



GOLDBERG SEGALLA ^{LLP}

LABOR LAW UPDATE

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

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“Risk Shifting” is critical to the understanding and application of New York Labor Law. The Court of Appeals and various Appellate Departments, during this reporting period, considered the implications of risk shifting between defendants and third party defendants. The failure to address these issues during the claims investigation stage and litigation of Labor Law cases can create an unwary trap and lost opportunities. In *Brooks v. Judlau Contracting, Inc.*, 2008 WL 4620804 (N.Y.), the Court of Appeals concluded that a partially negligent general contractor can seek contractual indemnification from its subcontractor, as long as the indemnification provision does not purport to indemnify the general contractor for its own negligence. The failure to assess the implications of *Brooks* can lead to an improper liability assessment between the various entities on a construction site.

Also during this reporting period, the various Appellate Departments continued to refine the “sole proximate cause” defense. Each of these cases should be read closely because they provide an investigative road map for the claims professional and an outline of the issues that need to be explored during the discovery process.

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 above address; by phone at (716) 566-5480; or email at tsegalla@goldbergsegalla.com. You can also contact Brian Stapleton at 170 Hamilton Avenue, Suite 203, White Plains, New York 10601; by phone at (914) 798-5470; or by email at bstapleton@goldbergsegalla.com.

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COURT OF APPEALS

1. *Quattrocchi v. F.J. Sciame Construction Corp.*, 11 N.Y.3d 757, 866 N.Y.S.2d 592 (2008) (Sept. 9, 2008). The plaintiff was injured when planks that were placed above doors to act as a make-shift scaffold for an air conditioner fell on him. The Court found that there were issues of fact as to whether the planks were adequately secured before they fell, or whether the plaintiff's action in jostling the door after disregarding a warning not to enter was a cause of the incident. In reaching its decision, the Court noted that "*falling object*" liability under §240(1) is not limited to cases in which the falling object was in the process of being hoisted or secured.

Practice Note: This may be a case where a construction expert will be needed at the time of trial to resolve issues of fact.

2. *Stringer v. Musacchia*, 11 N.Y.3d 212 (2008) (Oct. 21, 2008). The plaintiff had been hired by the defendant to construct a trade show display for the defendant family's archery company. The defendant told the plaintiff that he could participate in a turkey hunt if plaintiff built the defendant a shed for machinery. The plaintiff was working on the shed and was injured when the ladder "kicked out" beneath him and he fell 8' to 10'. The Court dismissed the plaintiff's section 240(1) cause of action because the statute does not apply to a volunteer who performs a service gratuitously. The Court concluded that the plaintiff was a "volunteer" and not an "employee."

Practice Note: The Court defines the difference between an employee and volunteer, which is extremely fact specific.

3. *Brothers v. New York State Electric and Gas Corporation*, 11 N.Y.3d 351 (2008) (Oct. 21, 2008). At the time of his injury, the plaintiff was an employee of an independent contractor who had "contracted" with the NYSEG to clear trees along electric lines. NYSEG had obtained a work permit from the N.Y. Department of Transportation. The Court affirmed the holding of the Appellate Division that the work permit was merely a license, not a contract, and that NYSEG "did not assume any duty running to the plaintiff." The Court considered the issue as to whether the plaintiff may hold NYSEG vicariously liable for plaintiff's employer's negligence and concluded that the plaintiff did not have such a claim.

Practice Note: In reaching its decision the Court noted that the "permit" was not a contract because NYSEG "does not really have a choice in the matter:" it cannot shirk maintenance work in state highway rights of way.

4. *Cohen v. Memorial Sloan-Kettering Cancer Center*, 11 N.Y.3d 823 (2008) (Oct. 28, 2008). The plaintiff was injured while installing pipe racks in a ceiling when he attempted to climb off the ladder and could not clear the first step due to protruding pipes from a nearby unfinished wall. The Court held that the injuries sustained were a result of the usual and ordinary dangers at a



construction site - and not an elevation related hazard – and therefore the plaintiff did not have a claim under §240(1).

Practice Note: Not all falls from a ladder are provided protection under §240(1).

5. *Brooks v. Judlau Contracting, Inc.*, 2008 WL 4620804 (N.Y.) (Oct. 21, 2008). The issue considered by the Court was whether N.Y. General Obligations Law §5-322.1 allows a general contractor who has been found to be partially at fault to enforce an indemnification provision against its subcontractor for that portion of damages attributable to the negligence of the subcontractor. The Court concluded that §5-322.1 does permit a partially negligent general contractor to seek contractual indemnification from its subcontractor, so long as the indemnification provision does not purport to indemnify the general contractor for its own negligence. The provision in the instant case did not obligate the subcontractor to indemnify the general contractor for the general contractor’s negligence.

Practice Note: The Court answered the question left open by *Itri Brick*, 89 N.Y.2d 786 (1997). However, a contract that purports to indemnify the general contractor for its own negligence may still be “voidable” if the general contractor is not negligent.

FIRST DEPARTMENT

1. *Ferluckaj v. Goldman Sachs & Co.*, 53 A.D.3d 422, 862 N.Y.S.2d 473 (1st Dept. 2008) (July 15, 2008). Plaintiff was injured when she fell from a desk while cleaning the interior windows of office space. The majority of a divided court held that there were issues of fact as to whether one defendant, as a lessee, was liable under §240(1). The majority also held that the plaintiff’s actions were not the sole proximate cause of the alleged accident.

Practice Note: This case provides a current analysis of the sole proximate cause defense. A comparison of the majority decision with the dissenting judge on this issue provides an interesting analysis.

2. *McCoy v. Metropolitan Transportation Authority*, 53 A.D.3d 457, 863 N.Y.S.2d 8 (1st Dept. 2008) (July 29, 2008). This appeal raised the issue of whether the court on a prior appeal had determined that there was an issue of fact as to the application of the Industrial Code. The court on this appeal held that the issue was not decided and recognized the defendant’s right to have a framed issue hearing.

Practice Note: This is a split decision, with the majority allowing the hearing. The dissent would have required the matter to go to trial.

3. *Lee v. Astoria Generating Company, L.P.*, 55 A.D.3d 124, 863 N.Y.S.2d 164 (1st Dept. 2008) (Aug. 12, 2008). The plaintiff, an employee of a company in the business of overhauling and



maintaining turbines, was injured while working on a barge that contained a turbine. At issue was whether the barge, at the time the plaintiff was injured, was considered a “vessel” under the Longshore and Harbor Workers’ Compensation Act. The court held that the barge was not a vessel and therefore, the New York Labor Law claim was not precluded by LHWCA. The court also noted that, even if it was a vessel, federal maritime jurisdiction would not preempt the plaintiff’s claims.

Practice Note: It is always critical to do a pre-emption analysis before proceeding with litigation.

4. *Campuzano v. Board of Education of the City of New York*, 54 A.D.3d 268, 863 N.Y.S.2d 184 (1st Dept. 2008) (Aug. 12, 2008). Plaintiff and a co-worker, while performing asbestos abatement work, were removing a heavy duct from a ceiling by cutting it with a torch. They were originally using a scaffold; however, the plaintiff determined that was unsafe and set up a ladder. While on the ladder, a piece of duct fell striking the plaintiff and the ladder and knocking plaintiff to the ground. The court held that the plaintiff established a *prima facie* case under §241(1).

Practice Note: The court rejected the defendant’s assertion that the plaintiff’s actions were the sole proximate cause of the accident.

5. *Bautista v. David Frankel Realty, Inc.*, 54 A.D.3d 549, 863 N.Y.S. 638 (1st Dept. 2008) (Sept. 2, 2008). The plaintiff fell from a ladder while painting an exterior staircase of the building. Plaintiff, a maintenance worker employed by the building owner, sued the managing agent of the building. The court held that the defendant failed to raise issues of fact as to whether the plaintiff was a special employee of the managing agent. Also, the court held that the defendant failed to establish a *prima facie* showing that the plaintiff’s actions were the sole proximate cause.

Practice Note: In assessing whether an employee is a special employee of an entity, the court will utilize a “building block” approach to determine the kind and degree of the relationship.

6. *Williams v. 7-31 Limited Partnership*, 54 A.D.3d 586, 864 N.Y.S.2d 1 (1st Dept. 2008) (Sept. 9, 2008). The plaintiff, an ironworker, was injured while operating a scissor lift. Plaintiff instituted an action against the lessor of the scissor lift. The court held that there were issues of fact as to whether the lessor was negligent in supplying a defective or unsafe scissor lift. The court rejected the plaintiff’s claim under the Labor Law because the lessor was not an owner, general contractor or agent.

Practice Note: The court refused to allow a contractual indemnification claim against the lessor for the lessor’s negligence.

7. *Lelek v. Verizon New York, Inc.*, 54 A.D.3d 583, 863 N.Y.S.2d 429 (1st Dept. 2008) (Sept. 9, 2008). The plaintiff, an asbestos handler, was injured when he lost his balance while



descending from the roadway to an I-beam to erect a decontamination chamber. The height differential was 2 ½ to 3 feet. The court held that the demolition-related asbestos abatement work in which plaintiff was engaged covered by Labor Law §241(6). The court granted the contractual indemnification claim.

Practice Note: There is also an analysis of the liability of Joint Venture defendants.

8. *Vargas v. New York City Transit Authority*, 54 A.D.3d 579, 863 N.Y.S.2d 426 (1st Dept. 2008) (Sept. 9, 2008). The plaintiff borrowed an A-frame ladder for another contractor. The ladder was not tall enough and the plaintiff used the ladder in a closed position. The ladder collapsed causing the plaintiff to fall. The court held that the plaintiff's activity was "repairing" within §240(1) and that the Industrial Code regulations under 12 NYCRR Part 23 were applicable.

Practice Note: The court also addressed the contractual indemnification between various parties on the construction site.

9. *Madtes v. Bovis Lend Lease LMB, Inc.*, 54 A.D.3d 630, 863 N.Y.S.2d 684 (1st Dept. 2008) (Sept. 25, 2008). The plaintiff, a foreman steamfitter, was injured when he fell from a 10-foot ladder while working on a building renovation project. The court held that the plaintiff established a *prima facie* case because a man lift was not available and he did the job with what equipment was available.

Practice Note: The court noted the defendant's evidence was insufficient and did not create any inconsistencies in the way the accident happened.

10. *Bradley v. IBEX Construction, LLC*, 54 A.D.3d 626, 865 N.Y.S.2d 32 (1st Dept. 2008) (Sept. 25, 2008). The court initially noted that the plaintiff established a *prima facie* case that defendants violated §240(1) by failing to ensure the proper placement of a ladder. The defendants raised an issue of fact as to whether the plaintiff was injured because he tripped on a plastic-covered floor and did not fall from a ladder.

Practice Note: The court determined that the accident report was admissible as a business record.

11. *Mennis v. Commet 380, Inc.* 54 A.D.3d 641, 864 N.Y.S.2d 414 (1st Dept. 2008) (Sept. 25, 2008). Plaintiff was injured when he fell from an affixed metal hatch ladder that led to the roof of the building. The court did not consider whether the fixed ladder was a safety device under §240(1) because it was not preserved for appeal.

Practice Note: The court rejected the argument of the defendant that because it was out-of-possession and not actively negligent that it was not liable.



12. *O'Keefe v. Tishman Westside Construction of New York*, 865 N.Y.S.2d 84 (1st Dept. 2008) (Oct. 14, 2008). The court refused to reverse the trial court's order granting the defendant contractual indemnification against the third-party defendant. The third-party defendant supported the defendant's motion below seeking summary judgment, which dismissed the plaintiff's §200 and part of the §241(6) claim. The court therefore refused to allow the third-party defendant to now argue that the defendant was negligent in order to preclude indemnification.

Practice Note: Indemnification is controlled by N.Y. Gen. Obligations Law §5-322.1.

13. *Barrios v. Boston Properties, LLC*, 866 N.Y.S.2d 99 (1st Dept. 2008) (Oct. 7, 20078). The court refused to dismiss the plaintiff's §200 claim because the motion was premature (i.e., failure of all defendants to engage in discovery). The §241(6) claim was dismissed as the 12 N.Y.C.C. Part 23 Industrial Codes relied upon were inapplicable.

Practice Note: The timing of a motion can be critical and should be made after all investigation and relevant discovery have been completed (assuming that the motion cannot be made on the pleadings).

14. *Stephens v. The Triborough Bridge and Tunnel Authority*, 55 A.D.3d 410, 866 N.Y.S.2d 48 (1st Dept. 2008) (Oct. 21, 2008). The plaintiff was injured when he allegedly fell from a prefabricated temporary stairway as he was attempting to attach the stairway to the bridge. He was injured when he fell partially in a gap. The court held that the plaintiff's inconsistent statements as to how this incident occurred presented issues of fact and refused to grant summary judgment under §240(1).

Practice Note: In order to establish liability, the court noted that an injured person is not required to show that he completely fell off the elevation device.

15. *Greaves v. Obayashi Corporation*, 55 A.D.3d 409, 866 N.Y.S.2d 47 (1st Dept. 2008) (Oct. 21, 2008). The plaintiff was standing on a scaffold, while working on a concrete wall. The wall collapsed and it hit the scaffold knocking it over and causing the plaintiff to fall. The court held that because the wall was neither braced or secured that the plaintiff made a *prima facie* showing under §240(1). Specifically, the court noted that the plaintiff was struck by a falling object that could have been (but was not) adequately secured.

Practice Note: The defendants failed to rebut the plaintiff's *prima facie* case.

16. *McGarry v. CVP 1 LLC*, 866 N.Y.S.2d 76 (1st Dept. 2008) (Oct. 23, 2008). The plaintiff was injured when the first block on an unsecured cinder block staircase (leading from a platform supporting a material hoist to the concrete slab floor of the worksite 3' below) skidded under his foot. The court granted summary judgment to the plaintiff noting that "staircase" was the



“functional equivalent” of a ladder. The fall down a temporary staircase is the type of elevation-related risk protected under §240(1). The distance of the fall was not important.

Practice Note: The court refused to dismiss the §241(6) claim because of the unsafe nature of the means of access to different working levels. The §200 claim was dismissed.

17. *Perez v. NYC Partnership Housing Development Fund Company, Inc.*, 55 A.D.3d 419, 866 N.Y.S.2d 61 (1st Dept. 2008) (Oct. 23, 2008). The plaintiff fell off a ladder. The court in granting the plaintiff partial summary judgment noted:

“ . . . plaintiff was not required to show that the ladder on which he was standing was defective . . . , it is sufficient for purposes of liability under section 240(1) that adequate safety devices to prevent the ladder from slipping or protecting plaintiff from falling were absent. . . .”

The court also noted that there was no evidence to show that plaintiff was not using the ladder correctly.

Practice Note: Plaintiff’s supervisor saw the plaintiff on top of the ladder shortly before the accident, but did not observe the accident.

18. *Jones v. 414 Equities, LLC*, 866 N.Y.S.2d 165 (1st Dept. 2008) (Oct. 28, 2008). The plaintiff was injured when the second floor on which he was working collapsed and he fell to the first floor. The court considered prior case law on the issue of whether an injured worker can recover under §240(1) for injuries caused the collapse of a permanent floor. The court noted that the Second Department has found liability under certain circumstances; the Third Department has held there is no liability; the Fourth Department’s rulings are inconsistent and that their own rulings are inconsistent. The Court of Appeals has not ruled on the issue. The court ruled that the plaintiff can recover under §240(1), even though he was injured as a result of the collapse of a permanent floor. However, the court noted that the plaintiff must establish that the collapse of the permanent floor was foreseeable.

Practice Note: In this case the court held that the plaintiff failed to make a *prima facie* showing that the collapse of the floor was a foreseeable risk of the task he was performing.

19. *Catarino v. The State of New York*, 55 A.D.3d 467, 866 N.Y.S.2d 161 (1st Dept. 2008) (Oct. 28, 2008). Plaintiff’s hand got pulled into the cable block of a crane when the crane operator moved the crane without notice. The court found a violation of a §241(6) and noted that the defendant failed to provide evidentiary proof sufficient to establish contributory and comparative negligence; reasonable safety measures; and proximate cause.



Practice Note: The defense of comparative fault and contributory negligence are viable defenses to a §241(6) claim.

20. *Kielar v. The Metropolitan Museum of Art*, 55 A.D.3d 456, 866 N.Y.S.2d 629 (1st Dept. 2008) (Oct. 28, 2008). The plaintiff was injured when he fell through a skylight while working on the roof of a building. The court held that the plaintiff was protected under §240(1). Because the plaintiff was following the directions of his foreman he could not utilize the safety lines. Therefore, the sole proximate cause defense was not available.

Practice Note: The court also concluded that the defendant was entitled to contractual and common law indemnification from the plaintiff's employer.

21. *Gomez v. Sharon Baptist Board of Directors*, 55 A.D.3d 446, 866 N.Y.S.2d 164 (1st Dept. 2008) (Oct. 28, 2008). Plaintiff was injured as a result of falling from a scaffold that shifted as he was working. The wheels on the scaffold were not locked. At issue on the appeal was whether the owner was entitled to contractual indemnification. The contract provided that the owner was entitled to indemnification for losses only to the extent that they were caused in whole or in part by the negligence of the contractor. The court held that a determination of §240(1) liability against the owner is not equivalent to a finding of negligence on behalf of the contractor; therefore, the owner was not entitled to indemnification.

Practice Note: Absent a finding of negligence in such situations the indemnification obligation is not triggered.

22. *Gallagher v. The New York Post*, 55 A.D.3d 488, 866 N.Y.S.2d 178 (1st Dept. 2008)(Oct. 30, 2008). In a 3-2 decision, the court affirmed the trial court's finding that the plaintiff was not entitled to summary judgment. The court held that there was an issue of fact as to whether the plaintiff had been provided with adequate safety devices, was instructed to use them, and declined to do so, rendering his actions or lack therefore the sole proximate cause of his injuries. The deposition of plaintiff's employer was sufficient to create an issue of fact. The court also granted the owner a conditional order of contractual indemnification against the general contractor.

Practice Note: The case provides an interesting analysis of the sole proximate cause defense and its meshing of the recalcitrant worker defense.

23. *Aponte v. The City of New York*, 2008 WL 4737083 (N.Y.A.D. 1 Dept.) (Oct. 30, 2008). Without reciting the facts of the case, the court held that the defendants' failure to provide adequate safety devices and to properly secure the ladder was the cause of the accident. The plaintiff's actions were at most comparative negligence, which is not a defense. Also at issue on this appeal was whether the construction manager was liable under §240(1). The court held that there were factual issues concerning the scope of construction manager's oversight and control of the work.



Practice Note: The liability of a construction manager turns on the terms of the contract and the actual on-site activities.

24. *Angamarca v. New York City Partnership Housing Development Fund Company, Inc.*, 866 N.Y.S.2d 659 (1st Dept. 2008) (Nov. 6, 2008). Plaintiff was injured when he fell from a roof during the construction of a townhouse. Based upon strong circumstantial evidence, the court noted that the plaintiff fell through an improperly covered skylight hole in the roof. The court held that the plaintiff established a *prima facie* case under §240(1), but dismissed the §241-a claim.

Practice Note: While the accident was unwitnessed, the plaintiff provided an expert affidavit indicating plaintiff's injuries were consistent with a fall through a skylight.

25. *Mihelis v. I. Park Lake Success, LLC*, 867 N.Y.S.2d 438 (1st Dept. 2008) (Nov. 20, 2008). Plaintiff and a co-worker were standing on a roof panel when it snapped in half and collapsed, causing them to fall to the floor sustaining serious injuries. The workers were not provided with safety devices. Because the defendants proceeded with construction knowing the roof was defective, the court denied the defendant's motion to dismiss plaintiff's common law and §200 claims. Plaintiff also established a *prima facie* case under §240(1).

Practice Note: The fact that there may have been safety devices somewhere at the worksite did not alter the courts conclusion that proper protection was not provided.

26. *Magee v. 438 East 117th Street, LLC*, 2008 WL 4977440 (N.Y.A.D. 1 Dept.) (Nov. 25, 2008). Plaintiff, a bricklayer, was working on the 5th floor of a building under construction. At the time of his injury, he was laying bricks for a wall of an elevator shaft. As he was stepping over a piece of plywood that covered a garage, the plywood chute broke or shifted causing him to fall several stories. The court held, even though the plaintiff's choice to step over the plywood and not around it was negligence, this did not provide a "sole proximate cause" defense to the defendants: there was a failure by defendants to properly protect against a fall into the chute.

Practice Note: Further there was not any evidence that plaintiff defied the instructions of his supervisor.

27. *Taylor v. Lehr Construction Corp.*, 2008 WL5058320 (N.Y.A.D. 1 Dept.) (Dec. 2, 2008). The plaintiff was injured when he was struck in the back by an uninstalled door frame that had been left in an open doorway. The jury returned a verdict in favor of company that was hired to install the frame and the manufacturer of the door. The court affirmed the jury verdict indicating that it was based upon a fair interpretation of the evidence. There was no evidence that the defendants were negligent or violated a statutory duty.



Practice Note: The §241(6) cause of action was dismissed because the defendant neither had authority to supervise or control plaintiff's work and not the owner or general contractor.

28. *Espinosa v. Azure Holdings II, LP*, 2008 WL 5085768 (N.Y.A.D. 1 Dept.) (Dec. 4, 2008). Plaintiff, a construction worker, was injured when a sidewalk collapsed into a cellar vault. The court held that there were general issues of fact under §240(1) -- specifically, whether the failure of the cellar vault beneath the sidewalk (a completed, permanent building structure) was reasonably foreseeable). The court also refused to dismiss the §200 and common law negligence claim as there were issues of facts as to whether the defendants had or did not have notice of the risk of the cellar vault's collapse.

Practice Note: The foreseeability requirement imposed by this court as it relates to permanent structure is a new factor.

29. *Hurley v. Best Buy Stores, L.P.*, 2008 WL 5083783 (N.Y.A.D. 1 Dept.) (Dec. 4, 2008). At issue of this appeal was the enforceability of a contractual indemnification provision in a contract between a store owner and plaintiff's employer. The court held that the defendant store owner's motion was premature because, based on the factual and procedural posture of the case, there was an issue of fact as to whether the store owner was negligent.

Practice Note: The timing of a motion for summary judgment can be important to the success of the motion.

30. *IBEX Construction, LLC v. Utica National Assurance Company*, 2008 WL 5083824 (N.Y.A.D. 1 Dept.) (Dec. 4, 2008). The court held that the defendant insurer was obligated to defend and indemnify the defendant in the underlying Labor Law action. The court had previously held that the plaintiff was liable to the injured party under §240; therefore, the plaintiff was an additional insured under the policy issued by defendant to the plaintiff.

Practice Note: The court also noted that the duty to defend was triggered by the allegations in the underlying complaint.

31. *Ritzer v. 6 East 43rd Street Corp.*, 2008 WL 5396678 (N.Y.A.D. 1 Dept.) (Dec. 30, 2008). The court reviewed the standard to defeat an injured worker's §240(1) claim. Defendant must establish that plaintiff:

1. Had adequate safety devices available.
2. Was aware that the safety devices were available.
3. There was an expectation that the devices would be used.
4. For no good reason chose not to, and had he made the choice he would not have been injured.

Practice Note: All the defendants offered was speculation that the accident might have occurred in some other manner.



SECOND DEPARTMENT

1. *Scharff v. Sachem Central School District at Holbrook*, 53 A.D.3d 538, 861 N.Y.S.2d 406 (2d Dept. 2008) (July 8, 2008). Plaintiff was injured when he slipped and fell onto the surface of the roof he was working on. The court dismissed the §240(1) claim because the plaintiff's injuries were not incurred as a result of an elevation-related risk.

Practice Note: Merely because a worker was injured while working above ground does not establish that the injury was a result of an elevation-related risk within §240(1).

2. *Wynne v. B. Anthony Construction Corporation*, 53 A.D.3d 654,862 N.Y.S.2d 379 (2d Dept. 2008) (July 29, 2008). The ground underneath a fully loaded dump truck collapsed causing the rear of the truck to fall 7 feet. The plaintiff was injured as a result of the collapse. The court dismissed the §240(1) claim and held that the plaintiff was not exposed to any risk that the safety devices referenced in the statute would have protected against. The court refused to dismiss the §241(6) claim because the defendants failed to prove that they complied with the Industrial Codes. The §200 claim was dismissed because defendant did not control the worksite nor did it have actual or constructive notice of the dangerous condition.

Practice Note: Plaintiff was working at ground level and therefore not protected by Labor Law §240(1).

3. *Wynne v. State of New York*, 53 A.D.2d 656, 863 N.Y.S.2d 222 (2d Dept. 2008) (July 29, 2008). In a case arising out of the facts in this case above, the plaintiff sued the State of New York in the Court of Claims under §200 and common law negligence. The court held that there were issues of fact as to whether the State of New York had actual or constructive notice of the dangerous condition that caused the accident and therefore did not dismiss the causes of action.

Practice Note: The court noted that a diligent inspection may have disclosed the dangerous condition.

4. *Galarraga v. City of New York*, 54 A.D.3d 308, 863 N.Y.S.2d 47 (2d Dept. 2008) (Aug. 5, 2008). At issue on this appeal was whether the plaintiff was entitled to amend his Bill of Particulars at trial to specify Industrial Code violations. The court held that it was proper to allow an amendment because the delay did not result in a change of position, intervention of equities, loss of evidence or other disadvantages. The court also discusses the importance of a Record on Appeal and how the failure to provide all relevant documentation can inhibit the rendering of a decision.

Practice Note: This case provides an excellent discussion of when amendments to a Bill of Particulars should or should not be allowed.



5. *Snellman v. Village of Port Chester*, 54 A.D.3d 371, 863 N.Y.S.2d 234 (2d Dept. 2008) (Aug. 12, 2008). The plaintiff was injured while working on the construction of a bulkhead when a section of plastic sheeting he had just cut began to fall. He was injured when he tried to prevent the sheet from falling. The court dismissed the §240(1) claim and noted that the plaintiff was not exposed to an elevation related hazard within §240(1). Further, the §241(6) claim was dismissed because the Industrial Codes relied upon by the plaintiff were inapplicable.

Practice Note: Not all falling objects create liability under §240(1).

6. *Med Valley Oil Company, Inc. v. Hughes Network Systems, Inc.*, 54 A.D.3d 394, 863 N.Y.S.2d 244 (2d Dept. 2008) (Aug. 19, 2008). At issue on this appeal was whether the owner of the premise was entitled to common law and contractual indemnification. In an underlying action, the injured worker had secured a judgment against the owner under §240(1). The owner in this action sought indemnification from the contractor who had hired the injured worker's employer. The court held that while an owner who establishes that its §240(1) liability is purely statutory and vicarious may obtain common law indemnification against a contractor, the owner must also prove that the contractor was guilty of some negligence that cause or contributed to the accident, or - in the absence of any negligence - the contractor had the authority to direct, supervise and control the work giving rise to the accident. The court found that there was no such negligence and that the contractor lacked authority to direct, supervise or control the work. The court also dismissed the owner's contractual indemnification claim because it was not a third party beneficiary of a contract that the contractor entered into with another entity.

Practice Note: This case clearly outlines the parameters of common law and contractual indemnification claims.

7. *Torres v. LPE Land Development & Construction, Inc.*, 54 A.D.3d 668, 863 N.Y.S.2d 477 (2d Dept. 2008) (Sept. 2, 2008). The plaintiff was injured when he fell from a scaffold on a construction site and instituted this action against the owner, general contractor and subcontractor. The court dismissed the §240(1) and §241(6) claims against the subcontractor because the subcontractor did not have the authority to supervise and control the work giving rise to the accident. The court also held that the general contractor was not entitled to contractual indemnification because the right to indemnification was not implied from the language and purposes of the agreement.

Practice Note: The agreement was undated and did not specify the party to be indemnified, the work to be done, or the location of the work. Also, there was no proof of an ongoing relationship.

8. *Riley v. J.A. Jones Contracting, Inc.*, 54 A.D.3d 744, 865 N.Y.S.2d 225 (2d Dept. 2008) (Sept. 9, 2008). Plaintiff, a bricklayer, was injured when he tripped on a brick while standing on an elevated scaffold. The court refused to dismiss the §241(6) claim, at least with respect to one Industrial Code section (12 NYCRR 23-1.7(e)(2)) pertaining to tripping hazards. Specifically, the court found there were issues of fact as to whether the brick that the plaintiff allegedly tripped over was integral to the work being performed or was debris.



Practice Note: The court held there was not any proof that 12 NYCRR 23-1.7(d) pertaining to slipping hazards was violated.

9. *Valdivia v. Consolidated Resistance Company of America, Inc.*, 54 A.D.3d 753, 863 N.Y.S.2d 720 (2d Dept. 2008) (Sept. 9, 2008). The issue on this appeal pertained to whether the plaintiff at the time of his injuries was performing an activity protected under §240(1) and §241(6). The court held that “. . . the task in which an injured employee was engaged must have been performed during ‘the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.’” The court also held that protection under §241(6) is provided “. . . only to those workers engaged in duties connected to the inherently hazardous work of construction, excavation or demolition” The defendant in this case failed to prove that plaintiff was not performing on the protected activities.

Practice Note: The court does not recite the facts of the case; therefore the Record and Brief on Appeal should be reviewed.

10. *Denis v. City of New York*, 54 A.D.3d 803, 863 N.Y.S.2d 773 (2d Dept. 2008) (Sept. 16, 2008). Plaintiff was injured when he fell from the second step from the top of an unsecured ladder while removing guard frames from the windows of a building. The ladder had been placed on a platform 5 feet from the floor. The ladder began to shake and plaintiff fell to the ground. The court held that the plaintiff established a *prima facie* case that he was not equipped with safety devices.

Practice Note: Once the plaintiff establishes a *prima facie* case, the defendant must rebut with evidence in admissible form which defendant did not do in this case.

11. *Tobio v. Boston Properties, Inc.*, 54 A.D.3d 1022, 864 N.Y.S.2d 172 (2d Dept. 2008) (Sept. 30, 2008). A subcontractor employee had established liability against the general contractor under the Labor Law. On this appeal the general contractor sought contractual indemnification against the subcontractor. The contract provided that the subcontractor would indemnify the general contractor for liability, including statutory liability, “arising in whole or in part and in any manner from injury and/or death of any person or damage to or loss of a property resulting from the acts, omissions, breach or default” of the subcontractor. The court awarded contractual indemnification, noting that the provision was not limited to the negligence of the subcontractor and that there was no proof of the general contractor’s negligence.

Practice Note: The wording of the indemnification provision is critical to its application and therefore, it must be reviewed in light of relevant case law.

12. *Parrales v. Wonder Works Construction Corp.*, 55 A.D.3d 519, 866 N.Y.S.2d 227 (2d Dept. 2008) (Oct. 7, 2008). Plaintiff was injured when a piece of wood fell from the 5th floor of the building. The plaintiff had been removing debris from the bottom of a debris chute at the time



of his injury. The plaintiff alleged a violation of §241(6). The court held that the plaintiff must demonstrate that various provisions of the Industrial Code were applicable, that they were violated and that the violation was a proximate cause of the accident. Also, plaintiff must prove that he was free of comparative negligence. The court held that the plaintiff was entitled to summary judgment under various Industrial Codes.

Practice Note: The Industrial Codes must have specificity in order to support a §241(6) claim.

13. *DeSabato v. 674 Carroll Street Corp.*, 2008 WL 4595246 (N.Y.A.D. 2 Dept.) (Oct. 14, 2008). The plaintiff was injured while performing renovation work in a cooperative apartment and sued the owner of the building and lessee of the apartment. The court dismissed the §240(1) claim against the lessee and applied the one-and two-family dwelling exemption even though the lessee was using one room in cooperative as a home office. Because there were inconsistencies raised to how the accident happened, the court found issues of fact as to whether §240(1) was applicable to the allegations against the owner. The court granted the lessee's motion to dismiss the contractual indemnification claim because the provision in the lease was broad enough to be read to include the exemption of the owner for the owner's own negligence.

Practice Note: Not all contractual indemnification provisions are enforceable under N.Y. Gen. Obligations Law §5-322.1.

14. *Van Salisbury v. Elliott-Lewis*, 55 A.D.3d 725, 867 N.Y.S.2d 454 (2d Dept. 2008) (Oct. 14, 2008). The plaintiff was injured when he tripped and fell on a pile of electrical cables and sued the general contractor under Labor Law §200. The defendant failed to establish that it lacked control over the dangerous condition of the worksite. The court rejected the defendant's contention that because the pile of cables was open and obvious and not inherently dangerous that plaintiff was not entitled to a judgment.

Practice Note: The plaintiff has the burden to establish a *prima facie* claim and defendant has the same burden as to its defenses.

15. *Galazka v. WFP One Liberty Plaza Co., LLC*, 55 A.D.3d 789, 865 N.Y.S.2d 689 (2d Dept. 2008) (Oct. 21, 2008). The plaintiff was injured when he slipped on wet plastic. The court dismissed the plaintiff's §241(6) claim because the plastic was an integral part of the asbestos removal project on which the injured plaintiff was working.

Practice Note: The wet plastic and asbestos fibers were neither a "foreign substance" nor "debris."

16. *Giangarra v. Pav-Lak Contracting, Inc.*, 55 A.D.3d 869, 866 N.Y.S.2d 332 (2d Dept. 2008) (Oct. 28, 2008). The plaintiff, a steelworker, was injured when he tripped over a piece of wood while performing steel work. At issue was whether the general contractor was entitled to indemnification from the subcontractor. The court held in the affirmative and noted that the contractual indemnification provision was not void and unenforceable under N.Y. Gen.



Obligations Law §5-322.1. In reaching its decision the court stated that an indemnification provision does not violate the law if its states “to the fullest extent permitted by law” and is enforceable where the party to be indemnified is found free of negligence.

Practice Note: The wording of the indemnification provision is critical and here the provision was triggered because the plaintiff’s injuries arose out of the subcontracted work.

17. *Ortega v. Puccia*, 866 N.Y.S.2d 323 (2d Dept. 2008) (Oct. 28, 2008). Plaintiff, at the time he was injured, was performing work on a single family dwelling. Plaintiff allegedly fell from a scaffold. There were inconsistent versions of how the incident happened and the plaintiff’s involvement in the assembling of the scaffold. (i.e., the wheels of the scaffold were not locked). The court held that the one-and two-family dwelling exemption barred the plaintiff’s §240(1) and §241(6) claims and noted that the owners did not direct or control the plaintiff’s work.

Practice Note: This case also provides an excellent analysis of the application of N.Y. Labor Law §200 and the fact that the one-and two-family homeowners exemption does not apply to §200 or common law negligence causes of action.

18. *Canete v. Judlau Contracting, Inc.*, 867 N.Y.S.2d 134 (2d Dept. 2008) (Nov. 5, 2008). The homeowners contended that the plaintiff was their employee and therefore, his claim was barred by Workers’ Compensation Law §11. The court held that the defendant’s failed to establish a *prima facie* case that the plaintiff was the “employee” of the homeowners.

Practice Note: A review of the case indicates that the court will utilize a “building block” approach looking at various wage documentation and the nature of the work being performed to determine who employed the plaintiff.

19. *Chowdhury v. Rodriguez*, 867 N.Y.S.2d 123 (2d Dept. 2008) (Nov. 5, 2008). The plaintiff, at the time of his injury, was reconstructing a porch on a two-family dwelling which the defendant owned and occupied. The court dismissed the §240(1) and 241(6) causes of action and applied the one-and two-family dwelling exemption. The court noted that the fact that the homeowner supplied a ladder to the plaintiff did not alter their opinion because this action is not equivalent to directing or controlling the work and could not serve as a predicate for liability outside of the homeowner’s exemption. The court refused to dismiss the §200 claim because there were issues of fact as to whether the ladder supplied by the owner was dangerous or defective.

Practice Note: The court addressed a new issue under §200 and common law negligence where an owner loans an injured worker equipment and tools.

20. *Padovano v. Teddy’s Realty Associates, Ltd.*, 866 N.Y.S.2d 743 (2d Dept. 2008) (Nov. 5, 2008). The owner of a third-floor condominium apartment hired the plaintiff, a professional window



washer, to wash the interior and exterior windows of her apartment. The court dismissed the §240(1) claim and noted the routine, household window washing is not protected under the Labor Law. The court did not dismiss the Labor Law §202 cause of action, which applies to the cleaning of windows from the outside, as well as, cleaning exterior windows from the inside, because there were issues of fact as to whether the windows could be operated easily.

Practice Note: Each jurisdiction should be reviewed concerning how they address routine window washing activities.

21. *Coque v. Wildflower Estates Developers, Inc.*, 867 N.Y.S.2d 158 (2d Dept. 2008) (Nov. 12, 2008). The issue considered on this appeal was whether an undocumented alien, who submitted a fraudulent Social Security card when applying for a job, is barred, by virtue of that fact alone, from recovering damages for lost wages when he is injured on the job. The court held that the submission of false documentation is sufficient to bar recovery for lost wages only where the conduct actually induces the employer to hire the worker. This circumstance is not present where the employer knew or should have known of the worker's undocumented status or failed to verify he worker's eligibility for employment as required by federal law. Based on the facts of the case, the court refused to disturb the jury's award of damages for lost wages.

Practice Note: In reaching its decision, the court dismissed the implications of *Balbuena*, 6 N.Y.3d at 360 and *Hoffman*, 535 U.S. at 141.

22. *Wade v. Atlantic Cooling Tower Services*, 867 N.Y.S.2d 489 (2d Dept. 2008) (Nov. 12, 2008). The plaintiff was injured when he fell though the floor of the cooling tower that he was disassembling. The court held that the dismantling of the sprinkler system constituted alteration of a structure within the meaning of §240(1) and demolition within the meaning of §241(6). The §200 claim was dismissed because of the lack of authority to supervise or control plaintiff's work.

Practice Note: This case provides a basic analysis of the various Labor Law causes of action.

23. *Coates v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 2008 WL 4937366 (N.Y.A.D. 2 Dept.) (Nov. 18, 2008). Without reciting the facts of the case, the court held there were issues of fact as to whether the construction of the wall from which the plaintiff fell was completed at the time of the plaintiff conducted his inspection. Also, there were issues of fact as to whether the plaintiff performed the inspection in an unnecessary risky manner.

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



24. *Huerta v. Three Star Construction Co., Inc.*, 2008 WL 4936989 (N.Y.A.D. 2 Dept.) (Nov. 18, 2008). The court dismissed the §§200, 240(1), 241(6) and common law negligence causes of action because the defendant did not have any authority to enforce safety standards, did not hire any subcontractor, did not supervise or control the work or provide any equipment. The defendant was not considered a contractor.

Practice Note: The court will review all contract documents and the actual activities on the job site in determining whether an entity is liable under the Labor Law.

25. *Monterroza v. State University Construction Fund*, 2008 WL 4936843 (N.Y.A.D. 2 Dept.) (Nov. 18, 2008). The plaintiff was injured when he fell onto a concrete platform as he attempted to get out of a ground-level dumpster that was wet with rain and located at a construction site. The court dismissed the §240(1) cause of action because the type of elevation-related risk covered by §240(1) was not present. The §241(6) cause of action was dismissed because the Industrial Code Regulations were inapplicable. Specifically, the dumpster did not constitute an elevated working surface within the meaning of 12 NYCRR 23-1.7(d).

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

26. *Hurtado v. Interstate Materials Corporation*, 2008 WL 5006449 (N.Y.A.D. 2 Dept.) (Nov. 25, 2008). Without reciting the facts of the case, the court held that the defendant demonstrated, *prima facie*, that the plaintiff's accident did not occur in connection with construction, demolition, or excavation work. The court therefore dismissed the plaintiff's §240(1) claim. The court did not dismiss the §200 and common law negligence causes of action because the accident arose from the manner in which the plaintiff performed his work. Further, the defendant did not have the authority to control the manner in which the work was performed.

Practice Note: The purpose of the requirement of the authority to control is that it enables the defendant to avoid or correct an unsafe condition.

27. *Pascarella v. Klubenspies*, 2008 WL 5006174 (N.Y.A.D. 2 Dept.) (Nov. 25, 2008). The court dismissed the §§240(1) and 241(6) causes of action by applying the one-or two-family dwelling exemption. In discussing the phrase "direct or control" as utilized in the exemption, the court noted that the phrase is strictly construed and refers to situations where the owner supervises the method and manner of the work.

Practice Note: The court also applied a similar definition of control to the §200 and common law negligence causes of action.



28. *Rakowicz v. Fashion Institute of Technology*, 2008 WL 50052909 (N.Y.A.D. 2 Dept.) (Nov. 25, 2008). Plaintiff alleges that he was injured while using a defective ladder. The court held that the plaintiff, in opposing to the defendants motion for summary judgment, raised a triable issue of fact as to whether the specific alleged statutory and Industrial Code violations proximately caused the tipping of the ladder. Therefore, the court refused to dismiss the plaintiff's §240(1) and §241(6) claim. With respect to the plaintiff's §200 cause of action, the court noted that despite the defendant's alleged ownership of the subject ladder, the defendant made a *prima facie* showing, as a matter of law, that it neither created the alleged danger or defect in the ladder nor had actual or constructive knowledge of any danger or defect in the ladder.

Practice Note: This jurisdiction is clear that the mere loaning of safety equipment is not sufficient to establish liability.

29. *Artoglou v. Gene Scappy Realty Corp.*, 2008 WL 5102312 (N.Y.A.D. 2 Dept.) (Dec. 2, 2008). The plaintiff was injured when he fell off a 20 foot ladder that he was using to access the roof of the defendant's building. The court held that the plaintiff was performing a "painting" activity, which is protected under §240(1). The court found triable issues of fact as to whether the action was caused by a violation of §240(1). In doing so, the court noted:

““ a fall from [a] ladder, by itself, [i]s not sufficient to impose liability under Labor Law §240(1)”

There must be evidence that the ladder was defective or inadequately secured which was a substantial factor in causing plaintiff's injuries.

Practice Note: This first question is to ask is whether the plaintiff is performing a protected activity.

30. *Mingo v. Lebedowicz*, 2008 WL 5102144 (N.Y.A.D. 2 Dept.) (Dec. 2, 2008). Plaintiff was injured when a 10 foot A-frame ladder on which he was standing tipped over, causing him to fall and sustain injuries. The plaintiff established a *prima facie* case that the ladder was unsecured. In reaching its decision, that court stated that where, as here, the plaintiff alleges that the subject ladder tipped over for no apparent reason, the plaintiff does not have the burden to prove that the ladder was defective.

Practice Note: The court noted that an expression of hope that further discovery would reveal something helpful is not sufficient ground to oppose resolution of the motion.

31. *Spiegler v. Gerken Building Corporation*, 2008 WL 5101674 (N.Y.A.D. 2 Dept.) (Dec. 2, 2008). The plaintiff at the time of his injury was installing a new electrical box and was also installing, with a co-worker, a 10 foot long mounting channel. The plaintiff was working at ground level. The court held that work being performed was not the type of hazard experienced by construction workers protected by the Labor Law. Therefore, the court dismissed the

§240(1) claim. The Industrial Codes relied on by plaintiff to support his §241(6) were inapplicable.

Practice Note: The court sets forth the standard applied to falling objects (i.e. materials or loads positioned or secured).

32. *Tomyik v. Junefield Assoc.*, 2008 5101654 (N.Y.A.D. 2 Dept.) (Dec. 2, 2008). The plaintiff allegedly was injured when he fell from a wooden scaffold while working on the construction of a single family home. The court noted that while “a construction manager is generally not responsible for injuries under Labor Law §240(1), it may be held vicariously liable as an agent of the property owner if it had the ability to control the activity which brought about the injury” Based on the facts of the case, the construction manager is liable. Further, the court held that the prime contractor was the statutory agent of the owner and liable under §240(1). Another defendant contractor had potential liability under common law negligence for the improper installation of the scaffold; however, based on the facts, liability was not established.

Practice Note: This case provides an interesting analysis of how various entities on a job site can be liable under the Labor Law.

33. *Venezia v. State of New York*, 2008 WL 5101650 (N.Y.A.D. 2 Dept.) (Dec. 2, 2008). The plaintiff was injured when he tripped over rebar. The court dismissed the §241(6) cause of action on various grounds, including the fact that the rebar upon which he tripped was an integral party of the construction. The §200 claim was dismissed because the evidence demonstrated that the defendant did not have any authority to supervise or control the plaintiff’s work.

Practice Note: In order to establish liability under §241(6) plaintiff must allege sufficiently specific Industrial Code violations.

34. *Fajardo v. Clark*, 2008 WL 5174975 (N.Y.A.D. 2 Dept.) (Dec. 9, 2008). The entities on the job site had potential responsibility to construct a wooden roof. At issue on this appeal was the position of the defendants that they were a joint venture (including plaintiff’s employer) and they were entitled to the protection of the exclusory provision of the Workers’ Compensation Law. The court held that the defendants/joint venture failed to establish their entitlement to the Workers’ Compensation defense (i.e. share in losses). The court further held there were issues of fact as to who was the general contractor. Therefore, the various motions for summary judgment were denied.

Practice Note: It appears that these motions may have been premature and additional discovery was needed.

35. *Reaber v. Connequot Central School District*, 2008 WL 5172351 (N.Y.A.D. 2 Dept.) (Dec. 9, 2008). The plaintiff’s job was to spackle drywall. On the date of the accident, other employees were utilizing the baker scaffold that the plaintiff had previously used. As a result, plaintiff claims he was told by his supervisor to use a ladder to complete the spackling job. The plaintiff



chose an A-frame ladder which kicked out causing him to fall. It appears, however, a baker scaffold was observed a few feet from the room where the plaintiff was working. The court held that the plaintiff established a *prima facie* case that defendants failed to supply adequate safety devices which proximately caused plaintiff's injuries. However, the defendants failed to raise triable issues of fact, as there was no proof that the baker scaffold was available to the plaintiff.

Practice Note: The court also held that under the facts of this case the construction manager was not liable under §240(1).

36. *Cambizaca v. New York City Transit Authority*, 2008 WL 5263925 (N.Y.A.D. 2 Dept.) (Dec. 16, 2008). Plaintiff and a co-worker were working on a subway platform. The co-worker was using a grinder and a piece of the grinder broke hitting the plaintiff decedent in the head. The court dismissed the §200 claim noting that the claim arose from alleged defects or dangers in the subcontractor's method or materials. In such cases, the court noted that there is no liability under §200 or common law negligence unless the owner or general contractor had authority to exercise supervisory control over the operation (i.e. bears responsibility for the manner in which the work is performed).

Practice Note: The retention of the right to generally supervise the work is insufficient.

37. *Domino v. Professional Consulting, Inc.*, 2008 WL 5263854 (N.Y.A.D. 2 Dept.) (Dec. 16, 2008). At issue on this appeal was the liability of the construction manager for injuries sustained by a worker at a construction site. The court dismissed the §240(1) and §241(6) and noted that construction managers are generally not considered a "contractor" or "owner" unless it is responsible for the safety of the worker by being delegated the authority and duties of a general contractor, or if it functions as an agent of the owner. In this case, the contract specifically prohibited the construction manager from supervising the manner or means of the work or safety procedures nor did it function as an agent of the owner.

Practice Note: The contract documents and onsite activities should be reviewed in determining the liability of the construction manager.

38. *Duarte v. State of New York*, 2008 WL 5263842 (N.Y.A.D. 2d Dept.) (Dec. 16, 2008). The plaintiff was injured while painting a bridge when a pressurized painting hose he was holding exploded. The court held that because the injury arose from the allegedly defective means utilized by the plaintiff to perform his work liability only attaches to an owner that had the authority to supervise or control the performance of the work. The court found that the State did not control the method and means of the work or exercise the required supervisory control.

Practice Note: Even if the owner has notice of the allegedly unsafe manner in which the work was performed that is insufficient to establish liability.



39. *Decaire v. New York City Health and Hospitals Corp.*, 2008 WL 5376628 (N.Y.A.D. 2 Dept.) (Dec. 23, 2008). The plaintiff was injured when a beam struck him. At the time of the injury, the hoisting operation had been completed and the operator of the crane was retracting the crane hooks. The court dismissed the §241(6) cause of action because the Industrial Codes were inapplicable or not the proximate cause of the plaintiff's injuries.

Practice Note: This was not the typical falling object case and not all falling objects are covered by the Labor Law.

40. *Rau v. Bagels N Brunch, Inc.*, 2008 WL 5376532 (N.Y.A.D. 2 Dept.) (Dec. 23, 2008). The court, without reciting the facts of the case, dismissed the plaintiff's §240(1) case, noting that the statute protects special hazards and does not apply to perils that may be connected in some tangential way to the effects of gravity. The court also dismissed the §241(6) cause of action.

Practice Note: The Record and Briefs on appeal must be read in order to determine the significance of this holding.

41. *Kretowski v. Braender Condominium*, 2008 WL 5413532 (N.Y.A.D. 2 Dept. 2008). The plaintiff was injured when a brick fell from a pallet being hoisted to the roof of the building. The court held that the plaintiff established a *prima facie* case under §240(1) (i.e. statute violated and the violation was a proximate cause). The brick fell while it was being hoisted. With respect to the §241(6) cause of action, the court rejected the plaintiff's expert because his operation was speculative and conclusory, but still found there was an issue of fact as to the application of various Industrial Code sections.

THIRD DEPARTMENT

1. *McKeighan v. Vassar College*, 53 A.D.3d 831, 862 N.Y.S.2d 396 (3d Dept. 2008) (July 10, 2008). The court held that because a safety device in form of a ladder was required, the absence of the device was a proximate cause of the accident. The court also held that because there was sufficient proof that the general contractor was negligent a question of fact existed as to whether the general contractor was entitled to indemnification from the plaintiff's employer.

Practice Note: The terms of the indemnification provision are important to the determination of whether the negligence of the party seeking indemnification is precluded.

2. *Neissal v. Rensselaer Polytechnic Institute*, 54 A.D.3d 446, 863 N.Y.S.2d 128 (3d Dept. 2008) (Aug. 7, 2008). The plaintiff received a shock and severe burns while performing various electrical functions. One of the issues on this appeal was whether the plaintiff's activities were the sole proximate cause of the incident. The court noted that the plaintiff's actions may have been "ill advised and/or careless" but this was "not a case where the plaintiff recognized the

danger and chose to disregard it, thus rendering the plaintiff's conduct the sole proximate cause."

Practice Note: The application of the sole proximate cause defense is fact-specific and applied where the plaintiff's conduct is "extraordinary."

3. *Roberti v. Advance Auto Parts*, 55 A.D.3d 1022 (3d Dept. 2008) (Oct. 16, 2008). The plaintiff was injured when he fell from an A-frame ladder while pulling wires through a drop ceiling. The court dismissed the plaintiff's §240(1) claim and noted that even though there was not any defect in the ladder the statute requires more than provision of any safety device -- it has to be appropriate for the task. In this case the plaintiff had reported that the ladder fell as he had not set the side bars properly when he moved the ladder from one location to the next.

Practice Note: The defendant's expert engineer opined that the ladder was appropriate, safe and proper equipment.

4. *Amoah v. Mallah Management, LLC*, 866 N.Y.S.2d 797 (3d Dept. 2008) (Oct. 30, 2008). The Workers' Compensation Board had ruled that the claimant, an undocumented alien, was entitled to an award for reduced earning benefits. The insurance carrier had contested payment of benefits based on the claimant's utilization of fraudulent documents to obtain employment. In reaching its decision, the court noted that the Immigration Reform and Control Act did not preempt the N.Y. Workers' Compensation Law.

Practice Note: The court discussed the holding of the Court of Appeals in *Balbuena*, 6 N.Y.3d 338, 356 and the U.S. Supreme Court case of *Hoffman*, 535 U.S. 137.

5. *Rosenblatt v. Wagman*, 2008 WL 4999162 (N.Y.A.D. 3 Dept.) (Nov. 26, 2008). At issue on this appeal was whether a life tenant and owner of the property where the plaintiff was injured was entitled to the one and two-family exemption under sections 240(1) and 241(6). The court held that merely explaining the work to be done, prohibiting activities that destroyed the lawn and providing a ladder without directing the plaintiff how to use the ladder were insufficient acts to transform the defendants into a supervisor or director of the plaintiff's work.

Practice Note: The owner must significantly participate in the project "before he or she will be deemed to have crossed the line" from being a legitimately concerned homeowner to a *de facto* supervisor.

6. *Petticrew v. St. Lawrence Cement, Inc.*, 2008 WL 5352282 (N.Y.A.D. 3d Dept.) (Dec. 24, 2008). The plaintiff alleged that he was injured when the scaffolding failed because the defendant neglected to provide a proper tie-off point. The court held that discrepancies about the accident as described by the plaintiff and a co-worker created an issue of fact as to liability



under §240(1). The court also held that there was an issue of fact as to whether the plaintiff's actions were the sole proximate cause of the accident.

Practice Note: In reaching its decision the court cited to *Robinson*, 6 N.Y.3d 550, *Montgomery*, 4 N.Y.3d 805 and *Cahill*, 4 N.Y.3d 35.

7. *Snyder v. Brendan G. Gnall*, 2008 WL 5352333 (N.Y.A.D. 3 Dept.) (Dec. 24, 2008). The plaintiff was injured while constructing a garage at the defendants' home. At issue on this appeal was the application of the one and two-family dwelling exemption. Based on the exemption, the court dismissed the §240(1) and §241(6) causes of action. The court, in reaching its decision, noted that even though the homeowners were involved in many aspects of the project their activities did not support a conclusion that they directed or supervised plaintiff's work.

Practice Note: In assessing whether there are sufficient facts to support direction and control, the court will utilize a building block approach.

8. *Auchampaugh v. Syracuse University*, 2008 WL 5352350 (N.Y.A.D. 3d Dept.) (Dec. 24, 2008). Plaintiff was injured when he stepped backward and tripped over a trapdoor which he had left open on the platform he had been working on. He fell on the platform and his head and shoulders went into the open hatchway. The court dismissed the §240(1) cause of action and noted that the plaintiff's injury was not related to the effects of gravity and could have happened at ground level.

Practice Note: Not all accidents that occur while a worker is working above ground are covered under §240(1).

FOURTH DEPARTMENT

1. *Fuller v. Spiesz*, 53 A.D.3d 1093, 861 N.Y.S.2d 896 (4th Dept.) (July 3, 2008). The plaintiff, a friend of the owner, was injured when he fell while installing a metal roof. The defendant had agreed to perform work on the plaintiff's residence in exchange for plaintiff performing construction work on the defendant's roof. The court held that the Labor Laws are inapplicable to friends and neighbors who voluntarily render casual assistance to a homeowner. The defendant, however, can still be liable for common law negligence.

Practice Note: A "barter agreement" does not create liability under §240(1) or §241(6).



2. *Uzar v. Louis P. Ciminelli Construction Co.*, 53 A.D.3d 1078, 862 N.Y.S.2d 234 (4th Dept. 2008) (July 3, 2008). The court held that the construction manager was not liable under §241(6). In reaching its decision the Court held that an entity is a contractor within the meaning of the Labor Law where it has the power to enforce safety standards and choose responsible subcontractors. An entity is also considered a general contractor if it is responsible for coordinating and supervising the project. The court noted that these factors were missing with respect to the construction manager. The court also dismissed the §200 claim against the general contractor because of the lack of control or supervision over the work of the plaintiff, so as to enable it to prevent or correct unsafe conditions. Further, the general contractor did not create the dangerous condition.

Practice Note: The court applies a “building block” approach to determine liability, including the terms of the contract and the actual outside activities.

3. *Brown v. Concord Nurseries, Inc.*, 53 A.D.3d 1067, 863 N.Y.S.2d 314 (4th Dept. 2008) (July 3, 2008). Plaintiff was injured when he fell from an extension ladder while repairing an overhead door. The court held that the trial court properly denied the plaintiff’s motion for a directed verdict under §240(1). The court held that there was a rational basis for the jury’s finding that the defendant provided the plaintiff with a proper safety device. Further, the court noted that the jury verdict was not against the weight of the evidence.

Practice Note: The defendant’s expert had testified that the extension ladder used by the plaintiff was appropriate for the repair that the plaintiff was performing.

4. *Ganger v. Anthony Cimato/ACP Partnership*, 55 A.D.3d 1051, 862 N.Y.S.2d 628 (4th Dept. 2008) (July 3, 2008). Plaintiff was injured when he fell through a skylight hole that had been covered over with roofing felt. The court granted the plaintiff’s motion for summary judgment under §240(1) and noted that the defendants failed to submit evidence that plaintiff had adequate safety devices available; that plaintiffs knew both that they were available; that he was expected to use them; that he chose for no good reason not to use them and that had he not made the choice he would not have been injured. The court also refused to dismiss the §241(6) claim.

Practice Note: Proof that the plaintiff’s normal and logical response would have been to use the available safety devices or whether plaintiff, based on his training, prior practices, and common sense, new or should have known to cover the opening.

5. *Evans v. Syracuse Model Neighborhood Corp.*, 53 A.D.3d 1135, 862 N.Y.S.2d 425 (4th Dept. 2008) (July 11, 2008). Plaintiff was injured when he fell 20’ from an aluminum ladder pick which was used as a sidewalk from ladder to ladder. Evidence showed that one of the ladders shifted causing the plaintiff to fall. The court held that the plaintiff established a prima facie case and the plaintiff’s evidence as to how the accident happened was consistent.



Practice Note: The court dismissed the §241(6) claim. The court rejected the defendant's claim that plaintiff's conduct was the sole proximate cause of the accident. Proper placement is a key element.

6. *Orlikowski v. Cornerstone Community Federal Credit Union*, 55 A.D.3d 1245, 865 N.Y.S.2d 429 (4th Dept. 2008) (Oct. 3, 2008). The plaintiff, a bricklayer, was injured when he fell 4' from a scaffold through the open frame of a window onto a concrete floor. The court granted the plaintiff's motion and noted that the defendants failed to controvert plaintiff's expert that a barrier should have been placed across the window. The court also considered a default judgment against the plaintiff's employer and held that "[i]ndemnification claims generally do not occur . . . until part[ies] seeking indemnification ha[ve] made payment to the injured person."

Practice Note: Actual payment must be made before a defendant is entitled to indemnification from a third-party defendant.

7. *Duffield v. Will's Equipment Repair*, 55 A.D.3d 1365, 864 N.Y.S.2d 615 (4th Dept. 2008) (Oct. 3, 2008). Plaintiff was injured when he fell from a roof. The court held that because the defendant was the fee owner she was liable under §§240(1) and 241(6).

Practice Note: Even though plaintiff's employer had purchased the building the title had not been transferred at the time of the injury.

8. *Baker v. Essex Homes of Western New York, Inc.*, 864 N.Y.S.2d 822 (4th Dept. 2008) (Oct. 3, 2008). Plaintiff, at the time of his fall from the roof, was standing on bundles of shingles. The bundles broke apart, causing the plaintiff to fall. There were not any safety devices in place to protect the plaintiff from falling. The court rejected the sole proximate cause defense. The court noted that because the "plaintiff lacked authority to exercise independent judgment with respect to safety issues," and his forepersons did not require or suggest that the plaintiff install safety devices the defense was not available.

Practice Note: Even though the safety device was onsite, the court refused to apply the sole proximate cause defense because other elements were missing.

9. *Bissell v. Town of Amherst*, 86 7 N.Y.S.2d 582 (4th Dept. 2008) (Nov. 14, 2008). The court held that the defendant had established good cause for delay in its motion for summary judgment. Further, the court held that the jury instruction on "grave injury" conveyed the proper legal standard. The jury's verdict was reviewed and the court held that the award for loss of services and society was supported by the evidence. With respect to jury award for past and future loss of services and past and future pain and suffering, the court held that they "deviated materially" from what would be reasonable compensation and reduced the verdict.

Practice Note: This case provides an excellent analysis of the standard applied by the court in assessing a jury verdict.



10. *Rodriquez v. Seven Seventeen HB Buffalo Corporation*, 2008 WL 4952593 (N.Y.A.D. 4 Dept.) (Nov. 21, 2008). At issue on this appeal was the application of a contractual indemnification provision. The court held that there was no written contract on the date of the plaintiff's accident. However, there was a contract that provided for indemnification if there was an executed contract in place.

Practice Note: Even though there was a certificate of insurance indicating that an indemnification contract existed, the court held it was not an argument to indemnify.

FEDERAL COURTS:

Eastern District of New York

1. *Vasquez v. FCE Industries, Ltd.*, 2003 WL 4224396 (E.D.N.Y.) (Sept. 10, 2008). At the time the plaintiff was injured, he was ascending a ladder that acted as a passageway between various elevations. Another employee was descending the same ladder. When the two met, the plaintiff stepped off the ladder onto an angle iron. Plaintiff lost his balance and fell. The Court rejected the §240(1) cause of action and concluded, based upon expert testimony that the ladder provided proper protection. The Court also concluded that the plaintiff's actions were the sole proximate cause of his injuries. The §241(6) cause of action was dismissed because OSHA regulations cannot give rise to such liability.

Practice Note: The court held that based upon the facts of the case the federal maritime law does not preempt New York Labor Law.

Southern District of New York

1. *Starkey v. Capstone Enterprises of Portchester*, 2008 WL 4452366 (S.D.N.Y.) (Sept. 30, 2008). The Court considered the relationship of various parties on a construction site. The Court found that there were issues of fact as to whether the construction manager had sufficient authority and responsibility over the project to be held liable under §240(1). In addition, the Court discussed the distinction between a general contractor and prime contractor for general construction. The latter is only liable under §240(1) if it stands in the shoes of the owner or general contractor with the authority to supervise and control the work.

Practice Note: This case provides an excellent discussion of the definition of general contractor and prime contractor.

2. *1085 Park Avenue LLC*, 2008 WL 4386751 (S.D.N.Y.) (Sept. 25, 2008). The plaintiff was injured when he fell from a sidewalk bridge that was used to protect pedestrians as a staging area. The bridge gave way while the plaintiff was pulling a rope which was raising a handcart.



The plaintiff was not provided ropes and harnesses. The court noted that the plaintiff's activity was protected under §240(1) (i.e., it was an elevation-related risk). The Court held that there were issues of fact as to whether but for the defendant's violations, plaintiff would have fallen or whether the plaintiff's conduct independently caused the accident. (i.e. sole proximate cause. This Court also considered the rights of an undocumented alien).

Practice Note: The Court also discusses the anti-subrogation rule that bars an insurer's right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered.

3. *In the Matter of the Complaint of DonJon Marine Co., Inc.*, 2008 WL 5153721 (S.D.N.Y.) (Aug. 5, 2008). Plaintiff was standing on a 12 A-frame ladder sandblasting the hull of a tugboat when he fell and sustained injuries. The tugboat was in dry dock and the ladder was not on board, nor leaning against the tugboat. The Court dismissed the plaintiff's State Labor Law claims holding that they were preempted by the Longshore and Harbor Workers' Compensation Act.

Practice Note: Not all maritime accidents are preempted by federal law. This case provides a detailed analysis.

4. *McNeight v. Railcar Custom Leasing, LLC*, 2008 WL 4186331 (W.D.N.Y.) (Sept. 10, 2008). Plaintiff, a painter, was injured while he was stepping on a brake pipe that was covered with morning dew which caused his foot to slip and he fell 6 feet. The Court dismissed the §240(1) claim against one defendant because it was neither an owner or general contractor or agent of either. As to the owner of the rail car, the Court refused to dismiss the complaint. Relying on the Court of Appeals case of *Prats*, 100 N.Y.2d 878 the Court concluded that the plaintiff was performing a protected activity. However, the court dismissed the §240(1) claim because the plaintiff's fall was not the type of elevator risk covered, but was caused by a usual and ordinary danger of a railroad yard.

Practice Note: Not every fall from a height is protected by Labor Law §240(1).

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