



GOLDBERG SEGALLA ^{LLP}

LABOR LAW UPDATE

Winter 2010

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

GOLDBERG SEGALLA LABOR LAW LITIGATION GROUP

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Has the Court of Appeals changed the playing field and will the case of *Runner v. New York Stock Exchange*, 2009 N.Y. LEXIS 4484 (Dec. 17, 2009) change our analysis and defense of Labor Law §240(1) cases? In *Runner*, the Court of Appeals rejected the argument that liability under §240(1) should be limited to situations involving falling workers or falling objects and held that where a plaintiff is injured as a result “harm directly flowing from the application of the force of gravity to the object or person” liability is established under §240(1). The plaintiff’s injury in *Runner* was directly attributable to a risk posed by a physically significant elevation differential. Therefore, when analyzing the viability of a §240(1) claim, the focus is no longer on whether the object fell or whether the worker fell, but is on how gravity impacted the factual scenario leading up to the plaintiff’s injury.

Also, during this reporting period, the Courts continue to consider various “risk shifting” issues associated with contractual and common law indemnification. The cases, discussed below, clearly indicate that practioners must first analyze whether a contractual indemnification provision is enforceable on its face and then assess whether the provision is enforceable under the facts of a particular case.

As previously reported, we have been monitoring the case of *Businesses for a Better N.Y. v. Angello*, 2009 U.S. Dist. LEXIS 72798 (W.D.N.Y. 2007) which had rejected the constitutional challenge asserted by the New York business community against N.Y. Labor Law. As reported below, the Second Circuit Court of Appeals affirmed the dismissal of the case.

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 Buffalo address below; by phone at (716) 566-5480; or email at tsegalla@goldbergsegalla.com. You can also contact **Brian Stapleton** at 11 Martine Avenue, Suite 750, White Plains, New York 10606; by phone at (914) 798-5470 or by email at bstapleton@goldbergsegalla.com.

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COURT OF APPEALS

1. *Lee v. Astoria Generating Company, L.P.*, 2009 N.Y. LEXIS 4079 (Nov. 23, 2009). At issue on this appeal was whether the Longshore and Harbor Workers' Compensation Act (LHWCA) preempts New York Labor Law §240(1) and §241(6). The plaintiff at the time of his injury was working on a barge repairing an electricity generating turbine and was injured when his feet slipped and he fell as he came climbing down into the turbine. The majority (5-2 decision) of the Court held that LHWCA limits claims against vessel owners and therefore, the state law claims are preempted.

Practice Note: This court concludes that the injured plaintiff was working on a vessel within the meaning of LHWCA, even though at the time of the accident the vessel was anchored.

2. *Affri v. Yaakov Basch*, 2009 N.Y. LEXIS 4088 (Nov. 24, 2009). In this 4-3 decision, the majority of the Court held that the defendants did not exercise sufficient direction and control over the plaintiff's work to overcome the one or two-family dwelling exception. The plaintiff, a neighbor of the defendants, was injured when he fell from a ladder while installing a vent on the roof. Plaintiff had been installing appliances. The Court indicated in applying the exemption that the homeowner's participation was limited to discussion of the results that the homeowner wished to see, not the method or means in which the work was to be performed.

Practice Note: The method and means of the plaintiff's work were left to his judgment and experience.

3. *Scaparo v. Village of Ilion*, 2009 N.Y. LEXIS 4142 (Dec. 1, 2009). With respect to whether the Herkimer County Industrial Development Agency (HCIDA) was an owner within Labor Law, the court held that even though the accident occurred on HCIDA property that, because there was not any nexus between the owner and the worker, whether by lease agreement or grant of an easement or other property interest, there was no liability under the Labor Law. The Court also considered whether the defendant church was an owner because it did not have any interest in the property and did not fulfill the role of an owner by contracting to have the work performed for her benefit. It held that the church was not.

Practice Note: In determining ownership issue, the court will focus on particular written agreements and the activities on this construction site.

4. *Runner v. New York Stock Exchange, Inc.*, 2009 N.Y. LEXIS 4484 (Dec. 17, 2009). The Second Circuit Court of Appeals certified the following two questions:
 - I. Where a worker who is serving as a counterweight on a makeshift pulley is dragged into the pulley mechanism, after a heavy object is on the other side of the



pulley rapidly descends a small set of stairs, causing an injury to plaintiff's hand, is the injury: (a) an elevation related injury, and (b) directly caused by the effects of gravity, such that §240(1) of New York's Labor Law applies?

- II. An injury stems from neither a falling worker nor a falling object that strikes a plaintiff, does liability exist under §240(1) of New York's Labor Law?

The Court recanted the first question -- whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential. In holding that the Labor Law applied, the Court rejected the defendant's argument that there must be a traversal of an elevation differential either by the plaintiff or an object hitting him and that gravity must operate directly upon either the plaintiff or upon the object falling. The Court held that the factual scenario involved an injury directly attributable to a risk posed by a physically significant elevation differential and the elevation differential here was not *de minimis*.

Practice Note: For the first time, the Court of Appeals has expanded the application of §240(1) to situations other than those involving purely a falling worker or falling object.

FIRST DEPARTMENT

1. *Belding v. Verizon New York, Inc.*, 65 A.D.3d 414, 883 N.Y.S.2d 577 (1st Dept. 2009) (Aug. 4, 2009). In a 5-2 decision, the majority of the court held that the activity being performed by the plaintiff was a protected activity under §240(1). Plaintiff was injured when he fell from a ladder that collapsed while reinstalling a shatter-proofing substance on windows in a building which were part of a reconstruction project. The court held this was "altering" under the statute.

Practice Note: The defendants and two dissenting judges were of the opinion that the activity that was being performed was merely to correct a "cosmetic defect" and not an enumerated activity.

2. *Cherry v. Time Warner, Inc.*, 885 N.Y.S.2d 28 (1st Dept. 2009) (Aug. 18, 2009.) Plaintiff was injured when he fell off a scaffold and contends that his fall was caused by the lack of a guardrail on the scaffold. The court held that there were issues of fact as to whether the safety guardrails were in place on the scaffold from which the plaintiff fell, and if they were not in place, whether they were made readily available on site for the plaintiff's use.

Practice Note: The court in reaching its decision noticed that if adequate safety devices are provided and the worker chooses not to use them or misuses them then liability does not attach under §240(1). Note there was a dissent holding that a worker's personal and logical response could be to search for the device.



3. *Paljevic v. 998 Fifth Avenue Corp.*, 65 A.D. 3d 896, 885 N.Y.S.2d 65 (1st Dept. 2009) (Sept. 8, 2009). At issue on this appeal, was the liability several contractors under the Labor Law who were not “owners” or “general contractors”. One entity had a written contract that required it to provide full time site supervision and maintain protection throughout the project. The court held there were issues of fact as to that entities liability. Another entity agreed to supervise the project and to oversee the painting and decorating activities. The court held that there were issues of fact or to whether that entity was the owner’s agent. Plaintiff was injured when he fell from a ladder while painting.

Practice Note: In assessing whether an entity is liable under the Labor Law, the courts look at the contractual arrangements and on site activities.

4. *DiFilippo v. Parkchester North Condominium*, 65 A.D.3d 899, 885 N.Y.S.2d 81 (1st Dept. 2001) (Sept. 15, 2009). Plaintiff was injured when he slipped and fell on a dangerous condition. (water and debris on the floor). At issue on this appeal was the enforceability of the indemnification provision. The court held that it would be enforceable if the party seeking indemnification was not negligent. Here there were issues of fact.

Practice Note: The initial fact question to ask is whether an indemnification is enforceable as written and then whether it is enforceable by application.

5. *Scuderi v. Independence Community Bank Corp.*, 65 A.D.3d 928, 884 N.Y.S.2d 861 (1st Dept. 2009) (Sept. 15, 2009). Plaintiff was injured when he slipped over debris (cardboard boxes and twine) which was owned by a subcontractor. The §200 claim was dismissed against the subcontractor because it was not an owner or general contractor. The court held there were questions of fact as to whether the subcontractor was present on the day of the injury and whether it created the debris; therefore, the common law negligence claim was not dismissed.

Practice Note: The contractual indemnification claim was dismissed because there was not any contract to support the claim.

6. *Costabile v. Damon G. Douglas Company*, 885 N.Y.S.2d 602 (1st Dept. 2009) (Oct. 8, 2009). The court allowed plaintiff’s supplemental bill of particulars because the defendant was not prejudiced and the theory of liability did not change. This was also an issue of fact as to whether the spot where plaintiff fell was covered by the industrial code.

Practice Note: It is incumbent that the plaintiff pleading and prove a violation of an Industrial Code under 12 N.Y.C.R.R. Part 23.



7. *Bowman v. Beach Concerts, Inc.*, 886 N.Y.S.2d 880 (1st Dept. 2009) (Oct. 29, 2009). The court discussed the plaintiff's §200 and common law negligence claims because of the lack of evidence that the defendants had the authority to supervise or control the work or that they had actual or constructive notice of the unsafe condition.

Practice Note: Procedurally the court notes that a showing of merit on a motion to restore is less than that required to defend a motion for summary judgment.

8. *Zengotita v. JFK International Air Terminal*, 2009 N.Y. App. Div. LEXIS 7790 (Nov. 5, 2009). Plaintiff fell from a scaffold that moved just prior to his fall. The wheels on the scaffold were securely locked. The court held that §240(1) had been violated and the violation was a proximate cause because there was no evidence that controverted the scaffold moved and no safety devices were provided to prevent it from moving or the worker from falling.

Practice Note: It appears that the defendant was unable to establish that the plaintiff was descending the ladder in an improper fashion.

9. *Williams v. The City of New York*, 888 N.Y.S.2d 36 (1st Dept. 2009) (Nov. 5, 2009). Plaintiff was injured when he fell on "black ice" and cut his arm on an iron angle embedded in the ice. The §200 and common law negligence claim had not been dismissed; therefore, the defendant was not entitled to contractual indemnification.

Practice Note: The contractual indemnification provision was enforceable because it contained the language -- "To the fullest extent permitted by law."

10. *Fontaine v. Juniper Associates*, 888 N.Y.S.2d 409 (1st Dept. 2009) (Nov. 24, 2009). Plaintiff was injured when he was struck by several pieces of lumber that fell from a flatbed truck. At the time of his injury, he and a co-worker were unloading the lumber by hand. The court granted plaintiff's motion under §240(1) since the accident involved an elevation-related risk within the meaning of the statute and his injuries were attributable, in part, to the failure to provide protection mandated by the statute.

Practice Note: In my opinion, this is an extremely close call as the plaintiff was working at the ground level. It appears the lumber was too close to the edge of the truck bed.

11. *Cardenas v. One State Street, LLC*, 2009 N.Y. App. Div. LEXIS 8793. (Dec. 3, 2009) Plaintiff injured his arm and shoulder when a panel that he was prying from a wall fell. Plaintiff was not provided with any safety devices to assist in removing the panel. The court noted that there was no evidence presented on the sole proximate cause defense.



Practice Note: In order to prevail on the sole proximate cause defense there has to be proof that safety devices were available, plaintiff knew they were available and he was expected to sue them and for no good reason he chose not to use them or that had he not made that choice he would not have been injured.

12. *Macedo v. J.D. Posillico, Inc.*, 2009 N.Y. App. Div. LEXIS 8986 (Dec. 10, 2009). Plaintiff, at the time of his injury, was working on an elevated platform, attempting to lift a cone hanging from a rope, when he and a co-worker fell from the platform. None of the safety devices prevented the fall or injury. Therefore, plaintiff met his prima facie burden under §240(1). The court dismissed a portion of the plaintiff's §241(6) claim holding that various Industrial Codes were inapplicable or insufficiently specific.

Practice Note: The court noted that the fact that the platform was secure after the incident did not refute eyewitness testimony that the platform bent or failed.

13. *Santiago v. Fred-Doug 117, LLC*, 2009 N.Y. App. Div. LEXIS 9149 (Dec. 17, 2009). Plaintiff was injured when he fell from an A-frame ladder. There were issues of fact as to whether the plaintiff was involved in covered repair work or non-actionable routine maintenance at the time of the accident. Also, there were issues of fact as to whether the plaintiff's own actions were the sole proximate cause of the injuries.

Practice Note: Specifically, the case involved the misuse of an adequate safety device.

14. *Lupo v. Pro Foods, LLC*, 2009 N.Y. App. Div. LEXIS 9321 (Dec. 22, 2009). Plaintiff was injured when he fell into an inclined opening or ramp which was partially concealed by sheeting. The court dismissed the §240(1) claim because the plaintiff failed to prove that an elevation-related hazard was involved. The §241(6) claim was dismissed because a hazardous opening under 12 N.Y.C.R.R. §23-1.7(b) was not involved.

Practice Note: The court also refused to allow the plaintiff to amend his bill of particulars after the filing of the note of issue.

15. *Siegel v. RRG Fort Greene, Inc.*, 2009 N.Y. App. Div. LEXIS 9514 (Dec. 29, 2009). Plaintiff contends that he was injured because the ladder on which he was working tipped causing him and the ladder to fall. The court granted the defendant's argument that in order to prevail under §240(1), the plaintiff must prove the ladder was defective.

Practice Note: The court also considered contractual indemnification issues between various of the defendants.



SECOND DEPARTMENT

1. *Yin Min Zhu v. Triple L. Group, LLC*, 64 A.D. 3d 590, 881 N.Y.S.2d 324 (2nd Dept. 2009) (July 7, 2009). Plaintiff established a claim under §240(1) through evidence that established that he fell from an unsecured ladder and that the failure to secure the ladder was the proximate cause of his injuries.

Practice Note: The fact that the plaintiff was the sole witness to the accident does not alter the court's holding.

2. *Novak v. Raymond L. Del Savio*, 64 A.D.3d 636, 883 N.Y.S.2d 558 (2nd Dept. 2009) (July 14, 2009). Plaintiff, at the time of his injury, was standing on a ladder when a pipe he was installing came loose and fell hitting him on his face. The court dismissed the plaintiff's §2410(1) claim because the pipe was not in the process of being hoisted or secured and did not require securing for the purpose of being affixed to the ceiling.

Practice Note: Not all objects that fall on a worker give rise to the extra ordinary protection of §240(1).

3. *Jennosa v. Vermeer Manufacturing Company*, 64 A.D.3d 630, 883 N.Y.S.2d 276 (2nd Dept. 2009) (July 14, 2009). The court held that the owner of the residential premises was not liable under §200 or common law negligence because the owner did not have actual or constructive knowledge of the alleged dangerous condition.

Practice Note: The court also considered the issue of lost evidence and refused to apply sanctions because the evidence was not central to the case and did not prejudice the plaintiff.

4. *Weisman v. Duane Reade, Inc.*, 64 A.D.3d 643, 883 N.Y.S.2d 137 (2nd Dept. 2009) (July 14, 2009). The plaintiff was injured when he fell from a beam he was standing on in order to reach an inoperable HVAC unit located on a roof. The court held that there was an issue of fact as to which the plaintiff was performing routine maintenance rather than repair.

Practice Note: In assessing the activity being performed by the plaintiff, the courts looked at the contractual arrangement and the nature of the work being performed.

5. *Hirsch v. Blake Housing, LLC*. The court held that the negligence of the general contractor and subcontractor/employer could not be determined as a matter of law. Therefore, the court refused to grant the general contractor contractual indemnification against the subcontractor/employer.

Practice Note: Under relevant law, the party seeking indemnification must be free from negligence and the contract



provision required that the party from whom indemnification was sought must be negligent.

6. *Weitz v. Anzek Construction Corporation*, 65 A.D.3d 678, 885 N.Y.S.2d 314 (2nd Dept. 2009) (Aug. 2009). The plaintiff was injured when a six foot metal object he was holding came in contact with overhead electrical wires. One of the subcontractors moved for summary judgment contending that the plaintiff's action should be dismissed because it was the plaintiff's employer. The subcontractor relied upon a finding by the workers' compensation board that the subcontractor should pay the plaintiff's benefits. The court rejected this argument and found that there were issues of fact as to whether the subcontractor was the plaintiff's employer. As to the finding of the Workers' Compensation Board, the court held there was not an adjudication of the employment relationship. The court further refused to dismiss the §§200 and 241(6) claims because there was insufficient proof that the defendant did not direct or control the plaintiff's work.

Practice Note: The court also discussed the special employee issue and held the proof was not undisputed.

7. *Preneta v. North Castle, Inc.*, 65 A.D.3d 1027, 885 N.Y.S.2d 322 (2nd Dept. 2009) (Sept. 8, 2009). The plaintiff, at the time of his injury was painting from a closed A-frame ladder which slid out from under him causing him to fall and injure himself. A-frame ladder was leaning against the house. The court reversed the trial court's refusal to grant the plaintiff's CPLR 4401 motion after a jury trial and held that there is no rationale process by which the fact trier could base a finding in favor of the nonmoving party. The court noted that the only reasonable view of the evidence is that the defendant failed to provide proper protection under Labor Law §240(1).

Practice Note: It is important to assess the burden of proof under a CPLR 4401 motion.

8. *Morocho v. Marino Enterprises Contracting Corp.*, 65 A.D.3d 675, N.Y.S.2d 99 (2nd Dept. 2009) (Aug. 25, 2009). Plaintiff was renovating kitchen cabinets in a one-family dwelling when a power saw he was using recoiled and struck him in the face. The court dismissed the §241(6) claim based on the one- and two-family dwelling exemption because the homeowner did not direct or control the work being performed and the work being performed was for residential purposes.

Practice Note: The common law and §200 claims were also dismissed because the accident arose from the means and methods of the plaintiff's work and the defendant did not exercise supervision or control.

9. *Wong v. City of New York*, 65 A.D.3d 1000, 885 N.Y.S.2d 120 (2nd Dept. 2009) (Sept. 8, 2009). The plaintiff was injured when he fell from a lift/ramp near the cargo door of an airplane owned by the airlines (his employer). The court held that the airplane was a



structure within §240(1). The court refused to dismiss the action under §240(1) against the fee owner of the premises even though it had leased the premise to another entity when in turn leased it to the plaintiff's employer. The court dismissed the §200 and common law negligence claim because there was not sufficient proof that the owner had authority to supervise or control the method or manner of the work being performed.

Practice Note: In this Department fee or title owners are automatically liable under §240(1). That may not be the case in other Departments.

10. *Colon v. Bet Torah, Inc.*, 887 N.Y.S.2d 611 (2nd Dept. 2009) (Oct. 13, 2009). Plaintiff, at the time of his injury, was carrying materials from one section of the job site to another and was injured when a cover on a grease pit dislodged causing him to fall into the pit. An owner's liability under §200 on common law negligence where it created the dangerous condition or failed to remedy the condition after having actual or constructive notice.

Practice Note: Reasonable inspection of the premises is necessary and an owner that has control of the premises must establish this defense.

11. *Bridges v. Wyandanch Community Development Corporation*, 888 N.Y.S.2d 142 (2nd Dept. 2009) (Oct. 27, 2009). The two plaintiffs in this action were hired to do painting on the interior of a building and died because of carbon monoxide poisoning. The court held that the owner and general contractor were liable under §200 and common law negligence because they created the condition causing the injuries or where they failed to remedy a dangerous or defective condition of which they had actual or constructive notice.

Practice Note: The owner and general contractor in order to prevail on a motion for summary judgment must prove this appropriate defense.

12. *Herrnsdorf v. Bernard Janowitz Construction Corporation*, 2009 N.Y. App. Div. LEXIS (Nov. 4, 2009). The plaintiff, a carpenter, was injured when he fell off a roof of a house while installing metal trim. The court held that the plaintiff failed to establish a prima facie case that the ladder did not provide him with proper protection under §240 and that his actions were the sole proximate cause of his injuries.

Practice Note: This decision cites all relevant case law on the sole proximate cause defense.

13. *Monaghan v. 540 Investment Land Company LLC*, 888 N.Y.S.2d 24 (2nd Dept. 2009)(Oct. 29, 2009). The plaintiff's complaint under §240 was dismissed because at the time of the plaintiff's injuries he was removing a ballast from a fluorescent light fixture which constitute routine maintenance. This is not a covered activity.



Practice Note: In reaching its decision, the court noted that in order to be a protected activity the work “entitled much more than merely changing a lightbulb.”

14. *Quilliams v. Half Hollow Hills School District*, 2009 N.Y. App. Div. LEXIS 8045. (Nov. 10, 2009). At issue on this appeal were the contractual indemnification claims of the owner and general contractor against the subcontractor/employer. The court held that the fact that the general contractor exercised duties to oversee work and to ensure compliance with safety regulations did not raise a triable issue of fact or to whether the general contractor was negligent. Therefore, the court held that the general contractor was entitled to contractual indemnification.

Practice Note: In order to preclude contractual indemnification, the party seeking indemnification must be proven to have been negligent. Proof must be more than hope and speculation.

15. *Mendelsohn v. John Goodman*, 2009 N.Y. App. Div. LEXIS 8034 (Nov. 10, 2009). The plaintiff was injured when he was struck by a plank that fell from a scaffold. The owner of the premises sought common law indemnification under a verbal agreement against a subcontractor. The court denied the owner’s motion because it failed to demonstrate that it was not negligent and that the subcontractor was either negligent or exclusively controlled the plaintiff’s work site.

Practice Note: Where common law indemnification is allowed the degree of fault between the parties still has to be assessed.

16. *Caballero v. Benjamin Beechwood, LLC*, 2009 N.Y. App. Div. LEXIS 8427 (Nov. 17, 2009). The plaintiff was injured when he fell from a scaffold while performing drywall work. The plaintiff established a prima facie case that a wheel of the scaffold slipped into a hole causing him to fall. The court also granted the defendant’s contractual indemnification claim against the plaintiff’s employer.

Practice Note: Even though the indemnification agreement purported to indemnify a party for its own negligence and is covered under GOL §5-322.1, such an agreement does not violate the GOL if it authorizes indemnification to the fullest extent permitted by law.

17. *Bovis v. Crab Meadow Enterprises, Ltd.*, 2009 N.Y. App. Div. LEXIS 8418 (Nov. 17, 2009). At issue on this appeal was whether the plaintiff’s employer was entitled to summary judgment dismissing the contractual indemnification claim against it. The employer failed to establish that it did enter into an indemnification agreement with the defendant prior to the date of the accident.



Practice Note: In order to shift the risk, the plaintiff must have sustained a grave injury or there must be an agreement for contribution or indemnification.

18. *Minchala v. Port Authority of New York and New Jersey*, 888 N.Y.S.2d 777 (2nd Dept. 2009) (Nov. 24, 2009). The plaintiff was injured when a cement barrier that was on a forklift fell 7 feet striking him. The court held that plaintiff established that his work was ancillary to the ongoing construction – and that an elevation – related risk was involved.

Practice Note: The plaintiff, in order to recover under §240, must be performing a protected activity and be injured by an elevation - related risk.

19. *Sakai-Figurny v. Irastan, LLC*, 888 N.Y.S.2d 753 (2nd Dept. 2009) (Nov. 24, 2009). Plaintiff was injured while carrying wood up a dirt slope leading to the front door of a two-family home. The §§240(1) and 241(6) claims were dismissed because the defendant was not an owner, contractor or agent under the meaning of the statute.

Practice Note: Not all falls on work sites are protected under §240(1).

20. *LaGiudice v. Sleepy's Inc.*, 2009 N.Y. App. Div. LEXIS 8617 (Nov. 24, 2009). Plaintiff was injured when he fell while descending a six foot fall A-frame ladder after installing an electrical exit sign. The court held that this was a protected activity and not routine maintenance. Even though the ladder moved for no apparent reason, the court found a §240(1) violation.

Practice Note: With respect to §200 claims the court noted that they fall into two categories - - those that result from a dangerous or defective condition at a work site and those involving the manner in which the work is performed.

21. *Salvagno v. J.P. Spano and Company, Inc.*, 2009 N.Y. App. Div. LEXIS 8651 (Nov. 24, 2006). A co-worker of a plaintiff fell from an A-frame ladder that kicked out. As the co-worker was falling, a saw that he was holding struck and injured the plaintiff who was working below. The court held that the injury occurred when the protective device that was provided was inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person.

Practice Note: This case evidences the court's willingness to extend the application of §240 to situations other than the traditional falling worker and/or falling object fact pattern.

22. *Radoncic v. Independence Garden Owners Corp.*, 2009 N.Y. App. Div. LEXIS 8646 (Nov. 24, 2009). Plaintiff was injured when he fell from a ladder as he was cutting down a tree



branch that had fallen against utility lines. He was employed by the building management company. The court discussed the §240(1) and 241(6) cause of action because tree cutting is not one of the activities covered by these statutes. The counsel also dismissed the §200 and common law negligence causes of action because general supervision authority is insufficient to establish liability.

Practice Note: Not all falls from a height are covered by §240(1) because plaintiff must be performing a protected activity.

23. *Yax v. Development Team, Inc.*, 2009 N.Y. App. Div. LEXIS 8665 (Nov. 24, 2009). The defendant raised triable issues of fact as to whether the plaintiff was a recalcitrant worker under §240(1). The plaintiff was provided with certain safety devices; the safety devices were readily available for their use and plaintiff was instructed to use the device. With respect to the §241(6) cause of action, the court found that there were issues of fact as to whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances.

Practice Note: The recalcitrant worker defense is extremely fact specific and each requirement must be proven.

24. *Enos v. Werlatone, Inc.*, 2009 App. Div. LEXIS 8812 (Dec. 1, 2009). The plaintiff was injured when a co-worker dropped a tree on his back. Tree removal did not constitute an enumerated activity under §240(1); therefore, the §240(1) was dismissed. In reaching its decision, the court also noted that no protection is afforded under the statute for an activity that occurs before an enumerated activity. The §241(6) cause of action was dismissed because the plaintiff was not performing construction, excavation or demolition work.

Practice Note: The court noted that construction work is defined expansively and tree removal is not a protected activity.

25. *Picano v. Rockefeller Center North, Inc.*, 2009 N.Y. App. Div. LEXIS 8767. Even though the ladder was not defective, because no one was holding the ladder from which plaintiff fell when it suddenly shifted or wobbled, and that no safety devices were provided to prevent the ladder from slipping or plaintiff from falling; the plaintiff established a §240(1) violation.

Practice Note: A ladder has to be properly placed, as well as, not defective.

26. *Riffo-Velozo v. Village of Scarsdale*, 2009 N.Y. App. Div. LEXIS 9038. (Dec. 8, 2009). The plaintiff was injured while installing a new garage door when he fell from a ladder leaning against the building. At the time of his injury, the plaintiff was connecting the door to the door opener. The court noted that the accident could have been prevented by the proper placement or erection of the ladder; therefore, the plaintiff established a *prima facie* case under §240(1).



Practice Note: The court held that the fact that the garage door opened was not such an extraordinary nature or so attenuated from the statutory violation to constitute a superseding cause sufficient to relieve the defendant of liability.

27. *Baginski v. Queen Grand Realty, LLC*, 2009 N.Y. App. Div. LEXIS 9235 (Dec. 15, 2009). The plaintiff, an asbestos remover, was injured when he stepped on a plank he used to gain access to the work site and the plank broke causing him to fall. At issue on this appeal, is the contractual indemnification cause of action. The court noted that based on the plain language of the indemnity provision there was an indemnification obligation.

Practice Note: In reaching its decision, the court noted that a contractual indemnification provision must be strictly construed to avoid imposing a duty where the parties did not contend.

28. *Singh v. City of New York*, 2009 N.Y. App. Div. LEXIS 9412 (Dec. 22, 2009). The plaintiff was injured when he fell from a ladder while cutting down a 16-foot fence at a construction site. The court held that the plaintiff established a *prima facie* case.

Practice Note: The court noted the defendant failed to raise a triable issue of fact as to whether the plaintiff was hired to work on the construction site and given permission to work on the date of the accident.

29. *Ravinov v. Popeye's*, 2009 N.Y. App. Div. LEXIS 9447 (Dec. 22, 2009). The plaintiff was injured when a grate fell from the ceiling, striking him. The court held that there was an issue of fact as to whether the falling grate was required to be secured by a hoisting or securing device as enumerated in the statute.

Practice Note: Would the court's decision have changed if it followed the more expansive approach to §240 liability?

30. *Tarpey v. Kolanu Partners, LLC*, 2009 N.Y. App. Div. LEXIS 9458 (Dec. 22, 2009). The issue on this appeal involved the application of contractual indemnification principles. The court denied contractual indemnification because there were issues of fact as to whether the party seeking indemnification was negligent.

Practice Note: The court focuses on whether the plaintiff's injuries were caused by a dangerous condition or the manner in which the work was being performed.

31. *Ferreira v. Village of Kings Point*, 2009 N.Y. App. Div. LEXIS 9423 (Dec. 22, 2009). The defendant contended that it was not an owner within the purview of §240(1). The court noted that, in order for an owner to be liable under the Labor Law §§240(1) and 241(6), there



must be some nexus between the owner and the worker, whether by lease agreement, or grant of easement, or other property interest. The fact the owner did not have control does not insulate an owner for liability. However, the court dismissed the §240(1) claim because the plaintiff's injury, which was caused by a collapse of a trench, was not protected under §240(1).

Practice Note: While, traditionally, the collapse of a trench does not create a violation of §240(1), each case must be assessed on its facts.

THIRD DEPARTMENT

1. *Ostuni v. Town of Inlet*, 64 A.D.3d 854, 881 N.Y.S.2d 678 (3d Dept. 2009) (July 2, 2009). At issue on this appeal was the enforceability of the indemnification provision under GOL §5-322.1(1). The court held that contractual indemnification was enforceable and noted that "partial indemnification" agreements do not run afoul of the GOL.

Practice Note: The agreement would also be enforceable only in the event the party seeking indemnification was free from active negligence, instead of liability being imputed as vicarious.

2. *Alexander v. Fabian M. Hart*, 64 A.D.3d 940, 884 N.Y.S.2d 181 (3d Dept. 2009) (July 9, 2009). The defendants were liable under the New York Labor Law, even though the accident occurred on an Indian reservation. In reaching its decision, the court noted that liability under the Labor Law is not limited to titleholders, but also encompasses a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his/her benefit. Here the defendants held a "Saint Regis Mohawk Indian Reservation Right to Use and Occupancy Deed." The plaintiff was performing a repair activity and not routine maintenance.

Practice Note: Routine maintenance involves "replacing components that require replacement in the course of normal wear and tear."

3. *Yost v. Peter Quartararo*, 64 A.D.3d 1073, 883 N.Y.S.2d 630 (3d Dept. 2009) (July 23, 2009). Plaintiff was injured when he fell as a result of a railing on a balcony breaking. The plaintiff was leaning against the railing while attempting to secure a tarp on a roof. The court held that the plaintiff demonstrated that he was exposed to "the exceptionally dangerous condition posed by elevation differentials at work sites" and that no safety devices were provided to protect the plaintiff from the fall.



Practice Note: The court did recognize that the railing was a permanent appurtenance to the building, which is not a functional equivalent to a scaffold, etc.

4. *Kindlon v. Schoharie Central School District*, 887 N.Y.2d 310 (3d Dept. 2009) (Oct. 22, 2009). The plaintiff's employer had been hired to remove part of the roof. Plaintiff was injured when he fell through the roof where a part had been removed. The court held that the collapse of the worksite itself, even if it is part of a permanent structure, will constitute a *prima facie* violation of §240(1), especially if the structure being worked upon is acting as the functional equivalent of a scaffold. There was not any safety devices provided to protect workers from falling through the roof. The court dismissed the action against the construction manager.

Practice Note: Plaintiff was not required to prove that safety devices would have prevented the accident.

5. *Fassett v. Wegmans Food Markets, Inc.*, 888 N.Y.S.2d 635 (3d Dept. 2009) (Oct. 29, 2009). The court dismissed the §200 and common law negligence claims against the owner because there was no evidence that the owner exerted any actual control or supervision over the plaintiff or the manner in which the work was performed. General contractual authority to halt work or object to work was sufficient. These causes of action were not dismissed against another defendant who had contracted to provide construction monitoring and inspection, because there were issues of fact as to the exercise of the requisite supervisory or safety control.

Practice Note: The court also noted that §241(6) applies to the area where the work was actually being conducted and the entire construction site.

6. *Chapman v. Town of Copake*, 2009 N.Y. App. Div. LEXIS 8299 (Nov. 12, 2009). The plaintiff was injured when a retaining wall collapsed onto him while he was digging holes to install concrete footers near the wall. The §§240(1) and 241(6) causes of action were dismissed against one defendant because he was neither an owner's agent nor a contractor responsible for the work. Also, the §200 and common law negligence causes of action were dismissed against that defendant had no obligation with regard to safety at the work site. The Labor Law claims were against the owners, based upon the one- and two-family dwelling exemption. The fact that the owners were involved in basic planning and coordination of the renovation project was not sufficient to defeat the exemption.

Practice Note: Any analysis of this exemption is fact-specific and a legitimately concerned homeowner does not lose the exemption.

7. *Auchampaugh v. Syracuse University*, 2009 N.Y. App. Div. LEXIS 7967 (Nov. 12, 2009). At issue on this appeal was whether an indemnity clause in an agreement was enforceable. Specifically, the issue was whether an indemnity agreement was entered into. The court held



that there were issues of fact as to whether the one party agreed to be bound by the clause (*i.e.*, unsigned purchase order).

Practice Note: The timing of the issuance of the indemnity clause and the actions of the parties with respect to the clause are critical to the court's assessment.

8. *Husted v. Central New York Oil and Gas Company, LLC*, 2009 N.Y. App. Div. LEXIS 8752 (Dec. 3, 2009). Plaintiff fell from a stepladder when one of the ladder's legs slipped into a roughly three-inch diameter hole in the floor by an employee of one contractor and hidden by plastic sheeting or construction debris placed by another contractor. At issue on this appeal was whether the contractor defendants and/or the owner were liable under §200 and common law negligence and whether the owner was entitled to contractual indemnification. The court held that there were issues of fact as to liability and denied the owner's contractual indemnification claim.

Practice Note: The terms of the indemnification clause are critical, especially where it is triggered by the negligence of the party that agreed to indemnify the other party.

9. *Intelisano v. Sam Greco Construction, Inc.*, 2009 N.Y. App. Div. LEXIS 8960 (Dec. 10, 2009). The plaintiff was assigned to assist in unloading bundles of insulation from a flatbed truck. Also, he was trying to swing himself onto the top of the bundles, which were ten feet above the flatbed, and the flatbed was four feet above the ground. While he was swinging himself, he slipped and fell to the ground. The court held that §240(1) applies where some risk-enhancing circumstances implicate the protection of the statute and granted the plaintiff's motion for summary judgment.

Practice Note: While a fall from a flatbed is not covered by §240(1), here there was a risk-enhancing circumstance.

FOURTH DEPARTMENT

1. *Rigby v. The Brisky Family Limited Partnership*, 64 A.D.3d 1169, 883 N.Y.S.2d 673 (4th Dept. 2009) (July 2, 2009). The plaintiff was working with trusses 16 feet above the ground. The trusses were being elevated by a forklift, and the plaintiff accidentally set a truss on top of one of his fingers. The court dismissed the plaintiff's §240(1) claim because the alleged injury did not flow from the application of the force of gravity to an object or person.

Practice Note: The court noted that the plaintiff would have sustained his injury even if he was using a safety device to protect him from falling.



2. *Mergenhagen v. Dish Network Service, LLC*, 64 A.D.3d 1170, 883 N.Y.S.2d 405 (4th Dept. 2009) (July 2, 2009). The plaintiff was injured when he slipped and fell off the roof of the residence where he was installing a satellite dish. The court held that the defendants were liable under §240(1) because they were contractors. Entities that have the right and power to enforce safety standards and choose responsible subcontractors are liable under §240(1) even if they do not exercise the right.

Practice Note: The industrial codes relied on by plaintiff supported a 241(6) §claim.

3. *Buckmann v. State of New York*, 64 A.D.3d 1137, 881 N.Y.S.2d 760 (4th Dept. 2009) (July 2, 2009). Plaintiff was injured when she fell from a platform while repairing a non-functioning signal lamp. The court held that the plaintiff was engaged in repairing because the lens of the light was inoperable and not functioning properly (i.e. broken). Plaintiff was not doing routine maintenance because there was no proof the lens never break from wear and tear.

Practice Note: The sole proximate cause defense was not applicable because there was not any evidence that adequate safety devices were available; worker knew both that they were available and was expected to use them, plaintiff chose for no-good reason not to do so and had plaintiff not made that choice she would not have been injured.

4. *Reed v. NEA Residential, Inc.*, 64 A.D.3d 1148, 881 N.Y.S.2d 345 (4th Dept. 2009) (July 2, 2009). The plaintiff was performing framing work on a single-family residence at the time of his injury. At issue was whether the project coordinator for the construction project was liable under §241(6). Specifically, the issue was whether the coordinator was a statutory agent of the property owner pursuant the agreement or whether the coordinator was a general contractor.

Practice Note: A general contractor is one defined as being responsible for coordinating and supervising the project and invested with a concomitant power to enforce safety standards and to hire responsible contractors.

5. *Scaparo v. Village of Ilion*, 64 A.D.3d 1209, 883 N.Y.S.2d 677 (4th Dept. 2009) (July 10, 2009). In their 4-2 decision, the court considered whether the church was an “owner” in order to be liable under §240(1) and 241(6). The majority of the court held that while the work was being performed for the benefit of the church it did not have any ownership interest in the property where the sewer line was being placed. The dissent noted that the term owner is not limited to titleholders and the facts of the case raised triable issues of fact.

Practice Note: Both the majority and dissent considered the same determination of owner – owner has been held to encompass a person who has an interest in the property and who fulfilled the role of the owner by contracting to have the work performed for its benefit.



6. *McNabb v. OOT Bros., Inc.*, 64 A.D.3d 1237, 882 N.Y.S.2d 792 (4th Dept. 2009). The plaintiff, at the time of his injury, was working on stilts when he tripped over an electrical cord and fell causing injuries. The court dismissed the §240(1) claim against all the defendants because the accident did not fall within the purview of the statute. As to the §241(6) claim against the owner, the court applied the one-or two-family exemption and noted that they did not control or direct the manner of the plaintiff's work. The §200 and common law negligence claims were dismissed because there was not any direction or control.

Practice Note: The exemption applied even though the owner was present at the work site from time to time and hired subcontractors.

7. *Gizowski v. State of New York*, 887 N.Y.S.2d 383 (4th Dept. 2009) (Oct. 2, 2009). A portion of the ceiling that the plaintiff was demolishing collapsed and struck the scaffold on which the plaintiff was working which caused the plaintiff to go up into the air and fall to the ground. The court held that the plaintiff met its prima facie burden under §240(1) by proving a lack of a proper safety device to prevent the ceiling from falling on the scaffold. The court refused to apply the sole proximate cause defense because the plaintiff's actions constituted contributory negligent at best.

Practice Note: The court also refused to dismiss the §241(6) cause of action as some of the industrial codes were applicable.

8. *McGee v. Dale H. Van Erden*, 885 N.Y.S.2d 864 (4th Dept. 2009) (Oct. 2, 2009). The plaintiff was injured when he fell to the ground from the rafter of a barn while he was installing hurricane clips. The court held that the trial court erred in deciding the motion absent a determination of the workers' compensation board on the issue of whether the plaintiff was an employee. An employee of the defendant, the defendant was entitled to the application of the exclusive remedy of workers' compensation defense.

Practice Note: The workers' Compensation board has exclusive jurisdiction.

9. *Hunt v. Ciminelli-Cowper Vo., Inc.*, 887 N.Y.S.2d 395 (4th Dept. 2009) (Oct. 9, 2009). The plaintiff was injured when he slipped and fell on an icy and unlit path while performing construction work. At issue on this appeal was the liability between and among the various defendants. With respect to the snow removal contractor, the court held that there were issues of fact as to whether that contractor failed to remove snow from the area where the accident occurred.

Practice Note: The decision is very fact specific and outlines not only the parameters of contractual indemnification, but the failure to procure insurance.

10. *Crandall v. Wright Wisner Distributing Corp.*, 887 N.Y.S.2d 737 (4th Dept. 2009) (Oct. 9, 2009). The plaintiff was injured when he was struck by an overhead garage door while working on the floor of a truck wash bay. At issue on their appeal was whether the defendant



retained control over the work throughout the course of the construction project to make it liable under §200 and common law negligence.

Practice Note: In reaching its decision the court considered the doctrine of res ipsa loquitor.

11. *O'Donnell v. Buffalo-DS Associates*, 2009 N.Y. App. Div. 8220 (Nov. 13, 2009). Plaintiff was injured while cranking a hand-operator hoisting mechanism that was being used to raise a hoist. The court dismissed the §240(1) claim noting that plaintiff's injuries did not result from an elevation-related risk under the statute even though the force of gravity acted upon the mechanism.

Practice Note: The court rejected the plaintiff's expert because his opinion was based on speculation.

12. *Dineen v. Rechichi*, 2009 N.Y. App. Div. LEXIS 8179 (Nov. 13, 2009). At issue on this appeal, is whether the owners of the premises are entitled to the one-and two-family dwelling exemption under §§240(1) and 241(6). The plaintiff was repairing a barn that was used solely for residential purposes. At the time of the plaintiff's injury, the residential home had not been built. The court applied the exemption and reviewed the "intentions" of the owners at the time of the injury. The court concluded that the barn was going to be used for residential purposes.

Practice Note: This case gives an excellent analysis of the purpose and background of the one- and two-family dwelling exemption.

13. *Morgan v. David Jacobs and Kirst Construction, Inc.*, 887 N.Y.S.2d 903 (4th Dept. 2009) (Nov. 13, 2009). Plaintiff was injured while attempting to start a roof-cutting machine. The court dismissed the §241(6) claim because the regulation (12 N.Y.D.R.R. 23-9.2(a) relied upon was not specific enough to permit recovery under §241(6).

Practice Note: In assessing the viability of a §241(6), the Pattern Jury Instructions can be used to determine whether a particular regulation has been addressed from a specific standpoint.

14. *Moll v. Brandwood*, The plaintiff was injured when his foot got caught in a top soil shredding machine owned by his employer. The court dismissed the §241(6) claim because the plaintiff was not involved in construction or excavation work and not part of the construction work going on at the premises.

Practice Note: There can be separate activities going on at a premises -- some of which are not protected under the Labor Law.

15. *Harris v. Hueber-Breuer Construction Co., Inc.*, 2009 N.Y. App. Div. LEXIS 8126 (Nov. 13, 2009). Plaintiff was injured when he attempted to descend a multi-level scaffold from the



roof of the building to the ground. Plaintiff contends that the lower tier was not fully planked and he injured his neck attempting to prevent himself from falling as he stepped onto the lower tier. The court held that there were triable issues of fact as to whether the injury was proximately caused by the failure of a safety device to afford him proper protection from an elevation related risk and whether there was an alternative means to descend the scaffold (i.e. sole proximate cause).

Practice Note: The court also treated such issues as to whether a subcontractor was an agent of the general contractor and owner and whether the subcontract had requested supervisory control over the work to prevent the unsafe condition or exposure to it.

16. *Andrews v. Northwest Auto Mall*, 888 N.Y.S.2d 451 (4th Dept. 2009)(Nov. 20, 2009). Plaintiff was injured when he fell from a ladder while installing a security system. The court held that the plaintiff was altering a building and therefore performing a protected activity under §240(1). The plaintiff was furnished with a defective ladder which proximately caused his fall and resulting injuries.

Practice Note: Not only must the plaintiff be performing a protected activity, but there must be a violation of §240(1) that proximately caused the fall and injuries.

17. *Gimeno v. American Signature, Inc.*, 888 N.Y.S.2d 839 (4th Dept. 20089)(Nov. 20, 2009). Plaintiff, at the time of his injury, was attaching plastic sheeting over the scaffolding. Plaintiff was on a platform which was attached to a forklift-like device. The device came detached from the platform causing the plaintiff and the forklift to fall 15 feet. Plaintiff was attached to the forklift by a harness and lanyard. The court held that the plaintiff started a §240(1) claim and rejected the defendant's sole proximate cause argument.

Practice Note: There was not any evidence that the plaintiff was properly instructed or trained.

18. *Brown v. Rome Up & Running, Inc.*, 2009 N.Y. App. Div. LEXIS 9599 (Dec. 30, 2009). Plaintiff was injured when he fell from a ladder. At issue was whether the negligence cause of action should have been dismissed. The court held that there were issues of fact as to whether it was foreseeable that the plaintiff should have been on the premises.

Practice Note: The standard applicable is:

The duty of a landowner to maintain its property in a safe condition extends to persons where presence is reasonably foreseeable by the landowner. Status is not determined on the basis of a contractor; visitor or trespasser.

19. *Long v. Cellino & Barnes, P.C.*, 2009 N.Y. App. Div. LEXIS 9602 (Dec. 30, 2009). At issue on this appeal is whether the plaintiff's attorney failure to protect the dismissal of the



plaintiff's §240(1) constitutes malpractice. Because the court determined that the plaintiff would have prevailed on its claim, the plaintiff's counsel was liable to plaintiff.

Practice Note: Practitioners must be prepared to plead and prove various causes of actions under the Labor Law.

20. *Rowland v. Wilmo-Rite, Inc.*, 2009 N.Y. App. Div. LEXIS 9681 (Dec. 30, 2009). Plaintiff was injured when he fell from a ladder while performing electrical work at a mall. The court held that the construction manager in this case was not liable as an agent of the mall owner. In reaching its decision, the court refused to allow additional discovery or amend his answer to include the owner as a defendant because the statute of limitations had run.

Practice Note: The plaintiff should have asserted all grounds for recovery and all potential liable parties in its original pleadings.

21. *Tafelski v. Buffalo City Cemetery, Inc.*, 2009 N.Y. App. Div. LEXIS 9782 (Dec. 30, 2009). Plaintiff was standing on the scaffold and a co-worker was standing above the plaintiff. The co-worker dropped a plywood panel. The plywood panel either struck the plaintiff or jarred the scaffold which caused the plaintiff to lose his balance and slip several rungs down the scaffold. The court noted that the plaintiff established that he was not furnished with the appropriate safety devices within the meaning of §240(1). The court also dismissed the §241(6) claim because the industrial regulation were not applicable to the facts.

Practice Note: The court did hold that the object was not a "falling object" because the co-worker intended to drop the panel.

SECOND CIRCUIT

1. *Businesses for A Better New York v. Linda Angello*, 2009 U.S. App. LEXIS 17962 (Aug. 12, 2009). The plaintiffs' in this case were challenging the constitutionality of Labor Law §240(1). The Court rejected the plaintiffs' various arguments and concluded that the "scaffolding law" was not unconstitutional.

Practice Note: Of interest, the Court refused to address several arguments which were raised for the first time on appeal and not below; and noted that plaintiffs' have not demonstrated manifest injustice or extraordinary need for this Court to consider the argument.

2. *McNeight v. Railcar Custom Leasing, LLC*, 2009 U.S. App. LEXIS 19874 (Sept. 4, 2009). The plaintiff was injured when he fell 6 feet from the brake pipe on a rail car. The issue on this appeal is whether the plaintiff had to work at an elevation to turn the hand brake. The Court held that the plaintiff's evidence was insufficient to establish that he had to work at an elevation. The Court also dismissed the §241(6) claim because the brake pipe was not an



elevated working surface. It was not a floor or passageway either, but was a momentary step not an elevated work surface.

Practice Note: The plaintiff could have performed his work from the ground and therefore he was not an elevated work surface.

3. *Vasquez v. GMD Shipyard Corp.*, 582 F.3d 293 (2d Cir. 2009)(Sept. 15, 2009). The plaintiff/decendent fell to his death while ascending the wall of a tank aboard a vessel in dry dock at the Brooklyn Navy Yard. Prior to his fall, the plaintiff/decendent stepped off the ladder onto angle irons to allow a co-worker to pass. The Court dismissed the §240(1) claim. Initially, the Court noted that it had maritime jurisdiction. Further, the Court held because the plaintiff/decendent deliberately stepped off the ladder and abandoned the safety device he is not entitled to the protection of §240(1). There was a misuse of the safety device that was provided. The §241(6) claim was dismissed because the industrial regulations relied on were inapplicable.

Practice Note: Where an injured party makes a choice not to use an adequate safety device liability under the Labor Law should not attach.

FEDERAL COURTS:

Eastern District

1. *Agate v. The City of New York*, 2009 U.S. Dist. LEXIS 92130 (Oct. 2, 2009). The plaintiff was dismantling a Ferris wheel on the City property and was injured by a metal pole that fell. The Court held that defendants were liable under §240(1) because the plaintiff was injured by a falling object that fell due to its being inadequately secured while he was engaged in altering or demolishing a structure (Ferris wheel). The Court also allowed the §241(6) claim because the plaintiff in his moving papers identified the relevant regulations. There was a genuine issue of fact as to whether defendants were liable under §200 and common law negligence based upon the activities of the onsite inspection.

Practice Note: In assessing liability under common law and §200, the courts will look at the contractual arrangements between the parties and the actual onsite activities.

Southern District

1. *Balbino v. Akam Associates, Inc.*, 2009 U.S. Dist. LEXIS 102759 (Nov. 4, 2009). While working on a construction site, the plaintiff was injured when he fell from the penthouse roof. At issue in this case, was whether the Court, in its discretion, will allow a defendant, to implead another based on a claim for indemnification under Fed.R.Civ.P.

14(a). The Court allowed the impleader, even though the relevant time allowed had passed.

Practice Note: There are dangers in violating procedural rules and while the discretion of the Court is freely given it often depends on the procedural posture of the case.



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