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Construction Law
Year in Review 2020

An Organized Compilation of the Summaries of Selected Decisions Addressing Labor Law-Construction Law Released in 2020. The Entries in the Table of Contents Link to the Summaries which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header to Return There.

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$0 DAMAGES FOR PAIN AND SUFFERING,

JUDGE PROPERLY SET ASIDE THE VERDICT AWARDING $0 FOR FUTURE PAIN AND SUFFERING IN THIS LABOR LAW 240 (1) ACTION DESPITE PLAINTIFF'S FAILURE TO OBJECT TO THE VERDICT AS INCONSISTENT (FIRST DEPT).

The First Department determined Supreme Court properly set aside the verdict awarding $0 for pain and suffering in this Labor Law 240 (1) action, despite plaintiff's failure to object to the verdict as inconsistent:

… [P]laintiff's failure to object to the jury's award of $0 for both past and future pain and suffering as inconsistent with the jury's awards for past and future lost earnings and future medical expenses did not preclude the court from deciding whether " the jury's failure to award damages for pain and suffering [wa]s contrary to a fair interpretation of the evidence and constitute[d] a material deviation from what would be reasonable compensation'" … . Natoli v City of New York, 2020 NY Slip Op 00988, First Dept 2-11-20

ALTERATION, 241(6).

QUESTION OF FACT WHETHER INSTALLING CONDENSERS WAS 'ALTERATION' WITHIN THE MEANING OF LABOR LAW 241(6); DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was engaged in construction (alteration) at the time of his injury. His Labor Law 241(6) cause of action, therefore, should not have been dismissed:

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 defendants' motions 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) … . Rodriguez v Antillana & Metro Supermarket Corp., 2020 NY Slip Op 00669, First Dept 1-30-20

EXCAVATOR BUCKET, 241(6).

JURY CONFUSION AND THE INCONSISTENT VERDICT IN THIS LABOR LAW 241(6) ACTION REQUIRED A NEW TRIAL; EVEN A WORKER AUTHORIZED TO BE WITHIN THE RANGE OF AN EXCAVATOR BUCKET CAN CLAIM THE PROTECTION OF THE INDUSTRIAL CODE PROVISION WHICH PROHIBITS WORK IN AN AREA WHERE A WORKER MAY BE STRUCK BY EXCAVATION EQUIPMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the inconsistent verdict in this Labor Law 241(6) action required a new trial. The trial court had dismissed the action. The Second Department noted that even though plaintiff was a member of an excavator crew and therefore was authorized to be within range of a moving excavator bucket he still claim the protections provided by 12 NYCRR 23-9.5(k) which provides "[p]ersons shall not be . . . permitted to work in any area where they may be struck . . . by any excavation equipment." Plaintiff's hand was crushed by an excavator bucket:

The jury returned a verdict finding that the City defendants violated Industrial Code (12 NYCRR) 23-4.2(k), but that the violation was not a substantial factor in causing the accident. Although the instructions on the verdict sheet directed the jury to end its deliberations if it found that the violation of Industrial Code (12 NYCRR) 23-4.2(k) was not a substantial factor in causing the accident, the jury further found that the injured plaintiff was negligent and that his negligence was a substantial factor in causing the accident. The jury then proceeded to apportion fault 25% to the City defendants and 75% to the injured plaintiff. After the Supreme Court instructed the jurors to reconsider its verdict, the jury returned a second verdict which was identical to the first verdict, except that the jurors

did not answer the questions as to the injured plaintiff's negligence and apportionment of fault. …

"When a jury's verdict is internally inconsistent, the trial court must direct either reconsideration by the jury or a new trial" (…see CPLR 4111[c] …). "On reconsideration, the jury [is] free to substantively alter its original statement so as to conform to its real intention, and [is] not bound by the terms of its original verdict inasmuch as that verdict was not entered by the court" … . "Even after reconsideration by the jury, a trial court has discretion to set aside a verdict which is clearly the product of substantial confusion among the jurors" . "A new trial should be granted where . . . the record demonstrates … substantial confusion among the jurors in reaching a verdict" … . Torres v City of New York, 2020 NY Slip Op 00170, Second Dept 1-8-20

FALLING OBJECTS, 200.

RARE CASE WHERE PLAINTIFF'S SUMMARY JUDGMENT MOTION ON LABOR LAW 200 AND COMMON-LAW NEGLIGENCE CAUSES OF ACTION WAS APPROPRIATELY GRANTED (FIRST DEPT).

The First Department determined this was a rare case where summary judgment was appropriate on a Labor Law 200, common-law negligence cause of action:

Here, PSJV, the entities responsible for site cleanliness and trade coordination, at a time when the project was open to the elements, covered a recessed area of the third floor, where rainwater regularly collected, with non-waterproof planking, and never inspected it for water accumulation. Further, PSJV did not warn plaintiff or his employer that he was working under the recessed area, and when he drilled into the second floor ceiling to affix electrical equipment, the sludgy, oily water poured down onto him, causing him to lose his balance and injure himself. Thus, plaintiffs made a prima showing that the accident occurred due to a defective condition on the premises of which PSJV had actual notice, having caused and created it … . In response, PSJV failed to adduce credible evidence that anyone else, including plaintiff electrician, negligently caused the accident … . Langer v MTA Capital Constr. Co., 2020 NY Slip Op 03171, First Dept 6-3-20

FALLING OBJECTS, 240(1), 200.

PLAINTIFF SHOULD HAVE BEEN AWARDED SUMMARY JUDGMENT ON LABOR LAW 240 (1), LABOR LAW 200 AND COMMON LAW NEGLIGENCE CAUSES OF ACTION IN THIS FALLING OBJECT CASE, EVEN IF PLAINTIFF SHOULD NOT HAVE BEEN WHERE HE WAS AT THE TIME OF THE ACCIDENT (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment against the general contractor (Sweeney) on his Labor Law 240 (1) cause of action in this falling object case, even if plaintiff was not supposed to be in the area when he was struck (comparative negligence is inapplicable). Plaintiff was also entitled to summary judgment on his Labor Law 200 and common-law negligence claims against the subcontractor (Structure Tech) whose employee caused the object to fall. There was a question of fact whether the Structure Tech employee was instructed by Sweeney to cut the object which fell, which would make Sweeney liable for the Labor Law 200 and negligence causes of action as well:

Plaintiff should have been awarded summary judgment on the issue of liability on his Labor Law § 240(1) claim as against Sweeney because there was no overhead protection provided to plaintiff … . Thus even if, as Structure Tech's superintendent testified, plaintiff was in an area of the worksite where he was not supposed to be at the time of his accident, this would at most constitute comparative negligence which is not a defense to a Labor Law § 240(1) claim … . …

Plaintiff also should have been awarded summary judgment on his Labor Law § 200 and common-law negligence claims as against Structure Tech. As a subcontractor and, therefore, the statutory agent of the general contractor, Structure Tech may be held liable pursuant to Labor Law § 200 and under common-law negligence for injuries caused by a dangerous condition that it caused or created or of which it had actual or constructive notice … . Since no party disputes that a Structure Tech employee was responsible for dislodging the baluster and allowing it to fall and strike plaintiff, Structure Tech is liable to plaintiff under Labor Law § 200 and common-law negligence.

However, an issue of fact exists as to Sweeney's liability to plaintiff under these claims based on the testimony of Structure Tech's superintendent that it was, in fact, Sweeney's superintendent who instructed Structure Tech to cut the baluster that ultimately struck plaintiff. If credited, this testimony could support a finding that Sweeney actually exercised

supervisory control over the worksite so as to trigger liability under these claims … . Hewitt v NY 70th St. LLC, 2020 NY Slip Op 03280, First Dept 6-11-20

FALLING OBJECTS, 240(1), 200.

PLAINTIFF WAS STRUCK BY A FALLING OBJECT; COMPARATIVE NEGLIGENCE IS NOT A DEFENSE TO A LABOR LAW 240(1) CAUSE OF ACTION; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW 240(1), 200 AND COMMON LAW NEGLIGENCE CLAIMS SHOULD HAVE BEEN GRANTED; THERE WAS A QUESTION OF FACT ABOUT WHETHER ONE OF THE DEFENDANT'S EXERCISED SUPERVISORY CONTROL OVER THE SITE (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action stemming from his being struck with a falling object. The allegation plaintiff should not have been where he was is an allegation of comparative negligence which is not a defense. Plaintiff also should have been awarded summary judgment on the Labor Law 200 and common law negligence causes of action against the statutory agent of the general contractor on the ground the agent caused the dangerous condition:

Plaintiff should have been awarded summary judgment on the issue of liability on his Labor Law § 240(1) claim as against Sweeney and Structure Tech. Sweeney, as general contractor, and Structure Tech, as subcontractor and statutory agent of Sweeney, may be held strictly liable for failing to provide overhead protection to plaintiff … . Thus even if, as Structure Tech's superintendent testified, plaintiff was in an area of the worksite where he was not supposed to be at the time of his accident, this would at most constitute comparative negligence which is not a defense to a Labor Law § 240(1) claim … . Accordingly, the issue of their liability under Labor Law § 241(6) is academic … .

Plaintiff also should have been awarded summary judgment on his Labor Law § 200 and common-law negligence claims as against Structure Tech. As the statutory agent of the general contractor, Structure Tech may be held liable pursuant to Labor Law § 200 and under common-law negligence for injuries caused by a dangerous condition that it caused or created or of which it had actual or constructive notice … . Since no party disputes that a Structure Tech employee was responsible for dislodging the baluster and allowing it to

fall and strike plaintiff, Structure Tech is liable to plaintiff under Labor Law § 200 and common-law negligence.

However, an issue of fact exists as to Sweeney's liability to plaintiff under these claims based on the testimony of Structure Tech's superintendent that it was, in fact, Sweeney's superintendent who instructed Structure Tech to cut the baluster that ultimately struck plaintiff. If credited, this testimony could support a finding that Sweeney actually exercised supervisory control over the worksite so as to trigger liability under these claims … . Hewitt v NY 70th St. LLC, 2020 NY Slip Op 05853, First Dept 10-20-20

FALLING OBJECTS, 240(1), 241(6), 200.

PLAINTIFF WAS INJURED WHEN THE CEILING COLLAPSED WHILE HE WAS TAKING OUT WALLS, THE LABOR LAW 240(1), 241(6) AND 200 CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined that plaintiff's Labor Law 240(1) ,241(6) and 200 causes of action should not have been dismissed. Plaintiff was in the process of taking down two bathroom walls when the ceiling collapsed:

To prevail on a Labor Law § 240(1) claim based on an injury resulting from the failure of a completed and permanent building structure (in this case, the collapse of a ceiling), a plaintiff must show that the failure of the structure in question was a foreseeable risk of the task he was performing, creating a need for protective devices of the kind enumerated in the statute … .

Here, there are issues of fact as to whether the ceiling was in such an advanced state of disrepair due to water damage that plaintiff's work on the bathroom walls exposed him to a foreseeable risk of injury from an elevation-related hazard, the fall of the ceiling, and whether the absence of a type of protective device enumerated under Labor Law § 240(1) was a proximate cause of his injuries. Because the evidence of water stains on the bathroom ceiling could provide constructive notice of a dangerous condition, summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims was also improperly granted. …

Defendants failed to show that plaintiff was not engaged in demolition work to trigger Labor Law § 241(6). His task was part of a larger project that included the demolition of interior walls, "which altered the structural integrity of the building'"(… Industrial Code § 23-1.4[b][16]). Issues of fact exist as to whether Industrial Code § 23-3.3(b)(3) and (c), pertaining to demolition, were violated or whether any such violation was a proximate cause of plaintiff's injuries. Clemente v 205 W. 103 Owners Corp., 2020 NY Slip Op 01117, First Dept 2-18-20

FALLING OBJECTS, 240(1), 241(6).

PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION IN THIS FALLING OBJECT CASE; DEFENDANTS DID NOT DEMONSTRATE THE JOB WAS NOT A HARD HAT JOB PRECLUDING DISMISSAL OF PLAINTIFF'S LABOR LAW 241(6) CAUSE OF ACTION (SECOND DEPT).

The Second Department, modifying Supreme Court, determined: (1) plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action stemming from his being struck by an unsecured heating duct during demolition; and (2) defendants (appellants) were not entitled to summary judgment dismissing the Labor Law 241 (6) cause of action premised on plaintiff's failure to wear a hard hat:

With respect to falling objects, liability is not limited to cases in which the falling object is in the process of being hoisted or secured … . Rather, "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" … . "To succeed on a cause of action under Labor Law § 240(1), a plaintiff must establish that the defendant violated its duty and that the violation proximately caused the plaintiff's injuries" … . The burden then shifts to the defendant to raise a triable issue of fact … . A worker's comparative negligence is not a defense to a cause of action under Labor Law § 240(1) … . Rather, only where the worker's own conduct is the sole proximate cause of the accident is recovery under Labor Law § 240(1) unavailable … .

Here, the plaintiff established his prima facie entitlement to judgment as a matter of law on his Labor Law § 240(1) cause of action insofar as asserted against the owner and the general contractor by submitting evidence that while he was engaged in demolition work,

he was injured when an unsecured HVAC duct fell and hit him, causing him to fall to the ground … . …

“In order to prevail on a Labor Law § 241(6) cause of action premised upon a violation of 12 NYCRR 23-1.8(c)(1), the plaintiff must establish that the job was a hard hat job, and that the plaintiff’s failure to wear a hard hat was a proximate cause of his injury” … . Here, the appellants failed to establish, prima facie, that this was not a hard hat job, and that the plaintiff’s lack of head protection did not play a role in the injuries he sustained when he was struck by the falling object. Aguilar v Graham Terrace, LLC, 2020 NY Slip Op 04906, Second Dept 9-16-20

FALLING OBJECTS, 240(1),

ADEQUACY OF SAFETY DEVICES, PROXIMATE CAUSE. QUESTIONS OF FACT ABOUT WHETHER PLAINTIFF’S INJURY WAS DUE TO DEFENDANTS’ FAILURE TO PROVIDE HIM WITH THE PROPER PROTECTIVE DEVICES PRECLUDED SUMMARY JUDGMENT IN THIS LABOR LAW 240(1) ACTION; THE DISSENT DISAGREED; A STACK OF CONCRETE BOARDS FELL OFF A TRUCK ONTO PLAINTIFF WHEN THE SKIDS UNDER THE BOARDS BROKE (FIRST DEPT).

The First Department, reversing Supreme Court, over a dissent, determined plaintiff was not entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff was injured when a stack of cement boards fell off a truck onto him after the skids under the concrete boards broke:

Plaintiff failed to demonstrate conclusively that the accident was proximately caused by [defendants’] failure to provide him with proper protective devices for the performance of his work. The load of cement boards atop the pallet jack did not fall because of an inadequacy or deficiency in the pallet jack but, rather, because the wooden skids underneath the load of cement boards broke, causing the load to fall from the pallet jack. Coupled with the dispute as to whether plaintiff was permitted to use the street level hoist for the delivery of cement boards, this evidence renders it impossible to determine as a matter of law that [defendants] failed to supply plaintiff with adequate safety devices for the performance of his work and that this failure was a proximate cause of plaintiff’s accident … . Valle v Port Auth. of N.Y. & N.J., 2020 NY Slip Op 07685, First Dept 12-17-20

FALLING OBJECTS, 240(1).

A HEAVY STONE SLAB SLIPPED OUT OF A SLING AS IT WAS BEING HOISTED AND FELL ON PLAINTIFF; PLAINTIFF DID NOT HAVE TO SHOW THE EQUIPMENT WAS DEFECTIVE AND DID NOT HAVE TO SHOW HE AND A CO-WORKER WERE NOT NEGLIGENT; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law 240 (1) claim in this falling object case should have been granted. A heavy stone slab which was being hoisted slipped out of a sling and fell on plaintiff. Plaintiff did not have to show the equipment was defective and did not have to show freedom from comparative fault:

Labor Law § 240(1) imposes on owners, general contractors, and their agents a nondelegable duty to provide safety devices to protect against elevation-related hazards inherent in construction, and they will be absolutely liable for any violation that proximately causes injury regardless whether they supervised or controlled the work … . The statute is violated when an object that is improperly hoisted or inadequately secured falls … .

Because the sling proved inadequate to secure the slab against falling, the statute was violated … . Defendants' contention that because the hoist and slings had sufficient load capacity to hoist the slab and were not broken or defective, plaintiff was required to demonstrate how the slab became unsecured, is unavailing. Either the sling itself or the manner in which it was used to secure the slab was inadequate and failed to provide proper protection, and plaintiff was not required to demonstrate how or why it failed to support the slab … .

Any failure by plaintiff to properly secure the slab with the straps would at most be comparative negligence which is not a defense to Labor Law § 240(1) … . Furthermore, any failure by his coworker to properly secure the slab with the straps was not so extraordinary or removed from defendants' duty to provide an adequate safety device so as to constitute a superseding, intervening event breaking the chain of causation … . Gallegos v Bridge Land Vestry, LLC, 2020 NY Slip Op 06854, First Dept 11-19-20

FALLING OBJECTS, 240(1).

INJURY CAUSED BY CEMENT BOARDS FALLING FROM AN A-FRAME CART COVERED UNDER LABOR LAW 240 (1) (FIRST DEPT).

The First Department determined injury caused by cement boards falling from an A-frame cart was covered under Labor Law 240 (1):

The evidence shows that plaintiff and his coworkers were moving an A-frame cart, loaded with approximately 16 cement boards measuring 4′ x 8′ in dimension and weighing approximately 100 pounds each, when its wheel became stuck and the cart would not move. Plaintiff and his coworkers then pushed and pulled the cart to free it, and, in the process, the cart and the boards suddenly tipped, with the boards landing on plaintiff's left leg. Given the weight and height of the cement boards on the A-frame cart, the elevation differential was within the purview of the statute … . Touray v HFZ 11 Beach St. LLC, 2020 NY Slip Op 01029, First Dept 2-13-20

FALLING OBJECTS, 240(1).

UNSUPPORTED CEILING COLLAPSED DURING DEMOLITION; PLAINTIFF PROPERLY GRANTED SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION (FIRST DEPT).

The First Department determined plaintiff's summary judgment motion on his Labor Law 240 (1) cause of action was properly granted where an unsupported ceiling collapsed during demolition:

Supreme Court properly granted plaintiff's motion for summary judgment on his Labor Law § 240(1) claim arising from the collapse of a ceiling that was not braced or shored during demolition operations. Regardless of whether the entire ceiling or only a portion of it collapsed, it was not the intended target of demolition at the time of the accident … . At the time of the accident, upon his supervisor's instruction, plaintiff had descended from the ladder upon which he was working and walked under the ceiling that collapsed in order to inspect or remove a sprinkler head. Plaintiff's supervisor acknowledged the

ceiling would not have collapsed on plaintiff had he remained on the ladder. Moreover, because no safety devices were provided to brace or shore the ceiling, the fact that plaintiff may have pulled on it with a hook while inspecting or attempting to remove the sprinkler head at most amounts to comparative negligence, which is not a defense to a Labor Law § 240(1) claim … . Sinchi v HWA 1290 III LLC, 2020 NY Slip Op 03176, First Dept 6-4-20

FALLING OBJECTS, LATE NOTICE OF CLAIM, COURT OF CLAIMS.

APPLICATION TO FILE A LATE CLAIM IN THIS LABOR LAW 240 (1) ACTION SHOULD HAVE BEEN GRANTED; CRITERIA FOR ACCEPTING A LATE CLAIM UNDER THE COURT OF CLAIMS ACT DESCRIBED (FOURTH DEPT).

The Fourth Department, reversing the Court of Claims, determined claimant's application to file a late claim in this Labor Law 240 (1) action should have been granted. The criteria for allowing a late claim under the Court of Claims Act were described in some detail:

Upon our consideration of the six factors outlined in Court of Claims Act § 10 (6), we conclude that the court abused its discretion in denying claimant's application insofar as claimant sought to assert a cause of action under Labor Law § 240 (1).

Several factors militate against granting claimant's application. For instance, his excuse for failing to file a timely notice of intent was law office failure, which, as the court determined, is not an acceptable excuse … . Also, as the court noted, claimant has at least "a partial alternate remedy through workers' compensation" … . With respect to three of the remaining four statutory factors, we agree with the court's determination that defendant had notice of the essential facts constituting the claim, had an opportunity to investigate the claim and was not prejudiced by the delay … .

The most significant factor, however, is "whether the claim appears to be meritorious" (Court of Claims Act § 10 [6]) inasmuch as "it would be futile to permit the filing of a legally deficient claim which would be subject to immediate dismissal, even if the other factors tend to favor the granting of the request" … .

.. [D]ocumentation submitted by claimant indicates that, as he struggled to remove the window and lower it to the ground, the window allegedly "fell" on him, causing him to sustain injuries to his back.

Claimant's submissions raise issues of fact whether he was injured by the application of the force of gravity to the window as he was moving it between "a physically significant elevation differential" … . Phillips v State of New York, 2020 NY Slip Op 00753, Fourth Dept 1-31-20

FALLING OBJECTS, RES IPSA LOQUITUR, 240(1), 241(6), 200.

JUDGE SHOULD NOT HAVE SEARCHED THE RECORD AND, SUA SPONTE, GRANTED RELIEF NOT REQUESTED IN THE MOTION PAPERS, INCLUDING THE APPLICATION OF THE RES IPSA LOQUITUR DOCTRINE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the judge should not have, sua sponte, searched the record to grant relief that was not requested in this Labor Law 200, 240(1), 241(6), negligence action. Plaintiff was injured when a portion of a ceiling fell causing a scaffold to collapse on him. The judge should not have granted summary judgment on a negligence cause of action which was not included in the motions, and should not have granted summary judgment on a res ipsa loquitur theory:

While it is well settled that the Supreme Court has the authority to search the record and grant summary judgment to a nonmoving party with respect to an issue that was the subject of a motion before the court (see CPLR 3212[b] …), here, the court, in effect, searched the record and awarded summary judgment to the movant with respect to an issue that was not the subject of the motion before the court. …

The doctrine of res ipsa loquitur applies when the injury-causing event (1) is "of a kind which ordinarily does not occur in the absence of someone's negligence"; (2) "[is] caused by an agency or instrumentality within the exclusive control of the defendant"; and (3) was not "due to any voluntary action or contribution on the part of the plaintiff" … . Contrary to the Supreme Court's determination, this is not one of "the rarest of res ipsa loquitur cases" where the plaintiff's circumstantial evidence is so convincing and the defendant's response so weak that the inference of the defendant's negligence is inescapable … .

Although the first and third elements may be satisfied in the plaintiff's favor, based upon the limited record, this standard was not met as to the second element. Even though courts do not generally apply the requirement of exclusive control as it is literally stated or as a fixed, mechanical or rigid rule … , the plaintiff failed to demonstrate that the plaster ceiling is "structural" and, therefore, the obligation of [defendant] Lexington to maintain pursuant to the terms of the lease it entered into with [defendant] Dover. Moreover, the papers do not establish the plaintiff's entitlement to summary judgment against Dover on this issue, which was raised by the court sua sponte as against Dover, and was not the subject of the plaintiff's motion as against Dover. Zhigue v Lexington Landmark Props., LLC, 2020 NY Slip Op 02948, Second Dept 5-20-20

HAZARD INHERENT IN JOB.

PLAINTIFF WAS INJURED BY A HAZARD INHERENT IN THE JOB HE WAS HIRED TO DO; HIS LABOR LAW 200 CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment on plaintiff's Labor Law 200 cause of action should have been granted because plaintiff was injured in the normal course of the tasks he was hired to do. Plaintiff was removing debris when his shovel struck a subway track:

The plaintiff's specific task was to shovel concrete debris, which had been chipped from the subway tunnel's walls, into bags for removal. During the project, eight-by-four foot pieces of plywood had been placed atop the subway tracks covering its rails and the trough between the rails, onto which the debris would fall making it easier to shovel. The plaintiff allegedly was injured when his shovel struck a rail of a track that was not covered by plywood. …

… The duty to provide workers with a safe place to work does not extend to hazards that are part of, or inherent in, the very work the worker is performing or defects the worker is hired to repair … .

Here, the defendants established, prima facie, that the plaintiff's job responsibilities required him to remove the debris from the subway tracks, and that his alleged injuries were caused in the normal course of his removal of the debris in that area … . In support

of their motion, the defendants submitted, among other things, the transcripts of the deposition testimony … demonstrated that[defendant] decided to and actually placed the plywood over the tracks for the purpose of making it easier to remove the debris rather than for a safety purpose. Pacheco v Judlau Contr., Inc., 2020 NY Slip Op 05216, Second Dept 9-30-20

HOISTED OBJECT, 241(6).

A COMPONENT OF A TOWER CRANE WAS BEING HOISTED WHEN IT SWUNG TO THE SIDE AND PINNED PLAINTIFF; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON A LABOR LAW 241 (6) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment on a Labor Law 241(6) cause of action:

The injured plaintiff allegedly was injured in the process of hoisting a component of the tower crane for assembly when the load, which had been stationary for several minutes, suddenly moved, swung to the side, struck the injured plaintiff, and pinned him against a plumber's pipe. * * *

… [T]he plaintiffs were entitled to summary judgment on the issue of liability on so much of the Labor Law § 241(6) cause of action as was predicated upon a violation of 12 NYCRR 23-8.1(f)(2)(i). The plaintiffs established, prima facie, that the load suddenly moved and caused the injured plaintiff's injuries (see 12 NYCRR 23-8.1[f][2][i] …). In opposition, the defendants failed to raise a triable issue of fact, as "[t]he fact that the plaintiff may have been the sole witness to the accident does not preclude the award of summary judgment in his favor" … , and "[a]ny comparative negligence on the part of the plaintiff does not preclude liability founded upon a violation of Labor Law § 241(6)" … . Wein v East Side 11th & 28th, LLC, 2020 NY Slip Op 05085, Second Dept 9-23-20

I-BEAM, FALL FROM, 240(1).

CLAIMANT FELL OFF AN I-BEAM AND HIS LANYARD DID NOT PREVENT HIM FROM STRIKING THE DECK EIGHT TO TEN FEET BELOW; CLAIMANT'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing the Court of Claims, determined claimant's motion for summary judgment on his Labor Law 240(1) cause of action should have been granted. Claimant alleged he fell off an I-beam and his lanyard didn't stop him from striking the deck eight to ten feet below:

The record establishes that the safety devices "proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity" … . Specifically, the record shows that the safety cable was set up too low, resulting in claimant's striking the deck before the lanyard could deploy … . Stigall v State of New York, 2020 NY Slip Op 07306, First Dept 12-3-20

INDEMNIFICATION, APPORTIONMENT OF SETTLEMENT.

DEFENDANT ARGUED THE INSURANCE COMPANY WHICH REPRESENTED THE PROPERTY OWNER AND THE GENERAL CONTRACTOR IN THIS CONSTRUCTION ACCIDENT CASE UNFAIRLY APPORTIONED THE PAYMENT OF THE SETTLEMENT BETWEEN THEM SUCH THAT THE NON-NEGLIGENT, VICARIOUSLY LIABLE PARTY PAID $2 MILLION, AND THE NEGLIGENT PARTY PAID $200,000; AFTER INDEMNIFYING THE PROPERTY OWNER IN THE AMOUNT OF $2 MILLION DEFENDANT SOUGHT TO BE INDEMNIFIED BY THE NEGLIGENT PARTY; THE ATTEMPT WAS REJECTED UNDER BOTH CONTRACTUAL AND COMMON LAW INDEMNIFICATION THEORIES (THIRD DEPT).

The Third Department, over a concurrence, determined Lamela & Sons, Inc. (Lamela), the employer of plaintiffs James and Robert Lamela, was required to indemnify the property owner, Satin, for Satin's portion of the $3.2 million settlement in this construction accident case. The settlement agreement required payment of $2,199,999 by Satin and Verticon, the general contractor. Lamela paid Satin $2 million in satisfaction of its contractual indemnity obligation to Satin. The insurance company which represented both

Verticon and Satin apportioned a larger portion of the settlement to Satin, which was not negligent but was vicariously liable, and a lesser portion to Verticon, which was negligent. Lamela argued that a larger portion of the settlement should have been apportioned to the negligent party, Verticon. Lamela's indemnity obligation to Satin, therefore, should have been less. On that basis, Lamela sought indemnity from Verticon. Lamela's argument was rejected:

Verticon submitted the construction contract … between Verticon and Lamela, which provides for indemnity flowing from Lamela to Verticon, specifically stating, "To the fullest extent permitted by law, [Lamela] shall indemnify, defend and save harmless [Verticon] . . . against any and all suits [or] actions . . . arising from the use or operation by [Lamela] of construction equipment, tools, scaffolding or facilities furnished to [Lamela] to perform the [w]ork." The provision, as expected, does not provide for indemnification flowing the other way, from Verticon to Lamela, as is being sought by Lamela. Thus, as "the subject of indemnification [is] clearly contemplated and expressly addressed by [Lamela and Verticon] in their contract, . . . there [can] only be a one-way obligation to indemnify by [Lamela] as the indemnitor, and any reciprocal obligation is extinguished" … . * * *

… .[C]ommon-law indemnity is not the appropriate relief here because Lamela is not responsible by operation of law … ; rather, its payment to Satin was based solely upon a voluntarily assumed obligation that it undertook by virtue of the contract. There has been no case cited that permits common-law indemnity under this scenario. Although we are mindful that Lamela's motivation for seeking common-law indemnity stems from its concern that the settlement was unfairly apportioned, to attempt to remedy this by way of common-law indemnity is unavailing. Lamela v Verticon, Ltd., 2020 NY Slip Op 04214, Third Dept 7-23-20

LADDER, 240(1), 241(6), DEFINITION OF "OWNER."

CERTAIN LABOR LAW 200, COMMON LAW NEGLIGENCE, AND LABOR LAW 241(6) CAUSES OF ACTION SHOULD HAVE BEEN DISMISSED; QUESTION OF FACT RE: WHETHER PLAINTIFF WAS THE SOLE CAUSE OF THE ACCIDENT IN THIS LADDER-FALL CASE; THE PROJECT COORDINATOR MET SEVERAL DEFINITIONS OF 'OWNER' WITHIN THE MEANING OF LABOR LAW 240(1), INCLUDING AS THE HOLDER OF AN EQUITABLE INTEREST IN THE PROPERTY (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, over a two-justice dissent, determined common law negligence and Labor Law 200 causes of action should have been dismissed re: several defendants because of the absence of supervisory control, several of the Labor Law 241(6) causes of action should have been dismissed because the Industrial Code provisions did not apply, and plaintiff should not have been awarded summary judgment on his Labor Law 240(1) cause of action because there was a question of fact whether plaintiff was the sole proximate cause of the fall, The dissenters argued plaintiff's summary judgment motion on his Labor Law 240(1) cause of action was properly granted. Plaintiff fell when he switched from one ladder to another and the ladder kicked out from under him. The definition of "owner" within the meaning of Labor Law 240(1) was discussed in some depth:

Although the term owner generally refers to the titleholder of the property, it may "also encompass[ ] one who has an interest in the property [and] . . . who contracted for or otherwise ha[d] the right to control the work" … . Here, Tucker Homes [the project coordinator] had an equitable interest in the property by virtue of provisions in its contract with the titleholders that permitted it to take possession of the deed and obtain legal title to the property if the titleholders did not pay for the home's construction. Moreover, Tucker Homes, as the only entity that had a contractual relationship with RGGT [defendant subcontractor], was the only entity that could insist that RGGT adhere to safety practices and obtain insurance. The titleholders, by contrast, had no contractual relationship with RGGT and did not obtain any insurance on the project. Thus, the court properly concluded that Tucker Homes, "as the only party with [both] a property interest and the right to insist on safety practices," was an owner within the meaning of the Labor Law … . …

Even if Tucker Homes was not an "owner" for purposes of the Labor Law, we conclude that the court properly determined that Tucker Homes was a general contractor based on

its power to enforce safety standards and essentially select the responsible subcontractors to perform work on the project, such as RGGT … . …

Plaintiff also met his burden of establishing that Tucker Homes was, at the very least, a statutory agent of the titleholders, and Tucker Homes did not raise a triable issue of fact in opposition … . Unrefuted evidence established that, under the terms of the subcontract, Tucker Homes had the power to supervise and control the work being done by RGGT at the time of the accident … . …

… [T]he court erred in granting plaintiff's motion with respect to the Labor Law § 240 (1) claim, and we further modify the order accordingly. Plaintiff failed to meet his initial burden on that part of the motion inasmuch as issues of fact exist whether plaintiff was the sole proximate cause of his accident … . Walkow v MJ Peterson/Tucker Homes, LLC, 2020 NY Slip Op 04098, Fourth Dept 7-17-20

LADDER, 240(1), 241(6).

PLAINTIFF WAS ON A LADDER WHEN HE RECEIVED AN ELECTRIC SHOCK; THERE WAS NO SHOWING THE LADDER WAS DEFECTIVE AND PLAINTIFF WAS NOT ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION; HOWEVER PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 241 (6) CAUSE OF ACTION AGAINST THE DEFENDANT RESPONSIBLE FOR TURNING OFF THE ELECTRICITY (FIRST DEPT).

The First Department determined questions of fact precluded summary judgment on his Labor Law 240(1) cause of action and he was entitled to summary judgment on his Labor Law 241 (6) cause of action. Plaintiff on a ladder when he received an electric shock. There was no showing the ladder was defective. ADCO, the company which was responsible for shutting off the was liable pursuant to Labor Law 241 (6):

Plaintiff seeks damages for personal injuries he sustained in a fall from a ladder while installing duct work on a building renovation project after either he received a shock or an arc fault occurred when he came into contact with a live electrical junction box. Summary judgment in plaintiff's favor as to liability on his Labor Law § 240(1) claim is precluded by an issue of fact as to whether the ladder, which was properly set up, provided plaintiff with proper protection … ; plaintiff had no problem with the ladder prior to the electric shock

and questions of fact exist whether a scaffold could have prevented this accident. Plaintiff is entitled to summary judgment on his Labor Law § 241(6) claim predicated on violations of Industrial Code (12 NYCRR) § 23-1.13(b)(2), (3) and (4) against ADCO, the electrical subcontractor, which failed to warn of and de-energize or "safe off" the junction box so that a worker would not come into contact with it. Because ADCO had been delegated authority to control the electrical work that gave rise to plaintiff's injury, it was a statutory agent subject to liability under the statute … . Higgins v TST 375 Hudson, L.L.C., 2020 NY Slip Op 00358, First Dept 1-14-20

LADDER, 240(1), ADEQUACY OF SAFETY DEVICES.

PLAINTIFF ALLEGED HE WAS STANDING ON AN A-FRAME LADDER WHEN IT SHIFTED CAUSING A CONCRETE SLAB TO FALL ON HIS HAND; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED; IN ADDITION A DEFENDANT FAILED TO SHOW IT WAS NOT AN "OWNER" WITHIN THE MEANING OF LABOR LAW 240(1) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment on plaintiff's Labor Law 240(1) cause of action should not have been granted. Plaintiff alleged the A-frame ladder he was standing when positioning a concrete slab shifted causing the slab to fall on his hand. In addition the Second Department determined defendant (Cappy's) did not demonstrate it was not an "owner" within the meaning of Labor Law 240(1):

The defendants failed to show, prima facie, that this incident did not involve an injury caused by the failure to provide a safety device to protect against an elevation-related risk, within the meaning of the statute. In particular, the plaintiff's work entailed attempting to move or lift a heavy slab of cement at ceiling or roof level, while standing on a ladder. The plaintiff testified that the ladder "moved" while he was reaching for the slab, causing the slab to fall or drop. The plaintiff alleges, inter alia, that a sling or other device should have been provided to secure the slab. Under these circumstances, the defendants failed to show, prima facie, that this incident did not result from the failure to provide such safety device to protect against an elevation-related risk, and the evidence also raised issues of fact as to that matter … .

Further, [defendant] Cappy's failed to show, prima facie, that it cannot be deemed an "owner" within the meaning of Labor Law § 240(1). Under Labor Law §§ 240(1) and 241(6), "those parties with a property interest who hire the general contractor" are deemed "owners" … . "Lessees who hire a contractor and have the right to control the work being done are considered 'owners' within the meaning of the statutes" … . Gomez v 670 Merrick Rd. Realty Corp., 2020 NY Slip Op 07549, Second Dept 12-16-20

LADDER, 240(1).

EVIDENCE THE LADDER SLIPPED OUT FROM UNDER PLAINTIFF WAS SUFFICIENT TO WARRANT SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION; PLAINTIFF WAS NOT REQUIRED TO SHOW THE LADDER WAS DEFECTIVE (FIRST DEPT)

The First 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 his ladder slipped out from under him. Plaintiff did not have to show the ladder was defective:

Plaintiff's testimony that the unsecured ladder slipped out from under him established prima facie his entitlement to summary judgment on the Labor Law § 240(1) claim …, and defendants failed to raise an issue of fact in opposition. Their contention that an issue of fact exists as to whether the ladder was appropriate to perform the work is unavailing. Plaintiff was not required to show that the ladder was defective … . Cabrera v 65 Park W. Realty, LLC, 2020 NY Slip Op 06702, First Dept 11-17-20

LADDER, 240(1).

NO NEED TO SHOW THE LADDER WAS DEFECTIVE IN THIS LABOR LAW 240 (1) ACTION; IT WAS SUFFICIENT TO SHOW THE LADDER WAS UNSECURED AND FELL WHEN PLAINTIFF WAS STRUCK BY DEBRIS (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law 240 (1) cause of action should have been granted. Plaintiff was using an unsecured ladder when he was struck by debris causing him and

the ladder to fall. There was no need to show the ladder was defective. It was sufficient to show the ladder was not secured:

The undisputed facts show prima facie that defendants violated Labor Law § 240(1) by failing to provide adequate safety devices to plaintiff, who was injured doing demolition work when the unsecured ladder he was using to remove a ceiling was struck by a piece of falling metal debris, causing him and the ladder to fall to the ground … . The record lacks any conflicting evidence relevant to the issue of whether Labor Law 240 (1) was violated, sufficient to raise a material issue of fact. The issues of fact relied upon by the motion court in denying partial summary judgment are immaterial to the issue of whether defendants' violation of section 240(1) was a proximate cause of plaintiff's injuries. Plaintiff was not required to show that the ladder he was using was defective, where testimony established prima facie that defendant failed to provide a safety device to insure the ladder would remain upright while plaintiff used it … . Avila v Saint David's Sch., 2020 NY Slip Op 05571, First Dept 10-8-20

LADDER, 240(1).

PLAINTIFF WAS ENGAGED IN REPAIR WORK WHEN A PERMANENT LADDER IN AN ELEVATOR SHAFT ALLEGEDLY VIBRATED CAUSING HIM TO FALL; EVEN IF A HARNESS WERE AVAILABLE, COMPARATIVE NEGLIGENCE IS NOT A DEFENSE TO A LABOR LAW 240(1) ACTION; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's Labor Law 240(1) cause of action should not have been dismissed. Plaintiff was engaged in a long-term project to repair elevator cables which were striking objects in the elevator shaft. While using a ladder that was permanently affixed in the shaft when it allegedly vibrated causing him to fall:

… [W]hile an unsecured ladder that moves or shifts constitutes a prima facie violation of Labor Law § 240(1) … , the ladder from which plaintiff fell was secured to the structure, and, other than allegedly vibrating, it did not move, shift or sway. Under the circumstances, an issue of fact exists whether the secured, permanently affixed ladder that allegedly vibrated provided proper protection for plaintiff.

The record demonstrates, contrary to defendants' contention, that at the time of his accident plaintiff was performing not routine maintenance but repair work, which falls within the protective ambit of Labor Law § 240(1) … . …

Defendants failed to establish that plaintiff was the sole proximate cause of his accident, as they submitted no evidence that plaintiff knew that he was supposed to use a harness for climbing ladders or that he disregarded "specific instructions" to do so … . Further, to the extent the ladder failed to provide proper protection, plaintiff's failure to use a harness amounts at most to comparative negligence, which is not a defense to a Labor Law § 240(1) claim … . Kehoe v 61 Broadway Owner LLC, 2020 NY Slip Op 01391, First Dept 2-27-20

LADDER, 240(1).

PLAINTIFF WAS PROVIDED WITH A LADDER WITHOUT RUBBER FEET WHICH SLID CAUSING PLAINTIFF TO FALL; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION PROPERLY GRANTED (SECOND DEPT).

The Second Department determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause action in this ladder fall case:

We agree with the Supreme Court's determination granting that branch of the plaintiff's motion which was for summary judgment on the issue of liability on the Labor Law § 240(1) cause of action asserted against [defendant]. The plaintiff established, prima facie, [defendant's] liability under Labor Law § 240(1) through the submission of a transcript of the plaintiff's deposition testimony, which demonstrated that he was provided with a ladder that lacked rubber feet, and that the ladder, which was leaning against a wall, slid away from the wall, causing the plaintiff to fall to the ground … . Chapa v Bayles Props., Inc., 2020 NY Slip Op 00397, Second Dept 1-22-20

LADDER, 240(1).

QUESTION OF FACT WHETHER A PERMANENTLY AFFIXED LADDER VIBRATED CAUSING PLAINTIFF TO FALL; PLAINTIFF WAS ENGAGED IN REPAIR NOT ROUTINE MAINTENANCE; NO SHOWING PLAINTIFF WAS AWARE HE SHOULD WEAR A HARNESS AND FAILURE TO DO SO WOULD CONSTITUTE COMPARATIVE NEGLIGENCE WHICH IS NOT A BAR TO RECOVERY (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined defendants' motion for summary judgment on the Labor Law 240 (1) cause of action should not have been granted. Plaintiff alleged a permanently affixed ladder in an elevator shaft vibrated causing him to fall to the floor of the shaft:

… [W]hile an unsecured ladder that moves or shifts constitutes a prima facie violation of Labor Law § 240(1) … , the ladder from which plaintiff fell was secured to the structure, and, other than allegedly vibrating, it did not move, shift or sway. Under the circumstances, an issue of fact exists whether the secured, permanently affixed ladder that allegedly vibrated provided proper protection for plaintiff.

The record demonstrates, contrary to defendants' contention, that at the time of his accident plaintiff was performing not routine maintenance but repair work, which falls within the protective ambit of Labor Law § 240(1) … . The work in which plaintiff was engaged occurred over the course of weeks, if not longer, and its purpose was to correct the unguarded condition of traveling cables that caused the cables to strike other objects within the elevator shafts … . …

Defendants failed to establish that plaintiff was the sole proximate cause of his accident, as they submitted no evidence that plaintiff knew that he was supposed to use a harness for climbing ladders or that he disregarded "specific instructions" to do so . Further, to the extent the ladder failed to provide proper protection, plaintiff's failure to use a harness amounts at most to comparative negligence, which is not a defense to a Labor Law § 240(1) claim … . Kehoe v 61 Broadway Owner LLC, 2020 NY Slip Op 04900, First Dept 9-3-20

LADDER, 240(1).

WHERE A LADDER SHIFTS OR SLIDES FOR NO APPARENT REASON A VIOLATION OF LABOR LAW 240 (1) IS ESTABLISHED; DEFENDANT'S MOTION TO SET ASIDE THE VERDICT IN THIS LADDER-FALL CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff's verdict in this Labor Law 240 (1) action should not have been set aside. Plaintiff used a ladder which kicked out from under him. The Second Department included a clear explanation of when a fall from a ladder is actionable under Labor Law 240 (1). If for example plaintiff merely loses his or her balance and falls off a stable ladder, the incident is not actionable. However, if the ladder shifts or slides for no apparent reason, the incident is actionable:

To establish a violation under Labor Law § 240(1), "[t]here must be evidence that the ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries" … . Where, for instance, the plaintiff falls from a ladder because the plaintiff lost his or her balance, and there is no evidence that the ladder was defective or inadequate, liability pursuant to Labor Law § 240(1) does not attach … . By contrast, where a ladder slides, shifts, tips over, or otherwise collapses for no apparent reason, the plaintiff has established a violation … . …

…[W]we disagree with the Supreme Court's determination to set aside the jury verdict and direct judgment as a matter of law on the ground that the plaintiff was the sole proximate cause of the accident. At the trial, the parties presented conflicting evidence as to whether adequate safety devices—namely, the CTS [the employer's] ladders and/or the scissor lift—were available, whether the plaintiff knew that he was expected to use those devices, and, if so, whether he had a good reason for choosing instead to use the non-CTS ladder … . … [C]onstruing the trial evidence in the light most favorable to the plaintiffs, there was a valid line of reasoning and permissible inferences which could have led a rational jury to conclude that the plaintiff was neither a recalcitrant worker nor the sole proximate cause of his injuries … . Cioffi v Target Corp., 2020 NY Slip Op 06487, Second Dept 11-12-20

LADDER, 240(1).

QUESTION OF FACT WHETHER PLAINTIFF WAS TOLD TO PAINT ONLY WHERE HE COULD REACH WITHOUT THE LADDER IN THIS LADDER-FALL CASE (FIRST DEPT).

The First Department, reversing Supreme Court, determined there was evidence plaintiff was told only to paint areas he could reach without the ladder. Plaintiff fell from the ladder:

Plaintiff was injured when he fell from a ladder while painting an apartment in a building owned by defendant. The testimony of plaintiff's employer, that he had specifically instructed plaintiff only to paint areas he could reach and not to use the ladder, raises triable issues as to whether plaintiff's duties were expressly limited to work that did not expose him to an elevation-related hazard within the purview of Labor Law § 240(1) … . Orellana v Mo-Hak Assoc., LLC, 2020 NY Slip Op 02867, First Dept 5-14-20

OWNER, STATUTORY AGENT, ARTICULATING LIFT, 240(1).

DEFENDANT CONSTRUCTION MANAGER WAS A STATUTORY AGENT OF THE OWNER AND WAS THEREFORE LIABLE FOR PLAINTIFF'S INJURY PURSUANT TO LABOR LAW 240 (1); THE ARTICULATING LIFT USED BY PLAINTIFF WAS A SAFETY DEVICE WHICH FAILED TO ADEQUATELY PROTECT AGAINST AN ELEVATION-RELATED RISK (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined defendant which entered a construction management agreement with the Port Authority was a statutory agent of the Port Authority and was liable for plaintiff's injury pursuant to Labor Law 240 (1). Plaintiff was injured when he lost control of an articulating lift when backing down a ramp:

Plaintiffs demonstrated that defendants can be held liable as a statutory "agent" of the Port Authority based on the contract documents that they submitted on the motion. Those documents impose not only the responsibility to coordinate the work but also a broad responsibility for "overall job site safety," including the implementation of the Port Authority's Safety Health and Environmental Program, as well as measures to ensure worker safety, thereby granting the construction manager "the ability to control the activity which brought about the injury" … .

Moreover, plaintiffs are entitled to summary judgment on the Labor Law § 240(1) claim. As the motion court found, plaintiff's testimony established prima facie that the articulating lift was a safety device and that it's failure to protect him from the elevation-related risk that he faced was the proximate cause of his injury. Lind v Tishman Constr. Corp. of N.Y., 2020 NY Slip Op 01026, First Dept 2-13-20

REBAR GRID, 200.

QUESTIONS OF FACT WHETHER WALKING ON THE REBAR GRID WAS AN INHERENT RISK OF THE JOB AND WHETHER THE GRID WAS A DANGEROUS CONDITION PRECLUDED A DIRECTED VERDICT IN THIS LABOR LAW 200 ACTION; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined questions of fact for the jury precluded the directed verdict (CPLR 4401) for the defendants in this Labor Law 200 action. Plaintiff was working as a surveyor at a construction site. He was walking across a rebar grid when one of his legs fell through. There were questions of fact whether walking on the rebar grid was an inherent risk of his job and whether the grid was a dangerous condition. Plaintiff's motion to set aside the directed verdict (CPLR 4404) should have been granted:

Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work … . The duty, however, is subject to recognized exceptions … . It does not extend to hazards which are part of or inherent in the very work which the contractor is to perform, or where the contractor is engaged for the specific purpose of repairing the defect … .

Here, in directing a verdict in favor of the defendants on the issue of liability, the Supreme Court improperly decided the factual questions of whether traversing an uncovered rebar grid was an inherent risk in the injured plaintiff's work as a surveyor, and whether the uncovered rebar grid was a dangerous condition under the circumstances presented. The record demonstrates that the plaintiffs' evidence made out a prima facie case, and that disputed factual issues existed which should have been resolved by the jury. Since the court failed to draw "every favorable inference" in favor of the plaintiffs and because the court resolved disputed issues of fact … , the matter must be remitted to the Supreme

Court, Queens County, for a new trial on the issue of liability. Vitale v Astoria Energy II, LLC, 2020 NY Slip Op 01381, Second Dept 2-26-20

ROOF, FALL FROM, 240(1).

DEFENDANT MANUFACTURER OF METAL ROOFING WAS A CONTRACTOR WITHIN THE MEANING OF LABOR LAW 240 (1) BECAUSE IT HAD THE AUTHORITY TO EXERCISE CONTROL OVER PLAINTIFF'S WORK, EVEN IF IT DID NOT DO SO; PLAINTIFF SHOULD HAVE BEEN AWARDED SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION STEMMING FROM A FALL FROM A ROOF WHERE THE METAL ROOFING WAS BEING INSTALLED (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined defendant Union was a contractor within the meaning of Labor Law 240 (1) and plaintiff was entitled to summary judgment against Union on his Labor Law 240 (1) cause of action stemming from his fall from the roof of a residence where metal roofing manufactured by Union was being installed by plaintiff's employer:

It is well settled that the Labor Law "holds . . . general contractors absolutely liable for any breach of the statute even if the job was performed by an independent contractor over which [they] exercised no supervision or control" … , inasmuch as "[t]heir status as contractors is dependent on their right to exercise control, not whether they in fact did so" … . In determining whether a defendant may be found liable pursuant to section 240 (1), it is well settled that, where, as here, a defendant "ha[s] the authority to choose the part[y] who did the work, and directly enter[s] into [a] contract[] with th[at party], it ha[s] the authority to exercise control over the work, even if it [does] not actually do so" … .

… [P]laintiff submitted evidence establishing that Union entered into a contract with plaintiff's employer to install the roofing materials at issue and that the contract provided Union with the power to, inter alia, perform inspections, stop work, and remove plaintiff's employer from the job. We therefore conclude that plaintiff demonstrated as a matter of law that Union is a "contractor" within the meaning of Labor Law § 240 (1) … . Barker v Union Corrugating Co., 2020 NY Slip Op 05349, Fourth Dept 10-2-20

ROOF, FALL FROM, 240(1).

PLAINTIFF WAS NOT WEARING A HARNESS AND FELL FROM A ROOF; THE FACT THAT HARNESSES MAY HAVE BEEN AVAILABLE DID NOT RAISE A QUESTION OF FACT SUFFICIENT TO DEFEAT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, over a two-justice dissent, determined plaintiff's motion for summary judgment on his Labor Law 240 (1) cause of action should have been granted. Although plaintiff was a ground worker the on roofing job, he fell from the roof alleging that a toe board "gave out." The fact that plaintiff was not wearing a harness, in the face of allegations harnesses were available, was not enough to defeat plaintiff's motion. The dissenters argued the evidence that all the toe boards were in tact after the accident raised a question of fact whether that safety device failed:

… [P]laintiff met his initial burden on that part of the motion by establishing that his " injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential' " … . Specifically, plaintiff submitted his deposition testimony, wherein he stated that the toe board failed, causing him to fall from the roof. He also testified that he was not provided with a harness and that there were no available harnesses nearby. …

The " presence of [other safety devices] somewhere at the worksite' does not [alone] satisfy defendants' duty to provide appropriate safety devices" … . …

… "[T]he mere failure by plaintiff to follow safety instructions" does not render plaintiff the sole proximate cause of his injuries … . The evidence presented by defendants established only that plaintiff possibly failed to follow safety instructions, not that he outright refused to "use available, safe and appropriate equipment" … . Defendants failed to demonstrate that plaintiff " chose for no good reason not to' " wear a safety harness … . At most, plaintiff's "alleged conduct would amount only to comparative fault and thus cannot bar recovery under the statute" … . Schutt v Bookhagen, 2020 NY Slip Op 04651, Fourth Dept 8-20-20

SCAFFOLD, 240(1), 200, HOMEOWNER'S EXEMPTION.

IN THIS LABOR LAW 240(1), 241(6) AND 200 TRIAL, THE DEFENDANTS' MOTION FOR A JUDGMENT AS A MATTER OF LAW ON THE LABOR LAW 240(1) AND 241(6) CAUSES OF ACTION BASED UPON THE HOMEOWNER'S EXEMPTION SHOULD NOT HAVE BEEN GRANTED, THE BETTER PRACTICE WOULD HAVE BEEN TO RESERVE ON THE MOTION AND LET THE MATTER GO TO THE JURY; AND PLAINTIFF'S MOTION TO SET ASIDE THE LABOR LAW 200 VERDICT SHOULD HAVE BEEN GRANTED BECAUSE THE VERDICT WAS INCONSISTENT; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for a judgment as a matter of law pursuant to CPLR 4401 should have been denied and plaintiff's motion to set aside the verdict pursuant to CPLR 4404 (a) in this Labor Law 240 (1), 241 (6) and 200 scaffold-fall case should have been granted. The defendants' motion to dismiss the Labor Law 240 (1) and 241 (6) causes of action were granted because the court found defendants exempt pursuant to the homeowner exemption. Plaintiff moved to set aside the verdict because the jury found the defendant homeowner (Nielson) was negligent in striking the scaffold with a Bobcat, but also illogically found the negligence was not the proximate cause of the accident:

Contrary to the Supreme Court's determination, we conclude that different inferences could be drawn from the evidence on the issue of whether Nielson had authority to or exercised authority to direct or control the work. Affording the plaintiff the benefit of every favorable inference and considering the evidence in the light most favorable to the plaintiff, there was a rational process by which a jury could find that the defendants were not exempt from liability by reason of the homeowner exemption under Labor Law §§ 240(1) and 241(6), and could find that they were liable under Labor Law § 200 … .

We note that, in the interest of judicial economy, the better practice would have been for the Supreme Court to reserve determination on the motion for a directed verdict on the Labor Law causes of action, and allow those causes of action to go to the jury. "There is little to gain and much to lose by granting the motion for judgment as a matter of law after . . . the evidence has been submitted to the jury and before the jury has rendered a verdict. If the appellate court disagrees, there is no verdict to reinstate and the trial must be repeated" … . …

Assuming that Nielson struck the scaffold with the Bobcat, which was the only theory of common-law negligence presented by the plaintiff, then it is logically impossible under the circumstances to find that such negligence was not a substantial factor in causing the accident. Thus, the issues of negligence and proximate cause were so inextricably interwoven as to make it logically impossible to find Nielson negligent without also finding proximate cause. Brewer v Ross, 2020 NY Slip Op 06483, Second Dept 11-12-20

SCAFFOLD, 240(1), 241(6),

WORKERS' COMPENSATION, GRAVE INJURY. HEARSAY INSUFFICIENT TO DEFEAT PLAINTIFF'S SUMMARY JUDGMENT MOTION IN THIS LABOR LAW 240(1) AND 241(6) ACTION; THE INDEMNIFICATION AND CONTRIBUTION CLAIM WAS PROPERLY DISMISSED BECAUSE PLAINTIFF DID NOT SUFFER GRAVE INJURY WITHIN THE MEANING OF WORKERS' COMPENSATION LAW 11 (FIRST DEPT).

The First Department determined hearsay was not sufficient to defeat plaintiff's summary judgment in this Labor Law 240(1) and 241(6) case. In addition the indemnification and contribution claims were properly dismissed because plaintiff did not suffer a "grave injury" within the meaning of Workers' Compensation Law 11:

Plaintiff commenced this action alleging, inter alia, violations of Labor Law §§ 240(1) and 241(6) seeking to recover for personal injuries he sustained when, while dismantling a scaffold in an elevator shaft of a building under renovation, he fell from the scaffold to the bottom of the shaft. … Plaintiff testified that his employer had instructed him to dismantle the scaffold and the sole support for Empire's contention that dismantling the scaffold was outside the scope of his duties was inadmissible hearsay testimony. …

Pursuant to their contract, Empire agreed to indemnify Pen & Brush for damages, "arising from any act, omission, negligence, potential claims and losses" of, inter alia, Empire or its subcontractors "during the performance of the Contract." Its indemnification obligation was triggered here where plaintiff's injuries arose from the act of Empire's subcontractor, Lough Allen, in dismantling the scaffold and a finding of negligence is not required … .

Supreme Court properly determined plaintiff had not sustained a grave injury and dismissed the common-law indemnification and contribution claims against Lough Allen … . As relevant here, "grave injury" within the meaning of Workers' Compensation Law §

11 includes "an acquired injury to the brain caused by external physical force resulting in permanent total disability." Permanent total disability in the context of Workers' Compensation Law § 11 means unemployable in any capacity … . Clarke v Empire Gen. Contr. & Painting Corp., 2020 NY Slip Op 07698, First Dept 12-22-20

SCAFFOLD, 240(1), 241(6).

PLAINTIFF ALLEGEDLY FELL SIX FEET FROM A SCAFFOLD WITHOUT GUARD RAILS; PLAINTIFF'S SUMMARY JUDGMENT MOTION ON HIS LABOR LAW 240 (1) CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED; DEFENDANT'S SUMMARY JUDGMENT MOTION ON PLAINTIFF'S LABOR LAW 200 CAUSE OF ACTION SHOULD HAVE BEEN GRANTED; AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S LABOR LAW 241 (6) CAUSE OF ACTION WAS PROPERLY DENIED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's summary judgment motion on his Labor Law 240 (1) cause of action should not have been granted, defendant's (Henry Street's) motion for summary judgment on plaintiff's Labor Law 200 cause of action should have been granted, and defendant's motion for summary judgment on plaintiff's Labor Law 241 (6) cause of action was properly denied. Plaintiff fell approximate six feet for a scaffold which did not have guard rails:

The plaintiff failed to eliminate triable issues of fact as to whether the scaffolding at issue provided proper protection under Labor Law § 240(1) … . …

Here, the plaintiff's accident did not involve any dangerous or defective condition on Henry Street's premises. Rather, the accident involved the manner in which the plaintiff performed his work … . Henry Street established, prima facie, that it did not have the authority to exercise supervision and control over the subject work … . In opposition, the plaintiff failed to raise a triable issue of fact. Accordingly, the Supreme Court should have granted that branch of Henry Street's cross motion which was for summary judgment dismissing the causes of action alleging common-law negligence and a violation of Labor Law § 200 insofar as asserted against it. …

… [W]we agree with the Supreme Court's determination to deny that branch of Henry Street's cross motion which was for summary judgment dismissing so much of the cause of action alleging a violation of Labor Law § 241(6) as was predicated upon an alleged

violation of Industrial Code provision 12 NYCRR 23-5.1(b) insofar as asserted against it. That section provides that "[t]he footing or anchorage for every scaffold erected on or supported by the ground, grade or equivalent surface shall be sound, rigid, capable of supporting the maximum load intended to be imposed thereon without settling or deformation and shall be secure against movement in any direction." Henry Street failed to sustain its prima facie burden of demonstrating that Industrial Code provision 12 NYCRR 23-5.1(b) was either factually inapplicable to this case or was satisfied … . Medina-Arana v Henry St. Prop. Holdings, LLC, 2020 NY Slip Op 05199, Second Dept 9-30-20

SCAFFOLD, 240(1).

PLAINTIFF FELL FROM A SCAFFOLD AFTER TOUCHING A LIVE ELECTRIC WIRE; FAILURE TO TURN OFF THE ELECTRICITY MAY BE COMPARATIVE NEGLIGENCE WHICH DOES NOT DEFEAT A LABOR LAW 240 (1) CAUSE OF ACTION; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law 240 (1 cause of action should have been granted. Plaintiff was standing on a scaffold installing an exit sign when he touched a live wire and fell. Failure to turn off the electricity was at most comparative negligence which does not defeat the action:

The undisputed evidence in the record shows that plaintiff was attempting to install an exit sign in a building under construction while standing about 12 feet above the floor on a scaffold platform, without using any safety harness or safety lines, when he touched a live wire to a component of the sign, causing him to receive an electrical shock and then fall off the scaffold and onto the floor. Plaintiff made a prima facie showing that his accident was proximately caused by the inadequacy of the safety devices he was using or the absence of other safety devices necessary to protect him from the risks posed by working at a significant elevation above the floor … .

Defendants did not raise issues of fact by pointing to evidence that plaintiff checked the scaffold before using it and did not find it to be defective, and that the scaffold had safety

railings on all four sides, or by asserting that no other devices such as a safety harness or safety line would have prevented his fall … .

Defendants failed to raise an issue of fact as to whether “plaintiff knew that he was supposed to use a harness” or safety line, “or that he disregarded specific instructions to do so” … . …

Plaintiff’s failure to turn off the power supply before working with a live wire was at most comparative negligence, which is not a defense to a Labor Law § 240(1) claim … . Goundan v Pav-Lak Contr. Inc., 2020 NY Slip Op 06950, First Dept 11-24-20

SLIP AND FALL, 200, MEANS AND METHODS OF WORK.

THE HOMEOWNERS EXERCISED NO SUPERVISORY CONTROL OVER THE INJURY-CAUSING WORK IN THIS LABOR LAW 200 AND NEGLIGENCE CASE; THE CASE SHOULD HAVE BEEN ANALYZED AS A “MEANS AND METHODS OF WORK” ACTION, NOT A “CREATE OR HAVE NOTICE OF A DANGEROUS CONDITION” ACTION; THE HOMEOWNERS’ MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the Labor Law 200 and negligence causes of action against the homeowners should have been dismissed because the homeowners did not exercise any supervisory control over plaintiff’s work. The hole into which plaintiff fell was dug as part of the construction project. Supreme Court should not have analyzed the case using a “create or have notice of a dangerous condition” theory:

Plaintiff was injured when he fell into a hole dug by employees of codefendant Apex Construction/Masonry Corp. (Apex) in the backyard of Homeowner Defendants’ home during renovation of the premises. The hole was created for the purpose of building the foundation for a deck. Homeowner Defendants hired nonparty IA Construction Management Inc. as the general contractor, which subcontracted out part of the work to Apex; plaintiff was an employee of IA Construction.

Here, plaintiff’s accident arose from the means and methods of Apex’s work, not a defective premises condition. Thus, the dispositive issue is whether the Homeowner Defendants had authority to exercise supervisory control over the injury-producing work,

not whether they created or had notice of the hazardous condition … . The record establishes, as a matter of law, that they had no such authority. It is undisputed that Homeowner Defendants lived offsite during the renovation project and had no involvement with the work, and Apex's owner testified that the homeowners did not direct or control Apex's work … . Tsongas v Apex Constr./Masonry Corp., 2020 NY Slip Op 07520, First Dept 12-15-20

SLIP AND FALL, 200.

LABOR LAW 200 CAUSE OF ACTION BASED UPON A DANGEROUS CONDITION PROPERLY SURVIVED SUMMARY JUDGMENT, APPELLANTS DID NOT DEMONSTRATE A LACK OF ACTUAL OR CONSTRUCTIVE NOTICE OF THE CONDITION; JUDGE SHOULD NOT HAVE, SUA SPONTE, DENIED A MOTION ON A GROUND NOT RAISED BY A PARTY (SECOND DEPT).

The Second Department determined the Labor Law 200 and common-law negligence causes of action properly survived summary judgment. The Second Department noted the court should not have, sua sponte, denied appellants' motion on the ground the deposition transcripts were inadmissible because that issue was not raised. Plaintiff was working in the bottom of a hole which was muddy from heavy rain and littered with boulders and rocks. Plaintiff was injured when he allegedly slipped and fell because of the mud. The Second Department held that the causes of action were based upon a dangerous condition, not the method and manner of work, and the appellants did not demonstrate they lacked actual or constructive notice of the condition:

Labor Law § 200 is a codification of the common-law duty imposed on owners, contractors, and their agents to provide workers with a safe place to work … . 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 category of actions under Labor Law § 200 involves injuries arising from the method and manner of the work … . 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 … .

Contrary to the appellants' contention, the plaintiff's accident arose from a dangerous premises condition, not from the method and manner of the work. Where a plaintiff alleges that he or she was injured at a work site as a result of a dangerous premises condition, a property owner's liability under Labor Law § 200 and for common-law negligence rests upon whether the property owner created the condition, or had actual or constructive notice of it and a reasonable amount of time within which to correct the condition … . Modugno v Bovis Lend Lease Interiors, Inc., 2020 NY Slip Op 03508, Second Dept 6-24-20

SLIP AND FALL, 240(1).

PLAINTIFF STEPPED INTO A TRENCH WHICH HAD BEEN FILLED WITH SOFT SOIL AND SANK DOWN TO ABOVE HIS KNEE; SUMMARY JUDGMENT ON PLAINTIFF'S LABOR LAW 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First 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 stepped into a trench that had been filled with soft soil and sank into the soil past his knee:

It is undisputed that no safety devices were provided to plaintiff to protect him against the gravity-related risk of descending a significant distance into the trench. Thus, plaintiff established prima facie his entitlement to partial summary judgment on the Labor Law § 240(1) claim … . The elevation differential between the ground level and the lower level to which plaintiff's foot and leg sank is analogous to the risk that a worker standing on a platform on a body of water would fall into the water, which we have found to be covered by Labor Law § 240 … . Defendants failed to submit evidence that no safety devices could have prevented the accident … . Sunun v Klein, 2020 NY Slip Op 06471, First Dept 11-12-20

SLIP AND FALL, 240(1).

PLAINTIFF WAS INJURED ATTEMPTING TO ENTER A BUILDING FROM A SCAFFOLD THROUGH A WINDOW CUT-OUT; THERE WAS A QUESTION OF FACT WHETHER PLAINTIFF WAS AWARE THAT METHOD OF ENTERING THE BUILDING WAS PROHIBITED BY DEFENDANTS; THE LABOR LAW 240(1) CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (CT APP).

The Court of Appeals, reversing (modifying) the Appellate Division, over a three-judge dissent, determined defendants' motion for summary judgment should not have been granted in this Labor Law 240(1) action. Plaintiff was injured when he fell attempting to enter a building from a scaffold through a window cut-out. Although there was evidence of a standing order prohibiting use of that method for entering the building, other workers used that method:

A defendant has no liability under Labor Law § 240 (1) when plaintiffs: (1) "had adequate safety devices available," (2) "knew both that" the safety devices "were available and that [they were] expected to use them," (3) "chose for no good reason not to do so," and (4) would not have been injured had they "not made that choice" … . Here, a triable issue of fact exists as to whether plaintiff knew he was expected to use the safety devices provided to him, despite the apparent accepted practice of entering the building through the window cut-outs from the scaffolding. Indeed, as the Appellate Division dissent concluded, the Appellate Division majority (and the dissent here) "ignore[] the evidence in the record that workers on this job site used the scaffold to go through window cut-outs to enter the interior of the building and that the scaffold was clearly inadequate for that purpose" … .

Given defendants' purported acquiescence to this alleged practice, the general contractor's standing order directing workers not to enter the building through the cut-outs is insufficient to entitle defendants to summary judgment … . Further, the accepted practice could have negated the normal and logical inclination to use the scaffold, stairs, or hoist instead of the cut-outs … . Finally, in context and given the other conflicting evidence in the record, a factfinder should determine whether plaintiff's statement that he "wasn't supposed to pass through there" unambiguously establishes that he knew he was expected to use the safety devices. Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp., 2020 NY Slip Op 01116, CtApp 2-18-20

SLIP AND FALL, 241(6), 200.

FALL AFTER STEPPING ON LOOSE PIPES NOT COVERED BY LABOR LAW 240 (1); LABOR LAW 200 AND 241 (6) CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the Labor Law 240 (1) cause of action based upon plaintiff's fall when he stepped on a pile of loose pipes was properly dismissed. However the Labor Law 200 cause of action and the Labor Law 241 (6) cause of action against some of the defendants should not have been dismissed:

The court correctly dismissed the Labor Law § 240(1) claim, as that statute does not cover a fall allegedly caused by stepping on a pile of unsecured pipes on the floor of a construction site … . …

The Labor Law § 200 and common-law negligence claims should not be dismissed as against UA, Independent Mechanical, Intel Plumbing, and WeWork. The cause of plaintiff's accident was not the manner in which his work was performed but a dangerous condition on the premises, i.e., the loose pipes that had been laid on the floor directly in front of a doorway … . …

… [T]he record does not support the summary dismissal of the Labor Law § 241(6) claim as against the UA and 401 Park defendants. Plaintiff's testimony that his fall was caused by a pile of loose pipes obstructing the doorway presents an issue of fact as to whether the accident was caused by a tripping hazard in a passageway (Industrial Code [12 NYCRR] § 23-1.7[e][1] …). There is also an issue of fact as to whether the accident was caused by a violation of 12 NYCRR 23-1.7(e)(2), since part of the floor where workers worked or passed was not kept free from scattered tools or materials … . In addition, there is an issue of fact as to whether the unsecured pipes, which were allegedly piled about two feet high directly in front of the doorway, were safely stored pursuant to 12 NYCRR 23-2.1(a)(1) … . Armental v 401 Park Ave. S. Assoc., LLC, 2020 NY Slip Op 02154, First Dept 4-2-20

SLIP AND FALL, 241(6), 200.

LABOR LAW 200, 241(6) AND COMMON LAW NEGLIGENCE CAUSES OF ACTION PROPERLY SURVIVED SUMMARY JUDGMENT IN THIS WORKPLACE SLIP AND FALL CASE (FIRST DEPT).

The First Department determined plaintiff's Labor law 200, 241(6) and common law negligence causes action properly survived summary judgment in this workplace slip and fall case. Plaintiff fell going down a staircase and there was evidence that dust and perhaps paint was on the stairway associated with sanding and painting the walls. Although the stairway was not a passageway pursuant to the Industrial Code, there was a question of fact whether the stairway was a work area, even though no work was being done at the time of the fall. The defendant responsible for cleaning up, Magnetic, could be liable as a statutory agent:

… [P]laintiff's identification of the cause of his slip and fall is not merely speculation. He testified that after he fell down the stairs, the steps he could see from the bottom of the staircase were dusty, his clothes were dusty, and his jacket was wet with paint. Further, there is testimony in the record that the walls of the stairway had been sanded and painted before plaintiff's accident. * * *

Industrial Code § 23-1.7(e)(2) may serve as a predicate for plaintiff's Labor Law § 241(6) claim, as it applies to slipping as well as tripping hazards … . …

Industrial Code § 23-1.7(d) is applicable to plaintiff's accident. While a staircase used to provide access to a job site is not a passageway or other working surface within the meaning of the provision unless it is the sole means of access … , the provision is applicable if the staircase was a work area … . …

Insofar as Magnetic was delegated authority for the injury-producing work, retained subcontractors to perform the injury-producing work, and was responsible for clean-up at the site, it may be held liable under Labor Law § 241(6) as a statutory agent … . Ohadi v Magnetic Constr. Group Corp., 2020 NY Slip Op 02278, First Dept 4-16-20

SLIP AND FALL, 241(6).

PLAINTIFF SLIPPED ON ICE AND SNOW IN AN AREA OF THE WORK SITE USED AS A WALKWAY; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS LABOR LAW 241(6) ACTION SHOULD HAVE BEEN GRANTED; THERE WAS A DISSENT (FIRST DEPT).

The First Department, reversing Supreme Court, over a dissent, determined plaintiff was entitled to summary judgment on his Labor Law 241(6) cause of action. Plaintiff slipped and fell on ice and snow on a walkway used on the work site:

[12 NYCRR] Section 23-1.7(d) provides, in pertinent part, that no employee shall be permitted "to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition" and requires the removal of any "[i]ce, snow, water, grease and any other foreign substance which may cause slippery footing." Here, plaintiff's accident occurred while he was walking on a path in the fenced-in area between the security guard booth and the worksite entrance at Staircase B. The general superintendent … swore in his deposition that there was an unpaved path between the booth and the worksite entrance, that it was one of two entrances to the worksite, that it was a "walked path that workers generally took" and that it was "an area that should be kept clear of snow and ice and any other slippery conditions so that workers don't injure themselves[.]" Potenzo v City of New York, 2020 NY Slip Op 08013, First Dept 12-29-30

SLIP AND FALL, 241(6).

QUESTION OF FACT WHETHER BOARDS OR MASONITE WERE SCATTERED DEBRIS OR DELIBERATELY PLACED AS AN INTEGRAL PART OF THE RENOVATION WORK; PLAINTIFF'S SUMMARY JUDGMENT MOTION ON HIS LABOR 241(6) CAUSE OF SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined there was a question of fact whether boards/Masonite on the floor of a passageway were placed there as an integral part of the renovation project or were scattered debris constituting a tripping hazard in violation of the Industrial Code (12 NYCRR 23-1.7(e)(1) or (e)(2)). The court held there was a question of fact on that issue and plaintiff's motion for summary judgment

on his Labor Law 241(6) cause of action should not have been granted. The court noted that its decision to the contrary in Singh v 1221 Holdings, LLC (127 AD3d 607 [1st Dept 2015]) should no longer be followed:

Plaintiff claims that the boards were a tripping hazard and a violation of Industrial Code § 23-1.7 (e)(1) because defendants failed to provide him with a passageway free of obstructions. Defendants argue, however, that there is no liability because the boards were Masonite, not scattered materials or debris, and because they were purposefully laid out upon the floor each day, this being "integral to" the renovation work being performed.

At the outset, these arguments require us to address whether the "integral-to-the work" defense raised by defendants, but rejected by Supreme Court, equally applies to Industrial Code § 23-1.7(e)(1), as well as § 23-1.7(e)(2). We hold that it does. * * *

[The facts] raise a triable issue of fact regarding whether the boards were a "protective covering [that] had been purposefully installed on the floor as an integral part of the renovation project" … . … [S]ummary judgment in favor of plaintiff was improper because it was based on the mistaken supposition that the "integral-to-work" defense means integral to plaintiff's specific task. The defense applies to things and conditions that are an integral part of the construction, not just to the specific task a plaintiff may be performing at the time of the accident … . Krzyzanowski v City of New York, 2020 NY Slip Op 00232, First Dept 1-14-20

SLIP AND FALL, 241(6).

QUESTION OF FACT WHETHER THE TWO BY FOUR PLAINTIFF TRIPPED OVER WAS DEBRIS, WHICH WOULD CONSTITUTE A VIABLE LABOR LAW 241(6) CAUSE OF ACTION, OR PART OF A SAFETY BARRICADE, WHICH WOULD NOT (FIRST DEPT).

The First Department determined there was a question of fact whether the two by four plaintiff tripped over was debris, which would constitute a viable Labor Law 241(6) cause of action, or part of a safety barricade, which would not:

Plaintiff's motion for partial summary judgment on the Labor Law § 241(6) claim based on Industrial Code (12 NYCRR) § 23-1.7(e)(2) should be denied. This Industrial Code provision requires work areas to be kept free of debris and scattered tools and materials "insofar as may be consistent with the work being performed," and thus is not violated when the condition that caused the plaintiff to trip or slip was integral to the work being performed, such as the presence of materials placed in the work area intentionally …. The staircase that plaintiff was approaching was installed by the ironworkers, and there is testimony that it was not opened for use until days after plaintiff's accident. Plaintiff acknowledged that the staircase had not been completed at the time of his accident, that a barricade remained in place around three sides of the opening in the floor, and that an ironworker was working on the fourth side at the top of the stairs where the barricade had been removed. Under the circumstances, issues of fact exist as to whether the two-by-four over which plaintiff tripped was part of the barricade blocking the staircase opening in the floor and therefore integral to the work at the time of his accident, even if the barricade had been pulled back or removed from the front of the stairs where an iron worker was working … . Rudnitsky v Macy's Real Estate, LLC, 2020 NY Slip Op 07325, First Dept 12-8-20

SLIP AND FALL, 241(6).

WIRES WHICH CAUSED PLAINTIFF TO TRIP AND FALL WERE INTEGRAL TO THE WORK BEING PERFORMED AND CANNOT THEREFORE BE CONSIDERED DEBRIS WITHIN THE MEANING OF THE INDUSTRIAL CODE; THE LABOR LAW 241(6) CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's Labor Law 241(6) cause of action should have been dismissed. Plaintiff fell when his foot became entangled in electrical wires hanging from the ceiling. The wires were integral to the work being performed. Therefore the Industrial Code provision prohibiting the accumulation of debris did not apply. However the common law negligence (dangerous condition) cause of action properly survived summary judgment:

To prevail on a cause of action alleging a violation of Labor Law § 241(6), a plaintiff "must set forth a violation of a specific rule or regulation promulgated by the Commissioner of the Department of Labor" … . Here, the plaintiff alleged a violation of 12 NYCRR 23-

1.7(e)(2), which requires that "[t]he parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed." However, 12 NYCRR 23-1.7(e)(2) is "inapplicable [where] the material over which [a plaintiff] alleges he [or she] tripped was integral to the work being performed" … . Martinez v 281 Broadway Holdings, LLC, 2020 NY Slip Op 02773, Second Dept 5-13-20

SLIP AND FALL, WORKERS' COMPENSATION, EXCLUSIVE REMEDY.

THE DEFENDANT LIMITED LIABILITY COMPANIES FUNCTIONED AS A SINGLE INTEGRATED UNIT WITH PLAINTIFF'S EMPLOYER; PLAINTIFF'S ONLY REMEDY IN THIS SLIP AND FALL CASE IS THE WORKERS' COMPENSATION LAW BENEFITS HE APPLIED FOR AND RECEIVED BEFORE BRINGING THIS LABOR LAW 240(1) ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, over an extensive dissent, determined the corporate entities plaintiff sued in this slip and fall case function as a single integrated entity with plaintiff's employer, the nursing home where he was injured. Plaintiff had applied for and received Workers' Compensation benefits and then brought this Labor 240(1) action. The First Department held that plaintiff's exclusive remedy was Workers' Compensation:

… [W]e find that Hopkins Ventures has shown ownership of 100% of both KFG Land and KFG Operating and that it exercised complete managerial and financial control over both companies, operating them as if they were a single integrated entity. Since the evidentiary proof submitted by KFG Land was sufficient to make out its prima facie case, that the LLCs functioned as a single integrated entity in connection with the joint venture of acquiring and operating the property and nursing home, the exclusivity provisions of the WCL apply. Plaintiff failed to raise a material issue of fact to defeat defendant's motion for summary judgment. …

Although the dissent reaches the underlying merits of plaintiff's cross appeal concerning the dismissal of his Labor Law §240(1) on the basis that he was not engaged in a "repair" or "alteration" within the meaning of Labor Law § 240(1) at the time of his accident, we affirm on the ground that even if plaintiff was engaged in alteration or repair, the exclusivity

provisions of the WCL would be his sole remedy since he applied for and received those benefits. Fuller v KFG L & I, LLC, 2020 NY Slip Op 07998, First Dept 12-29-20

SUPERVISORY AUTHORITY, 200.

DEFENDANT HOME OWNER DEMONSTRATED HE DID NOT HAVE SUPERVISORY CONTROL OVER PLAINTIFF'S WORK AND DID NOT HAVE ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE DANGEROUS CONDITION WHICH ALLEGEDLY RESULTED IN PLAINTIFF'S INJURIES IN THIS LABOR LAW 200 ACTION; SUPREME COURT SHOULD NOT HAVE CONSIDERED AN AFFIDAVIT FROM A NOTICE WITNESS WHO WAS NOT DISCLOSED PRIOR TO THE SUMMARY JUDGMENT MOTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant home owner's motion for summary judgment in this Labor Law 200 action should have been granted. Defendant was not home when plaintiff fell through an open hole in the deck while removing a window. The defendant demonstrated he did not have any control over the manner of plaintiff's work and did not have actual or constructive knowledge of the dangerous condition. Supreme Court should not have considered the affidavit of a nonparty who was not previously disclosed as a witness who had actual notice of the condition.

… [T]he defendant established, prima facie, that he did not exercise supervision or control over the performance of the work giving rise to the accident … . Further, to the extent that the accident could be viewed as arising from a dangerous or defective premises condition at the work site, the defendant established, prima facie, that he did not create or have actual or constructive notice of the alleged dangerous condition … .

In opposition, the plaintiffs failed to raise a triable issue of fact. We disagree with the Supreme Court's determination to consider the affidavit of a nonparty witness submitted by the plaintiffs in opposition to the defendant's motion. In his discovery demands, the defendant sought disclosure of, inter alia, the name of any witness who had actual notice of the alleged condition, or the nature and duration of such condition. The nonparty witness was not disclosed in the plaintiffs' discovery responses, the plaintiffs failed to offer an excuse for their failure to do so, and nothing that transpired during discovery would

have alerted the defendant of the potential significance of the nonparty's testimony … . Casilari v Condon, 2020 NY Slip Op 04146, Second Dept 7-22-20

SUPERVISORY AUTHORITY, 200.

GENERAL CONTRACTOR DID NOT EXERCISE ANY SUPERVISORY CONTROL OVER PLAINTIFF'S WORK AND THEREFORE WAS NOT LIABLE FOR AN INJURY ARISING FROM THE MANNER OF PLAINTIFF'S WORK FOR A SUBCONTRACTOR; LABOR LAW 200 CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the Labor Law 200 action against the general contractor, El Sol. should have been dismissed. The accident involved the manner in which the work was done, not a dangerous condition. Plaintiff was employed by a subcontractor. Because El Sol did not exercise any supervisory control over plaintiff's work, El Sol was not liable:

"Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" … . Where "a claim arises out of alleged defects or dangers arising from a subcontractor's methods or materials, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation" … . "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" … . "[M]ere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200" … .

Contrary to the plaintiff's contentions, El Sol established, prima facie, that the accident did not arise from a dangerous or defective premises condition but from the method and manner of the work … . El Sol further established that it did not exercise supervision or control over the performance of the work giving rise to the accident … . Boody v El Sol Contr. & Constr. Corp., 2020 NY Slip Op 01140, Second Dept 2-19-20

SUPERVISORY AUTHORITY, 241(6), 200.

DOCUMENTARY EVIDENCE SUBMITTED BY DEFENDANT SUBCONTRACTOR DEMONSTRATED IT DID NOT HAVE THE AUTHORITY TO SUPERVISE OR CONTROL THE WORK THAT CAUSED PLAINTIFF'S INJURY; THEREFORE THE LABOR LAW 240 (1) AND 200 CAUSES OF ACTION WERE PROPERLY DISMISSED AND THE COMMON LAW NEGLIGENCE CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, modifying Supreme Court, determined the documentary evidence submitted by defendant subcontractor in this Labor Law 241(6), 200 and common law negligence action conclusively established defendant did not have the authority to supervise of control the work which caused plaintiff's injury. Defendant's motion to dismiss pursuant to CPLR 3211 was properly granted re the Labor Law 240 (1) and 200 causes of action and should have been granted re the common law negligence cause of action:

… [T]he court properly granted defendant's motion insofar as it sought to dismiss the Labor Law causes of action because defendant submitted documentary evidence "conclusively establish[ing]" … that, "as a subcontractor, it did not have the authority to supervise or control the work that caused the plaintiff's injury and thus cannot be held liable under Labor Law §§ 200 . . . or 241 (6)" … . … [T]he documentary evidence belies plaintiff's allegation that he is a third-party beneficiary of the contract between his employer and defendant … . … [G]iven the documentary evidence submitted in support of defendant's motion, … the court should have also granted the motion insofar as it sought to dismiss the common-law negligence cause of action against defendant … . Eberhardt v G&J Contr., Inc., 2020 NY Slip Op 06627, Fourth Dept 11-13-20

SUPERVISORY AUTHORITY.

APPELLANT WAS NOT AN AGENT OF THE GENERAL CONTRACTOR OR OWNER, DID NOT SUPERVISE AND CONTROL PLAINTIFF'S WORK AND DID NOT HAVE CONTROL OVER THE WORK SITE; THEREFORE THE LABOR LAW 240(1), 241(6) AND 200 CAUSES OF ACTION SHOULD HAVE BEEN DISMISSED IN THIS CONSTRUCTION-DEBRIS-SLIP-AND-FALL CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the appellant, which was hired by the construction manager to put in concrete steps, was bit an agent of the general contractor or the owner and did not exercise supervisory control plaintiff's work in this Labor Law 200, 240(1) and 241(6) action. Plaintiff worked for an HVAC contractor and fell over construction debris on a temporary ramp leading to the entrance of the premises:

To hold a defendant liable as an agent of the general contractor or the owner for violations of Labor Law §§ 240(1) and 241(6), there must be a showing that it had the authority to supervise and control the work that brought about the injury … "The determinative factor is whether the party had the right to exercise control over the work, not whether it actually exercised that right" … . "Where the owner or general contractor does in fact delegate the duty to conform to the requirements of the Labor Law to a third-party subcontractor, the subcontractor becomes the statutory agent of the owner or general contractor" … .

Here, the appellant established its prima facie entitlement to judgment as a matter of law dismissing the Labor Law §§ 240(1) and 241(6) causes of action insofar as asserted against it by demonstrating that it was not an agent of the general contractor or the owner with regard to the plaintiff's work … . There was no evidence that the appellant had any authority to supervise or control the work of the plaintiff … . … [T]he appellant established its prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 200 and common-law negligence causes of action insofar as asserted against it by demonstrating that it did not have control over the work site … . Fiore v Westerman Constr. Co., Inc., 2020 NY Slip Op 04460, Second Dept 12-12-20

TREE-CUTTING, 240(1), 241(6).

TREE-CUTTING IS A COVERED ACTIVITY PURSUANT TO LABOR LAW 240 (1) AND 241 (6) IF DONE IN CONNECTION WITH A COVERED CONSTRUCTION PROJECT (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined defendant's motion for summary judgment on plaintiff's Labor 240 (1) should not have been granted, defendant's motion for summary judgment on plaintiff's Labor Law 241 (6) cause of action was properly denied, and defendant's motion for summary judgment on plaintiff's Labor Law 200 cause of action should have been granted. Plaintiff was injured cutting trees, which is a covered activity when done in connection with a construction project:

Although trees are not structures and tree removal in and of itself is not an enumerated activity within the meaning of Labor Law § 240 (1), tree removal performed to facilitate an enumerated activity does come within the ambit of this statute (see Lombardi v Stout, 80 NY2d 290, 296 [1992]). Defendant failed to meet its initial burden on that part of its motion because defendant's own submissions raised a triable issue of fact whether plaintiff's tree removal work at the time of the accident was ancillary to the larger construction project, specifically the culvert installation work, that was ongoing at the time of the accident … . Contrary to plaintiff's further contention, however, the court properly denied his cross motion seeking summary judgment on the issue of defendant's liability under section 240 (1) inasmuch as plaintiff failed to eliminate all triable issues of fact whether his tree removal work "[fell] into a separate phase easily distinguishable from other parts of the larger construction project" … . …

Although it is well settled that Labor Law § 241 (6) does not apply to a worker who engages in tree trimming that is unrelated to construction, demolition or excavation work … , as noted above, there is a triable question of fact whether plaintiff's work at the time of his accident was related to the culvert installation work and was thus related to construction, demolition or excavation work. …

[Re: the Labor law 200 cause of action] defendant met its burden … by submitting evidence establishing "that the alleged dangerous condition arose from the . . . methods [of plaintiff's employer] and that defendant did not exercise supervisory control over the removal of the tree or any aspect of plaintiff's activities" … . Krencik v Oakgrove Constr., Inc., 2020 NY Slip Op 04642, Fourth Dept 8-20-20

TRUCK, FALL FROM, 200.

LIABILITY UNDER LABOR LAW 200 DOES NOT REQUIRE THAT PLAINTIFF BE ENGAGED IN CONSTRUCTION WORK; HERE PLAINTIFF FELL OFF THE TOP OF A TRACTOR-TRAILER; THE LABOR LAW 200 CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's Labor Law 200 cause of action should not have been dismissed. The court noted that liability under Labor Law 200 does not require that the plaintiff be engaged in construction work:

Plaintiff was injured when he fell to the ground from the top of a tractor-trailer, as he was attempting to manually roll out a tarp to cover trash in the trailer, as required by [defendant] Tully. The trailer with the allegedly defective tarping mechanism was owned by Strength and leased to plaintiff's employer.

Plaintiff is entitled to the protection afforded by Labor Law § 200 for his work because that section codifies the common-law duty of an owner to provide workers with a safe place to work, which is not limited to construction work … .

The record presents an issue of fact as to Tully's authority to control the activity that brought about plaintiff's injury … . Plaintiff testified that Tully directed him in how to proceed at the facility and mandated that he cover the trash with the tarp, and the facility manager testified that Tully had a policy prohibiting drivers from standing on the tops of trailers. There is also a factual issue as to whether Tully permitting the tractor-trailer to be overfilled created the condition that may have cause plaintiff's injuries … . Landron v Wil-Cor Realty Co. Inc., 2020 NY Slip Op 05287, First Dept 10-1-20

TRUCK, FALL FROM, 240(1), 241(6).

FALL WHILE UNLOADING A FLATBED TRUCK CAN BE A COVERED ACTIVITY AND INVOLVED AN ELEVATION-RELATED RISK; INDUSTRIAL CODE VIOLATION FIRST ASSERTED IN OPPOSITION PAPERS SHOULD NOT HAVE BEEN REJECTED; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS LABOR LAW 240 (1) AND 241 (6) ACTION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment on the Labor Law 240 (1) and 241 (6) causes of action should not have been granted. Plaintiff was unloading a man lift from a flatbed truck and was on the man lift when it rolled off the truck. The Fourth Department determined: (1) unloading a truck at an active construction site is a covered activity; (2) the fall involved an elevation-related risk; and (3), although an industrial code violation was first asserted in opposition paper, it should not have been rejected:

Delivery of equipment is a covered activity if the equipment is being delivered to an active construction site … or is being "readied for immediate use" … . Delivery of equipment is not a covered activity if it is being delivered to an inactive construction site and is merely being "stockpil[ed] for future use" … . …

Although a fall from a flatbed truck generally does not present the sort of elevation-related risk that Labor Law § 240 (1) is intended to cover … , we have distinguished those cases in which a falling object causes the injured worker to fall … . …

Although plaintiff alleged a violation of section 23-1.5 (c) (3) for the first time in opposition to the motion, a plaintiff may be entitled to leave to amend his or her bill of particulars where, as here, he or she makes a showing of merit, raises no new factual allegations or legal theories, and causes the defendant no prejudice … . Shaw v Scepter, Inc., 2020 NY Slip Op 05651, Fourth Dept 10-9-20

WELDING NOT COVERED, 240(1).

DECEDENT'S WORK AS A WELDER NOT A COVERED ACTIVITY UNDER LABOR LAW 240 (1) (CT APP).

The Court of Appeals, in a one-sentence memorandum, determined the plaintiff was not engaged in an activity covered by Labor Law 240 (1) when he was injured:

Decedent's work as a welder during the "normal manufacturing process" of fabricating rotor components for air preheaters did not involve "erection, demolition, repairing, altering, painting, cleaning or pointing" of a building or structure (Jock v Fien , 80 NY2d 965, 968 [1992]; Labor Law § 240 [1]). Preston v APCH, Inc., 2020 NY Slip Op 01000, Ct App 2-13-20

WHEELED CONTAINER, 200.

LABOR LAW 200 AND NEGLIGENCE CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED; THE ACCIDENT WAS RELATED TO MATERIAL ON THE FLOOR WHICH CAUSED THE WHEELS OF A CART PLAINTIFF WAS PUSHING TO GET STUCK; DEFENDANT DID NOT DEMONSTRATE WHEN THE FLOOR WAS LAST INSPECTED OR CLEANED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the Labor Law 200 and common law negligence causes of action should not have been dismissed. Plaintiff was pushing a cart when the wheels got stuck. When a coworker kept pulling the cart plaintiff hand was pinned and the tip of his index finger was severed. Plaintiff alleged there were steel rods (which were integral to the work) and garbage on the floor:

A defendant will be found to have "failed to establish that they lacked constructive notice of the dangerous condition that caused plaintiff's injury, [if] they submitted no evidence of the cleaning schedule for the work site or when the site had last been inspected before the accident" … .

Here, plaintiff alleges that there was "garbage" as well as rods on the floor that impeded the cart's movement. Bravo's [the builder's] contract explicitly required it to look for

dangerous and hazardous conditions on a daily basis, and to keep the workplace safe. However, since Bravo submitted no evidence as to its inspection and cleaning schedule of the worksite, this claim must be reinstated.

It is not relevant whether the rods on which the cart got stuck were an open and obvious condition that plaintiff could have seen, since that issue raises a question of plaintiff's comparative negligence and does not bear on defendant's own liability … . Spencer v Term Fulton Realty Corp., 2020 NY Slip Op 02855, First Dept 5-14-20

WHEELED CONTAINER, 241(6), 200.

PLAINTIFF WAS INJURED WHEN A WHEEL ON THE CONTAINER HE WAS PUSHING GOT STUCK IN A GAP IN THE FLOOR AFTER THE PLYWOOD COVERING THE GAP BROKE; PLAINTIFF'S MOTION TO AMEND THE COMPLAINT TO ADD THE RELEVANT INDUSTRIAL CODE PROVISION SHOULD HAVE BEEN GRANTED; THE LABOR LAW 241(6), LABOR LAW 200 AND NEGLIGENCE CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's Labor Law 241(6), Labor Law 200 and Negligence causes of action should not have been dismissed. Plaintiff was pushing a container of cinderblocks when plywood covering a gap in the floor broke and a wheel got stuck, causing plaintiff to be propelled head over heels and land on his back. The Second Department further held plaintiff should have been allowed to amend the complaint by adding the relevant Industrial Code provision, despite the 3 1/2 delay in bringing the motion to amend. Defendant was not prejudiced by the amendment:

As Industrial Code (12 NYCRR) § 23-1.7(e)(1) is applicable to these facts and defendant failed to show that it would be prejudiced by an amendment of the bill of particulars to assert a violation of this provision as a predicate to the Labor Law § 241(6) claim, plaintiff's motion to amend should be granted (see CPLR 3025[b] …). In view of the absence of prejudice to defendant, plaintiff was not required to explain his 3½-year delay in bringing this motion … . …

… [A]n inadequately protected gap in the floor of a passageway at a construction site that causes a container, dumpster, or the like to become stuck or otherwise lose its balance

and trip, slip, or fall violates Industrial Code (12 NYCRR) § 23-1.7(e)(1) and can serve as a predicate for a Labor Law § 241(6) claim. …

Defendant failed to establish prima facie that it neither created nor had notice of the dangerous condition of the hallway floor … . Trinidad v Turner Constr. Co., 2020 NY Slip Op 07519, First Dept 12-15-20

WHEELED CONTAINER, 241(6).

QUESTIONS OF FACT WHETHER INDUSTRIAL CODE PROVISIONS RE: DEBRIS IN PASSAGEWAYS AND KEEPING EQUIPMENT IN GOOD REPAIR IN THIS LABOR LAW 241(6) ACTION PRECLUDED SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendants' motion for summary judgment on the Labor Law 241(6) causes of action should not have been granted. There were questions of fact whether the Industrial Code provisions re: debris in passageways and keeping equipment in good repair were violated. Plaintiff was injured when a wheeled dumpster allegedly tipped over:

Plaintiff's claim premised upon § 23-1.7(e)(2), which concerns debris in passageways, is viable because the area where the accident occurred was a passageway for the purposes of that provision … . The provision applies not just when loose debris causes a direct trip and fall, but also in circumstances similar to those involved here … .

With regard to § 23-1.28(b), which pertains to hand-propelled vehicles, and § 23-1.5(c), which prohibits use of machinery or equipment that is not in good repair and safe working condition, defendants failed to make a prima facie showing that the wheeled dumpster was not defective … . Sancino v Metropolitan Transp. Auth., 2020 NY Slip Op 03615, First Dept 6-25-20

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