



GOLDBERG SEGALLA ^{LLP}

LABOR LAW UPDATE

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LABOR LAW §§ 200, 240(1) & 241(6) – UPDATE

GOLDBERG SEGALLA LABOR LAW LITIGATION GROUP

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Over the last several years various Courts, including the N.Y. Court of Appeals, have provided defendants, involved in construction site personal injury litigation, with hope that the playing field may be leveling out. For example, the “sole proximate cause” and “recalcitrant worker” defenses were refined. However, during this current reporting period it appears that the Courts are extending the traditional principles and providing a more expansive approach to liability under Labor Law §240(1). In several cases, the Courts have recognized the “sole proximate cause” defense, but have been reluctant to apply it even though the plaintiff made an obvious choice of the manner, method and means of performing the work. Also, several of the Appellate Divisions appear to be expanding the application of §240(1) beyond the traditional “falling object” and “falling worker” scenarios. In fact, the U.S. District Court for the Second Circuit Court of Appeals in the case of *Runner v. New York Stock Exchange, Inc.*, 2009 U.S. App. LEXIS 12436 (June 10, 2009) noted that there was an absence of authoritative State Court decisions on the issue of whether liability will attach under §240(1) if an injury stems from neither a “falling worker” or “falling object” and certified the question to the N.Y. Court of Appeals. Also, during this reporting period, the Second Circuit heard oral argument on the case of *Businesses for a Better N.Y. v. Angello*, 2007 U.S. Dist. LEXIS 72798 (W.D.N.Y. 2007) which involved a constitutional challenge to the New York Labor Law. We will keep you advised as these cases proceed through the system.

Also, “risk shifting” continues to be an important element in the litigation of these cases and the language of the contract and the activities of the various entities involved in the construction process continue to impact one party’s ability to escape liability by shifting the risk to another entity.

If you have any questions about any cases reported in this Update or questions concerning Labor Law §§200, 240(1) and 241(6) in general, please contact **Tom Segalla** at the Buffalo address below; by phone at (716) 566-5480; or email at tsegalla@goldbergsegalla.com.

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COURT OF APPEALS

1. *Ferluckaj v. Goldman Sachs & Co.*, 12 N.Y.3d 316 (2009)(Apr. 2, 2009). The plaintiff was injured when she fell off a desk while cleaning the inside of windows in an office building. In a 4-3 decision, the majority held that the lessee in this case did not hire the injured plaintiff's employer nor did it have the right to direct or control the work and therefore, did not constitute an "owner" within the meaning of Labor Law §240(1). The dissent believed that there was a triable issue of fact as to whether the lessee had the right to control the plaintiff's work.

Practice Note: It is not disputed that a lessee can be liable under §240(1), if it has the right to control the work being done. The contractual arrangement and activities on the job site are important.

2. *Misicki v. Salvatore Caradonna*, 2009 N.Y. LEXIS 942 (May 12, 2009). At issue on this appeal was whether the N.Y. Industrial Code 12 N.Y.C.R.R. 23-9.2 was sufficiently specific to support liability under Labor Law §241(6). In a 5-2 decision, the majority of the Court denied the defendants' motion for summary judgment and held that an employee who claimed to have suffered injuries proximately caused by a previously identified and unremedied structural defect or unsafe condition affecting power-operated equipment or machinery stated a cause of action under §241(6).

Practice Note: While the majority was attempting to resolve a conflict in the lower courts, the dissent noted because the majority relied on the awareness of the defect that the lower court cases were still viable.

3. *Cunha v. City of New York*, 2009 N.Y. LEXIS 2000 (June 9, 2009). This appeal involves a claim by one defendant against a third-party defendant for indemnification. One defendant had settled with the injured worker and then sought indemnification. The Court held that because the entity seeking indemnification was only vicariously liable that it was entitled to full (100%) indemnification from that entity even though that entity was found to only be 40% liable. The jury did not apportion the remaining 60% fault. In reaching its decision that Court noted that "[t]his Court has recognized that an owner held strictly liable under the Labor Law is entitled to 'full indemnification from the party wholly at fault'"

Practice Note: The Court distinguishes other cases where indemnification is limited by CPLR Article 16.



FIRST DEPARTMENT

1. *Vukovich v. 1345 Fee, LLC*, 58 A.D.3d 410 (1st Dept. 2009)(Jan. 6, 2009). Plaintiff, a pipe fitter, was injured when he received an electrical shock and fell from a 3rd or 4th rung of an A-frame ladder. While it was an unwitnessed accident, the court granted the plaintiff's motion for summary judgment under §240(1) finding that the ladder provided was inadequate to prevent the injury. The court also found there were issues of fact as to control of the plaintiff's activities and denied plaintiff's motion under §200 and common law negligence. Contractual indemnification was allowed based because the risk was "allocated" by provision for insurance.

Practice Note: The failure provides an adequate safety device must be the proximate cause of the plaintiff's injuries.

2. *Mahoney v. Turner Construction Co.*, 61 A.D.3d 101, 872 N.Y.S.2d 433 (1st Dept. 2009)(Jan. 15, 2009). The plaintiff had sued the owner, general contractor and subcontractor in the context of a Labor Law §240(1) claim. The general contractor and owner sued the subcontractor in a third-party action for contribution and indemnification. The owner and general contractor settled with the plaintiff. At issue on this appeal was whether the terms of the settlement agreement were discoverable. The trial court denied disclosure. This court reversed and remanded for an in camera inspection and new determination on the motion.

Practice Note: The court in reaching its decision discussed at length the standard utilized to determine discoverability (i.e. material and necessary).

3. *Norstrom v. A.W. Chesteron Co.*, 59 A.D.3d 159, 872 N.Y.S.2d 122 (1st Dept. 2009)(Feb. 3, 2009). The court considered on this appeal whether various Industrial Codes under 12 N.Y.C.R.R. Part 23 were sufficiently specific to support the §241(6) claim. Where a code does not contain specific methods, standards, directives or controls or work process, it does not meet this standard.

Practice Note: In determining whether a code meets the relevant standard, the language of the code must be reviewed very closely.

4. *Wildman v. Lawrence Jensen*, 59 A.D.3d 165, 872 N.Y.S.2d 450 (1st Dept. 2009)(Feb. 3, 2009). The plaintiff, a cable installer, was injured when he fell from a ladder during the course of his work which was performed without the knowledge of the owner of the building. The court held that since the plaintiff was on the owner's premises not by reason of any action of the owner but by reasons of provisions of the Public Service Law, he was not an "employee or employed" within the meaning of the Labor Law and therefore not protected.



Practice Note: The Public Service Law states that no landlord can interfere with the installation of cable in any building owned.

5. *Vargas v. New York City Transit Authority*, 60 A.D.3d 438, 874 N.Y.S.2d 446 (1st Dept. 2009)(Mar. 10, 2009). The plaintiff was injured when he fell from a ladder he borrowed from a subcontractor. Neither plaintiff's employer nor the general contractor provided a ladder. The ladder was not tall enough and the employee climbed the ladder while it was closed and leaning. The court denied the defendants' motion to dismiss the §§240(1) and 241(6) causes of action and held that the sole proximate cause issue could not be decided as a matter of law. The court also considers the enforceability of various purchase orders that contained contractual indemnification claims and whether one party was a third-party beneficiary.

Practice Note: The case provides an interesting analysis of the terms and conditions of contractual indemnification provisions and their enforceability.

6. *Picchione v. Sweet Construction Corp.*, 60 A.D.3d 510, 875 N.Y.S.2d 42 (1st Dept. 2009)(Mar. 17, 2009). While pushing a 300-400 pound loaded equipment cart, the plaintiff was injured when the cart tipped over and pinned the plaintiff against a wall. The cart tipped because a wheel got caught in a groove in an unfinished floor. The court denied the defendants' motion under §241(6) because the Industrial Code sections relied on by the plaintiff were sufficiently specific. The court dismissed the §200 and common law negligence claims and noted that general supervision by the owner does not establish liability. The defendants were granted common law indemnification against plaintiff's employer because the defendants were only vicariously liable. The indemnification agreement was held to be enforceable under GOL §5-322.1 even though it provided that the defendants could be indemnified for their own negligence because the defendants were in fact not negligent.

Practice Note: The court also discussed the implications of the spoliation of evidence by the plaintiff.

7. *Gerasimos Voultepsis v. Gumley-Haft-Klierer, Inc.*, 60 A.D.3d 524, 875 N.Y.S.2d 74 (1st Dept. 2009)(Mar. 19, 2009). The plaintiff, a superintendent employed by a cooperative apartment corporation, was injured when a ladder he was using slid causing him to fall to the ground. The plaintiff sued the cooperative building managing agent. The court held that there were issues of fact as to whether the managing agent was the "statutory agent" of the owner. The court also found issues of fact under §200 as to whether the defendant had authority to control the activity being performed by the plaintiff or whether the defendant had actual or constructive notice of the alleged dangerous condition.

Practice Note: In assessing the liability of a managing agent, the courts review any contract documents and the activities onsite.



8. *Clarke v. The Morgan Contracting Corp.*, 60 A.D.3d 523, 875 N.Y.S.2d 69 (1st Dept. 2009)(Mar. 19, 2009). The plaintiff was injured when two metal studs that were being hoisted from the street were dropped from a sidewalk bridge. The court granted the plaintiff's motion under §240(1) because defendant's failure to provide adequate safety devices was the cause of plaintiff's injuries and rejected the defendant's sole proximate cause defense. The Industrial Codes relied on by the plaintiff to establish liability under §241(6) were sufficiently specific; however, there were issues of fact to preclude summary judgment.

Practice Note: In a falling object case, the courts will look at whether the area in which the accident occurred was an area that was "normally exposed to falling materials or objects."

9. *DeKenipp v. Rockefeller Center, Inc.*, 60 A.D.3d 550, 876 N.Y.S.2d 364 (1st Dept. 2009)(Mar. 24, 2009). The plaintiff had been instructed to stand on a wall mounted heating convector cover to wash the interior of windows in defendant's building. The plaintiff had washed these windows in this manner before. The convector cover came loose causing the plaintiff to fall. The court held that the plaintiff's activity involved an elevation-related risk of the type contemplated by the safety devices listed in §240(1).

Practice Note: The plaintiff had asked for a pole device to assist him which was denied by his employer.

10. *Arrasti v. HRH Construction, LLC*, 60 A.D.3d 582, 876 N.Y.S.2d 373 (1st Dept. 2009)(Mar. 31, 2009). At the time that the plaintiff fell from a ramp, he was wheeling a loaded A-frame cart full of construction materials. The court granted the plaintiff's motion under §240(1) and noted that the defendant's failure to equip the ramp with handrails, curbs, cleats or other safety devices was the proximate cause of the plaintiff's injuries.

Practice Note: The plaintiff established his §241(6) claim by providing extrinsic evidence that the Industrial Code relied upon set forth specific, positive standards with regard to construction runways and ramps.

11. *Kleinberg v. The City of New York*, 61 A.D.3d 436, 877 N.Y.S.2d 23 (1st Dept. 2009)(Apr. 7, 2009). The plaintiffs were injured when a service elevator in which they were riding allegedly went into free fall or over-speed and crashed at the bottom of the shaft from a height of 80 to 100 feet. The court dismissed the §240(1) claim because the plaintiff's injuries were not attributable to the elevation risks contemplated by §240(1). Specifically, the court noted that the elevator was not designed as a safety device within the statute. There were factual issues as to whether the §200 and common law negligence claims should be dismissed.

Practice Note: Not all falls from elevated sites are covered by the Labor Law.



12. *Vukovich v. 1345 Fee, LLC*, 61 A.D.3d 533, 878 N.Y.S.2d 15 (1st Dept. 2009)(Apr. 21, 2009). This decision vacated the courts prior decision. See case #1 above and reported at 58 A.D.3d 410 (1st Dept. 2009).

Practice Note: The Record and Briefs on Appeal should be reviewed to determine the impact of this decision.

13. *Greaves v. Obayashi Corp.*, 61 A.D.3d 570, 877 N.Y.S.2d 299 (1st Dept. 2009)(Apr. 23, 2009). Plaintiff was injured when an unsecured and unbraced concrete wall fell on him injuring him. On this appeal, the court found that there was an issue of fact as to whether the project manager was liable under §240(1). Pursuant to the general contract, the project manager was on the worksite on a daily basis, inspected the work and scaffold and was required to “make certain” that the scaffold was properly equipped.

Practice Note: A construction or project manager can be liable based on the contract language and the actual activities on site.

14. *Heer v. North Moore Street Developers, LLC*, 61 A.D.3d 617, 878 N.Y.S.2d 310 (1st Dept. 2009)(Apr. 30, 2009). The court held that, even though there was a lack of witnesses to the accident and the plaintiff was unable to recall how the accident happened, there was sufficient evidence to establish a violation of §240(1). The plaintiff’s head injury was due to a fall from a height and the lack of safety devices to prevent his fall.

Practice Note: Statements of co-workers and testimony of plaintiff’s medical expert and medical records were sufficient to establish liability under §240(1).

15. *Weiss v. El Al Properties NY LLC*, 877 N.Y.S.2d 895 (1st Dept. 2009)(May 12, 2009). Plaintiff, at the time he was injured, was guiding a dolly down a ramp when he veered to the right and a load of metal studs hit him. The court held there were triable issues of fact under §241(6) as to whether the floor planks were in compliance with the relevant Industrial Codes.

Practice Note: The court noted that the defendants failed to comply with their burden to establish it complied with the Codes.

16. *Kagan v. BFP One Liberty Plaza*, 879 N.Y.S.2d 119 (1st Dept. 2009)(May 19, 2009). The court dismissed the §200 claim because the plaintiff failed to raise a question of fact as to whether the defendants either created or caused the conditions complained of or exercised supervision or control over the work being performed. The court also dismissed the §241(6) claim as the plaintiff was not engaged in construction, excavation or demolition and the Industrial Codes relied upon were either non-existent, inapplicable or not sufficiently specific.

Practice Note: Under §200 general instructions and monitoring and oversight of the timing and quality of the work is insufficient to establish liability.



17. *Thompson v. Thomas Geniesse*, 2009 N.Y. App. Div. LEXIS 3788 (May 19, 2009). At issue on this appeal was the application of the one and two-family dwelling exemption to liability under §§240(1) and 241(6). The court dismissed the plaintiff's complaint. Plaintiff was injured when he fell from an icy scaffold while doing renovations to a weekend home purchased by the defendants. While the home was a two-family dwelling, it was intended by the defendant to renovate to a one-family dwelling. This was confirmed by the Certificate of Occupancy. Also, the defendants did not direct or control the work being performed.

Practice Note: The check of quality by the defendants was not sufficient control. Defendant/owner has the initial burden.

18. *Urban v. No. 5 Times Square Development, LLC*, 879 N.Y.S.2d 122 (1st Dept. 2009)(May 21, 2009). The plaintiff, an electrician, was injured after stepping into a 10" to 12" gap between the entrance to a catwalk and the catwalk itself. While the court found that the developer/owner did not control the electrician's work, nor did they have actual notice of the accident causing conditions, the court found that there was an issue of fact under §200 as to whether the defendants had constructive notice of the condition. As to the general contractor, the court found issues of fact on the control and notice aspects of the claim. Therefore, the court refused to dismiss the §200 and common law negligence claim.

Practice Note: As a result of these findings, the court has refused to grant the owner/developer contractual and common law indemnification claims.

19. *Ray v. The City of New York*, 2009 N.Y. App. Div. LEXIS 4007 (May 26, 2009). The plaintiff was injured when he was struck by a 8,000 pound steel beam being lowered into place on the top of a steel tower. The evidence showed that the tag line men could not control the swing of the beam. The court held that the accident involved an elevation related risk under §240(1).

Practice Note: In situations where the accident is at least partly attributable to the defects in the hoisting equipment and scaffold liability is established.

20. *Yoda, LLC v. National Union Fire Ins. Co. of Pittsburg, PA*, 829 N.Y.S.2d 327 (1st Dept. 2009)(June 2, 2009). National Union made a pre-discovery motion for summary judgment to declare that it is obligated only to provide final tier liability coverage in this Labor Law case upon the exhaustion of liability policy. The court denied this motion and National Union's motion for a protective order.

Practice Note: See also, 50 A.D.3d 492, 858 N.Y.S.2d 14 (2008) which is a prior coverage decision in this case.



21. *Bednarczyk v. Vornado Realty Trust*, 2009 N.Y. App. Div. LEXIS 4148 (June 4, 2009). The plaintiff was cleaning the bathroom which was being renovated when he was struck by an overhead light that fell. The court dismissed the §240(1) claim because the light fixture did not pose an elevation-related risk of the kind that would be addressed by the safety devices enumerated under §240(1). The §241(6) claim was dismissed because the plaintiff was not engaged in “construction, excavation or demolition.” The §200 claim was dismissed as to the manager of the building even though one of the defendants inspected the work and had authority to stop the work if it observed a dangerous condition or procedure. This was not sufficient to establish direction or supervisory control and there was no issue of notice.

Practice Note: As to other defendants there were issues of fact as to who created the condition; who had control and who had notice.

22. *Masullo v. 1199 Housing Corporation*, 2009 N.Y. App. Div. LEXIS 4131 (June 4, 2009). At the time of his injury, the plaintiff, a foreman on a project involving concrete and waterproofing work, was running an electrical cable needed for a power supply. The cable was being run through the trees; however, the plaintiff was not provided with a ladder or scaffold. Plaintiff constructed a makeshift scaffold from which he fell. The court rejected the sole proximate cause defense because the record did not establish whether there were other safety devices readily available on the site and whether the plaintiff chose for no good reason not to use them. The §241(6) claim was dismissed because the gravamen of the claim is that no safety device was provided, not that an adequate scaffold was provided.

Practice Note: The sole proximate cause defense is extremely fact specific and the fact that one constructs his own safety device alone is insufficient to establish liability.

23. *Hanley v. McClier Corporation*, 2009 N.Y. App. Div. LEXIS 4531 (June 9, 2009). At issue on this appeal was whether the general contractor was liable under §200. The Court found an issue of fact as to the extent of the general contractor’s control because there was evidence that every time the scaffold from which the plaintiff fell was inspected, it was done by the general contractor. With respect to the general contractor’s common law indemnification claim, the court refused to dismiss the claim because there were issues of fact as to whether the plaintiff’s employer contributed to the accident.

Practice Note: Common law and contractual indemnification claims are impacted by the negligence of the various entities on a construction site.

24. *Gomez v. The City of New York*, 2009 N.Y. App. Div. LEXIS 4570 (June 11, 2009). The plaintiff was involved in a demolition project and was injured when he fell two stories from a fire escape which was permanently attached to the building. The court held that the fire escape is the functional equivalent of a scaffold and the fact that the fire escape was a permanent rather than a temporary structure does not warrant a different determination.



Practice Note: Other jurisdictions have held that a permanent ladder does not fall under §240(1).

25. *Torkel v. NYU Hospitals Centers*, 2009 N.Y. App. Div. LEXIS 5223 (June 25, 2009). While plaintiff was maneuvering a container down a plywood ramp, the ramp collapsed, causing the container to spill concrete debris onto plaintiff's leg and fall over onto the sidewalk. Plaintiff was injured while trying to regain control of the container and keep it from tipping over. The court dismissed the §240(1) claim because the plaintiff was not exposed to an elevation-related hazard. The height differential of 12" to 18" from the bottom of the ramp to top was not an elevated related risk.

Practice Note: The concurring in part decision provides an interesting analysis of Labor Law §240(1) and 200.

26. *Parente v. 277 Park Avenue LLC*, 2009 N.Y. App. Div. LEXIS 5209 (June 25, 2009). The plaintiff, at the time of his accident, was inspecting a malfunctioning booster fan over the desk on which he was standing. The court refused to dismiss the plaintiff's §240(1). Routine maintenance that is not performed in the context of construction or renovation is not protected under the statute; however, the plaintiff was not performing routine maintenance. He was performing a repair of fan and ascertaining the cause of the breakdown.

Practice Note: Mere inspection and routine maintenance are not protected under the Labor Law.

SECOND DEPARTMENT

1. *Orellana v. Dutcher Avenue Builders, Inc.*, 58 A.D.3d 612, 871 N.Y.S.2d 352 (2d Dept. 2009)(Jan. 13, 2009). Plaintiff was injured when he fell off the roof of the defendants' house. The court dismissed the §240(1) claim against the husband/owner by applying the one and two-family dwelling exemption. With respect to the claim against the wife, the Court found an issue of fact as to whether the wife, an architect, had the authority to supervise or control the performance of the work. Also, the court refused to dismiss the §200 and common law negligence claims against the wife because there were issues of fact as to whether she had authority to direct and control the work.

Practice Note: The court equates direction and control to responsibility for the manner in which the work is being performed.

2. *Chlebowski v. Ester*, 58 A.D.3d 662, 871 N.Y.S.2d 652 (2d Dept. 2009)(Jan. 20, 2009). At the time of his injury, the plaintiff was standing on a closed ladder on top of a scaffold when the scaffold suddenly moved, causing the plaintiff to fall 10' to the ground. The court held that the plaintiff was entitled to summary judgment under §240(1) because the defendant



failed to provide him with a safety device. The court concluded that the negligent placement of the ladder could not be considered the sole proximate cause of the injuries.

Practice Note: The court did recognize the viability of the sole proximate cause defense in situations where the sole activity of the plaintiff was the cause.

3. *Cava Construction Co., Inc., v. Gealtec Remodeling Corp.*, 58 A.D.3d 660, 871 N.Y.S.2d 654 (2d Dept. 2009)(Jan. 20, 2009). The plaintiff sought to vacate an order denying its motion for summary judgment for contractual indemnification against the defendant because the plaintiff failed to appear at calendar call. The court vacated the order because the plaintiff had a reasonable excuse for failing to appear at calendar and had a meritorious defense under the Labor Law. The court, however, found a question of fact as to whether the plaintiff was negligent and therefore, would not be entitled to contractual indemnification under GOL §5-322.1.

Practice Note: Where a party is vicariously liable under the Labor Law, indemnification can come into play.

4. *Bastidas v. Epic Realty, LLC*, 58 A.D.3 776, 872 N.Y.S.2d 481 (2d Dept. 2009)(Jan. 27, 2009). At issue on this appeal was whether the defendants could raise the exclusivity of the workers' compensation defense in Supreme Court or whether the matter was to be determined by the Workers' Compensation Board. While the Workers' Compensation Board has primary jurisdiction to determine factual issues concerning the coverage under the Workers' Compensation Law, under the circumstances of this case the Supreme Court may properly consider the employment issues.

Practice Note: It is critically important that the defense of the exclusivity of the workers' compensation be properly raised in the litigation.

5. *Marin v. AP-Amsterdam 1661 Park LLC*, 60 A.D.3d 824, 875 N.Y.S.2d 242 (2d Dept. 2009)(Mar. 17, 2009). Plaintiff was injured when a metal bracket on a vertical drainpipe fell and struck him on the head. The worker had not been provided a safety hat. The court dismissed the §240(1) claim as liability for a falling object did not apply to objects that are part of a building's permanent structure. Further, an object must have fallen because of the absence or inadequacy of a safety device enumerated under the statute. The court further held that there was an issue of fact as to whether there was a violation of 12 N.Y.C.R.R. 23.1.8(c)(1)(safety hat) and a viable claim under §241(6).

Practice Note: Not all falling objects come within the purview of Labor Law §240(1). Here no hoisting or securing device was necessary or expected.



6. *Barr v. 157 S. Avenue, LLC*, 60 A.D.3d 796, 875 N.Y.S.2d 228 (2d Dept. 2009)(Mar. 17, 2009). Plaintiff was injured when he fell from a 12' tall A-frame ladder that wobbled and slid out while he was nailing plywood boards onto the façade of a building undergoing renovation work. The court held that the plaintiff made a prima facie case under §240(1) because the ladder was described as old, beat up and wobbly with no pads to prevent it from slipping. The defendants failed to provide evidence that the plaintiff's actions were the sole proximate cause. The accident was unwitnessed; however, the defendant failed to challenge the plaintiff's credibility.

Practice Note: The plaintiff was able to establish that defendant's failed to provide an adequate safety device and the ladder was defective.

7. *Oser v. Truck King International*, 60 A.D.3d 832, 874 N.Y.S.2d 385 (2d Dept. 2009)(Mar. 17, 2009). The court dismissed the §§240(1) and 241(6) claims because the injured plaintiff was performing routine maintenance in a non-construction, non-excavation and non-demolition context.

Practice Note: Not all routine maintenance is excluded under the Labor Law.

8. *Abreo v. URS Greiner Woodward Clyde*, 60 A.D.3d 878, 875 N.Y.S.2d 577 (2d Dept. 2009)(Mar. 24, 2009). At the time of his injury the plaintiff was standing on a pile of bricks to reach his work because the scaffold provided was not tall enough. The scaffolding moved and the plaintiff fell off the bricks onto the planking of the scaffolding. The court denied the defendant's motion to dismiss the §240(1) and held that there were issues of fact as to whether the protective device provided was adequate. There is no need for the plaintiff to completely fall off the device provided. The court refused to dismiss the §241(6) claim because the regulations relied on were specific; rather than general safety standard.

Practice Note: The plaintiff was exposed to the type of elevation-related risk within the contemplation of §240(1).

9. *Baillargeon v. Kings County Waterproofing Corp.*, 60 A.D.3d 881, 875 N.Y.S.2d 576 (2d Dept. 2009)(Mar. 24, 2009). Without reciting the facts of the case, the court dismissed the §§200 and 241(6) claims. With respect to the §200 claim, plaintiff failed to establish that the defendant created the condition or had actual or constructive notice. Further, the plaintiff failed to allege specific Industrial Code violations to support a §241(6) claim.

Practice Note: The Record and Briefs of Appeal should be reviewed in order to assess the impact of the decision.

10. *Lucas v. Fulton Realty Partners, LLC*, 60 A.D.3d 1004, 876 N.Y.S.2d 480 (2d Dept. 2009)(Mar.31, 2009). Two workers were dismantling and removing steel storage cages from walls in the defendant's warehouse. The first worker fell from a scaffold when the steel



plates hit him on the scaffold. The second worker was injured when he was attempting to prevent the sheets from falling on the first worker. The court held that the workers were “altering” which is a protected activity and not “decorative modification.” Further, the court concluded that they were injured by a falling object.

Practice Note: Liability attaches to objects that are in the process of being hoisted or secured and those that required securing for the purpose of the work.

11. *Settimo v. City of New York*, 61 A.D.3d 840, 878 N.Y.S.2d 89 (2d Dept. 2009)(Apr. 21, 2009). The plaintiff was injured when he slipped and fell down a slope as a result of a tree stump that he used to balance himself gave way. The court dismissed the §240(1) because the accident did not involve an elevated-related risk. The §241(6) claim was dismissed because the Industrial Codes relied on by the plaintiff did not apply to the facts. The §200 claim was dismissed because the plaintiff failed to prove that the defendants had control over the worksite and actual or constructive notice of the dangerous condition.

Practice Note: This Department appears to also require direction and control AND actual or constructive notice.

12. *Romeo v. Property Owner (USA) LLC*, 61 A.D.3d 491, 877 N.Y.S.2d 48 (2d Dept. 2009)(Apr. 14, 2009). Plaintiff, at the time of his injury, was working on a raised computer floor. He stepped on a floor tile that suddenly and unexpectedly dislodged causing his foot to fall through the 2x2 opening. The §240(1) claim was dismissed because the plaintiff was injured while walking on the permanent floor which did not involve an elevation related hazard. The §200 claim was dismissed because the plaintiff failed to prove that the defendants had notice of the condition or directly controlled and supervised the work involved. The Industrial Code relied on by the plaintiff were inapplicable to the facts of the case and therefore the §241(6) claim was dismissed.

Practice Note: This panel of this Department appears to hold that liability under §200 is either notice OR direction and control.

13. *Balzer v. City of New York*, 61 A.D.3d 796, 877 N.Y.S.2d 435 (2d Dept. 2009)(Apr. 21, 2009). The plaintiff, an ironworker, was wearing a safety harness and lanyard that he had tied to the beam. A co-worker was using a hydraulic jack that caused the beam to move and the plaintiff’s lanyard become detached and plaintiff fell 15’ to the ground. There were not any safety cables to tie off on. The court granted the plaintiff’s motion for summary judgment under §240(1) and held that the plaintiff met his burden of proof. The court, in reaching its decision, noted that even though the plaintiff may have tied off on a less stationary beam that was not a defense to a §240(1) claim.

Practice Note: The fact that the plaintiff may have been culpable is not a defense where there are other causes.



14. *Tama v. Gargiulo Bros.*, 61 A.D.3d 958, 878 N.Y.S.2d 128 (2d Dept. 2009)(Apr. 28, 2009). The plaintiffs, an employee, and a deceased employee, fell from a hanging scaffold while performing window repair work for their employer. The plaintiffs established a *prima facie* case under §§240(1) and 240(2) by showing that they were not provided with the proper protection under the statutes. The workers were working on a scaffold more than 20' above the ground and the required safety rails were absent. The court refused to grant the general contractor indemnification (contractual or common law) against the plaintiff's employer because the general contractor failed to establish that the employer exercised exclusive direction, supervision and control over the erection of the scaffold.

Practice Note: In order to prevail on an indemnification claim, the degree of fault attributable to the parties must be assessed.

15. *Garcia v. Edgewater Development Co.*, 61 A.D.3d 924, 878 N.Y.S.2d 134 (2d Dept. 2009)(Apr. 28, 2009). Plaintiff was injured when he was struck by a panel of drywall that he was unloading from a raised platform. The court dismissed the §240(1) claim holding that the drywall was not elevated above the worksite, but rather was at the same level as the plaintiff.

Practice Note: Where an accident occurs at ground-level, liability under Labor Law §240(1) generally does not attach.

16. *Harvey v. Malina Nealis*, 61 A.D.3d 935, 877 N.Y.S.2d 459 (2d Dept. 2009)(Apr. 28, 2009). The plaintiff was injured when he fell from a stepladder that began to “wobble and fall.” The court held that the plaintiff's motion for summary judgment under §240(1) was premature because no discovery had taken place and neither party had been disposed.

Practice Note: The timing of a motion for summary judgment is critical; especially, where the party has the burden of proof to establish that there are not any triable issues of fact.

17. *Madero v. Pizzagalli Construction Co.*, 878 N.Y.S.2d 434 (2d Dept. 2009)(May 5, 2009). The plaintiff tripped on a defect in or on a concrete floor at a construction site and was injured. The width, depth, elevation, irregularity and appearance of a defect will determine if a trip over the defect is actionable or will it be deemed “trivial” as a matter of law. Further, it is not actionable where the defect is common and expected at building sites. The court granted the defendant's summary judgment.

Practice Note: The object was $\frac{3}{4}$ of an inch in height, 1 inch wide and 4 inches long. This was established through deposition testimony.

18. *Fuchs v. Austin Mall Associates, LLC*, 879 N.Y.S.2d 166 (2d Dept. 2009)(May 12, 2009). At the time he was electrocuted, the plaintiff/decedent was replacing the ceiling of an elevator. The court held that the plaintiff/decedent was engaged in “alteration” which is a protected



activity within the scope of “construction” for the purposes of §241(6). The court found that there were issues of fact precluding a dismissal of the §200 claim. Specifically, the court held that the plaintiff must demonstrate that the owner or manager had control over the worksite AND actual or constructive notice of the dangerous condition.

Practice Note: This court again utilizes the word AND in the applicable standard under §200.

19. *Vislocky v. City of New York*, 879 N.Y.S.2d 176 (2d Dept. 2009)(May 12, 2009). The plaintiff wrenched his back and ripped his stomach when, while holding a jack hammer and wrapping his legs around a rebar, he twisted his body in reaching to jack another rebar. He was on a concrete pedestal approximately 20’ above subway train tracks. The court refused to grant the defendants’ motion for summary judgment dismissing the §240(1) claim. In doing so, the court noted: “the fact that the plaintiff does not actually fall from the [pedestal] is irrelevant as long as the harm directly flow[ed] from the application of the force of gravity to [his] person.”

Practice Note: It appears that the courts are moving farther and farther away from a pure “falling worker” test.

20. *Triola v. City of New York*, 2009 N.Y. App. Div. LEXIS 4088 (May 26, 2009). The plaintiff was cleaning out sand from steel tube pilings. As part of his work he was required to negotiate various height differentials between various pre-cast concrete beams. As he was doing so, he tore his left bicep tendon while attempting to lower himself from one beam to the next. He also caught his glove and was dangling 6 to 12 inches above the next beam. The court granted the plaintiff’s motion for summary judgment under §240(1) because his work involved an elevation-related risk that exposed him to a gravity related hazard and the defendant failed to provide him with safety devices.

Practice Note: In addition to not providing a safety device, the failure to provide a device must be the proximate cause of the injury.

21. *Andro v. City of New York*, 2009 N.Y. App. Div. 4775 (May 26, 2009). The court held that neither the plaintiff or defendants have made a *prima facie* showing of entitlement to judgment as a matter of law under §240(1). Plaintiff failed to prove the statute was violated and the violation was a proximate cause of his injuries. There were also issues of fact as to whether the plaintiff’s failure to use safety devices available at the worksite which were provided by his employer constitutes sole proximate cause.

Practice Note: In this case there was proof that the ladder was not defective.



22. *McFadden v. Boh S. Lee*, 2009 N.Y. App. Div. LEXIS 4760 (May 26, 2009). The plaintiff fell from a ladder while painting the exterior of a one-family dwelling. At issue on this appeal was whether the defendant was liable under §200 and common law negligence. The court dismissed these causes of action noting that “[a]n implicit precondition is that the party to be charged with that obligation ‘have authority to control the activity bringing about the injury to enable it avoid or correct an unsafe condition.’” In this case, the defendant had general supervisory authority to oversee the progress of the work, to inspect the work product, and/or to make aesthetic decision which is insufficient to establish liability.

Practice Note: The courts assess the relevant onsite activities, as well as, contractual obligations in determining the control issue.

23. *Razzak v. NHS Community Development Corp.*, 2009 N.Y. LEXIS 4316 (June 2, 2009). During the course of performing his work, the injured plaintiff was made aware that his activities were damaging an adjacent property. The general contractor provided the plaintiff with a ladder for him to use to put up a piece of plastic to protect the adjacent property. While installing the piece of plastic, the ladder moved and fell which caused the plaintiff to fall. At issue on appeal was whether the plaintiff was acting within the ambit of his employment. The court held that based upon the description in the contract that he was acting within his employment. The court rejected the defendant’s claim for contractual indemnification against the plaintiff’s employer because there were issues of fact as to the extent the defendant caused the plaintiff’s injuries.

Practice Note: The court also rejected the sole proximate cause defense and cited all Court of Appeals relevant case law.

24. *Gilliani v. 66th Street Woodwide Property, LLC*, 2009 N.Y. App. Div. LEXIS 4341 (June 2, 2009). The plaintiff fell from a ladder that was placed by his supervisor on an uneven surface and lacked rubber fee. The court granted the plaintiff summary judgment under §240(1) because the ladder slipped out from underneath the plaintiff which caused the fall.

Practice Note: The court held that the motion was not premature even though the only discovery was plaintiff’s deposition.

25. *Aguilera v. Pistilli Construction & Development Corp.*, 2009 N.Y. App. Div. LEXIS 4716 (June 9, 2009). The plaintiff was injured when he slipped on debris while walking down a staircase. The court held that the owner failed to establish that it lacked constructive notice of the dangerous condition and therefore, the plaintiff was entitled to summary judgment on its §200 claim. With respect to the §241(6) claim, the court held some of Industrial Codes relied on by the plaintiffs were applicable.

Practice Note: The court did hold that debris does not constitute a slippery hazard under 12 N.Y.C.R.R. 23-1.7(d).



26. *Enriquez v. B&D Development, Inc.*, 2009 N.Y. App. Div. LEXIS 4692 (June 9, 2009). Without reciting the facts of the case, the court dismissed the §200 claim because the accident arose from the means and method of the work being performed which was controlled by the plaintiff's employer and not the defendant. Mere general supervisory authority is insufficient to establish §200 liability. The §241(6) claim was also dismissed because the Industrial Codes relied upon were inapplicable and an integral part of the work the plaintiff was performing.

Practice Note: The Record and Briefs on Appeal should be reviewed in order to determine the impact of this decision.

27. *Morales v. Westchester Stone Co, Inc.*, 2009 N.Y. App. Div. LEXIS 4712 (June 9, 2009). The plaintiff was injured when he was struck by a tree limb of a tree he was cutting. Plaintiff was 10' above the ground. The court held that because a tree is neither a building or a structure, §240(1) is inapplicable. Further, the activity constituted routine maintenance which is not a protected activity.

Practice Note: Plaintiff merely provided conclusory allegations unsupported by evidence or factual references; therefore, he did not create triable issues of fact.

28. *Duran v. Kijak Family Partners, L.P.*, 2009 N.Y. App. Div. LEXIS 5103 (June 23, 2009). The plaintiff was injured when he fell through the roof of a greenhouse. The court held that the exclusivity of Workers' Compensation Law did not provide a defense to various defendants and that it applied to other defendants. The court refused to grant the plaintiff summary judgment under §240(1). In doing so, the court noted that the mere fact that the plaintiff fell is insufficient to establish liability under §240(1) and that "[w]hether the device provided proper protection is a question of fact; except when the device collapses, moves, falls or otherwise fails to support the plaintiff and his materials"

Practice Note: Not all falls from a height are protected by §240(1).

29. *Hricus v. Aurora Contractors, Inc.*, 2009 N.Y. App. Div. LEXIS 5130 (June 23, 2009). The plaintiff was injured when he was pinned against a beam by a fork lift being operated by a co-worker/apprentice. The court, in reaching its decision that the plaintiff had a viable §241(6) claim, reviewed various Industrial Codes and concluded that at least one was applicable. The court also held that there was an issue of fact concerning the comparative negligence of the plaintiff.

Practice Note: In analyzing the viability of a §241(6) claim, the plaintiff has the burden to prove an Industrial Code had been violated and it was the proximate cause of the injuries.



30. *Forschner v. Jucca Company*, 2009 N.Y. App. Div. LEXIS 5204 (June 23, 2009). The plaintiff was installing joists in tandem with a co-worker and had ascended a ladder to a beam prior to his accident. After ascending the ladder, a co-worker took the ladder to another part of the work site. As he was kneeling on the joist, it gave way causing him to fall 9 feet. The court denied both the plaintiffs' and defendants' motion for summary judgment under §240(1) because there were issues of fact as to whether the plaintiff was provided with any safety devices and if so, whether they were appropriate; whether plaintiff used or would have continued to use that safety device and whether the plaintiff voluntarily surrendered the safety device.

Practice Note: Neither the plaintiff nor the defendants met their burden of proof to establish liability under §240(1).

THIRD DEPARTMENT

1. *Staub v. William H. Lane, Inc.*, 58 A.D.3d 933, 870 N.Y.S.2d 630 (3d Dept. 2009)(Jan. 8, 2009). The unsigned contract between the defendant/contractor and the third-party defendant/employer purported to incorporate the terms of an AIA Contract which required indemnification. The court, after reviewing the course of conduct, prior relationship of the parties and the expected and intended practices, held that there were questions of fact as to whether the parties agreed to be bound by the indemnification provision of the AIA Contract.

Practice Note: Written, but unsigned, contractual indemnification provision can be enforceable.

2. *Pakenham v. Westmere Realty, LLC*, 58 A.D.3d 986, 871 N.Y.S.2d 456 (3d Dept. 2009)(Jan. 15, 2009). The plaintiff's employer dispatched him to the defendant's commercial premises because of a lack of heat. The plaintiff inspected the heating unit and while descending the ladder to get his tools to repair the unit, he fell from the ladder and was injured. The court held that the plaintiff was not performing routine maintenance, but was responding to an emergency situation. The court also found issues of fact as to whether the plaintiff was performing a protected activity (i.e. repair) under §240(1). The §241(6) claim was dismissed because the plaintiff was not engaged in "construction, demolition or excavation."

Practice Note: The nature of the "repair" can be important. For example, a component replacement or adjustment would not be protected.

3. *Dalaba v. City of Schenectady*, 61 A.D.3d 1151, 876 N.Y.S.2d 744 (3d Dept. 2009)(Apr. 9, 2009). The plaintiff, an ironworker, at the time of his injury was installing insulation and sheet metal on the roof of a new building under construction. The evidence showed that the edge of the roof was unprotected and no safety devices were provided. The court granted the plaintiff's motion for summary judgment under §240(1). In reaching its decision, the court rejected sole proximate cause and recalcitrant worker defenses.



Practice Note: This case provides all historical citations for the sole proximate cause and recalcitrant worker defenses.

4. *Jock v. Landmark Healthcare Facilities, LLC*, 879 N.Y.S.2d 227 (3d Dept. 2009)(May 7, 2009). The plaintiff, an ironworker, was injured when he was hit by a load of steel decking that was being hoisted and the load fell. The court held that the load of steel was a falling object and that the plaintiff established a *prima facie* case that he was protected under §240(1). The sole proximate cause defense was rejected and the court noted that a defendant is not absolved of liability where the plaintiff's injuries are at least partially attributable to the plaintiff's or defendants' failures.

Practice Note: Plaintiff's mere comparative fault is not a defense to a Labor Law §§240(1) or 241(6) claim.

5. *Nundi v. Schmidt*, 2009 N.Y. App. Div. LEXIS 5099 (June 25, 2009). The plaintiff was injured when he fell from a loft while installing insulation. The loft was in a cottage on the premises where the defendants' residence was located. At the time of the accident, the cottage was being renovated and was rented to the defendants' son. The court held that the defendants were not entitled to the one and two-family dwelling exemption under §240(1) because the exemption does not apply to property that is used for commercial purposes.

Practice Note: The homeowners have the burden to prove the application of the one and two-family dwelling exemption.

FOURTH DEPARTMENT

1. *Konopczynski v. ADF Construction Corp.*, 60 A.D.3d 1313, 875 N.Y.S.2d 697 (4th Dept. 2009)(Mar. 20, 2009). The plaintiff was injured when he tripped and fell in a depression in the floor at the worksite. The court dismissed the §241(6) cause of action because the depressions were by design permanently embedded in the floor and was "an integral part of the construction." The court found there were issues of fact as to whether the defendant had actual or constructive notice of the condition that caused the incident and therefore, refused to dismissed the §200 claim.

Practice Note: Not all trips and slips on construction sites are protected by the Labor Law.

2. *Johnson v. Ebidenergy, Inc.*, 60 A.D.3d 1419, 875 N.Y.S.2d 677 (4th Dept. 2009)(Mar. 20, 2009). Two workers were injured when a fuse installed by the first worker exploded. The court refused to dismiss the §241(6) clam in action #1 because the plaintiff was involved in "altering" a building within the statute. In action #1, the court denied the defendant's motion for summary judgment dismissing the §200 claim because there were issues of fact as to whether the defendant had control over the method and manner of the work being performed.



As to action #2, the court dismissed the whole complaint because the plaintiff in that action was not a person employed to carry out the project.

Practice Note: Not all workers on a job site are protected by the Labor Law.

3. *Ledwin v. Jeffrey Auman*, 60 A.D.3d 1324, 875 N.Y.S.2d 711 (4th Dept. 2009)(Mar. 20, 2009). The plaintiff was injured when he fell from a ladder while inspecting the electrical system of a single family home owned by the defendant. The court dismissed the Labor Law §240(1) claim holding that the defendant was entitled to the application under the one and two-family dwelling exemption because he did not control, direct or supervise the manner in which the plaintiff performed his work. The court did not dismiss the §200 and common law negligence claim because there were issues of fact as to whether the defendant had constructive notice of the condition that caused the accident.

Practice Note: Not all contractors are liable under the Labor Law and the facts of this case should be reviewed to determine what facts are critical in assessing a contractor's liability.

4. *Cantineri v. Frederic Carrere*, 60 A.D.3d 1331, 875 N.Y.S.2d 417 (4th Dept. 2009)(Mar. 20, 2009). Plaintiff and a co-worker constructed a make shift scaffold. As the co-worker stepped off the scaffold, a plank fell striking the plaintiff who was working at floor level. The court found there were issues of fact that precluded the parties' motion under §240(1). In reaching its decision that court noted:

. . . that "falling object" liability under Labor Law §240(1) is not limited to cases in which the object is being hoisted or secured.

The Court further noted that the collapse of a scaffold establishes a *prima facie* case; however, there were issues of fact on the sole proximate cause defense.

Practice Note: This case appears to expand liability in a falling object situation.

5. *DiPasquale v. M.J. Ogiony Builders, Inc.*, 60 A.D.3d 1338, 875 N.Y.S.2d 375 (4th Dept. 2009)(Mar. 20, 2009). Plaintiff was injured while working on a scaffold. The court held that there was a triable issue of fact as to whether the plaintiff was injured when he tripped and fell onto the scaffold and whether the plaintiff's injury was a result of the effects of gravity or whether the accident could have happened at ground level. The court refused to grant either parties motion for summary judgment under §240(1). The court also held that there were issues of fact as to whether the one defendant was entitled to common law negligence against the other.

Practice Note: A fall from or an attempt to prevent a fall from a scaffold can result in §240(1) liability.



6. *Rauls v. DirectTV, Inc.*, 60 A.D.3d 1337, 875 N.Y.S.2d 377 (4th Dept. 2009)(Mar. 20, 2009). The defendant was seeking in this case to vacate a default judgment taken against it. The court determined that the defendant had a reasonable excuse and there is a potential meritorious defense to the plaintiff's §240(1) claim. Specifically, the defendant contended that it was not acting as a general contractor at the site where plaintiff was injured.

Practice Note: The court defines in this case what constitutes a general contractor which is fact specific.

7. *Ewing v. Brunner International, Inc.*, 60 A.D.3d 1323, 875 N.Y.S.2d 388 (4th Dept. 2009)(Mar. 20, 2009). The plaintiff was injured when a portion of the flat concrete roof on which he was standing collapsed. The court noted that the plaintiff established a *prima facie* case under §240(1) because of the collapse. The court held that the defendant failed to raise a triable issue of fact that the plaintiff (a foreman knew or should have known) that he was expected to wear a safety harness and choose for no good reason not to do so and that had he made the choice he would not have been injured.

Practice Note: It is always important to develop facts that lead to issues surrounding the choices made by the plaintiff.

8. *Wzontek v. A&L, Inc.*, 61 A.D.3d 1404, 877 N.Y.S.2d 561 (4th Dept. 2009)(Apr. 24, 2009). Plaintiff was injured when he fell while climbing a ladder during a bridge reconstruction project. The court held that there were issues of fact on the sole proximate cause defense (i.e. were adequate safety devices at the job site and that the plaintiff chose not to use them).

Practice Note: The court cited to *Robinson*, 6 N.Y.3d 550 and *Montgomery*, 4 N.Y.3d 805.

9. *Sidelecki v. City of Buffalo*, 61 A.D.3d 1414, 877 N.Y.S.2d 584 (4th Dept. 2009)(Apr. 24, 2009). The plaintiff was injured while he was descending a scaffold by using the frame because the scaffold did not have a ladder. There was plaster dust on the frame. The court granted the plaintiff summary judgment under §240(1) noting that although the scaffold did not collapse, slip or otherwise malfunction, it did not provide proper protection to the plaintiff.

Practice Note: The absence of the ladder and the existence of the plaster dust established a violation under §240(1).

10. *Baker v. Richard J. Muraski*, 61 A.D.3d 1373, 877 N.Y.S.2d 582 (4th Dept. 2009)(Apr. 24, 2009). At issue on this appeal is whether the plaintiff was a protected worker under the Labor Law. The specific issue is whether the plaintiff was "permitted or suffered to work" on the roof. In reaching its decision, the court held that the determination of the Workers' Compensation Board that the plaintiff was not employed is not entitled to collateral estoppel. The court also refused to apply the exemption from liability under §240(1) for owners of one



and two-family dwellings because there were issues of fact as to whether the defendant (an experienced roofer) directed or controlled plaintiff's work.

Practice Note: The exemption depends on the degree of supervision exercised over the method and manner in which the work is performed.

11. *Wicks v. Trigen-Syracuse Energy Corporation*, 877 N.Y.S.2d 791 (4th Dept. 2009)(May 1, 2009). The issue on this appeal was whether the activity that the plaintiff was performing at the time of the accident constitutes "cleaning" under §240(1). The court, in reaching its decision that the plaintiff was not performing "cleaning," relied on dictionary definitions and held that the plaintiff was engaged in maintenance which was not a protected activity. The §200 claim was not dismissed because defendant failed to meet its burden on the direction and control or notice issues.

Practice Note: The court indicated that the issue before it was narrow but that §240(1) should be construed liberally.

12. *Peters v. Kissling Interests, Inc.*, 2009 N.Y. App. Div. LEXIS 4313 (June 5, 2009). The plaintiff, at the time of his injury, was removing window trim with a pry bar. While trying to prevent his fall, a piece of falling glass struck his wrist. The court granted the plaintiff's motion under §240(1) and noted that the statute not only applies where the plaintiff falls and hits the ground, but also applies where the force of gravity requires the worker to act to prevent himself or herself from falling.

Practice Note: The plaintiff established safety devices were not provided to protect him "from harm directly flowing from the application of gravity."

13. *Lovall v. Graves Bros., Inc.*, 2009 N.Y. App. Div. LEXIS 4307 (June 5, 2009). At issue in this case was whether the decreased injured worker was instructed to use scaffolding that was available to him rather than the extension ladder and that the scaffolding would have been more secure. The court in reaching its decision that there were issues of fact rejected the sole proximate cause defense. The court refused to dismiss the §241(6) claim because defendant failed to establish that the regulation was not applicable, that they did not violate it or that the violation was a proximate cause.

Practice Note: This case succinctly states the standard and burden of proof the defendant has under §241(6).

14. *Cromwell v. Kenneth E. Hess*, 2009 N.Y. App. Div. LEXIS 4232 (June 5, 2009). The plaintiff was injured when he fell from a ladder while attaching siding to rental property owned by defendant. In this case, there was an issue of fact whether there was an agreement pursuant to which the plaintiff was to perform a service in return for compensation. If so, the



plaintiff would be considered an employee rather than a volunteer. The §200 claim was not dismissed as there was an issue of fact as to whether the defendant had constructive notice.

Practice Note: Not all individuals that are injured as a result of a fall from an elevated site are protected by the Labor Law.

15. *Cansdale v. Polly Conn*, 2009 N.Y. App. Div. LEXIS 4469 (June 5, 2009). The plaintiff was injured when a retaining wall of a building on defendant's residential property fell on him. The court applied the one and two-family dwelling exemption because, even though the defendants allowed other individuals to store their belongings in the building (some for compensation), the work being performed directly related to the residential use of the home, even if the work also served a commercial purpose.

Practice Note: The plaintiff failed to raise an issue of fact as to whether the building was used exclusively for commercial purposes.

16. *Arnold v. Baldwin Real Estate Corp.*, 2009 N.Y. App. Div. LEXIS 4487 (June 5, 2009). The plaintiff was injured when he fell 11 feet from a ladder to the ground while painting a commercial building. The court granted the plaintiff's motion under §240(1) holding the plaintiff met his burden because the ladder shifted which caused him to fall. Even though the defendant provided evidence that the ladder was structurally sound and not defective, it was not relevant on the issue of whether the ladder was properly placed.

Practice Note: The safety device must not only not be defective but must be so placed to give protection.

17. *Holly v. County of Chautauqua*, 2009 N.Y. App. Div. LEXIS 4329 (June 5, 2009). Plaintiff, at the time of his injury, was working on scaffolding erecting a wall. As he was lifting a concrete block above his head, he lost his balance and he either fell or jumped off the scaffold. The court held that the plaintiff met his initial burden that he was not provided a safety device to prevent he accident. The court rejected the defendant's contention that the plaintiff jumped as lacking merit. The §200 claim was dismissed because the defendant only had general supervisory authority at the worksite. Also, the court held that because a §241(6) claim cannot be supported by an OSHA violation that cause of action must be dismissed.

Practice Note: The Industrial Codes, in order to establish a section 241(6) claim, must be applicable to the facts and sufficiently specific and not general.

18. *Smith v. Picone Construction Corp.*, 2009 N.Y. App. Div. LEXIS 4729 (June 12, 2009). Plaintiff fell from a ladder while carrying bricks. The court granted the plaintiff's motion under §240(1). In reaching its decision, the court noted that defendant failed to raise a triable issue of fact as to whether plaintiff "based on his training, prior practice and common sense, knew or should have known" not to carry bricks up a ladder. Defendant also failed to prove:



1. there were adequate safety devices available;
2. plaintiff knew both that the devices were available and he was expected to use them;
3. plaintiff chose for no good reason not to use them; and
4. had plaintiff not made that choice he would not have been injured.

Practice Note: This is an excellent case that outlines what defense counsel needs to prove where an injured worker makes a choice to perform a job in a particular way.

19. *Cummings v. Robert Vargo*, 2009 N.Y. App. Div. LEXIS 4710 (June 12, 2009). At the time the plaintiff was injured, he was applying a “silver coat” on defendant’s roof. The court held that this was equivalent to “painting” which is a protected activity §240(1). It was undisputed that the plaintiff was not provided one of the applicable safety devices listed in the statute.

Practice Note: “Painting” is a listed activity that does not have to be incidental to such other activities as construction, repair or alternation.

FEDERAL COURTS:

SECOND CIRCUIT

1. *Runner v. New York Stock Exchange, Inc.*, 2009 U.S. App. LEXIS 12436 (June 10, 2009). A jury returned a verdict in favor of the defendants and concluded that the defendants were not liable for injuries sustained by the plaintiff while using a pulley to move a reel of wire down a small flight of stairs. The District Court Judge reversed and defendants appeal to the Second Circuit. The Second Circuit because of the absence of authoritative State Court decisions and the importance of the issue certified the following two questions to the New York Court of Appeals:

1. Whether §240(1) covered an injury sustained while lowering a heavy object by means of a makeshift pulley down a small stairway; and
2. if an injury stems from neither a falling worker or falling object does liability exist under §240(1).



Practice Note: In light of the willingness of some Appellate Courts to expand the application of §240(1) beyond the traditional falling worker or falling object scenarios, it will be interesting to determine what the Court of Appeals does with these questions.

2. *Lamela v. City of New York*, 2009 U.S. App. LEXIS 13276 (June 22, 2009). The court affirmed the District Court decision which granted the defendant's motion for summary judgment under §§241(6) and 200. With respect to the application of §241(6), the court noted that there is a difference between a person that "lawfully frequenting" a premises over those "employed therein" under the regulation relied on by the plaintiffs. (Section 23-4.2(h)). The court held that the regulation did not provide protection. The court dismissed the §200 claim because the plaintiff failed to prove the defendant had control over the site where the accident occurred or that the defendants had notice.

Practice Note: In reaching its decision, the District Court conducted its own statutory and case analysis which the Second Circuit affirmed.

SOUTHERN DISTRICT OF NEW YORK

1. *Hocza v. The City of New York*, 2009 U.S. Dist. LEXIS 3574 (Jan. 19, 2009). The plaintiff is an undocumented alien. The defendant seeks to offer various evidence pertaining to the plaintiff's removal status. In reaching its decision, the Court analyzed all pertinent case law and concluded:
 1. The defendants may not discuss or inquire into the plaintiff's immigration status with respect to the possibility that he would be deported.
 2. The plaintiff's immigration status may be relevant to the question of the job opportunities he would have in the U.S.

Practice Note: This case outlines for the practitioner the relevant Federal Rules and case law applicable to the undocumented alien status of an injured worker.

2. *Bonocore v. Vornado Realty Trust*, 2009 U.S. Dist. LEXIS 20423 (Mar. 13, 2009). While there was a dispute as to how the accident happened, the Court held that it is persuaded that the N.Y. Court of Appeals would not hold that a §240(1) claim would be precluded, as a matter of law, simply because an injured worker did not actually fall and hit the ground. The court dismissed the §200 claim because the plaintiff failed to offer evidence that the defendants had supervisory control over how the plaintiff was to perform his job. General supervision is insufficient. With respect to the §241(6), the Court dismissed the cause of action, to the extent that the plaintiff relied on a violation of various OSHA regulations.

Practice Note: This case provides a detailed and up to date analysis of the standards applicable to §§200, 240(1) and 241(6). See footnote 3 which notes that some Courts request that under §200 that there be both direction and control AND notice.



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