOR LAW 240 (1), A MUNICIPALITY'S MAINTENANCE OF LIGHT POLES IS A PROPRIETARY FUNCTION TO WHICH THE DOCTRINE OF IMMUNITY DOES NOT APPLY, THE MUNICIPALITY'S 'LACK OF WRITTEN NOTICE' DEFENSE COULD NOT BE RAISED FOR THE FIRST TIME ON APPEAL (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that plaintiff was engaged in routine maintenance when he was injured, which is not actionable pursuant to Labor Law 240 (1). The Third Department further determined that a municipality's maintenance of light poles is a proprietary function subject to ordinary standards of negligence which is not protected by the doctrine of governmental immunity. The court further held that the "lack of written notice" defense was not a question of law which the municipality could raise for the first time on appeal. The plaintiff was repairing burned out lights which were on strands of decorative lights attached to a light pole. The strands of decorative lights were not fixtures within the meaning of the Labor Law:

… Merchants [a non-profit which had wrapped decorative lights around city light poles] hired plaintiff, as an independent contractor, to replace light strands located on 36 light poles because many of the light bulbs had become inoperable. Plaintiff was injured when he fell from a 16-foot aluminum-rung extension ladder when the pole that it was leaning on suddenly fell over. …

… [R]replacement of the light strands, which was necessary because numerous bulbs had burned out, constituted routine maintenance that is outside the protection of Labor Law § 240 (1) … . …

… [A]lthough replacement of a light fixture on a lighting pole is a repair within the protection of Labor Law § 240 (1) … , under the facts herein, the light strands cannot be considered a fixture. …

Although a municipality may enjoy qualified immunity from liability arising from highway planning and design decisions … , that doctrine does not shield a municipality from liability arising from negligent maintenance. Gutkaiss v Delaware Ave. Merchants Group, Inc., 2019 NY Slip Op 04527, Third Dept 6-6-19

MAINTENANCE, DEFINITION OF.

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

MAINTENANCE, DEFINITION OF.

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 routing 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

OWNER, DEFINITION OF.

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

OWNER, DEFINITION OF.

DEFENDANT, AN OUT OF POSSESSION LESSEE, WAS NOT AN 'OWNER' WITHIN THE MEANING OF LABOR LAW 240 (1) OR 241 (6) AND WAS THEREFORE ENTITLED TO SUMMARY JUDGMENT (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined defendant M & M was not a property owner in the context of Labor Law 240 (1) or 241 (6) and therefore was entitled to summary judgment. The Fourth Department noted that an issue on which Supreme Court reserved decision is not appealable:

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' " … . "The 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' " … .

Here, M and M met its initial burden of establishing that it was not an owner for purposes of Labor Law §§ 240 (1) and 241 (6) because its submissions established that "it was an out-of-possession lessee of the property [that] neither contracted for nor supervised the work that brought about the injury, and had no authority to exercise any control over the specific work area that gave rise to plaintiff's injuries' " … . Thompson v M & M Forwarding of Buffalo, N.Y., Inc., 2019 NY Slip Op 05875, Fourth Dept 7-31-19

OWNER, DEFINITION OF.

QUESTION OF FACT WHETHER THE LESSEE OF THE PROPERTY WAS AN OWNER OR AGENT OF THE OWNER FOR LABOR LAW PURPOSES, PROPERTY MANAGER WAS NOT LIABLE IN THIS LABOR LAW 240 (1), 241 (6) AND 200 ACTION STEMMING FROM PLAINTIFF'S FALL FROM A ROOF (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law 240 (1) cause of action, stemming from falling from a roof he was working on,

should have been granted with respect to the property owner (Bruckner) and the general contractor (Metro). There was a question of fact whether Western, which leased the property, was an "owner" or "agent" of the owner for Labor Law purposes. However, the property manager, Ashkenazy, had no authority to supervise or control plaintiff's work and was not liable under Labor Law 240 (1), 241 (6) or 200:

An issue of fact exists as to whether Western, the lessee, was an "owner" or "agent" of the owner, for Labor Law purposes. Record evidence showing that Western was responsible for renovating the premises, including the roof, and had retained Metro as the general contractor for the renovation work, raises an issue of fact as to whether Western had the authority to supervise and control the work site … . The testimony of Western's director of merchandising that he was not involved with the construction work is insufficient to excuse Western from liability, where he had no knowledge of, and could not testify to, the lease arrangements between Western and Bruckner, as well as the arrangement between Western and Metro … .

Ashkenazy had no involvement with the construction work, and was onsite only to check on its progress, and to ensure it did not interfere with the other tenants. The belief of its "Director of Property Management" that he may have been able to stop work at the job site "[w]ith proper notice I guess as per the lease" is too equivocal to raise an issue of fact. Because there was no evidence that Ashkenazy had authority to supervise or control the work site, the Labor Law § 240(1) claim should be dismissed against it … . Ashkenazy is also entitled to dismissal of the Labor Law § 241(6) claim because, for the same reasons, it is not an "owner" or "agent" under that statute … . Without authority to supervise or control plaintiff's work, Ashkenazy also may not be held liable under Labor Law § 200 and common law negligence principles in this case involving the means and method of plaintiff's work … . Reyes v Bruckner Plaza Shopping Ctr. LLC, 2019 NY Slip Op 05003, First Dept 6-20-19

REPAIR, DEFINITION OF.

REPAIRING A LIGHT FIXTURE IS COVERED UNDER BOTH LABOR LAW 240 (1) AND 241 (6), DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing (modifying Supreme Court) determined defendants' motion for summary judgment on plaintiff's Labor Law 240 (1), 241 (6) and 200 causes of action should not have been granted. Plaintiff fell from an A-frame ladder when he was repairing a light fixture at the Nassau Coliseum. Repairing the light fixture is an activity covered by both Labor Law 240 (1) and 241 (6):

Here, the County defendants' own submissions highlighted rather than eliminated triable issues of fact as to whether the plaintiff was engaged in repairs or routine maintenance at the time of his accident. Among other things, the County defendants submitted the plaintiff's deposition testimony in support of summary judgment. Although the plaintiff's testimony demonstrated that some of the lighting poles on which he worked may have only required the tightening or replacement of a lightbulb, he testified that more labor intensive work was performed on other lighting poles in order to make them function, which fell within the scope of "repairing" a light fixture and, concomitantly, within the scope of Labor Law § 240(1) … . …

"Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in . . . construction, excavation or demolition work"… . "[T]he courts have generally held that the scope of Labor Law § 241(6) is governed by 12 NYCRR 23-1.4(b)(13), which defines construction work expansively. Under that regulation, construction work consists of [a]ll work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures" …. Since the plaintiff was arguably engaged in the repair of the subject lighting fixtures, the County defendants failed to establish, prima facie, that Labor Law § 241(6) was inapplicable to the plaintiff's activities. Wass v County of Nassau, 2019 NY Slip Op 04748, Second Dept 6-12-19

SUPERVISE AND CONTROL.

LABOR LAW 200 CAUSE OF ACTION, PREMISED ON DEFENDANT'S AUTHORITY TO SUPERVISE OR CONTROL THE PERFORMANCE OF PLAINTIFF'S WORK, SHOULD NOT HAVE BEEN DISMISSED, LABOR LAW 240 (1) AND 241 (6) CAUSES OF ACTION PROPERLY DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff's Labor Law 200 cause of action should not have been dismissed. Plaintiff was injured when he was attempting to move a light fixture. He was cutting sheetrock in the ceiling with an allegedly improper electric saw when it kicked back and injured him. The Labor Law 240 and 231 causes of action were properly dismissed because an elevation-related hazard was not alleged, nor was an Industrial Code violation:

"Where a plaintiff's claims implicate the means and methods of the work, an owner or contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work. General supervisory authority to oversee the progress of the work is insufficient to impose liability. A

defendant has the authority to control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" … .

Here, as supplemented by the plaintiff's affidavit, the complaint states cognizable causes of action pursuant to Labor Law § 200 and to recover damages for common-law negligence. The plaintiff averred that on the day of the accident, Rapaport [the construction manager] , whom he knew as the "contractor," directed the plaintiff to move an overhead light from one place in the ceiling to another and told him to use an electrical saw to cut the sheetrock in the ceiling. These allegations are sufficient to support the statutory and common-law negligence claims against the moving defendants, and the moving defendants' documentary evidence does not utterly refute these allegations … . Soller v Dahan, 2019 NY Slip Op 04441, Second Dept 6-5-19

SUPERVISE AND CONTROL.

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

SUPERVISE AND CONTROL.

QUESTIONS OF FACT WHETHER DEFENDANT WAS A GENERAL CONTRACTOR AND WHETHER DEFENDANT HAD SUPERVISORY AUTHORITY OVER SAFETY CONDITIONS IN THIS LABOR LAW 240 (1) LADDER-FALL CASE (FIRST DEPT).

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

UNIFIED TRIALS (LIABILITY AND DAMAGES).

JUDGES IN THE 2ND DEPARTMENT HAVE THE DISCRETION TO ORDER UNIFIED PERSONAL INJURY TRIALS WHERE THE ISSUES OF LIABILITY AND THE INJURIES ARE INTERTWINED AS THEY WERE IN THIS CONSTRUCTION ACCIDENT CASE; DEFENSE VERDICT SET ASIDE AND A NEW UNIFIED TRIAL ORDERED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Scheinkman, setting aside the defense verdict on liability and ordering a new trial, determined that the trial judge had the discretion to order (and should have ordered) a unified trial (both liability and damages) in this Labor Law 240 (1), 241 (6), 200 and common law negligence action. Plaintiff (Castro) alleged the elevated work platform he was on collapsed and he fell 6 or 7 feet to the ground. There were no witnesses to the incident. Plaintiff alleged brain, head, shoulder and spine injuries. The defense alleged plaintiff was injured moving planks and did not in fact fall. Evidence of any brain injury was excluded from the trial. Because the evidence of brain injury was consistent with a fall, and inconsistent with moving planks, the exclusion of that evidence affected the fairness of the trial. The opinion makes it clear that judges in the Second Department have the discretion to order unified trials in personal injury cases:

Here, by any standard, a unified trial was warranted. Labor Law § 240(1) "imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks" … . [Defendants] disputed the plaintiffs' claim that Castro fell from a scaffold and contended that the accident resulted not from an elevation-related risk, but from Castro's action in lifting wooden planks. Evidence relating to Castro's brain injuries, which would not have occurred from lifting wooden planks, was probative in determining how the incident occurred … . Thus, the nature of the injuries had an important bearing on the issue of liability.

The Supreme Court did not exercise its available discretion in denying the plaintiffs' motion for a unified trial. The court's determination was predicated upon its perception that a bifurcated trial was strictly required by the Second Department's "rules." However, neither the statewide rule nor the governing precedent absolutely requires that the trial of a personal injury action be bifurcated. Although bifurcation is encouraged in appropriate settings, bifurcation is not an absolute given and it is the responsibility of the trial judge to exercise discretion in determining whether bifurcation is appropriate in light of all relevant facts and circumstances presented by the individual cases. …

Because the issues of liability and Castro's injuries were so intertwined, the court's insistence upon bifurcation and its ensuing limitations on the scope of the medical evidence that could be elicited by the plaintiffs deprived them of a fair trial. Castro v Malia Realty, LLC, 2019 NY Slip Op 06466, Second Dept 9-11-19