NEW YORK APPELLATE DIGEST

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IN THIS ISSUE

*Summaries of Selected Appellate Decisions and Opinions from January 2013 through November 2016 Which Flesh Out the Elements of Proof In Construction-Accident Actions Brought Pursuant to Labor Law 240(1)

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LABOR LAW 240(1) LIABILITY

The case summaries here, collected over the past (nearly) four years, identify proof problems which appear again and again at the appellate level, an indication the issues are not well understood.

This pamphlet addresses Labor Law 240(1) causes of action, a confusing area of the law.

Falling off a non-defective ladder is sometimes a covered accident, other times not.

Being struck by an object which fell off a pallet is sometimes covered, other times not.

Comparative negligence is not a defense. But if a worker's actions constitute the sole proximate cause of injury, the worker cannot recover.

The injury must be the result of the failure to provide a safety device. Is there a safety device that will prevent a fall from the back of a truck?

Is injury from a falling object that was not being hoisted or required to be secured at the time of the accident covered?

Is the injury of a worker told not to work that day covered?

Is an injury which occurred in an area the worker was told to avoid covered?

Hence the idea to create these pamphlets.

By reading through the summaries of the most recent cases, you will be able to identify the issues pertinent to your case and understand how the courts analyze them, before it is too late.

FROM THE EDITOR

This is the 3rd Practice Pamphlet---a compilation of the summaries of New York State appellate decisions addressing Labor Law 240(1) causes of action which were posted on the website www.newyorkappellatedigest.com between January 2013 and November 2016.

To link to the summarized cases in a new tab, hold down the control key (ctrl) and click on the case name.

The Table of Contents (p.2) facilitates moving (by a single click) to each summary.

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Contrary to defendants' contention, their lack of notice or control over plaintiff's work is not dispositive of their liability under Labor Law § 240 (1) (*see Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 340 [2008]). The lease defendants entered into with [plaintiff's employer], which required [plaintiff's employer] to perform substantial demolition and construction work on the leased premises, provides a sufficient "nexus" for imposing liability (*see Morton v State of New York*, 15 NY3d 50, 57 [2010]). **Mutadir v 80-90 Maiden Lane Del LLC, 2013 NY Slip Op 07127, 1st Dept 10-31-13**

Owners and Contractors Strictly Liable for Failure to Provide Safety Device

Labor Law § 240 (1) mandates that owners and contractors "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." The statute imposes absolute liability on owners and contractors whose failure to "provide proper protection to workers employed on a construction site" proximately causes injury to a worker … . **Desena v North Shore Hebrew Academy, 2014 NY Slip Op 05149, 2nd Dept 7-9-14**

Owner's and General Contractor's Duty Is Nondelegable

"[T]he nondelegable duty imposed upon the owner and general contractor under Labor Law § 240 (1) is not met merely by providing safety instructions or by making other safety devices available, but [instead is met] by furnishing, placing and operating such devices so as to give [a worker] proper protection" … . Although plaintiff concedes that he was instructed to use a harness, we conclude that "[d]efendants did not establish [a recalcitrant worker] **defense** merely by showing that plaintiff was instructed to avoid an unsafe practice" … . **Thompson v. Sithe/Independence 2013 NY Slip Op 04134, 4th Dept 6-7-13**

Plaintiff, Who Fell Through an Open Manhole, Entitled to Summary Judgment on Labor Law 240 (1) Cause of Action---Failure to Set Up Guard Rails Was a Proximate Cause--Liability Imposed Regardless of Plaintiff's Own Negligence and Regardless of Whether the Owner, Contractor or Agent Supervised or Controlled the Work

The Court of Appeals, in a full-fledged opinion by Judge Pigott, over a two-judge dissent, determined plaintiff, who fell through an uncovered manhole, was entitled to partial summary judgment on his Labor Law 240 (1) claim based on testimony the manhole should have been surrounded by guard rails. The court also determined there was a question of fact whether the safety consultant, IMS, was liable as a "statutory agent" under Labor Law 240 (1). The court explained that the obligation to provide safety devices is a nondelegable duty which imposes liability regardless of whether owner, contractor or agent supervises or controls the work. Where 240 (1) is violated, the plaintiff's negligence is not a defense, unless plaintiff's negligence is the sole proximate cause of the injury:

Section 240 (1) provides, in relevant part:
"All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor [certain enumerated] and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The statute imposes upon owners, contractors and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work ... . "Where an accident is caused by a violation of the statute, the plaintiff's own negligence will not furnish a defense"; however, "where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability" ... . Thus, in order to recover under section 240 (1), the plaintiff must establish that the statute was violated and that such violation was a proximate cause of his injury ... . **Barreto v Metropolitan Tr. Auth., 2015 NY Slip Op 03875, CtApp 5-7-15**

General Contractor's Control Over Work Site Safety Enough for Labor Law 240(1) Liability but Not Enough for Labor Law 200 Liability

The Second Department determined defendant general contractor (Metro) was not entitled to summary judgment on the Labor Law 240(1) and 241(6) causes of action, but was entitled to summary judgment on the Labor Law 200 and common law negligence causes of action. Plaintiff was injured when the knot on a rope he was tied to while pushing snow off a roof gave way and he fell three stories. The decision illustrates the subtle difference between the amount of supervisory control necessary to hold a general contractor liable under Labor Law 240(1) and the greater amount of supervisory control necessary to hold a general contractor liable under Labor Law 200 and common law negligence:

The failure of an owner or an agent of the owner "to furnish or erect suitable devices to protect workers when work is being performed" results in absolute liability against that owner or the owner's agent under the statute ... , and the duty to provide a suitable safety device under Labor Law § 240(1), moreover, is nondelegable ... . A general contractor is not considered a statutory agent of the property owner for Labor Law § 240(1) liability purposes, unless that contractor had the authority to supervise and control significant aspects of the construction project, such as safety, at the time of the accident ... .

... Metro was [demonstrated to be] a statutory agent of the property owner on the construction project through the submission of Metro's admission that it was hired by the property owners as the general contractor on the project, and evidence that Metro undertook general contractor duties by coordinating and supervising the project, and hiring and paying subcontractors... . ...

Where, as here, "a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work" ... . "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" ... . However, " [t]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient

to impose liability under Labor Law § 200 or for common-law negligence'" ... . **Sanchez v Metro Bldrs. Corp., 2016 NY Slip Op 00957, 2nd Dept 2-10-16**

Out-Of-Possession Landlord (Owner) Can Be Liable Under Labor Law 240 And 241; No Need for Supervision and Control.

The First Department noted that an out-of-possession landlord can be held liable for Labor Law 240 and 241 claims:

... [T]he court improperly dismissed the Labor Law §§ 240 and 241 claims on the ground that the City was an out-of-possession landlord, since the statutes impose liability on property owners without regard to the owner's degree of supervision or control over the premises ... . **Siguencia v City of New York, 2016 NY Slip Op 03108, 1st Dept 4-26-16**

An Agent of an Owner or General Contractor Must Exercise Supervisory Control Over the Injury-Producing Work to Be Liable Under Labor Law 240(1)---Put More Accurately, A Party Must Exercise Supervisory Control and Authority Over the Injury-Producing Work to Be Deemed an Agent of the Owner or General Contractor Under Labor Law 240(1)

Agent's Liability Depends On Control Over Injury-Producing Work

"Labor Law §§ 240 (1) and 241 (6) apply to owners, contractors, and their agents … . A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured …". **Medina v RM Resources, 2013 NY Slip Op 04582, 2nd Dept, 6-19-13**

Agent's Liability Depends On Control Over Injury-Producing Work

"In addition to owners and general contractors, Labor Law § 240 (1) imposes liability upon agents of the property owner who have the ability to control the activity which brought about the injury …". **Arto v Cairo Constr Inc, 2013 NY Slip Op 05863, 2nd Dept 9-18-13**

Contractor Was a Statutory Agent for the Owner

"When the work giving rise to [the duty to conform to the requirements of section 240 (1)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor"… . **Johnson v City of New York, 2014 NY Slip Op 05698, 1st Dept 8-7-14**

Subcontractor Which Supervised Plaintiff's Work Was An Agent for the General Contractor; Right to Exercise Control Is Determinative, Not Whether the Right Was Actually Exercised

"To hold a defendant liable as an agent of the general contractor for violations of Labor Law §§ 240 (1) and 241 (6), there must be a showing that it had the authority to supervise and control the work … . "The determinative factor is whether the party had the right to exercise control over the work, not whether it actually exercised that right" … . Where the owner or general contractor does in fact delegate the duty to conform to the requirements of the Labor Law to a third-party subcontractor, the subcontractor becomes the statutory agent of the owner or general contractor …". **Van Blerkom v America Painting LLC, 2014 NY Slip Op 05858, 2nd Dept 8-20-14**

Prime Contractor and Subcontractor Liability; Must Control the Injury-Producing Work

"As a general rule, a separate prime contractor is not liable under Labor Law §§ 240 or 241 for injuries caused to the employees of other contractors with whom they are not in privity of contract, so long as the contractor has not been delegated the authority to oversee and control the activities of the injured worker" … . * * * " 'Labor Law §§ 200, 240, and 241 liability cannot be assessed against a subcontractor who did not control the work that caused the plaintiff's injury' " … . **Giovanniello v E W Howell, Co., LLC, 2013 NY Slip Op 01805, 2011-11465, Ind No 26676/09, 2nd Dept. 3-20-13**

In Order to Act as an Agent of an Owner or General Contractor More than General Supervisory Authority Is Required

In affirming summary judgment in favor of the defendants, the Second Department described the nature of work-supervision necessary to hold a defendant liable under Labor Law 240 (1), 241 (6), 200 and common-law negligence theories. "General supervisory authority" is not enough to impose liability:

"Labor Law §§ 240(1) and 241(6) apply to owners, contractors, and their agents" ... . "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured" ... . "Similarly, where, as here, a claim against a defendant arises out of alleged defects or dangers in the methods or materials of the work, recovery cannot be had under Labor Law § 200 or pursuant to the principles of common-law negligence unless it is shown that the party to be charged under that theory of liability had the authority to supervise or control the performance of the work" ... . * * *Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging violations of Labor Law §§ 240(1) and 241(6) by establishing that they were not owners, contractors, or statutory agents under those provisions ... . The defendants also established their prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging violations of Labor Law § 200 and common-law negligence through the submission of evidence which demonstrated that they did not have the authority to supervise or control the manner in which the injured plaintiff performed his work ... . To the extent that the defendants had general supervisory authority over the work, this was insufficient in itself to impose liability under the Labor Law ... . **Fucci v Plotke, 2015 NY Slip Op 00726, 2nd Dept 1-28-15**

Construction Manager Did Not Have the Contractual Authority to Control the Manner In Which Work Was Done and In Fact Did Not Control the Manner In Which Work Was Done---Labor Law 240 (1) and 200 Causes of Action Properly Dismissed

The Third Department determined Supreme Court properly dismissed Labor Law 240 (1) and 200 causes of action against the construction manager because the construction manager (Sano-Rubin) did not possess the contractual authority to control, and in fact did not control, the manner in which the work was done. The court explained the analytical criteria:

At the time of plaintiff's injury, Sano-Rubin was serving as the construction manager for various construction projects occurring throughout the school district pursuant to a contract it had entered into with the school district. Plaintiff initially contends that there are factual issues as to whether Sano-Rubin's role renders it a statutory defendant under Labor Law § 240 (1), which "imposes liability only on contractors, owners or their agents" ... . Under this provision, a party that is operating as a construction manager is not deemed a statutory agent unless that party has "the authority to direct, supervise or control the work which brought about the injury" ... . "The key criterion in ascertaining Labor Law § 240 (1) liability is not whether the party charged with the violation actually exercised control over the work, but rather whether [that party] had the right to do so" ... . Similarly, under Labor Law § 200, which codifies the common-law duty of care as between owners, general contractors and their agents, the imposition of liability requires a showing that the defendant possessed the authority to direct or control the activity resulting in injury ... . Sano-Rubin's contract with the school district provided that Sano-Rubin "shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the [w]ork of each of the [c]ontractors" and further, that if Sano-Rubin "observes any safety program or action at the site which it believes is improper or in violation of applicable law or rules, it shall immediately advise the [o]wner." This contract was submitted upon the cross motion, together with proof of the implementation of these contractual limitations on Sano-Rubin's authority ... , These submissions were sufficient to establish its prima facie right to judgment as a matter of law... . **Larkin v Sano-Rubin Constr Co Inc, 2015 NY Slip Op 00672, 3rd Dept 1-29-15**

Contract with Construction Manager Did Not Give the Manager Sufficient Supervisory Control to Impose Liability as a Statutory Agent Under Labor Law 240 (1)

The First Department determined the terms of the contract with the construction manager did not afford the manager sufficient control to impose liability under Labor Law 200. The court further determined the contract did not make the manager an agent for the property owner, such that the manager would be vicariously liable under Labor Law 240 (1) or 246 (1). Plaintiff fell when an elevated plank on which he was standing shifted:

... [T]he CMS (construction management services contra t) specified that [t]he [construction manager] will not supervise, direct, control or have authority over or be responsible for each contractor's means, methods, techniques, sequences or procedures of construction or the safety precautions and programs incident thereto. If it became apparent that the means and methods of construction proposed by the construction contractors would constitute or create a hazard, then the construction manager was required to notify the Commissioner, or . . . his/her duly authorized representative." * * *

Defendants also established that they were not the property owner's statutory agent for purposes of Labor Law §§ 240(1) or 241(6) such that they should be held vicariously liable for plaintiff's injuries .... The CMS did not confer upon the construction manager the right to exercise supervisory control over the individual contractors, nor were defendants authorized to stop the work if their personnel observed an unsafe practice ... . The construction manager was only obligated to notify the project owner or its duly authorized representative of such a situation. **DaSilva v Haks Engrs, 2015 NY Slip Op 01380, 1st Dept 2-17-15**

A "Contractor" (Within the Meaning of Labor Law 240 (1)) Need Only Have the Authority to Control the Work---It Need Not Actually Exercise that Authority

The Second Department determined summary judgment was properly granted to the plaintiff for his Labor Law 240 (1) cause of action. A one-ton concrete plank fell from a jack onto plaintiff's hand. The court noted that the hearsay submitted by the defendant, claiming that plaintiff was injured when he continued to work after being ordered to stop, was not sufficient to defeat plaintiff's summary judgment motion. Hearsay is admissible in this context but hearsay alone will not suffice to raise a triable issue of fact. The court also found that the defendant was a contractor within the meaning of Labor Law 240 (1). To meet the definition, the contractor must have the authority to enforce safety measures and hire responsible subcontractors, but need not have exercised that authority:

"Although hearsay evidence may be considered in opposition to a motion for summary judgment, such evidence alone is not sufficient to defeat the motion" ... .

... "A party which has the authority to enforce safety standards and choose responsible subcontractors is considered a contractor under Labor Law § 240(1)" ... . [Defendant's] status as a contractor under Labor Law § 240(1) is dependent upon whether it had the authority to exercise control over the work, not whether it actually exercised that right ... . **Guanopatin v Flushing Acquisition Holdings, LLC, 2015 NY Slip Op 02933, 2nd Dept 4-8-15**

Lessee Who Has Authority to Control the Work Is Considered an Owner Under the Labor Law

The Second Department reversed Supreme Court finding that plaintiff was entitled to summary judgment on his Labor Law 240 (1) claim. Plaintiff alleged that a ladder twisted out from under him when he was carrying materials to the roof and defendant (Sigma) did not raise a question of fact whether plaintiff's conduct was the sole proximate cause of his injuries. The court explained the circumstances under which a tenant, the defendant (Sigma) here, is liable under the Labor Law:

Labor Law § 240(1) applies to owners, contractors, and their agents (see Labor Law § 240[1]...). A party is deemed to be an agent of an owner or contractor under the Labor Law when it has the " ability to control the activity which brought about the injury'" ... . A lessee of real property that hires a contractor and has the right to control the work at the property is considered to be an owner within the meaning of the law ... . Moreover, a lessee of property may be liable as an "owner" when it "has the right or authority to control the work site, even if the lessee did not hire the general contractor" ... . The

key question is whether the defendant had the right to insist that proper safety practices were followed ... . Here, the evidence established that Sigma was the lessee of the premises where the accident occurred and that the president of Sigma hired the injured plaintiff to perform the work and controlled his work. **Seferovic v Atlantic Real Estate Holdings, LLC, 2015 NY Slip Op 03343, 2nd Dept 4-22-15**

General Contractor Was Statutory Agent of Owner; General Contractor's Control Over Work Site Safety Enough for Labor Law 240(1) Liability but Not Enough for Labor Law 200 Liability

The Second Department determined defendant general contractor (Metro) was not entitled to summary judgment on the Labor Law 240(1) and 241(6) causes of action, but was entitled to summary judgment on the Labor Law 200 and common law negligence causes of action. Plaintiff was injured when the knot on a rope he was tied to while pushing snow off a roof gave way and he fell three stories. The decision illustrates the subtle difference between the amount of supervisory control necessary to hold a general contractor liable under Labor Law 240(1) and the greater amount of supervisory control necessary to hold a general contractor liable under Labor Law 200 and common law negligence:

The failure of an owner or an agent of the owner "to furnish or erect suitable devices to protect workers when work is being performed" results in absolute liability against that owner or the owner's agent under the statute ... , and the duty to provide a suitable safety device under Labor Law § 240(1), moreover, is nondelegable ... . A general contractor is not considered a statutory agent of the property owner for Labor Law § 240(1) liability purposes, unless that contractor had the authority to supervise and control significant aspects of the construction project, such as safety, at the time of the accident ... .

... Metro was [demonstrated to be] a statutory agent of the property owner on the construction project through the submission of Metro's admission that it was hired by the property owners as the general contractor on the project, and evidence that Metro undertook general contractor duties by coordinating and supervising the project, and hiring and paying subcontractors... . ...

Where, as here, "a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work" ... . "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" ... . However, " [t]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence'" ... . **Sanchez v Metro Bldrs. Corp., 2016 NY Slip Op 00957, 2nd Dept 2-10-16**

Safety Consultant Did Not Exercise Sufficient Control Over Worksite To Be Liable Under Labor Law 240(1), 241(6) Or 200.

The Second Department determined a worksite "safety consultant" (PSS) did not exercise sufficient supervisory control to be held liable under the Labor Law. Plaintiff was injured when he fell through a plywood covered hole in a ramp. The decision has detailed recitations of the black letter law requirements for Labor law 240(1), 241 (6) and 200 causes of action:

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

PSS made a prima facie showing of its entitlement to judgment as a matter of law dismissing the Labor Law §§ 240 (1) and 241 (6) causes of action insofar as asserted against it. PSS submitted evidence demonstrating that its role at the work site was only one of general supervision, and that it did not have the authority to control the work performed or the

safety precautions taken by the general contractor and the plaintiff's employer, which is insufficient to impose liability on a safety consultant under the Labor Law … .**Marquez v L & M Dev. Partners, Inc., 2016 NY Slip Op 05631, 2nnd Dept 7-27-16**

Comparative Negligence Cannot be Asserted in a Labor Law 240(1) Action

Comparative Negligence Not Available in Labor Law 240 (1) Action---Claimant Entitled to Partial Summary Judgment—Suspended Cable On Which Claimant Was Walking to Access Scaffolding Broke

"A prima facie case for summary judgment of Labor Law § 240 (1) liability is established when a claimant produces evidence that "the statute was violated and that the violation proximately caused his [or her] injury" … . Showing potential comparative negligence by the injured worker does not avoid summary judgment … . A defendant can, however, raise a factual issue by presenting "evidence that the device furnished was adequate and properly placed and that the conduct of the [claimant] may be the sole proximate cause of his or her injuries"…".**Portes v New York State Thruway Authority, 516749, 3rd Dept 12-5-13**

Worker Struck by Falling Brick Entitled to Summary Judgment; Comparative Negligence Is Not a Defense to a Labor Law 240(1) Claim; Instruction to Avoid Unsafe Area Is of No Consequence

"Plaintiff established his entitlement to judgment as a matter of law on the issue of liability on his Labor Law § 240 (1) claim by submitting, among other things, his testimony that he was performing his assigned work of cleaning debris from the ground level, just outside the north side of the subject building under construction, when he was suddenly struck by a falling brick, in the absence of any overhead netting or other such protective devices … . Defendants' witnesses further established their liability by confirming that the brick fell out of the hands of a masonry worker several stories above plaintiff, and that safety netting which had been installed on other sides of the building was absent from the north exterior. The lack of overhead protective devices was a proximate cause of plaintiff's injuries under any of the conflicting accounts … , and plaintiff's comparative negligence is not a defense to a Labor Law § 240 (1) claim … . Moreover, contrary to defendants' argument that plaintiff had been instructed not to cross the barricade or go underneath the scaffolding while any work was being performed overhead, "an instruction by an employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not a 'safety device' in the sense that plaintiff's failure to comply with the instruction is equivalent to refusing to use available, safe and appropriate equipment" … . In addition, the conflicting accounts of "what type of work he was doing at the time of the accident" do not raise a triable issue of fact …". **Hill v Acies Group LLC, 2014 NY Slip Op 07601, 2nd Dept 11-6-14**

Plaintiff, Who Fell Through an Open Manhole, Entitled to Summary Judgment on Labor Law 240 (1) Cause of Action---Failure to Set Up Guard Rails Was a Proximate Cause--Liability Imposed Regardless of Plaintiff's Own Negligence and Regardless of Whether the Owner, Contractor or Agent Supervised or Controlled the Work

The Court of Appeals, in a full-fledged opinion by Judge Pigott, over a two-judge dissent, determined plaintiff, who fell through an uncovered manhole, was entitled to partial summary judgment on his Labor Law 240 (1) claim based on testimony the manhole should have been surrounded by guard rails. The court also determined there was a question of fact whether the safety consultant, IMS, was liable as a "statutory agent" under Labor Law 240 (1). The court explained that the obligation to provide safety devices is a nondelegable duty which imposes liability regardless of whether owner, contractor or agent supervises or controls the work. Where 240 (1) is violated, the plaintiff's negligence is not a defense, unless plaintiff's negligence is the sole proximate cause of the injury:

Section 240 (1) provides, in relevant part:

"All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor [certain enumerated] and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The statute imposes upon owners, contractors and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work ... . "Where an accident is caused by a violation of the statute, the plaintiff's own negligence will not furnish a defense"; however, "where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability" ... . Thus, in order to recover under section 240 (1), the plaintiff must establish that the statute was violated and that such violation was a proximate cause of his injury ... . **Barreto v Metropolitan Tr. Auth., 2015 NY Slip Op 03875, CtApp 5-7-15**

Inability to Remember Fall and Absence of Witnesses Did Not Preclude Summary Judgment on Labor Law 240(1) Cause of Action

The First Department determined the plaintiff's inability to remember his fall from a scaffold and the absence of witnesses did not preclude summary judgment in his favor for the Labor Law 240(1) cause of action:

Plaintiff established his entitlement to judgment as a matter of law on the issue of liability in this action where he sustained injuries when, while performing asbestos removal work in a building owned by defendant, he fell from a baker's scaffold. Plaintiff's testimony that he was standing on the scaffold working, and then woke up on the ground with the scaffold tipped over near him, established a prima facie violation of the statute and that such violation proximately caused his injuries ... . That plaintiff could not remember how he fell does not bar summary judgment ... . Nor does the fact that he was the only witness raise an issue as to his credibility where, as here, his proof was not inconsistent or contradictory as to how the accident occurred, or with any other evidence ... . **Strojek v 33 E. 70th St. Corp., 2015 NY Slip Op 04203, 1st Dept 5-14-15**

Plaintiff Entitled To Summary Judgment On Labor Law 240 (1) Claim Even When Not Free From Negligence.

The First Department, over an extensive dissent, determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) claim, noting that comparative negligence on the part of the plaintiff is not a defense. Plaintiff alleged he was operating a forklift lifting bricks to be placed on a scaffold when the forklift pitched forward and catapulted him over the front of the machine:

We agree with the motion court that plaintiff is entitled to summary judgment on his Labor Law § 240 claim. Plaintiff was using the prime mover to hoist a load; if the prime mover pitched forward due to the force of gravity, it failed to offer adequate protection and Labor Law § 240(1) applies ... . Similarly, if the accident occurred because either the prime mover or scaffold could not support the weight of the brick load, the accident also resulted from the application of the force of gravity to the load during the hoisting operation, and Labor Law § 240(1) applies ... . * * *

"[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence" ... . On the contrary, that plaintiff may have negligently lowered the pallet, as the dissent posits, makes no possible difference to the outcome here, as "[n]egligence, if any, of the injured worker is of no consequence" ... . Rather, the law is clear that "if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" ... . Here, the failure to provide a proper hoisting device to protect plaintiff violated Labor Law § 240(1). **Somereve v Plaza Constr. Corp., 2016 NY Slip Op 01236, 1st Dept 2-18-16**

Persons Protected by Labor Law 240(1)---Only “Employees” Are Protected by Labor Law 240(1)

Allegation Plaintiff Was Told Not To Work On The Day He Fell From A Scaffold Precluded Summary Judgment In Plaintiff's Favor; The Definition Of Employee Includes Permission To Work.

The Second Department, reversing Supreme Court, determined defendants had raised a triable issue of fact about whether plaintiff had their permission to work when plaintiff fell from a scaffold. The definition of an employee under the Labor Law includes "permission to work." Here the defendants alleged plaintiff was specifically told not to work until certain demolition work was done:

The Labor Law defines "employee" as "a mechanic, workingman or laborer working for another for hire" (Labor Law § 2[5]), and "employed" as "permitted or suffered to work" (Labor Law § 2[7]). "To come within the special class for whose benefit absolute liability is imposed upon contractors, owners, and their agents to furnish safe equipment for employees under section 240 of the Labor Law, a plaintiff must demonstrate that he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it owner, contractor or their agent" ... . **Aslam v Neighborhood Partnership Hous. Dev. Fund Co., Inc., 2016 NY Slip Op 00316, 2nd Dept 1-20-16**

Buildings and Structures Covered by Labor Law 240(1)

Dismantling Shelves Constitutes Demolition and Alteration; Shelves Constitute a Structure Within Meaning of Labor Law 240(1)

Labor Law § 240 (1) provides that: "All contractors and owners and their agents . . . in the erection, *demolition*, repairing, *altering*, painting, cleaning or pointing of a *building or structure* shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed" (Labor Law § 240 [1] [emphasis added]). * * * The Court of Appeals has defined a structure as "any production or piece of work artificially built up or composed of parts joined together in some definite manner”… Contrary to the defendants' contentions, the shelves at issue constituted a "structure" under Labor Law § 240 (1), as they were composed of component pieces (metal grates and cross bars) attached in a definite manner … . Furthermore, at the time of the accident, the plaintiff was engaged in both alteration and demolition within the meaning of the statute. Demolition, for purposes of the statute, is defined under 12 NYCRR 23-1.4 (b) (16) … , and specifically includes "dismantling" … . Alteration is defined as "a *significant* physical change to the configuration or composition of the building or structure" … . By dismantling the shelves at issue, the plaintiff was both altering and demolishing the shelves. **Kharie v South Shore Record Mgt Inc, 2014 NY Slip Op 04738, 2nd Dept 1-25-14**

Parking Lot Is Not a Building or Structure within the Meaning of Labor Law 240 (1)

Plaintiff's employer was hired to expand the parking area outside of an apartment building which necessitated the removal of several trees. While plaintiff was removing tree limbs with a chainsaw as part of that project, he was injured when a limb he cut knocked over the ladder he was using and caused him to fall. He thereafter commenced this action against defendants, the owner and managers of the apartment building, and asserted claims sounding in negligence and

violations of Labor Law §§ 240 (1) and 241 (6). * * * In order to recover under Labor Law § 240 (1), plaintiff is obliged to show that he was injured in the course of "the erection, demolition, repairing, altering, painting, cleaning or pointing of a *building or structure*" (emphasis added). A tree is a naturally occurring object that is "clearly not a 'building' or a 'structure' within" the meaning of the statute … . Plaintiff argues that he is nevertheless entitled to recover under Labor Law § 240 (1) because he was employed in "duties ancillary to" work encompassed by the statute, namely, the expansion of the parking lot … . His argument is unavailing for the simple reason that construction work, as here, involving only a parking area or highway and nothing more, "does not constitute work on a [building or] structure for purposes of Labor Law § 240 (1)" … . **Juett v Lucente…, 517075, 3rd Dept 12-12-13**

Manhole Is a Structure Within the Meaning of Labor Law 240(1)

Plaintiff, a laborer, was injured when he fell into a steam manhole that was part of defendant's steam distribution system in lower Manhattan. … At around the time of the accident, New York City was beset by a nor'easter that threatened the metropolitan area with heavy rain, strong wind gusts and high tides. Due to the severity of the storm, defendant engaged [defendant's employer] to supplement its effort in responding to vapor conditions and pumping water out of flooded manholes. … A gust of wind caused plaintiff to stumble and fall into the manhole which his coworker had uncovered. Plaintiff landed in a pool of boiling water that reached his chest. The boiling water was caused by torrential rain that flooded the manhole and contacted the steam main. * * * Labor Law § 240 (1) affords protection to workers engaged in "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." Whether a particular activity constitutes a "repair" or routine maintenance must be decided on a case-by-case basis, depending on the context of the work … . A factor to be taken into consideration is whether the work in question was occasioned by an isolated event as opposed to a recurring condition. … The record here demonstrates that the work performed by plaintiff at the time of his injury was far from routine. * * *The motion court correctly found that the manhole meets the definition of a structure as that term is used in the statute. A structure is "a production or piece of work artificially built up or composed of parts joined together in some definite manner" … . Moreover, it is undisputed that plaintiff and his co-worker had to expose the manhole in order to pump out the subterranean water. Therefore, the motion court correctly found that plaintiff's injury resulted from an elevation-related hazard that Labor Law § 240 (1) is intended to obviate… . **Dos Santos v Consolidated Edison of NY, Inc, 2013 NY Slip Op 02140, 8914, 105861/08, 1st Dept 3-28-13**

Heavy Shelves Bolted to the Wall Constituted a "Structure" and Dismantling the Shelves Constituted "Demolition" within the Meaning of the Labor Law

The First Department, reversing Supreme Court, granted summary judgment to the plaintiff on liability re: his Labor Law 240(1) and 241(6) claims. The court determined the dismantling of heavy shelves which were bolted to the wall constituted demolition of a structure within the meaning of the Labor Law:

Plaintiff was injured in a fall from an unsecured ladder while working in a warehouse, where his job was to "clean out, remove machines, break down structures . . . and ship them out." The work included removal of heavy machinery and shelves that ran from floor to ceiling across three second-floor walls, each 50 feet long and 8 feet high, and were bolted to the floors and walls. The breaking down and removing of the shelves required the use of impact wrenches and sawzalls to cut the bolts. Removed materials, including shelving, were heavy, and had to be loaded in cages, which were then lifted by a pallet jack, moved to the edge of the second floor, and lowered to the first floor with a forklift. The dismantling of the shelves was a sufficiently complex and difficult task to render the shelving a "structure" within the meaning of Labor Law §§ 240(1) and 241(6) ... . Moreover, in dismantling the shelving, plaintiff was engaged in "demolition" for purposes of §§ 240(1) and 241(6) ... . **Phillips v Powercrat Corp., 2015 NY Slip Op 02407, 1st Dept 3-24-15**

Injury During Tree-Removal Not Covered by Labor Law Even though the Tree-Removal Was a Prerequisite to the Removal of a Fence---Work on the Fence (A "Structure") Had Not Begun at the Time of the Injury

Plaintiff was injured during the cutting and removal of trees along a property line which included a fence. Although the fence was to be removed, the fence-removal project had not been started at the time of the accident. A fence is a "structure" within the meaning of the Labor Law, so injury while removing a fence would be covered. But because tree-related work is not covered by the Labor Law, and because the fence removal was not underway at the time of the injury, defendants' motion for summary judgment was properly granted:

Labor Law § 240 (1) affords protection to workers engaged in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." Under settled case law, a tree does not qualify as a building or structure ..., and — generally speaking — neither tree removal ... constitutes one of the enumerated statutory activities. Although plaintiff correctly notes that a fence qualifies as a structure within the meaning of Labor Law § 240 (1) ... and, further, that the statutory protections extend to duties that are ancillary to the enumerated activities set forth therein ..., the fact remains that Labor Law § 240 (1) "afford[s] no protection to a plaintiff [who is] injured before any activity listed in the statute [is] under way" ... . **Cicchetti v Tower Windsor Terrace, LLC, 2015 NY Slip Op 04375, 3rd Dept 5-21-15**

Homeowner's Exemption from Labor Law 240(1) Liability---One and Two Family Dwellings

Residential vs Commercial (Must Be Residential for Homeowner's Exemption)

Single-Family House Exemption to Labor Law Action Applied

"Here, Green Chimneys demonstrated its prima facie entitlement to judgment as a matter of law with respect to, inter alia, its claim that it was entitled to the homeowner's exemption of Labor Law §§ 240 (1) and 241 by establishing that the Founder's House was a single-family dwelling used solely as a residence for Green Chimneys' founder and his wife, the house served no commercial or business use for Green Chimneys, which received no income from the house, and Green Chimneys did not direct or control the work being performed …". **Parise v Green Chimneys Children's Servs, Inc, 2014 NY Slip Op 03649, 2nd Dept, 5-22-13**

Bed and Breakfast Not Entitled to Homeowner's Exemption, Question of Fact About Commercial Use

"Although defendants' affidavits indeed addressed their intended residential use of the property "as a vacation and seasonal home" at the time of its purchase in 2004, those same affidavits were silent as to whether defendants intended—or did in fact continue—to use the property as their residence after they began operating a bed and breakfast at the premises in 2008 (other than to the extent necessary to provide services for their paying guests) … ..Similarly, although defendants [*3]averred that they "spen[t] long weekends and the summer months at the home" following its purchase in 2004, it is not at all clear from defendants' submissions that this practice continued—other than to carry out the property's commercial use—after they began operating the bed and breakfast at that location in 2008. Under these circumstances, we find that defendants failed to demonstrate their entitlement to the homeowners' exemption as a matter of law …". **Bagley v Moffett, 515914, 3rd Dept 6-27-13**

Question of Fact Re: Whether the Homeowner's Exemption Applied Where It Was Alleged Building Was to Be Used for Both Private-Residence and Commercial Purposes

"[The homeowner] established his prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6) on the ground that he was protected by the homeowner's exemption under the Labor Law. However, in opposition, the plaintiff raised a triable issue of fact as to whether the structure was to be used primarily as a residence or for commercial purposes when the renovations were completed…". **Sanchez v Palmiero, 2014 NY Slip Op 04473, 2nd Dept 6-18-14**

Owners' Intent, at the Time Plaintiff Was Injured, to Use the Property As a Second Home Triggered the Homeowners' Exemption to Labor Law Liability Notwithstanding that the Owners Never Occupied the Property and Started Leasing It Two Years After the Accident

"The owners acquired title to the premises through inheritance in July 2004. They began the renovation in July 2005. …[T]he owners renovated the house for the purpose of modernizing it and using it as their second home. As the renovation was ongoing, the house was unoccupied at the time of plaintiff's injury. The renovation reached the punch list stage in the fall of 2006. …[T]he owners, who never occupied the house, decided to lease it out in the spring of 2007 and did so that August. The owners made a prima facie showing of their entitlement to the homeowner's exemption by demonstrating that their premises consist of a one-family dwelling and that they did not direct or control plaintiff's work … . Therefore, the burden shifted to plaintiff to "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" … . Plaintiff has failed to meet this burden as his arguments before this Court and the motion court are based on unfounded speculation that the owners intended to use the house solely for commercial purposes."**Farias v Simon, 2014 NY Slip Op 07932, 1st Dept 11-18-14**

Building With One Retail Unit and Two Apartments, One of Which Was Owner-Occupied, Did Not Qualify for the Homeowner's Exemption from Liability Under the Labor Law

The Second Department determined defendant was not entitled to the homeowner's exemption from liability under the Labor Law. The exemption is afforded owners of one and two-family residences who do not control the work on the premises. Here defendant's building had a retail store on the ground level and two apartments above. One of the two apartments was occupied by the sole member of the defendant limited liability company which owned the building. The city had classified the building as within the "J-3" occupancy group, which includes one and two-family residential buildings. In finding the three-unit building did not trigger the exemption, the court explained the purpose behind the exemption, and the irrelevance of the "J-3" classification:

"In 1980, the Legislature amended Labor Law §§ 240 and 241 to exempt owners of one and two-family dwellings who contract for but do not direct or control the work' from the absolute liability imposed by these statutory provisions" ... . The homeowners' exemption "was enacted to protect those people who, lacking business sophistication, would not know or anticipate the need to obtain insurance to cover them against the absolute liability imposed" by Labor Law §§ 240 and 241 ... . The intent of the homeowner's exemption was to make the law fairer and more reflective of the "practical realities governing the relationship between homeowners and the individuals they hire to perform construction work on their homes" ... . The fact that title to an otherwise qualifying one- or two-family dwelling is held by a corporation rather than an individual homeowner does not, in and of itself, preclude application of the exemption ... .

Here, [defendant] failed to make a prima facie showing that the subject building qualified as a two-family dwelling entitled to the protection of the homeowner's exemption. Although [defendant] submitted evidence that the building's certificate of occupancy classified it within the J-3 occupancy group that includes one- and two-family residential dwellings (see Administrative Code of the City of New York, § 27-266), this classification is not dispositive because it is primarily intended to govern what building code safety standards are applicable to the building ... . **Assevero v Hamilton & Church Props., LLC, 2015 NY Slip Op 06567, 2nd Dept 8-19-15**

Homeowner's Exception Did Not Apply to a Horse Barn Used for Commercial Purposes Despite Presence of an Apartment in the Barn

The Second Department determined the "homeowner's exception" to the applicability of the Labor Law did not apply to a barn used to house horses for commercial purposes, even though the barn included an apartment used by one of the horse farm's shareholders. The court also noted that the "recalcitrant worker" affirmative defense should not have been

dismissed "sua sponte" in the absence of a motion to dismiss it. With respect to the homeowner's exception, the court explained:

"... [T]he plaintiff met his prima facie burden of demonstrating that he was not performing work at a residence within the meaning of the homeowner's exemption under Labor Law §§ 240(1) and 241(6) ... . Among other things, the plaintiff demonstrated that the defendant described itself as "essentially . . . a business for keeping horses," its owners were extensively involved in both keeping and racing horses, and approximately eight horses were boarded at the subject property at the time of the accident. The plaintiff's submissions also established that when the defendant corporation originally purchased the subject property, the large barn was in a state of disrepair. The defendant renovated the large barn and added many improvements to the property, including multiple paddocks, an additional barn, and an "Equicisor," a "72-foot circular automated horse exercising machine." One of the defendant's shareholders described the apartment in the rear of the barn as a part-time "office residence" where he might stay a 'few days' per week, although the amount of time he stayed varied depending on the season and the horse racing schedule. Under these circumstances, the plaintiff established, prima facie, that the defendant's boarding stable, which was used primarily for commercial purposes, did not constitute a residence within the meaning of the homeowner's exemption ...". **Rossi v Flying Horse Farm, Inc., 2015 NY Slip Op 06798, 2nd Dept 9-16-15**

Homeowner's Exemption From Labor Law Liability Applied, Despite Presence Of Three Families In The Home

The First Department, reversing Supreme Court, determined the homeowner's exemption from liability under the Labor Law for one- and two-family homes applied, despite evidence three families lived in the home:

The applicability of the homeowner exemption is determined by a "site and purpose" test ... , which "hinges upon the site and the purpose of the work" and "must be employed on the basis of the homeowners' intentions at the time of the injury" ... . Here, the evidence established that, at the time of the accident, defendants' house was a two-family residential home with a basement apartment, where a family friend lived, and three upper floors, which defendants shared with an adult child and two grandchildren. Defendants did not receive any rental income. That three families, two of which are related, lived in the home is insufficient to raise an issue of fact as to whether the home was a three-family dwelling ... . **Del Carnen Diaz v Bocheciamp, 2016 NY Slip Op 04305, 1st Dept 6-2-16**

Renovation Of Property For Commercial Purposes Disqualifies Homeowner From Homeowners' Exemption From Liability Under Labor Law 240(1) And 241(6);Question Of Fact About Homeowner's Intention At Time Of Injury

The Second Department, reversing Supreme Court, determined there was a question of fact whether defendant was entitled to the homeowner's exemption from liability under Labor Law 240(1) and 241(6). Homeowners who renovate property for commercial purposes cannot assert the exemption. Here there was a question of fact about the homeowner's intention at the time of the injury:

Although the Labor Law generally imposes liability for worker safety on property owners and contractors, it exempts from liability "owners of one and two-family dwellings who contract for but do not direct or control the work" ... . The exemption "was not intended to insulate from liability owners who use their one- or two-family houses purely for commercial purposes" ... .

"[R]enovating a residence for resale or rental plainly qualifies as work being performed for a commercial purpose" ... . However, where a one- or two-family property serves both residential and commercial purposes, "[a] determination as to whether the exemption applies in a particular case turns on the nature of the site and the purpose of the work being performed, and must be based on the owner's intentions at the time of the injury" ... . **Batzin v Ferrone, 2016 NY Slip Op 05108, 2nd Dept 6-29-16**

Homeowner's Exemption Restricted to Homeowners Who Do Not Direct or Control the Injury-Producing Work

Homeowner's Exemption Applied/Although Homeowner Did Some Work at the Site, Homeowner Did Not Direct and Control the Injury-Producing Work

"Although Labor Law §§ 240 (1) and 241 each "impose nondelegable duties upon contractors, owners and their agents to comply with certain safety practices for the protection of workers engaged in various construction-related activities . . . [,] the Legislature has carved out an exemption for the owners of one and two-family dwellings who contract for but do not direct or control the work" … . In this context, "the phrase 'direct or control' is to be strictly construed and, in ascertaining whether a particular homeowner's actions amount to direction or control of a project, the relevant inquiry is the degree to which the owner supervised the method and manner of the actual work being performed by the injured [party]" … . Here, [the contractor's] various representatives collectively testified that [the contractor provided its own framing and safety equipment and that defendant did not direct the course of the framing work, nor did he advise [the contractor] regarding any safety issues. As for the specific incident that gave rise to plaintiff's injury, defendant testified that he did not ask either plaintiff or his brother to assist [the contractor] in raising the wall … . Indeed, plaintiff acknowledged that it was one of "[t]he [contractor's] framers" who "asked . . . if we could give them a hand to deal with the wall" and, more to the point, made the decision as to the manner in which the wall would be lifted. Specifically, plaintiff testified that defendant did not tell him where to stand, how to position his hands or how to lift the wall—again stating, with respect to Top Notch, that raising the wall "was their deal." Such proof, in our view, was sufficient to demonstrate that defendant did not direct or control the injury-producing work." **Bombard v Pruiksma, 516213, 3rd Dept 10-24-13**

Homeowner Not Liable for Construction-Related Death---No Supervisory Control; General Supervisory Authority, Performing Some Work, Physical Presence Not Enough

"… [U]nder established case law, "neither providing site plans, obtaining a building permit, hiring contractors, purchasing materials, offering suggestions/input, inspecting the site, retaining general supervisory authority, performing certain work nor physical presence at the site operates to deprive a homeowner of the statutory exemption—so long as the homeowner did not exercise direction or control over the injury-producing work"… . **Peck v Szwarcberg, 2014 NY Slip Op 08290, 3rd Dept 11-26-14**

Homeowner Exercised Control Over Plaintiff's Work, Not Entitled To Homeowner's Exception To Liability Under Labor Law 240 (1) And 241 (6)

The Second Department determined defendant was not entitled to the homeowner's exception to liability under Labor Law 240 (1) and 241 (6) and plaintiff, who fell from a makeshift ladder after feeling the ladder "jerk," was entitled to summary judgment on his Labor Law 240 (1) cause of action. Although the defendant (called the appellant in the decision) owned the single-family home where plaintiff fell, defendant exercised control over the work:

"[I]n order for a defendant to receive the protection of the homeowners' exemption, the defendant must satisfy two prongs required by the statutes. First, the defendant must show that the work was conducted at a dwelling that is a residence for only one or two families" ... . "The second requirement . . . is that the defendants not direct or control the work'" ... . " The expressed and unambiguous language of both [Labor Law §§ 240(1) and 241(6)] focuses upon whether the defendants supervised the methods and manner of the work'" ... .

Here, it was undisputed that the home where the accident occurred was a single-family residence owned by the appellant. The appellant noted that the fact that he gave instructions regarding the placement of the light fixtures and other items was only related to the aesthetics and design of the home and "would be expected of the typical homeowner who hired a contractor to renovate his or her home" ... . However, the appellant's control of the work site exceeded that of the ordinary homeowner, since he was involved in the construction, assembled and placed the ladder where it was, and instructed the workers to use it for access to the second floor ... . The appellant also performed some of the work at the site himself, coordinated the subcontractors, and was 8 to 10 feet away from the plaintiff's decedent at the time of the accident, performing work on the entrance door. Because of his involvement in and control of the work site, the appellant was not entitled to the homeowners' exception under Labor Law §§ 240(1) and 241(6) ... . **Ramirez v I.G.C. Wall Sys., Inc., 2016 NY Slip Op 04927, 2nd Dept 6-22-16**

Conflict of Laws---Maritime Activities

Action Under Labor Law Based On Injury On a Ship in Dry-Dock Not Preempted by Federal Maritime Law

"Here, there is no real dispute that the present action falls within federal maritime jurisdiction … . Contrary to the contention of the defendants third-party plaintiffs, however, the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6) are not preempted by general maritime law. Under the circumstances of this case, the application of Labor Law §§ 240 (1) and 241 (6), which are local regulations enacted to protect the health and safety of workers in this state, will not unduly interfere with a fundamental characteristic of maritime law or the free flow of maritime commerce …"
Durando v City of New York, 2013 NY Slip Op 02214, 201200535, Index No 33753/08, 2nd Dept 4-3-13

Falling Workers, Generally—Elevation-Related (Gravity-Related) Risk Must Be Involved

Worker Fell through Hole in Deck

“The plaintiff Daniel Durando was working as a scaffolding installer and remover … on the SS Chemical Pioneer, a ship in dry dock for repairs at the Brooklyn Navy Yard. He allegedly sustained injures when he fell through an improperly covered opening in the floor, or deck, of one of the ship's cargo holds.” **Durando v City of New York, 2013 NY Slip Op 02214, 201200535, Index No 33753/08, 2nd Dept 4-3-13**

Plaintiff, Who Fell Through an Open Manhole, Entitled to Summary Judgment on Labor Law 240 (1) Cause of Action---Failure to Set Up Guard Rails Was a Proximate Cause--Liability Imposed Regardless of Plaintiff's Own Negligence and Regardless of Whether the Owner, Contractor or Agent Supervised or Controlled the Work

The Court of Appeals, in a full-fledged opinion by Judge Pigott, over a two-judge dissent, determined plaintiff, who fell through an uncovered manhole, was entitled to partial summary judgment on his Labor Law 240 (1) claim based on testimony the manhole should have been surrounded by guard rails. The court also determined there was a question of fact whether the safety consultant, IMS, was liable as a "statutory agent" under Labor Law 240 (1). The court explained that the obligation to provide safety devices is a nondelegable duty which imposes liability regardless of whether owner, contractor or agent supervises or controls the work. Where 240 (1) is violated, the plaintiff's negligence is not a defense, unless plaintiff's negligence is the sole proximate cause of the injury:

Section 240 (1) provides, in relevant part:
"All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor [certain enumerated] [*4]and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The statute imposes upon owners, contractors and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work ... . "Where an accident is caused by a violation of the statute, the plaintiff's own negligence will not furnish a defense"; however, "where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability" ... . Thus, in order to recover under section 240 (1), the plaintiff must establish that the statute was violated and that such violation was a proximate cause of his injury ... . **Barreto v Metropolitan Tr. Auth., 2015 NY Slip Op 03875, CtApp 5-7-15**

Injury When Stepping Off a Ladder Not Actionable under Labor Law 240 (1)---Injury Not Related to the Need for the Ladder

“We conclude that Supreme Court erred in denying those parts of [defendant’s] motion … for summary judgment dismissing plaintiff's Labor Law § 240 (1) cause of action inasmuch as "plaintiff's injury resulted from a separate hazard wholly unrelated to the danger that brought about the need for the ladder in the first instance—an unnoticed or concealed object on the floor"…”. **Smith v Nestle Purina Petcare Co. CA 1201554, 266, 4th Dept, 4-26-13**

Fall from Unfolded Step Ladder Stated Claim

“Plaintiff established prima facie entitlement to summary judgment on his Labor Law § 240 (1) claim as against defendants … by his testimony that: (1) the ladder was the only one available; (2) the ladder could not be properly opened into an A-frame stance due to excess debris in his narrowly confined work space; (3) he asked his foreman for another ladder, to no avail; (4) the ladder was unusual in that the step treads contained spikes which unexpectedly caught hold of his shoe as he was descending the improperly leaning ladder; (5) he was caused to fall backwards, from a height of approximately six feet; and (6) his right shoulder was injured when it struck the wooden work-zone barrier as he fell. In opposition, defendants failed to raise a triable issue of fact. Contrary to defendants' contention that plaintiff was the sole proximate cause of his accident, the record shows that the ladder was inadequate for the nature of the work performed and the gravity-related risks involved …”. **Keenan v Simon Prop Group, Inc, 2013 NY Slip Op 03622, 2nd Dept, 5-21-13**

Losing Balance On Non-Defective Ladder Did Not Support Labor Law 240(1) Cause of Action

"The mere fact that a plaintiff fell from a ladder does not, in and of itself, establish that proper protection was not provided" … . There must be evidence that the ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries … . Where a plaintiff falls off the ladder because he or she lost his or her balance, and there is no evidence that the ladder from which the plaintiff fell was defective or inadequate, liability pursuant to Labor Law § 240 (1) does not attach …”.**Hugo v Sarantakos, 2013 NY Slip Op 05512, 2nd Dept 7-31-13**

Evidence of Availability of Ladders Insufficient to Defeat Summary Judgment in Favor of Plaintiff/Plaintiff Fell While Working Standing on Milk Crates

“Under the circumstances, plaintiff established his entitlement to summary judgment on the issue of liability on his Labor Law § 240 (1) claim. The record shows that plaintiff's accident involved an elevation-related risk and his injuries were proximately caused by the failure to provide him with proper protection as required by section 240 (1) … . Defendants' claim that ladders were available on the site is conclusory and fails to raise an issue of fact … . The sole evidentiary support for defendants' argument was an affidavit from an individual who claimed … that there more than enough ladders available for plaintiff's work. Even if admissible, the affidavit failed to raise a triable issue as to whether plaintiff was the sole proximate cause of his injuries since it does not indicate that plaintiff knew that there were ladders available at the site and that he was expected to use them …”. **Mutadir v 80-90 Maiden Lane Del LLC, 2013 NY Slip Op 07127, 1st Dept 10-31-13**

Suspended Cable On Which Claimant Was Walking to Access Scaffolding Broke; Availability of Ladders of No Consequence

“The purpose of the suspension cables at the work site was to support workers and materials at the elevated height where the work necessarily occurred. The cable that broke failed to fulfill this fundamental function, and that failure resulted in claimant's fall. Claimant established a prima facie case for liability under Labor Law § 240 (1). Defendant produced proof that, contrary to claimant's assertion, a separate safety cable was available that he should have used instead of attaching his lanyard to the cable upon which he was walking. By attaching his lanyard to the suspension cable, claimant protected against the risk of falling but not the possibility of the cable breaking. While this action by claimant could go to comparative negligence (which is not available in a Labor Law § 240 [1] action), it was not the sole proximate cause of the accident and does not establish the recalcitrant worker defense ... . Similarly, the assertion that ladders were available and workers had been instructed to use them instead of walking across the suspension cables does not raise a triable issue under the circumstances of this claim. This is not a case where claimant lost his balance and fell off the cable while using it instead

of the safer way to access the scaffold via a ladder. Here, the cable broke. Hence, a device intended to support a worker at an elevated height failed, and that failure was a proximate cause of claimant's injury. "Under Labor Law § 240 (1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a [claimant's] injury) to occupy the same ground as a [claimant's] sole proximate cause for the injury" …". **Portes v New York State Thruway Authority, 516749, 3rd Dept 12-5-13**

Building Collapse (Not Clear Whether Plaintiffs Fell or Were Struck by Falling Building, or Both)

"Plaintiffs established, prima facie, that the partial building collapse that severely injured both of them and killed a coworker was foreseeable, and that defendants owner and general contractor were on notice of the hazard. Since defendants, in opposition, failed to raise a triable issue of fact as to the foresseability of the building collapse, plaintiffs are entitled to partial summary judgment on their section 240 (1) claim.
Section 240 (1) should be "construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" … , since the statute was intended to place "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor" **…". Garcia v Neighborhood Partnership Hous Dev Fund Co Inc, 2014 NY Slip Op 00298, 1st Dept 1-21-14**

Operating a Scaffold for the Benefit of an Enumerated Activity Done by Others (Caulking) Entitles Scaffold Operator to Coverage Under Labor Law 240 (1); Scaffold Operator Fell Through Rail Track

"Although plaintiff … was not operating the scaffold in his capacity as a window washer at the time of the accident, he was operating it for the caulkers who could not have safely discharged their duties without him. Since caulking is an activity of the sort enumerated in Labor Law § 240 (1) … , plaintiff is entitled to the same statutory protection as the caulkers, and his Labor Law § 240 (1) … should not be dismissed. Further, given the evidence that the lanyard and harness provided to plaintiff proved inadequate to shield him from falling through the rail track, plaintiff is entitled to summary judgment on the issue of liability on that claim…". **DeJesus v 888 Seventh Ave LLC, 2014 NY Slip Op 01273, 1st Dept 2-25-14**

Being Catapulted from a Bobcat While Standing on the Back as Counterweight is a Gravity-Related Event

"Plaintiff was injured while employed by third-party defendant tenant K&S Construction when he was thrown from a "Bobcat" front-end loader. Defendant landlord had contracted with third-party defendant tenant, plaintiff's employer, to construct a concrete curb around the perimeter of the nearby parking lot. Plaintiff was helping to remove plywood, which was allegedly interfering with the construction project, and was positioned on the Bobcat in order to provide balance or serve as a counterweight for the plywood in the Bobcat's front bucket. He was thrown off when the two back wheels of the Bobcat lifted up unexpectedly. The issue is whether plaintiff was engaged in construction work when moving the plywood so as to afford him the protection of the Labor Law. If, as plaintiff alleges, the plywood was being moved to clear the work site where the curb was under construction, plaintiff was "altering" the premises within the meaning of Labor Law § 240 (1) … . Since the landlord and K&S Construction submitted evidence that the accident occurred in the warehouse and that the construction work and plaintiff's activity were unrelated, a question of fact has been raised." Assuming that plaintiff was engaged in construction work, we find that falling from the Bobcat is the type of gravity-related event contemplated by the Court of Appeals in *Runner v New York Stock Exch., Inc.* (13 NY3d 599. In *Potter v Jay E. Potter Lbr. Co., Inc.* (71 AD3d 1565 [4th Dept 2010]), the Fourth Department, relying on *Runner*, similarly found that a worker, who like plaintiff here, was positioned as a counterweight for a load on a forklift and was catapulted forward when the forklift became unstable, was entitled to the protection of Labor Law § 240 (1). **Penaranda v 4933 Realty LLC, 2014 NY Slip Op 04685, 1st Dept 6-24-14**

Fall from Flatbed Truck Was Covered by Labor Law 240 (1)---Fall Caused by Gravity Acting On Plywood Being Hoisted from the Truck

"Plaintiff was unloading roofing supplies using a conveyor on a flatbed truck, and the accident occurred when plaintiff attempted to raise a four-foot by eight-foot plywood sheet onto the roof. The plywood became unbalanced on the conveyor and, as plaintiff attempted to steady it, he fell from the bed of the flatbed truck to the ground five feet below and sustained injuries. Supreme Court denied plaintiff's motion for partial summary judgment on the issue of liability on all of plaintiff's claims and granted defendant's cross motion for summary judgment dismissing the complaint**.** We note at the outset that, as limited by his brief, plaintiff appeals from the order and judgment insofar as it granted defendant's cross motion and denied that part of his motion seeking partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1). We agree with plaintiff.
Although flatbed trucks "d[o] not present the kind of elevation-related risk that the statute contemplates" (*Toefer v Long Is. R.R.*, 4 NY3d 399, 408 [2005]), the accident in this case was caused by a falling object, which distinguishes this case from *Toefer* (*cf. Brownell v Blue Seal Feeds, Inc.*, 89 AD3d 1425, 1426-1427 [2011]). The accident that caused plaintiff's injuries "flow[ed] directly from the application of the force of gravity to the object" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009]; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). In other words, the injuries were the result of "the direct consequence of a failure to provide statutorily required protection against a risk plainly arising from a workplace elevation differential" (*Runner*, 13 NY3d at 605). Inasmuch as plaintiff established that the plywood fell while being hoisted because of the absence or inadequacy of a safety device of the kind enumerated in the statute, we conclude that he is entitled to summary judgment on the section 240 (1) claim …".**Hyatt v Young, 2014 NY Slip Op 03056, 4th Dept 5-2-14**

Ladder Which "Kicked Out" from Under Plaintiff Entitled Plaintiff to Partial Summary Judgment/Replacement of Cracked Glass Constituted Covered "Repair" Not Routine Maintenance

"The plaintiff need not demonstrate that the [safety device] was defective or failed to comply with applicable safety regulations," but only that it "proved inadequate to shield [plaintiff] from harm directly flowing from the application of the force of gravity to an object or person" … . The inexplicable shifting of an unsecured ladder may alone support a section 240 (1) claim if a worker is caused to fall due to such shifting … . A worker's prima facie entitlement to partial summary judgment on his or her section 240 (1) claim may be established by proof that the ladder provided collapsed under the worker while he or she was engaged in an enumerated task …".**Soriano v St Mary's Orthodox Church of Rockland, Inc, 2014 NY Slip Op 04419, 1st Dept 6-17-14**

"Cleaning" Within the Meaning of Labor Law 240(1) Explained/Question of Fact Whether Non-Commercial Window Cleaning Was Covered/Plaintiff Fell From Ladder

"The plaintiff allegedly was injured when he fell from a 20-foot ladder while washing the windows of a four-story hostel … . … The accident occurred after the plaintiff had been directed by the hostel's manager to clean the external kitchen windows of the hostel." **Pena v Varet & Bogart LLC, 2014 NY Slip Op 05524, 2nd Dept 7-30-14**

Fall Into a Three-to-Four-Foot-Deep Hole Is Not an Elevation-Related Event Under Labor Law 240(1)

"Where, as here, a plaintiff falls into a hole while walking at ground level, the plaintiff's injury "[is] not caused by [defendants'] failure to provide or erect necessary safety devices in response to 'elevation-related hazards,' and, accordingly, the protections of Labor Law § 240 (1) do not apply" … . The cases relied upon by plaintiff are factually distinguishable because they involve falls into excavated areas, as opposed to mere holes in the ground such as the one here … . Unlike the excavation cases, this is not a case where protective devices enumerated in Labor Law § 240 (1), e.g., "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, [and] ropes" were designed to apply …". **Wrobel v Town of Pendelton, 2014 NY Slip Op 05738, 4th Dept 8-8-14**

Plaintiff Was Catapulted Into the Air from a Flatbed Truck When a Heavy Bundle Landed on the Plank He Was Standing On---Labor Law 240(1) Action Should Not Have Been Dismissed

"…[T]he workers began using crow bars to roll the bundles of rebar off of the wooden "four-by-four" planks on which they were resting on the bed of the truck, which was four or five feet above the ground. As one of the bundles began to fall from the truck, the shift in weight allegedly caused one of the wooden planks to catapult the plaintiff approximately 15 feet in the air from the bed of the truck, where he had been standing on that plank. The plaintiff allegedly fell 19 to 20 feet to the ground, and was immediately thereafter struck by the same four-by-four plank when it fell onto his back. * * * The launch of the plaintiff from the truck along with the wooden "four by four" plank upon which he was standing flowed directly from the application of the force of gravity to the bundle of rebar … . The elevation differential between the flatbed truck and the ground was significant given the 8,000-to-10,000-pound weight of the bundles of rebar, and the amount of force they were capable of generating, "even over the course of a relatively short descent" … .
The causal connection between the bundles' "inadequately regulated descent and plaintiff's injury" was unmediated by any safety device, such as the crane that had hoisted the bundles earlier in the day …". **Treile v Brooklyn Tillary LLC, 2014 NY Slip Op 06197, 2nd Dept 9-17-14**

Injury While Trying to Prevent a Ladder (Used by a Co-worker) from Falling Is Covered Under Labor Law 240 (1)

"The plaintiff Joseph Passantino was part of a three-man crew installing fiber optic cable at the defendant's property. The crew was working inside a courtyard area where the ground was covered with sand and gravel. Passantino was holding the bottom of an unsecured extension ladder while his coworker stood on the ladder above him, installing the cable. Passantino let go of the ladder in order to reach some cable, the ladder started to "kick out," and began to fall. Passantino reached out in order to stop the ladder and his coworker from falling, allegedly causing him to slip on sand and gravel in the area, and tear a tendon in his arm. Contrary to the defendant's contention, the hazard presented here is one contemplated by Labor Law § 240 (1) … . Indeed, the harm to Passantino was "the direct consequence of the application of the force of gravity" to the ladder … . The plaintiffs met their prima facie burden of establishing their entitlement to judgment as a matter of law on the cause of action alleging a violation of Labor Law § 240 (1) by demonstrating that the defendant failed to provide Passantino with a safety device, and that this violation was a proximate cause of his injuries …".**Passantino v Made Realty Corp, 2014 NY Slip Op 07136, 2nd Dept 10-22-14**

Wooden Flooring With Gaps Between the Planks Constituted an Elevation-Related Hazard

"The motion court correctly concluded that the flooring on which plaintiff was working, which was comprised of wooden planks with gaps between them seven stories above the bottom of a shaft below, confronted plaintiff with an elevation-related hazard to which Labor Law § 240 (1) is applicable, regardless of whether the flooring was permanent …". **Kircher v City of New York, 2014 NY Slip Op 07951, 1st Dept 11-18-14**

Failure to Wear a Safety Harness Could Not Constitute the Sole Proximate Cause of Plaintiff's Fall (Caused by the Failure of a Scaffolding Plank)---Therefore Plaintiff Entitled to Partial Summary Judgment on the Labor Law 240(1) Claim

"Here, the facts are undisputed that, in an effort to assist with the construction of a platform, claimant stepped onto a plank on the existing scaffold, which was the primary safety device erected for the work, and the plank collapsed, causing claimant to fall and sustain his injuries. Accordingly, claimant's decision not to wear an available safety harness, or employ other safety measures that might have been available, could not have been the sole proximate cause of the accident, and the Court of Claims correctly awarded claimants partial summary judgment on the issue of liability with respect to their Labor Law § 240 (1) claim …". Similarly, because claimant's actions could not constitute the sole proximate cause of his accident, the Court of Claims did not err in denying defendant's motion for summary judgment with respect to claimants' Labor Law § 241 (6) cause of action." **Fabiano v State of New York, 2014 NY Slip Op 08695, 3rd Dept 12-11-14**

Collapse of Makeshift Scaffold Entitled Plaintiff to Summary Judgment in Labor Law 240(1) Action---Plaintiff's Comparative Negligence Is Not a Defense

The Fourth Department determined summary judgment should have been granted to the plaintiff in the Labor Law 240 (1) action. Plaintiff was not provided with a scaffold or safety equipment. Plaintiff fashioned a makeshift scaffold which collapsed. The court noted plaintiff's comparative negligence (in the construction of the scaffold) is not a defense under Labor Law 240 (1):

We conclude that "[t]he fact that the scaffold collapsed is sufficient to establish as a matter of law that the [scaffold] was not so placed . . . as to give proper protection to plaintiff pursuant to the statute" ... . Contrary to defendant's contention, there is no issue of fact whether the safety equipment provided to plaintiff was sufficient to afford him proper protection under Labor Law § 240 (1). The only safety device provided to plaintiff at the work site was a 14-foot-long pick [an aluminum plank]. "There were no harnesses, lanyards, safety lines, or similar safety devices available for use to prevent [plaintiff's] fall" ... . To perform the work of installing siding on the building, plaintiff therefore had to create what the court accurately referred to as a "makeshift" scaffold by placing one end of the pick in the shovel of a backhoe and the other end between two pieces of wood he or a coworker nailed into the side of the building. "[T]he onus [was not] on plaintiff to construct an adequate safety device, using assorted materials on site [that were] not themselves adequate safety devices but which may [have been] used to construct a safety device" ... . **Bernard v Town of Lysander, 2015 NY Slip Op 00050, 4th Dept 1-2-15**

Non-Defective Ladder Tipped Over---Question of Fact Whether Plaintiff's Negligence Was Sole Proximate Cause of Injuries in Labor Law 240(1) Action

The Second Department determined there were questions of fact precluding both plaintiffs' and defendant's motions for summary judgment in a Labor Law 240(1) action. Although the ladder which tipped over was not defective and was appropriate to the task, there were questions whether the ladder was mispositioned and, if so, who mispositioned it. The

fact that plaintiff may have been negligent did not preclude recovery under Labor Law 240(1) as long a plaintiff's negligence was not the sole proximate cause of his injury:

In order to prevail on a Labor Law § 240(1) cause of action, a plaintiff must prove that the statute was violated and that the violation was a proximate cause of the injuries ... . Proof that the plaintiff's own negligence was also a proximate cause will not defeat the claim ... . When the evidence establishes, however, that the plaintiff's own negligence was the sole proximate cause of the injuries, the defendant may not be held liable for those injuries ... . The parties' submissions demonstrated that the ladder itself was not defective and was appropriate to [plaintiff's] task.

There are triable issues of fact ... as to whether the ladder was mispositioned and, if so, who mispositioned it, and, if it was mispositioned by [plaintiff], whether his conduct was the sole proximate cause of the ladder's tipping over ... . **Daley v 250 Park Ave., LLC. 2015 NY Slip Op 01917, 2nd Dept 3-11-15**

Fall from Ladder While Dismantling Shelves--Heavy Shelves Bolted to the Wall Constituted a "Structure" and Dismantling the Shelves Constituted "Demolition" within the Meaning of the Labor Law

The First Department, reversing Supreme Court, granted summary judgment to the plaintiff on liability re: his Labor Law 240(1) and 241(6) claims. The court determined the dismantling of heavy shelves which were bolted to the wall constituted demolition of a structure within the meaning of the Labor Law:

Plaintiff was injured in a fall from an unsecured ladder while working in a warehouse, where his job was to "clean out, remove machines, break down structures . . . and ship them out." The work included removal of heavy machinery and shelves that ran from floor to ceiling across three second-floor walls, each 50 feet long and 8 feet high, and were bolted to the floors and walls. The breaking down and removing of the shelves required the use of impact wrenches and sawzalls to cut the bolts. Removed materials, including shelving, were heavy, and had to be loaded in cages, which were then lifted by a pallet jack, moved to the edge of the second floor, and lowered to the first floor with a forklift. The dismantling of the shelves was a sufficiently complex and difficult task to render the shelving a "structure" within the meaning of Labor Law §§ 240(1) and 241(6) ... . Moreover, in dismantling the shelving, plaintiff was engaged in "demolition" for purposes of §§ 240(1) and 241(6) ... . **Phillips v Powercrat Corp., 2015 NY Slip Op 02407, 1st Dept 3-24-15**

Slip and Fall On Ice While Wearing Stilts Not an Elevation-Related Event within Meaning of Labor Law 240 (1)

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a dissent, determined that a slip and fall caused by ice on the floor was not an elevation-related event within the meaning of Labor 240(1), despite the fact the worker was using stilts when he slipped and fell:

... [T]he protections of Labor Law § 240 (1) "do not encompass any and all perils that may be connected in some tangential way with the effects of gravity" ... . "Rather, liability [remains] contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" ... . Moreover, section 240 (1) is not applicable unless the plaintiff's injuries result from the elevation-related risk and the inadequacy of the safety device ... . * * *

Here, plaintiff's accident was plainly caused by a separate hazard — ice — unrelated to any elevation risk. Plaintiff testified that stilts were the appropriate device for the type of work that he was undertaking, given the height of this particular ceiling. Plaintiff's testimony further established that it was the ice — not a deficiency or inadequacy of the stilts — that caused his fall. **Nicometi v Vineyards of Fredonia, LLC, 2015 NY Slip Op 02801 CtApp 4-2-15**

Fall from Ladder; Lessee Who Has Authority to Control the Work Is Considered an Owner Under the Labor Law

The Second Department reversed Supreme Court finding that plaintiff was entitled to summary judgment on his Labor Law 240 (1) claim. Plaintiff alleged that a ladder twisted out from under him when he was carrying materials to the roof and defendant (Sigma) did not raise a question of fact whether plaintiff's conduct was the sole proximate cause of his injuries. The court explained the circumstances under which a tenant, the defendant (Sigma) here, is liable under the Labor Law:

Labor Law § 240(1) applies to owners, contractors, and their agents (see Labor Law § 240[1]...). A party is deemed to be an agent of an owner or contractor under the Labor Law when it has the " ability to control the activity which brought about the injury'" ... . A lessee of real property that hires a contractor and has the right to control the work at the property is considered to be an owner within the meaning of the law ... . Moreover, a lessee of property may be liable as an "owner" when it "has the right or authority to control the work site, even if the lessee did not hire the general contractor" ... . The key question is whether the defendant had the right to insist that proper safety practices were followed ... . Here, the evidence established that Sigma was the lessee of the premises where the accident occurred and that the president of Sigma hired the injured plaintiff to perform the work and controlled his work. **Seferovic v Atlantic Real Estate Holdings, LLC, 2015 NY Slip Op 03343, 2nd Dept 4-22-15**

Plaintiff, Who Fell Through an Open Manhole, Entitled to Summary Judgment on Labor Law 240 (1) Cause of Action---Failure to Set Up Guard Rails Was a Proximate Cause--Liability Imposed Regardless of Plaintiff's Own Negligence and Regardless of Whether the Owner, Contractor or Agent Supervised or Controlled the Work

The Court of Appeals, in a full-fledged opinion by Judge Pigott, over a two-judge dissent, determined plaintiff, who fell through an uncovered manhole, was entitled to partial summary judgment on his Labor Law 240 (1) claim based on testimony the manhole should have been surrounded by guard rails. The court also determined there was a question of fact whether the safety consultant, IMS, was liable as a "statutory agent" under Labor Law 240 (1). The court explained that the obligation to provide safety devices is a nondelegable duty which imposes liability regardless of whether owner, contractor or agent supervises or controls the work. Where 240 (1) is violated, the plaintiff's negligence is not a defense, unless plaintiff's negligence is the sole proximate cause of the injury:

Section 240 (1) provides, in relevant part:
"All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor [certain enumerated] [*4]and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The statute imposes upon owners, contractors and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work ... . "Where an accident is caused by a violation of the statute, the plaintiff's own negligence will not furnish a defense"; however, "where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability" ... . Thus, in order to recover under section 240 (1), the plaintiff must establish that the statute was violated and that such violation was a proximate cause of his injury ... . **Barreto v Metropolitan Tr. Auth., 2015 NY Slip Op 03875, CtApp 5-7-15**

Fall from Scaffold---Inability to Remember Fall and Absence of Witnesses Did Not Preclude Summary Judgment on Labor Law 240(1) Cause of Action

The First Department determined the plaintiff's inability to remember his fall from a scaffold and the absence of witnesses did not preclude summary judgment in his favor for the Labor Law 240(1) cause of action:

Plaintiff established his entitlement to judgment as a matter of law on the issue of liability in this action where he sustained injuries when, while performing asbestos removal work in a building owned by defendant, he fell from a baker's scaffold. Plaintiff's testimony that he was standing on the scaffold working, and then woke up on the ground with the scaffold tipped over near him, established a prima facie violation of the statute and that such violation proximately caused his injuries ... . That plaintiff could not remember how he fell does not bar summary judgment ... . Nor does the fact that he was the only witness raise an issue as to his credibility where, as here, his proof was not inconsistent or contradictory as to how the accident occurred, or with any other evidence ... . **Strojek v 33 E. 70th St. Corp., 2015 NY Slip Op 04203, 1st Dept 5-14-15**

A Three-and-a-Half-Foot Fall from a Railing to a Raised Platform Was Covered by Labor Law 240(1)

The Second Department determined plaintiff's Labor Law 240(1) cause of action should not have been dismissed. Plaintiff climbed up scaffolding to access a platform and, as he attempted to climb over the three-and-a-half-foot platform railing, plaintiff fell to the platform and was injured. Plaintiff was not instructed to access the platform any other way, so plaintiff's failure to use a ladder located 25 to 30 feet away could not be considered the sole proximate cause of the accident. In addition, the Second Department noted that the Labor Law 241(6) cause of action should not have been dismissed. Plaintiff's failure to state the particular provision of the Industrial Code alleged to have been violated in the complaint or bill of particulars was not fatal to the cause of action. The belated identification of the relevant code provision involved no new factual allegations and no new theories of liability. The Second Department also held the Labor Law 200 cause of action should not have been dismissed, explaining the elements. With respect to the Labor Law 240(1) cause of action, the court wrote:

Labor Law § 240(1) imposes absolute liability on owners, contractors, and their agents when their "failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker" ... . However, liability may "be imposed under the statute only where the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential'" ... .

Contrary to the contention of the defendants and Newtron, Labor Law § 240(1) applies to the facts of this case, even though the plaintiff fell only from the railing to the platform ... . The plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability on his cause of action alleging a violation of Labor Law § 240(1) by submitting evidence demonstrating that the defendants failed to provide him with an adequate safety device, and that such failure was a proximate cause of his injuries ... .

In opposition, the defendants failed to raise a triable issue of fact as to whether the plaintiff's actions in using the scaffolding and climbing over the railing, rather than using a permanent ladder that was approximately 25 to 30 feet from the scaffolding ladder, to access the permanent platform was the sole proximate cause of his injuries. A plaintiff's negligence is the sole proximate cause of his or her injuries "when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he [or she] was expected to use them but for no good reason chose not to do so, causing an accident" ... . Here, there is no evidence that anyone instructed the plaintiff that he was "expected to" use the permanent ladder rather than the scaffolding ... . **Doto v Astoria Energy II, LLC, 2015 NY Slip Op 04605, 2nd Dept 6-3-15**

Plaintiff Entitled to Summary Judgment on Labor Law 240 (1) Cause of Action---Plaintiff Was Standing on an A-Frame Ladder When It Swayed and Tipped Over

The Second Department determined plaintiff, Casasola, was entitled to summary judgment on his Labor Law 240 (1) cause of action. Plaintiff was standing on an unsecured A-frame ladder when it swayed and tipped over. The incident occurred when Casasola was working on property owned by the State of New York. The court noted that, to be liable, the property owner need not have exercised any control over the work. All the plaintiff must show is the violation of a statute proximately caused his injury:

Labor Law § 240(1) provides that "[a]ll contractors and owners and their agents . . . shall furnish or erect, or cause to be furnished or erected . . . scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to [construction workers employed on the premises]" ... . The purpose of this statute, commonly referred to as the "scaffold law," is to protect workers "by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident" ... . **Casasola v State of New York, 2015 NY Slip Op 04798, 2nd Dept 6-10-15**

Plaintiff Who Fell From Scaffolding Which Did Not Have Safety Rails Entitled to Summary Judgment on His Labor Law 240(1) Cause of Action

The Second Department determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action based upon his fall from scaffolding which did not have safety rails. The relevant law was succinctly explained:

Labor Law § 240(1) imposes a nondelegable duty upon owners, lessees that control the work performed, and general contractors to provide safety devices necessary to protect workers from risks inherent in elevated work sites ... . "To recover on a cause of action pursuant to Labor Law § 240(1), a plaintiff must demonstrate that there was a violation of the statute, and that the violation was a proximate cause of the accident" ... . Here, the plaintiff established his prima facie entitlement to judgment as a matter of law by demonstrating that he was injured when he fell from a scaffold which lacked safety rails on the sides and that he was not provided with a safety device to prevent him from falling ... . **Vasquez-Roldan v Two Little Red Hens, Ltd., 2015 NY Slip Op 04842, 2nd Dept 6-10-15**

Defendant-Homeowner's Providing Plaintiff With a Ladder With Allegedly Worn Rubber Feet Raised a Question of Fact About Defendant's Liability for the Ladder's Slipping and Plaintiff's Fall---Cause of Accident Can Be Proven by Circumstantial Evidence

The Second Department determined Supreme Court should not have granted summary judgment to the defendant homeowner. Plaintiff was using defendant's ladder when the ladder slipped and plaintiff fell. Plaintiff alleged the rubber feet on the ladder were totally destroyed. That allegation created a question of fact whether defendant provided dangerous or defective equipment to the plaintiff which caused plaintiff's injury. In response to defendant's argument that plaintiff could not explain the cause of the accident without resort to speculation, the court noted that the cause of an accident can be proven by circumstantial evidence (here the condition of the feet of the ladder and fact that the feet slipped):

"[W]hen a defendant property owner lends allegedly dangerous or defective equipment to a worker that causes injury during its use, the defendant moving for summary judgment must establish that it neither created the alleged danger or defect in the instrumentality nor had actual or constructive notice of the dangerous or defective condition" ... . While lack of constructive notice can generally be established by evidence demonstrating when the area or condition was last inspected relative to the time of the accident ..., the absence of rubber shoes on a ladder is a "visible and apparent defect," evidence of which may be sufficient to raise a triable issue of fact on the issue of constructive notice ... . Here, the defendants satisfied their prima facie burden with evidence that the ladder had been inspected prior to the accident. The defendant

Billis Arniotis (hereinafter Billis) testified that, since purchasing the ladder 20 years before the accident, he had used it once per week and had inspected its rubber feet each time. Billis last inspected the ladder one or two weeks before the accident and did not observe any wear at that time. However, the plaintiff testified that he inspected the ladder after the accident and found that its rubber feet were "totally eaten up, worn," and "destroyed." This conflicting evidence, coupled with Billis's testimony that the ladder had not been used between the time of the accident and the plaintiff's inspection, raised a triable issue of fact.

Contrary to the defendants' contention, they failed to make a prima facie showing that the plaintiff cannot identify the cause of his fall without engaging in speculation. A plaintiff's inability to testify exactly as to how an accident occurred does not require dismissal where negligence and causation can be established with circumstantial evidence ... . Here, Billis's testimony establishes that he was present at the time of the accident and that he watched the ladder slide down while the plaintiff was on it. Evidence that the ladder's rubber feet were worn down also is sufficient to permit the inference that this defective condition caused the slippage ... . **Patrikis v Arniotis, 2015 NY Slip Op 05167, 2nd Dept 6-17-15**

Fall from Ladder Doing Routine Cleaning of Basketball Backboard Not Covered by Labor Law 240 (1)

The Second Department determined Supreme Court properly dismissed an action by plaintiff-janitor who fell from an A-frame ladder while cleaning the basketball backboard in a school gymnasium. The Labor Law 240 (1) cause of action was properly dismissed because cleaning the backboard was routine maintenance, not covered by Labor Law 240 (1). The Labor Law 200 and common law negligence causes of action were properly dismissed because the defendant school demonstrated the ladder was not defective and it did not have the authority to control the manner in which plaintiff did his work:

... [T]he injured plaintiff's work did not constitute "cleaning" within the meaning of Labor Law § 240(1). The defendant established that the injured plaintiff was performing routine maintenance of the basketball backboards, done regularly throughout the course of the basketball season, that did not require any specialized equipment, and was unrelated to any ongoing construction or renovation of the school. As such, it was not a covered activity under Labor Law § 240(1) ... . **Torres v St. Francis Coll., 2015 NY Slip Op 05466, 2nd Dept 6-24-15**

Plaintiff's Use of a Partially Open A-Frame Ladder Did Not Constitute Misuse of a Safety Device---Directed Verdict in Favor of Plaintiff on Labor Law 240(1) Cause of Action Was Proper/Plaintiff's Apparent Failure to Turn Over All of the Relevant Medical Records Required a New Trial on Damages

The First Department, over a dissent, determined that the court, after a jury trial, properly directed a verdict in favor of the plaintiff on the Labor Law 240(1) cause of action. Plaintiff was using an A-frame ladder to weld a tank. It was not possible to open the ladder completely unless the ladder was perpendicular to the tank. Because using the ladder in a perpendicular position would have forced plaintiff to twist his body to weld, plaintiff placed the ladder against the tank in a partially open position. The ladder "shook" and plaintiff fell off it. The First Department held that, under those facts, the way plaintiff used the ladder did not constitute misuse of a safety device and, because Labor Law 240(1) was violated, plaintiff's action could not constitute the sole proximate cause of the injury. A new trial was required, however, because the medical records supplied to the defendants pursuant to a subpoena were much less voluminous than the medical records brought to trial by the plaintiff's medical expert, thereby depriving the defendants of the ability to fully cross-examine the expert:

A verdict may be directed only if the "court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party" ... . The benefit of all inferences is afforded to the non moving party, and the facts are viewed in a light most favorable to it (id.). Here, plaintiff argued that there was no issue of fact necessary for a jury to resolve regarding whether defendants violated their obligation under Labor Law § 240(1) to provide him with an appropriate safety device to guard against the elevation-related risk. That is because, he asserts, there was no alternative safety device readily available to him, and he had no choice but to place the ladder in the closed

position given the way the tank was situated. Defendants do not dispute that an unsecured ladder, even one in good condition, can give rise to Labor Law section 240(1) liability if the worker falls from it * * *

A worker's decision to use an A-frame ladder in the closed position is not a per se reason to declare him the sole proximate cause of an accident ... . To be sure, we do not disagree with the dissent that, in principle, placement of an A-frame ladder in the closed position "can constitute misuse of a safety device".... . * * *

Here, plaintiff gave a specific reason why he used the ladder in the closed position. Plaintiff testified that using the ladder in an open position and twisting his body to face the tank would have been exhausting, requiring him to take frequent breaks, which defendants did not dispute. Indeed, defendants' assertion that turning the ladder would have presented an issue of "[m]ere expediency or inconvenience" mischaracterizes the record. In any event, we are hesitant to adopt a rule that, in order to permit a worker to enjoy the protection of Labor Law section 240(1), would require him to take extraordinary measures to perform his work, when he has a good faith belief that doing so would cause him acute discomfort while drastically slowing his pace ... . **Noor v City of New York, 2015 NY Slip Op 06295, 1st Dept 7-28-15**

Fall from Ladder Which May Have Been Misused---Labor Law 240 (1) Concerns Only Whether Proper Safety Equipment Was Provided---Comparative Negligence (Misuse of Ladder) Is Not Relevant

The First Department determined plaintiff was entitled to summary judgment under Labor Law 240 (1) for injury incurred while using the top half of an extension ladder which did not have rubber feet. The court noted that contributory or comparative negligence is not a defense to a Labor Law 240 (1) cause of action:

Plaintiff presented evidence establishing that defendants did not provide "proper protection" within the meaning of Labor Law § 240(1). The record indicates that plaintiff "only saw the extension ladder" in the area where he was working. There was no scaffolding available to plaintiff. Plaintiff was not wearing a safety harness, and there was no appropriate anchor point to tie off the ladder.

We reject defendants' assertion that plaintiff's conduct was the sole proximate cause of his injuries. Plaintiff's knowing use of half of the extension ladder without proper rubber footings goes to his culpable conduct and comparative negligence. Comparative negligence is not a defense to a claim based on Labor Law § 240(1), where, as here, defendants failed to provide adequate safety devices ... . Further, defendants failed to show that plaintiff refused to use the safety devices that were provided to him. **Stankey v Tishman Constr. Corp. of N.Y., 2015 NY Slip Op 06643, 1st Dept 8-25-15**

Fall from Non-Defective Ladder After Co-Worker Who Had Been Stabilizing the Ladder Was Called Away---Defendants Did Not Demonstrate Plaintiff Was Adequately Protected---Comparative Negligence Is Not Relevant

The First Department, over a dissent, determined plaintiff's motion for summary judgment for the Labor Law 240 (1) cause of action should have been granted. Plaintiff fell from a non-defective ladder when he lost his balance while attempting to use a drill to install a metal stud. A co-worker, who had been stabilizing the ladder, had been called away five minutes before plaintiff fell. Plaintiff alleged no one else was around who could have stabilized the ladder. The court noted that plaintiff's alleged comparative negligence was not relevant. The only relevant consideration is whether plaintiff was provided with adequate protection, an issue not addressed by defendants:

Supreme Court erred in denying plaintiffs' motion for summary judgment against defendants on the cause of action alleging a violation of Labor Law § 240(1). The dissent mischaracterizes the majority's position. We do not simply hold that "a plaintiff-worker's testimony that he fell from a non-defective ladder while performing work . . . alone establish[es] liability under Labor Law § 240(1). Rather, it is undisputed that no equipment was provided to plaintiff to guard against the risk of falling from the ladder while operating the drill, and that plaintiff's coworker was not stabilizing the ladder at the time of the

fall. Under the circumstances, we find that plaintiff's testimony that he fell from the ladder while performing drilling work established prima facie entitlement to summary judgment on the issue of liability on his Labor Law § 240(1) claim ... . In response, defendants failed to raise a triable issue of fact concerning the manner in which the accident occurred or whether the A-frame ladder provided adequate protection. Their arguments that plaintiff caused his own injuries, by allegedly placing himself in a position where he had to lean and reach around the side of the ladder to fix the wall stud, at most establish comparative negligence, which is not a defense to a Labor Law § 240(1) claim ... . **Caceres v Standard Realty Assoc., Inc., 2015 NY Slip Op 06645, 1st Dept 8-25-15**

Collapse of Rotten Floor First Revealed When Carpet Was Removed Was Not Foreseeable---Labor Law 240(1) Cause of Action Properly Dismissed---Defect Was Latent and Was Not Caused by Owner

The Second Department determined plaintiff's fall through a rotted portion of subfloor exposed when carpeting was removed was not foreseeable. Therefore the Labor Law 240 (1) cause of action, the Labor Law 200 cause of action, and the common-law negligence cause of action against the owner of the property were properly dismissed:

In order for liability to be imposed under Labor Law § 240(1), there must be "a foreseeable risk of injury from an elevation-related hazard . . . as [d]efendants are liable for all normal and foreseeable consequences of their acts'" ... . Thus, the collapse or partial collapse of a permanent floor may give rise to liability under Labor Law § 240(1) where " circumstances are such that there is a foreseeable need for safety devices'" ... . Here, however, the plaintiffs failed to demonstrate that the partial collapse of a small section the basement subfloor and, in turn, the need for safety devices to protect the injured plaintiff from an elevation-related hazard, were foreseeable. Consequently, since the plaintiffs did not meet their prima facie burden of demonstrating their entitlement to judgment as a matter of law, the Supreme Court properly denied that branch of their motion which was for summary judgment on the issue of liability with respect to the cause of action alleging a violation of Labor Law § 240(1) .. . * * *

Where, as here, a plaintiff's alleged injury arose not from the manner in which the work was performed, but from an allegedly dangerous condition on the premises, a property owner moving for summary judgment dismissing causes of action alleging common-law negligence and a violation of Labor Law § 200 has the initial burden of showing only that it neither created the dangerous condition nor had actual or constructive notice of it ... . A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident such that it could have been discovered and corrected ... . "When a defect is latent and would not be discoverable upon a reasonable inspection, constructive notice may not be imputed" ... . Here, the defendant demonstrated its prima facie entitlement to judgment as a matter of law by establishing that it did not have actual or constructive notice of the defect in the subfloor, which was latent and not discoverable upon a reasonable inspection. The defendant further demonstrated that it did not create the defect. **Carrillo v Circle Manor Apts., 2015 NY Slip Op 06652, 2nd Dept 8-26-15**

Plaintiff Entitled to Summary Judgment on His Labor Law 240 (1) Cause of Action---Plaintiff Fell from Temporary Staircase Which Was Wet from Rain

The First Department, over an extensive dissent, determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action based upon his fall from a temporary staircase which was wet from rain. The dissent argued that there was a question of fact whether a safer temporary staircase could have been provided, and, therefore, summary judgment in plaintiff's favor was not appropriate. The majority wrote:

Plaintiff is entitled to partial summary judgment on his Labor Law § 240(1) claim. As the dissent recognizes, plaintiff was engaged in a covered activity at the time he slipped and fell down the stairs of a temporary tower scaffold. A fall down a temporary staircase is the type of elevation-related risk to which section 240(1) applies, and the staircase, which had been erected to allow workers access to different levels of the worksite, is a safety device within the meaning of the statute ... . As we stated in Ervin v Consolidated Edison of N.Y. (93 AD3d 485, 485 [1st Dept 2012]), involving a worker who fell when the temporary structure he was descending gave way, "It is irrelevant whether the structure constituted a staircase, ramp, or passageway since it was a safety device that failed to afford him proper protection from a gravity-related risk." We are

thus at a loss to comprehend the dissent's reasoning that although the temporary staircase was a safety device and although it admittedly did not prevent plaintiff's fall, there is nonetheless a factual issue which would defeat plaintiff's entitlement to partial summary judgment on his section 240(1) claim.

The fact that the affidavits of plaintiff's and defendant's experts conflict as to the adequacy and safety of the temporary stairs does not preclude summary judgment in plaintiff's favor. A plaintiff is entitled to partial summary judgment on a section 240(1) claim where, as here, stairs prove inadequate to shield him against harm resulting from the force of gravity, and his injuries are at least in part attributable to the defendants' failure to take mandated safety measures to protect him against an elevation-related risk ... . Plaintiff's expert opined, inter alia, that the stairs showed obvious signs of longstanding use, wear and tear; therefore, a decrease in anti-slip properties was to be expected. Given that it is undisputed that the staircase, a safety device, malfunctioned or was inadequate to protect plaintiff against the risk of falling, plaintiff is entitled to summary judgment, whatever the weather conditions might have been. **O'Brien v Port Auth. of N.Y. & N.J., 2015 NY Slip Op 06749, 1st Dept 9-8-15**

Tree Removal Was First Step in Making Structural Repairs, Injury from Fall During Tree Removal Covered Under Labor Law 240 (1)

The Second Department determined removal of a tree which had fallen on a house, causing structural damage, was the first step in repairing the structure. Therefore, plaintiff, who fell while attempting the remove the tree, was engaged in an activity covered by Labor Law 240 (1) and 241 (6):

"… [T]he protections of Labor Law § 240(1) are to be afforded to tree removal when undertaken during the repair of a structure ... . * * * Since the plaintiff was engaged in activities ancillary to the repair of the building from which he fell, the provisions of Labor Law § 241(6) are also applicable to the facts of this case." **Moreira v Osvaldo J. Ponzo, 2015 NY Slip Op 06792, 2nd Dept. 9-16-15**

Question of Fact Whether Plaintiff's Conduct, Placing Ladder on Ice, Was Sole Proximate Cause of Injury

The Fourth Department determined there was a question of fact whether the plaintiff's conduct constituted the sole proximate cause of his injury (re: the Labor Law 240 (1) cause of action). Plaintiff placed his ladder on ice and was injured when the ladder slipped on the ice. The court explained the analytical criteria:

Liability under section 240 (1) "is contingent on a statutory violation and proximate cause" ... . If both elements are established, "contributory negligence cannot defeat the plaintiff's claim" ... . There can be no liability under Labor Law § 240 (1), however, "when there is no violation and the worker's actions . . . are the sole proximate cause' of the accident" ... . It is therefore "conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation" ... .

While we agree with plaintiffs that evidence that a ladder is "structurally sound and not defective is not relevant on the issue of whether it was properly placed" ..., we conclude that there are triable issues of fact whether plaintiff's actions were the sole proximate cause of his injuries ... . * * *

In this case, we conclude that plaintiffs failed to meet their initial burden of establishing entitlement to partial summary judgment on the issue of liability on the Labor Law § 240 (1) cause of action inasmuch as they submitted evidence raising a triable issue of fact whether plaintiff's conduct in "refusing to use available, safe and appropriate equipment" was the

sole proximate cause of the accident ... . Specifically, plaintiffs submitted deposition testimony from defendant's customer, who purportedly owned the building on which plaintiff was working. The owner testified that, on the day of the accident, he advised plaintiff that the ladder was not placed in a safe position. The owner offered to retrieve safety equipment from his own truck that would help to remove ice from underneath the ladder and thereby stabilize the ladder. Plaintiff, however, rejected that offer. The owner also attempted to hold the ladder for plaintiff, but plaintiff again rejected the owner's assistance. **Fazekas v Time Warner Cable, Inc., 2015 NY Slip Op 07403, 4th Dept 10-9-15**

The Fact That A (Non-Defective) A-Frame Ladder Fell Over While Plaintiff Held On To It After Plaintiff Was Jolted With Electricity Did Not Justify Summary Judgment On Plaintiff's Labor Law 240 (1) Cause Of Action, Question of Fact Whether Safety Device Should Have Been Provided

The Court of Appeals, reversing (modifying) the Appellate Division, determined plaintiff was not entitled to summary judgment on his Labor Law 240 (1) cause of action. Defendant fell from an A-frame ladder after receiving an electrical shock:

Plaintiff is not entitled to summary judgment under Labor Law § 240 (1). While using an A-frame ladder, plaintiff fell after receiving an electrical shock. Questions of fact exist as to whether the ladder failed to provide proper protection, and whether plaintiff should have been provided with additional safety devices ... . **Nazario v 222 Broadway, LLC, 2016 NY Slip Op 07823, CtApp 11-21-16**

Plaintiff's Leaning To The Side Of A Non-Defective Ladder Was The Sole Proximate Cause Of Injury

The Second Department determined summary judgment was properly granted to defendants in a Labor Law 240 (1) cause of action. Plaintiff was using an A-frame ladder which was not defective. Plaintiff was injured when he leaned to the side of the ladder and the ladder tipped and the plaintiff fell. It was the act of reaching to the side, not a defective ladder, which was the proximate cause of plaintiff's injury:

"Labor Law § 240(1) imposes a nondelegable duty upon owners, lessees that control the work performed, and general contractors to provide safety devices necessary to protect workers from risks inherent in elevated work sites" ... . "To recover on a cause of action pursuant to Labor Law § 240(1), a plaintiff must demonstrate that there was a violation of the statute, and that the violation was a proximate cause of the accident" ... . "Where there is no statutory violation, or where the plaintiff is the sole proximate cause of his or her own injuries, there can be no recovery under Labor Law § 240(1)" ... .

Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 240(1) insofar as asserted against each of them. Their submissions demonstrated, prima facie, that the injured plaintiff improperly positioned and misused the ladder, which was the sole proximate cause of his injuries ... . **Scofield v Avante Contr. Corp., 2016 NY Slip Op 00493, 2nd Dept 1-27-16**

Plaintiff Need Not Show Ladder Which Fell Was Defective To Be Entitled To Summary Judgment On Labor Law 240 (1) Cause Of Action

The First Department determined plaintiff need not show the ladder which fell was defective to be entitled to summary judgment on his Labor Law 240 (1) cause of action:

Plaintiff made a prima facie showing of his entitlement to summary judgment as to liability on his Labor Law § 240(1) cause of action, by submitting his own testimony that the ladder upon which he was standing to perform his work wobbled, and that both he and the ladder fell to the ground as he descended it to figure out why it had wobbled ... . Plaintiff was not required to offer proof that the ladder was defective ... .

In opposition, defendant failed to show that plaintiff's conduct was the sole proximate cause of the accident ... and that it had provided plaintiff with adequate safety devices to prevent his fall ... . **Ocana v Quasar Realty Partners L.P., 2016 NY Slip Op 01902, 1st Dept 3-17-16**

12 To 18 Inch Fall Supported Summary Judgment In Favor Of Plaintiff Under Labor Law 240 (1)

The First Department determined a fall of 12 to 18 inches sufficed to award plaintiff summary judgment Labor Law 240 (1) action:

Plaintiff was injured when, while carrying wood planks, he fell through an opening in a latticework rebar deck to a plywood form that was 12 to 18 inches below. "There is no bright-line minimum height differential that determines whether an elevation hazard exists" ... , and here, the record establishes that plaintiff's fall was the result of exposure to an elevation related hazard ... . **Brown v 44 St. Dev., LLC, 2016 NY Slip Op 02527, 1st Dept 3-31-16**

Ladder Was Not Defective, Fall Not Covered By Labor Law 240

The First Department determined plaintiff's fall from a ladder did not support a Labor Law 240 cause of action. Plaintiff's pant leg caught on an unmarked rebar as he descended from the third rung. The accident was not caused by a defective ladder and was not attributable to an extraordinary elevation-related risk:

... [D]ismissal of the Labor Law § 240 claim was proper, as there is no dispute that the ladder was free from defects, and the record shows that plaintiff's fall was not attributable to the kind of extraordinary elevation-related risk that the statute was designed to prevent. Rather, plaintiff's injuries "were the result of the usual and ordinary dangers at a construction site" ... . **Almodovar v Port Auth. of N.Y. & N.J., 2016 NY Slip Op 03075, 1st Dept 4-21-16**

Openings Through Which A Worker's Body Could Not Completely Fall Not Actionable Under Labor Law 240(1) Or 241(6)

Plaintiff was injured when his leg slipped into a 12-inch square opening in a rebar grid. The Second Department determined an opening through which a worker's body could not fall through was not an elevation hazard (Labor Law 240(1)) and did not violate a regulation prohibiting "hazardous openings" (Labor Law 241(6):

... [T]he openings of the grid, which were not of a dimension that would have permitted the plaintiff's body to completely fall through and land on the floor below, did not present an elevation-related hazard to which the protective devises enumerated in Labor Law § 240(1) are designed to apply ... .

This Court has repeatedly held that 12 NYCRR 23-1.7, which concerns "hazardous openings," does not apply to openings that are too small for a worker to completely fall through ... . **Vitale v Astoria Energy II, LLC, 2016 NY Slip Op 02986, 2nd Dept 4-20-16**

Fall from Wet Ladder Which Was Too Close to the Building; Fixing A Leaky Roof Not Routine Maintenance, Plaintiff's Labor Law 240(1) Cause Of Action Properly Survived Motion To Dismiss

The First Department determined defendant's motion to dismiss plaintiff's Labor Law 240(1) cause of action was properly denied. Plaintiff climbed up a permanent ladder to fix a roof leak. The ladder was wet with rain, shaky and too close to the wall. Plaintiff fell when he attempted to come back down the ladder from the roof:

... [D]efendant [is not] entitled to dismissal of the Labor Law § 240(1) claim. Plaintiff was engaged in repairing the roof, an activity to which Labor Law § 240(1) applies, and not merely in routine maintenance ... . Moreover, the permanently affixed ladder that provided the sole access to plaintiff's elevated work site was a safety device within the meaning of Labor Law § 240(1) ... . In view of plaintiff's testimony that the ladder shook and was wet and was too close to the wall to allow room for his feet on the rungs, defendant failed to demonstrate as a matter of law that plaintiff was provided with proper protection. **Kolenovic v 56th Realty, LLC, 2016 NY Slip Op 04005, 1st Dept 5-24-16**

Absence Of Safety Rail On Scaffolding Entitled Plaintiff To Summary Judgment On Labor Law 240(1) Cause Of Action

The Second Department determined plaintiff was entitled to summary judgment on the Labor Law 240(1) cause of action. Plaintiff fell from scaffolding after suffering an electric shock. There was no safety rail on the scaffolding:

Labor Law § 240(1) is to be "interpreted liberally to accomplish its purpose" ... . To establish liability pursuant to Labor Law § 240(1), a plaintiff must demonstrate a violation of the statute and that such violation was a proximate cause of his or her injuries ... . Here, the plaintiff established his prima facie entitlement to judgment as a matter of law by demonstrating that he was injured when he fell from a scaffold that lacked a safety railing, and that he was not provided with a safety device to prevent him from falling ... . **Viera v WFJ Realty Corp., 2016 NY Slip Op 04202, 2nd Dept 6-1-16**

Proof Plaintiff Fell When Ladder Wobbled Sufficient For Summary Judgment On The Labor Law 240 (1) Cause Of Action

The First Department held that a proof plaintiff fell after the ladder wobbled was sufficient to support summary judgment on the Labor Law 240 (1) cause of action. Proof the ladder was defective is not necessary:

"Liability under Labor Law § 240(1) depends on whether the injured worker's task creates an elevation-related risk of the kind that safety devices listed in section 240(1) protect against'" ... . "[T]he single decisive question is 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" ... . Under this section of the Labor Law, a plaintiff's comparative fault is not a defense ... . "Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain[s] steady and erect while being used, constitutes a violation of Labor Law § 240(1)" ... . **Hill v City of New York, 2016 NY Slip Op 05019, 1st Dept 6-23-16**

Question Of Fact Whether Accident Was Gravity-Related, Motorized Wheelbarrow Slid Down Hill

The First Department determined there was a question of fact whether the accident was related to a gravity-related risk or merely part of the usual dangers of construction work. Plaintiff was operating a motorized wheelbarrow and was stopped near the top of a hill when it slid down the hill:

Issues of fact exist here as to whether plaintiff's accident was the result of a gravity-related risk or part of the usual and ordinary dangers of the work site ... . Hence partial summary judgment on plaintiff's Labor Law § 240(1) claim should have been denied, and summary dismissal of plaintiff's Labor Law § 200 and common law negligence claims was properly denied. **Ankers v Horizon Group, LLC, 2016 NY Slip Op 05342, 1st Dept 7-5-16**

Plaintiff Fell to Ground While Attempting to Move from Roof to Scaffold; Plaintiff's Allegedly Inconsistent Accounts Of The Cause Of His Fall Created A Question Of Fact; Plaintiff Alleged Wire Attaching Scaffold to Building Snapped; No Witnesses

The First Department, with a two-justice concurring memorandum, determined conflicting testimony raised questions of fact about whether a safety harness was available and whether the scaffold was defective. Plaintiff was not wearing a harness when he attempted to move from the roof to a scaffold and fell. With respect to the scaffold, the court noted that plaintiff's allegedly inconsistent accounts of the cause of the fall raised a question of fact:

According to plaintiff, as he attempted to swing down from the roof to the scaffold, a wire attaching the scaffold to the building snapped, causing the scaffold to swing away from the wall and resulting in plaintiff's fall to the ground below. The foreman, however, testified that, in conversation after the accident, plaintiff had admitted to him that he fell because his foot had slipped as he stepped onto the scaffold from the roof, without mentioning any movement of the scaffold. These two versions of how the accident happened, each given by plaintiff, the sole witness to the incident, are inconsistent with each other and give rise to an issue of fact as to whether plaintiff's fall was caused by a failure of a safety device within the purview of § 240(1). As this Court recently noted, "[W]here a plaintiff is the sole witness to an accident, an issue of fact may exist where he or she provides inconsistent accounts of the accident" ... . **Albino v 221-223 W. 82 Owners Corp., 2016 NY Slip Op 05953, 1st Dept 9-8-16**

Plaintiff Entitled To Summary Judgment On Labor Law 240(1) Cause Of Action; Plaintiff Fell 13 Or 14 Feet From The Back Of A Flatbed Truck

The First Department, over an extensive dissent, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action stemming from a fall of 13 to 14 feet from the back of a flatbed truck. Plaintiff was standing on top of steel beams, securing the beams with a cable (to be hoisted by crane off the truck), when he fell. The dissent argued plaintiff did not demonstrate he could have been provided with any kind of safety equipment which would have prevented the fall. Plaintiff was wearing a safety harness, but the harness was not tied off:

The motion court correctly determined that defendants, other than Metropolitan Steel, were liable under Labor Law § 240(1) for plaintiff's injuries because they failed to provide plaintiff with an adequate safety device to prevent his fall from steel beams placed on a flatbed trailer. ... [D]efendants' contention that the accident is outside the scope of Labor Law § 240(1) is without merit, because plaintiff's fall from a height of 13 or 14 feet above the ground "constitutes precisely the type of elevation-related risk envisioned by the statute" ... . The fact that plaintiff did not ask for a specific safety device prior to the accident is not dispositive and is not a prerequisite for recovery under Labor Law § 240(1) ... . Plaintiff has met his burden of showing that his fall resulted from the lack of a safety device and is, therefore, entitled to summary judgment on liability (see Phillip v 525 E. 80th St. Condominium, 93 AD3d 578, 579 [1st Dept 2012] [the plaintiff entitled to summary judgment where evidence showed that the plaintiff, who fell while unloading scaffolding material from the flatbed of a truck, was provided with a safety harness, but there was no place where the harness could be secured]). **Myiow v City of New York, 2016 NY Slip Op 06461, 1st Dept 10-4-16**

Standing On The Top Step Of An A Frame Ladder Was Not The Sole Proximate Cause Of The Plaintiff's Fall; Summary Judgment On The Labor Law 240(1) Cause Of Action Should Have Been Granted

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff was injured when he fell descending from the top step of a six-foot A frame ladder. Plaintiff used the six-foot ladder because debris prevented the use of an eight-foot ladder (the eight-foot ladder could not opened due to the debris). Standing on the top step was not the sole proximate cause of the accident:

Denial of summary judgment on plaintiff's claim pursuant to Labor Law § 240(1) was in error where plaintiff electrician was injured when he fell from an A-frame ladder as he was attempting to descend it. Plaintiff's use of a six-foot ladder that required him to stand on the top step did not make him the sole proximate cause of his accident where the eight-foot ladder could not be opened in the space due to the presence of construction debris ... . Defendants' reliance on the affidavit of the high-rise superintendent is misplaced. Although the superintendent speculated that there was sufficient space to open an eight-foot ladder, this was inconsistent with his prior deposition testimony and was thus calculated to create a feigned issue of fact ... .

Nor was plaintiff a recalcitrant worker ... . While the site safety manager who worked for a subcontractor of defendants testified that she told plaintiff that he should not work in the room because it was unsafe due to all the debris, she explicitly denied that she directed plaintiff to stop work, explaining that she had no such authority. **Saavedra v 89 Park Ave. LLC, 2016 NY Slip Op 06974, 1st Dept 10-25-16**

Plaintiff's Motion Papers Raised A Question Of Fact Whether His Failure To Use A Ladder Was The Sole Proximate Cause Of His Fall, Plaintiff's Motion For Summary Judgment Should Have Been Denied Without Reference To The Opposing Papers

The Fourth Department, over a two-justice dissent, reversing Supreme Court, determined plaintiff's motion papers in the Labor Law 240(1) action raised a triable issue of fact whether his failure to use an available ladder was the sole proximate cause of his fall from a wall. Plaintiff's motion must therefore be denied without any need to consider the opposing papers:

Liability under section 240 (1) does not attach when the safety devices that [the] plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and [the] plaintiff knew he [or she] was expected to use them but for no good reason chose not to do so, causing an accident" ... . Under those circumstances, the "plaintiff's own negligence is the sole proximate cause of his [or her] injury" ... .

Where the plaintiff's submissions in support of the motion raise a triable issue of fact whether his or her own actions were the sole proximate cause of the injury, the plaintiff has failed to make a prima facie showing of entitlement to judgment as a matter of law on the issue of liability because "if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation" ... . In this case, plaintiff's submissions raised triable issues of fact whether plaintiff knew that he was expected to use a readily available ladder at the work site to perform his task, but for no good reason chose not to do so, and whether he would not have been injured had he not made that choice ... . **Scruton v Acro-Fab Ltd., 2016 NY Slip Op 07428, 4th Dept 11-10-16**

Allegation The Ladder Swayed Sufficient To Demonstrate The Failure To Secure The Ladder Caused The Fall

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law 240(10 cause of action should have been granted. Plaintiff had been hired to install wood paneling. Speakers were removed from wall to install the paneling. Plaintiff was standing on an A-frame ladder, replacing one of the speakers when

the ladder swayed and he fell. The Second Department held that plaintiff was engaged in "altering," a covered activity, and the allegation that the ladder swayed was sufficient to link the fall to a failure of a safety device (failure to secure the ladder):

Although the defendant contends that the act of rehanging a speaker does not constitute the "altering" of a building or structure, "[t]he intent of [Labor Law § 240(1)] was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts" ... . The plaintiff was injured while rehanging a speaker that he and his coworkers had removed to enable them to install the wood paneling and, therefore, we conclude that the plaintiff was injured while performing work that was "ancillary to" a covered activity, entitling him to the protections afforded by Labor Law § 240(1) ... . "To myopically focus on a job title or the plaintiff's activities at the moment of the injury would be to ignore the totality of the circumstances in which the plaintiff and his employer were engaged in contravention of the spirit of the statute which requires a liberal construction in order to accomplish its purpose of protecting workers" ... .

Further, the plaintiff established, prima facie, the existence of a violation of Labor Law § 240(1) that was a substantial factor in causing his injuries ... . "A fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240(1). There must be evidence that the subject ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries" ... . Here, the plaintiff's proof established that the ladder from which he fell was inadequately secured to provide him with proper protection, and that the failure to secure the ladder was a proximate cause of his injuries ... . **Goodwin v Dix Hills Jewish Ctr., 2016 NY Slip Op 07293, 2nd Dept 11-9-16**

Ladder Was Not Use For a Protected Activity

The Second Department determined defendant (Nickel) was entitled to summary judgment dismissing the Labor Law 200(1), 246(1) and 240(1) causes of action. Plaintiff was injured when he fell of a ladder while attempting to fix an air conditioner which had stopped running. Plaintiff was not engaged in a protected activity under Labor Law 240(1) or 246(1). The Labor Law 200(1) cause of action was properly dismissed because defendant did not control the manner of plaintiff's work:

Nickel submitted evidence sufficient to establish, prima facie, that the plaintiff was not engaged in an enumerated activity protected under Labor Law § 240(1) at the time of his accident. Furthermore, Nickel submitted evidence sufficient to establish, prima facie, that the plaintiff's accident did not involve construction, demolition, or excavation and, accordingly, that Labor Law § 241(6) does not apply. In opposition, the plaintiff failed to raise a triable issue of fact.

Supreme Court properly granted that branch of Nickel's motion which was for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action insofar as asserted against it, albeit for a different reason. Nickel established, prima facie, that the ladder was not defective, and the plaintiff conceded that fact. Thus, the potential liability of Nickel, contrary to the Supreme Court's finding, was not based on its actual or constructive notice of any dangerous or defective condition of the ladder ... . Instead, the plaintiff allegedly was injured as a result of the manner in which he performed his work. Accordingly, recovery against Nickel under Labor Law § 200 or under the common law may only be found if Nickel had the authority to supervise or control the performance of the work ... . Nickel established, prima facie, that it did not have authority to exercise supervision or control over the means and methods of the plaintiff's work. In opposition, the plaintiff failed to raise a triable issue of fact ... . **Mammone v T.G. Nickel & Assoc., LLC, 2016 NY Slip Op 07300, 2nd Dept 11-9-16**

Fall When Descending A 28-Foot Ladder Entitled Plaintiff To Summary Judgment, Apparently A 40-Foot Ladder Would Have Been Safer But None Was Available, Therefore Use Of The Shorter Ladder Could Not Be The Sole Proximate Cause Of The Injury

The Second Department determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff fell when he attempted to descend a 28-foot ladder. Apparently a 40-foot ladder would have been safer, but there was no showing a 40-foot ladder was available. Therefore plaintiff's use of a 28-foot ladder could not be the sole proximate cause of his injury:

... [T]he plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by demonstrating that he was injured when he fell while descending an unsecured, 28-foot ladder, and that he was not provided with a safety device to prevent him from falling ... . Contrary to Halsted's (defendant's) contention, it failed to raise a triable issue of fact as to whether the plaintiff's decision to use a 28-foot ladder, rather than a 40-foot ladder, was the sole proximate cause of his injuries. The record reveals that there were no 40-foot ladders readily available to the plaintiff on the date of his accident, and that a Halsted employee nevertheless instructed the plaintiff that he was required to complete his job, or be fired. Under these circumstances, the plaintiff's use of the 28-foot ladder cannot be said to be the sole proximate cause of his injuries ... . **Pacheco v Halsted Communications, Ltd., 2016 NY Slip Op 07303, 2nd Dept 11-9-16**

A Two-Foot Deep Trench Was Not An Elevation Hazard Or A Hazardous Opening

The Second Department determined defendant was entitled to summary judgment dismissing the Labor Law 240(1) and 241(6) causes of action. Plaintiff alleged he was pulled into a two-foot deep trench while holding a cable. The court held the hazard was not "elevation-related" and the two-foot deep trench was not a "hazardous opening:"

The defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff's alleged injuries were not caused by the elevation or gravity-related hazards encompassed by Labor Law § 240(1) ... .

... [T]he defendants made a prima facie showing of entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 241(6) by demonstrating, inter alia, that 12 NYCRR 23-1.7(b)(1), which is the only Industrial Code provision upon which the plaintiff presently relies, is inapplicable to the facts of this case. That provision provides, in pertinent part, that "[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing" (12 NYCRR 23-1.7[b][1][i]). Although this provision is sufficiently specific to support a cause of action under Labor Law § 241(6) ... , the trench in this particular case, which was only two feet deep, is not a hazardous opening within the meaning of 12 NYCRR 23-1.7(b)(1) ... . **Palumbo v Transit Tech., LLC, 2016 NY Slip Op 07305, 2nd Dept 11-9-16**

Fall Off Back Of Flatbed Truck Warranted Summary Judgment On Labor Law 240 (1) Cause Of Action

The First Department determined plaintiff's motion for summary judgment on his Labor Law 240 (1) cause of action should have been granted. Plaintiff was knocked off the back of a flatbed truck. The Labor Law 241(6) cause of action was properly dismissed (no sufficiently specific industrial code regulation applied). And defendants' control over the injury-producing work was insufficient to support the Labor Law 200 cause of action:

The injured plaintiff testified that a metal beam, while being placed on a flatbed truck, fell off the blades of a forklift, slamming plaintiff's foot and causing him to fall off the truck. This unrefuted testimony established prima facie that

"plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" and therefore that liability exists under Labor Law § 240(1) ... . The cases that defendants rely on are inapposite, since they involve not objects falling on or toward workers on flatbeds but workers falling from flatbeds, implicating only the adequacy of safety devices for falling workers, which is not at issue here ... .

Nor was plaintiff the sole proximate cause of his injuries since the injuries "were caused at least in part by the lack of safety devices to check the beam's descent as well as the manner in which [his coworker] lowered the beam" ... . **McLean v Tishman Constr. Corp., 2016 NY Slip Op 07754, 1st Dept 11-17-16**

Fall From A Scaffold Did Not Warrant Summary Judgment On Plaintiff's Labor Law 240 (1) Cause Of Action, Plaintiff Did Not Demonstrate The Failure To Provide Proper Protection

The Second Department determined summary judgment should not have been granted to plaintiff on his Labor Law 240 (1) cause of action. Plaintiff fell from a scaffold but his papers did not make out a prima facie case:

To establish liability pursuant to Labor Law § 240(1), a plaintiff must show that the statute was violated, and that the violation was a proximate cause of his or her injuries ... . The mere fact that a plaintiff fell from a scaffold " does not establish, in and of itself, that proper protection was not provided, and the issue of whether a particular safety device provided proper protection is generally a question of fact for the jury'" ... . Here, the plaintiff's own submissions demonstrated the existence of triable issues of fact as to how the accident occurred and it cannot be concluded, as a matter of law, that the alleged failure to provide him with protection proximately caused his injuries ... . **Karwowski v Grolier Club of City of N.Y., 2016 NY Slip Op 07625, 2nd Dept 11-16-16**

Scaffold Did Not Have A Safety Railing, Plaintiff Entitled To Summary Judgment On 240 (1) Cause Of Action

The First Department determined plaintiff was properly awarded summary judgment in this Labor Law 240(1) action. Plaintiff fell from a scaffold which did not have safety railings. Any comparative negligence on plaintiff's part (not locking the wheels) was irrelevant:

Plaintiff made a prima facie showing of entitlement to judgment as a matter of law on the Labor Law § 240(1) claim by presenting undisputed evidence that he "fell off a scaffold without guardrails that would have prevented his fall" ... . Plaintiff's alleged "failure to use the locking wheel devices and his movement of the scaffold while standing on it" were at most comparative negligence, which is not a defense to a Labor Law § 240(1) claim ... . **Celaj v Cornell, 2016 NY Slip Op 07996, 1st Dept 11-29-16**

Plaintiff Entitled To Summary Judgment On Labor Law 240 (1) Cause Of Action, Ladder Kicked Out From Under Him.

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action. There was evidence the ladder kicked out from under plaintiff. There was no need to show the ladder was defective. It was enough the ladder was not secured:

Plaintiff established his entitlement to partial summary judgment on his Labor Law § 240(1) claim through witnesses' testimony that the ladder from which he was descending suddenly kicked out to the left, resulting in his fall ... . Contrary to the motion court's finding, plaintiff was not required to demonstrate that the ladder was defective in order to satisfy his prima facie burden ... .

In opposition, defendants failed to raise a triable issue of fact as to whether plaintiff was the sole proximate cause of the accident. Plaintiff was not responsible for setting up the ladder, and there was no testimony establishing the existence of any other readily available, adequate safety devices at the work site ... . Furthermore, given the undisputed testimony that the ladder kicked out because it was unsecured, the testimony that plaintiff unsafely descended from the ladder by carrying pipe fittings in his arms established, at most, "contributory negligence, a defense inapplicable to a Labor Law § 240(1) claim" ... . **Fletcher v Brookfield Props., 2016 NY Slip Op 08105, 1st Dept 12-1-16**

Fall From Scaffold With No Side Rails Entitled Plaintiff To Summary Judgment, Hearsay Alone Will Not Defeat Summary Judgment Motion, Unsigned Deposition Transcript Properly Considered.

The First Department determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action. Plaintiff fell from a Baker's scaffold that had no side rails. Although hearsay can be submitted in opposition to a summary judgment motion, the motion will not be defeated by hearsay alone (the case here). The court noted that the plaintiff's unsigned deposition transcript was properly considered because it was certified by the reporter, its accuracy was not challenged by the defendant, and plaintiff adopted it as accurate by submitting it:

Plaintiff was entitled to summary judgment on his Labor Law § 240(1) claim where he fell from a six-foot-high Baker's scaffold, which he was directed to use in order to plaster a ceiling. The record shows that the scaffold "had no side rails, and no other protective device was provided to protect him from falling off the sides" ... .

... [T]he statement in the affidavit of [defendant's] owner that a subcontractor had assured him that the subcontractor had instructed all his employees to use the lifeline, belt and harness is insufficient raise a triable issue of fact as to whether plaintiff may be the sole proximate cause for disregarding such an instruction ... . While hearsay may be considered in opposition to defeat a summary judgment motion if it is not the only evidence upon which opposition to the motion is predicated, because it was the only evidence establishing that plaintiff disregarded an instruction to use the safety devices, it is insufficient to defeat plaintiff's motion ... . **Chong v 457 W. 22nd St. Tenants Corp., 2016 NY Slip Op 07997, 1st Dept 11-29-16**

(Falling Workers Cont'd—Case Summaries from the "Falling Workers Generally" Section, Above, Organized by Cause of the Fall---Falls Related to "Scaffolds" Are Included in the "Falling Workers Generally" Section, Above, and Are Separately Listed in the "Safety Devices" Section, Below)

Temporary Staircase (Falling Workers Cont'd)

Plaintiff Entitled to Summary Judgment on His Labor Law 240 (1) Cause of Action---Plaintiff Fell from Temporary Staircase Which Was Wet from Rain

The First Department, over an extensive dissent, determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action based upon his fall from a temporary staircase which was wet from rain. The dissent argued that there was a question of fact whether a safer temporary staircase could have been provided, and, therefore, summary judgment in plaintiff's favor was not appropriate. The majority wrote:

Plaintiff is entitled to partial summary judgment on his Labor Law § 240(1) claim. As the dissent recognizes, plaintiff was engaged in a covered activity at the time he slipped and fell down the stairs of a temporary tower scaffold. A fall down a temporary staircase is the type of elevation-related risk to which section 240(1) applies, and the staircase, which had been erected to allow workers access to different levels of the worksite, is a safety device within the meaning of the statute ... . As we stated in Ervin v Consolidated Edison of N.Y. (93 AD3d 485, 485 [1st Dept 2012]), involving a worker who fell when the temporary structure he was descending gave way, "It is irrelevant whether the structure constituted a staircase, ramp, or passageway since it was a safety device that failed to afford him proper protection from a gravity-related risk." We are thus at a loss to comprehend the dissent's reasoning that although the temporary staircase was a safety device and although it admittedly did not prevent plaintiff's fall, there is nonetheless a factual issue which would defeat plaintiff's entitlement to partial summary judgment on his section 240(1) claim.

The fact that the affidavits of plaintiff's and defendant's experts conflict as to the adequacy and safety of the temporary stairs does not preclude summary judgment in plaintiff's favor. A plaintiff is entitled to partial summary judgment on a section 240(1) claim where, as here, stairs prove inadequate to shield him against harm resulting from the force of gravity, and his injuries are at least in part attributable to the defendants' failure to take mandated safety measures to protect him against an elevation-related risk ... . Plaintiff's expert opined, inter alia, that the stairs showed obvious signs of longstanding use, wear and tear; therefore, a decrease in anti-slip properties was to be expected. Given that it is undisputed that the staircase, a safety device, malfunctioned or was inadequate to protect plaintiff against the risk of falling, plaintiff is entitled to summary judgment, whatever the weather conditions might have been. **O'Brien v Port Auth. of N.Y. & N.J., 2015 NY Slip Op 06749, 1st Dept 9-8-15**

Trucks, Workers or Objects Falling Off (Falling Workers Cont'd)

Fall from Flatbed Truck Was Covered by Labor Law 240 (1)---Fall Caused by Gravity Acting On Plywood Being Hoisted from the Truck

"Plaintiff was unloading roofing supplies using a conveyor on a flatbed truck, and the accident occurred when plaintiff attempted to raise a four-foot by eight-foot plywood sheet onto the roof. The plywood became unbalanced on the conveyor and, as plaintiff attempted to steady it, he fell from the bed of the flatbed truck to the ground five feet below and sustained injuries. Supreme Court denied plaintiff's motion for partial summary judgment on the issue of liability on all of plaintiff's claims and granted defendant's cross motion for summary judgment dismissing the complaint**.** We note at the outset that, as limited by his brief, plaintiff appeals from the order and judgment insofar as it granted defendant's cross

motion and denied that part of his motion seeking partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1). We agree with plaintiff.
Although flatbed trucks "d[o] not present the kind of elevation-related risk that the statute contemplates" (*Toefer v Long Is. R.R.*, 4 NY3d 399, 408 [2005]), the accident in this case was caused by a falling object, which distinguishes this case from *Toefer* (*cf. Brownell v Blue Seal Feeds, Inc.*, 89 AD3d 1425, 1426-1427 [2011]). The accident that caused plaintiff's injuries "flow[ed] directly from the application of the force of gravity to the object" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009]; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). In other words, the injuries were the result of "the direct consequence of a failure to provide statutorily required protection against a risk plainly arising from a workplace elevation differential" (*Runner*, 13 NY3d at 605). Inasmuch as plaintiff established that the plywood fell while being hoisted because of the absence or inadequacy of a safety device of the kind enumerated in the statute, we conclude that he is entitled to summary judgment on the section 240 (1) claim …".**Hyatt v Young, 2014 NY Slip Op 03056, 4th Dept 5-2-14**

Plaintiff Was Catapulted Into the Air from a Flatbed Truck When a Heavy Bundle Landed on the Plank He Was Standing On---Labor Law 240(1) Action Should Not Have Been Dismissed

"…[T]he workers began using crow bars to roll the bundles of rebar off of the wooden "four-by-four" planks on which they were resting on the bed of the truck, which was four or five feet above the ground. As one of the bundles began to fall from the truck, the shift in weight allegedly caused one of the wooden planks to catapult the plaintiff approximately 15 feet in the air from the bed of the truck, where he had been standing on that plank. The plaintiff allegedly fell 19 to 20 feet to the ground, and was immediately thereafter struck by the same four-by-four plank when it fell onto his back. * * * The launch of the plaintiff from the truck along with the wooden "four by four" plank upon which he was standing flowed directly from the application of the force of gravity to the bundle of rebar … . The elevation differential between the flatbed truck and the ground was significant given the 8,000-to-10,000-pound weight of the bundles of rebar, and the amount of force they were capable of generating, "even over the course of a relatively short descent" … .
The causal connection between the bundles' "inadequately regulated descent and plaintiff's injury" was unmediated by any safety device, such as the crane that had hoisted the bundles earlier in the day …". **Treile v Brooklyn Tillary LLC, 2014 NY Slip Op 06197, 2nd Dept 9-17-14**

Plaintiff Entitled To Summary Judgment On Labor Law 240(1) Cause Of Action; Plaintiff Fell 13 Or 14 Feet From The Back Of A Flatbed Truck

The First Department, over an extensive dissent, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action stemming from a fall of 13 to 14 feet from the back of a flatbed truck. Plaintiff was standing on top of steel beams, securing the beams with a cable (to be hoisted by crane off the truck), when he fell. The dissent argued plaintiff did not demonstrate he could have been provided with any kind of safety equipment which would have prevented the fall. Plaintiff was wearing a safety harness, but the harness was not tied off:

The motion court correctly determined that defendants, other than Metropolitan Steel, were liable under Labor Law § 240(1) for plaintiff's injuries because they failed to provide plaintiff with an adequate safety device to prevent his fall from steel beams placed on a flatbed trailer. ... [D]efendants' contention that the accident is outside the scope of Labor Law § 240(1) is without merit, because plaintiff's fall from a height of 13 or 14 feet above the ground "constitutes precisely the type of elevation-related risk envisioned by the statute" ... . The fact that plaintiff did not ask for a specific safety device prior to the accident is not dispositive and is not a prerequisite for recovery under Labor Law § 240(1) ... . Plaintiff has met his burden of showing that his fall resulted from the lack of a safety device and is, therefore, entitled to summary judgment on liability (see Phillip v 525 E. 80th St. Condominium, 93 AD3d 578, 579 [1st Dept 2012] [the plaintiff entitled to summary judgment where evidence showed that the plaintiff, who fell while unloading scaffolding material from the flatbed of a truck, was provided with a safety harness, but there was no place where the harness could be secured]). **Myiow v City of New York, 2016 NY Slip Op 06461, 1st Dept 10-4-16**

Fall Off Back Of Flatbed Truck Warranted Summary Judgment On Labor Law 240 (1) Cause Of Action

The First Department determined plaintiff's motion for summary judgment on his Labor Law 240 (1) cause of action should have been granted. Plaintiff was knocked off the back of a flatbed truck. The Labor Law 241(6) cause of action was properly dismissed (no sufficiently specific industrial code regulation applied). And defendants' control over the injury-producing work was insufficient to support the Labor Law 200 cause of action:

The injured plaintiff testified that a metal beam, while being placed on a flatbed truck, fell off the blades of a forklift, slamming plaintiff's foot and causing him to fall off the truck. This unrefuted testimony established prima facie that "plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" and therefore that liability exists under Labor Law § 240(1) ... . The cases that defendants rely on are inapposite, since they involve not objects falling on or toward workers on flatbeds but workers falling from flatbeds, implicating only the adequacy of safety devices for falling workers, which is not at issue here ... .

Nor was plaintiff the sole proximate cause of his injuries since the injuries "were caused at least in part by the lack of safety devices to check the beam's descent as well as the manner in which [his coworker] lowered the beam" ... . **McLean v Tishman Constr. Corp., 2016 NY Slip Op 07754, 1st Dept 11-17-16**

Forklift/Bobcat, Worker Thrown from (Falling Workers Cont'd)

Being Catapulted from a Bobcat While Standing on the Back as Counterweight is a Gravity-Related Event

"Plaintiff was injured while employed by third-party defendant tenant K&S Construction when he was thrown from a "Bobcat" front-end loader. Defendant landlord had contracted with third-party defendant tenant, plaintiff's employer, to construct a concrete curb around the perimeter of the nearby parking lot. Plaintiff was helping to remove plywood, which was allegedly interfering with the construction project, and was positioned on the Bobcat in order to provide balance or serve as a counterweight for the plywood in the Bobcat's front bucket. He was thrown off when the two back wheels of the Bobcat lifted up unexpectedly. The issue is whether plaintiff was engaged in construction work when moving the plywood so as to afford him the protection of the Labor Law. If, as plaintiff alleges, the plywood was being moved to clear the work site where the curb was under construction, plaintiff was "altering" the premises within the meaning of Labor Law § 240 (1) … . Since the landlord and K&S Construction submitted evidence that the accident occurred in the warehouse and that the construction work and plaintiff's activity were unrelated, a question of fact has been raised." Assuming that plaintiff was engaged in construction work, we find that falling from the Bobcat is the type of gravity-related event contemplated by the Court of Appeals in *Runner v New York Stock Exch., Inc.* (13 NY3d 599. In *Potter v Jay E. Potter Lbr. Co., Inc.* (71 AD3d 1565 [4th Dept 2010]), the Fourth Department, relying on *Runner*, similarly found that a worker, who like plaintiff here, was positioned as a counterweight for a load on a forklift and was catapulted forward when the forklift became unstable, was entitled to the protection of Labor Law § 240 (1). **Penaranda v 4933 Realty LLC, 2014 NY Slip Op 04685, 1st Dept 6-24-14**

Fall Into a Three-to-Four-Foot-Deep Hole Is Not an Elevation-Related Event Under Labor Law 240(1)

"Where, as here, a plaintiff falls into a hole while walking at ground level, the plaintiff's injury "[is] not caused by [defendants'] failure to provide or erect necessary safety devices in response to 'elevation-related hazards,' and, accordingly, the protections of Labor Law § 240 (1) do not apply" … . The cases relied upon by plaintiff are factually distinguishable because they involve falls into excavated areas, as opposed to mere holes in the ground such as the one here … . Unlike the excavation cases, this is not a case where protective devices enumerated in Labor Law § 240 (1), e.g., "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, [and] ropes" were designed to apply …". **Wrobel v Town of Pendelton, 2014 NY Slip Op 05738, 4th Dept 8-8-14**

A Two-Foot Deep Trench Was Not An Elevation Hazard Or A Hazardous Opening

The Second Department determined defendant was entitled to summary judgment dismissing the Labor Law 240(1) and 241(6) causes of action. Plaintiff alleged he was pulled into a two-foot deep trench while holding a cable. The court held the hazard was not "elevation-related" and the two-foot deep trench was not a "hazardous opening:"

The defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff's alleged injuries were not caused by the elevation or gravity-related hazards encompassed by Labor Law § 240(1) ... .

... [T]he defendants made a prima facie showing of entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 241(6) by demonstrating, inter alia, that 12 NYCRR 23-1.7(b)(1), which is the only Industrial Code provision upon which the plaintiff presently relies, is inapplicable to the facts of this case. That provision provides, in pertinent part, that "[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing" (12 NYCRR 23-1.7[b][1][i]). Although this provision is sufficiently specific to support a cause of action under Labor Law § 241(6) ... , the trench in this particular case, which was only two feet deep, is not a hazardous opening within the meaning of 12 NYCRR 23-1.7(b)(1) ... . **Palumbo v Transit Tech., LLC, 2016 NY Slip Op 07305, 2nd Dept 11-9-16**

Worker Fell through Hole in Deck

"The plaintiff Daniel Durando was working as a scaffolding installer and remover … on the SS Chemical Pioneer, a ship in dry dock for repairs at the Brooklyn Navy Yard. He allegedly sustained injures when he fell through an improperly covered opening in the floor, or deck, of one of the ship's cargo holds." **Durando v City of New York, 2013 NY Slip Op 02214, 201200535, Index No 33753/08, 2nd Dept 4-3-13**

Plaintiff, Who Fell Through an Open Manhole, Entitled to Summary Judgment on Labor Law 240 (1) Cause of Action---Failure to Set Up Guard Rails Was a Proximate Cause--Liability Imposed Regardless of Plaintiff's Own Negligence and Regardless of Whether the Owner, Contractor or Agent Supervised or Controlled the Work

The Court of Appeals, in a full-fledged opinion by Judge Pigott, over a two-judge dissent, determined plaintiff, who fell through an uncovered manhole, was entitled to partial summary judgment on his Labor Law 240 (1) claim based on testimony the manhole should have been surrounded by guard rails. The court also determined there was a question of fact whether the safety consultant, IMS, was liable as a "statutory agent" under Labor Law 240 (1). The court explained

that the obligation to provide safety devices is a nondelegable duty which imposes liability regardless of whether owner, contractor or agent supervises or controls the work. Where 240 (1) is violated, the plaintiff's negligence is not a defense, unless plaintiff's negligence is the sole proximate cause of the injury:

Section 240 (1) provides, in relevant part:
"All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor [certain enumerated] [*4]and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The statute imposes upon owners, contractors and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work ... . "Where an accident is caused by a violation of the statute, the plaintiff's own negligence will not furnish a defense"; however, "where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability" ... . Thus, in order to recover under section 240 (1), the plaintiff must establish that the statute was violated and that such violation was a proximate cause of his injury ... . **Barreto v Metropolitan Tr. Auth., 2015 NY Slip Op 03875, CtApp 5-7-15**

Fall Through Open Manhole

Plaintiff, a laborer, was injured when he fell into a steam manhole that was part of defendant's steam distribution system in lower Manhattan. … At around the time of the accident, New York City was beset by a nor'easter that threatened the metropolitan area with heavy rain, strong wind gusts and high tides. Due to the severity of the storm, defendant engaged [defendant's employer] to supplement its effort in responding to vapor conditions and pumping water out of flooded manholes. … A gust of wind caused plaintiff to stumble and fall into the manhole which his coworker had uncovered. Plaintiff landed in a pool of boiling water that reached his chest. The boiling water was caused by torrential rain that flooded the manhole and contacted the steam main. * * * Labor Law § 240 (1) affords protection to workers engaged in "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." Whether a particular activity constitutes a "repair" or routine maintenance must be decided on a case-by-case basis, depending on the context of the work … . A factor to be taken into consideration is whether the work in question was occasioned by an isolated event as opposed to a recurring condition. … The record here demonstrates that the work performed by plaintiff at the time of his injury was far from routine. * * *The motion court correctly found that the manhole meets the definition of a structure as that term is used in the statute. A structure is "a production or piece of work artificially built up or composed of parts joined together in some definite manner" … . Moreover, it is undisputed that plaintiff and his co-worker had to expose the manhole in order to pump out the subterranean water. Therefore, the motion court correctly found that plaintiff's injury resulted from an elevation-related hazard that Labor Law § 240 (1) is intended to obviate… . **Dos Santos v Consolidated Edison of NY, Inc, 2013 NY Slip Op 02140, 8914, 105861/08, 1st Dept 3-28-13**

Collapse of Rotten Floor First Revealed When Carpet Was Removed Was Not Foreseeable---Labor Law 240(1) Cause of Action Properly Dismissed---Defect Was Latent and Was Not Caused by Owner

The Second Department determined plaintiff's fall through a rotted portion of subfloor exposed when carpeting was removed was not foreseeable. Therefore the Labor Law 240 (1) cause of action, the Labor Law 200 cause of action, and the common-law negligence cause of action against the owner of the property were properly dismissed:

In order for liability to be imposed under Labor Law § 240(1), there must be "a foreseeable risk of injury from an elevation-related hazard . . . as [d]efendants are liable for all normal and foreseeable consequences of their acts'" ... . Thus, the collapse or partial collapse of a permanent floor may give rise to liability under Labor Law § 240(1) where " circumstances are such that there is a foreseeable need for safety devices'" ... . Here, however, the plaintiffs failed to demonstrate that the partial collapse of a small section the basement subfloor and, in turn, the need for safety devices to protect the injured plaintiff from an elevation-related hazard, were foreseeable. Consequently, since the plaintiffs did not meet their prima

facie burden of demonstrating their entitlement to judgment as a matter of law, the Supreme Court properly denied that branch of their motion which was for summary judgment on the issue of liability with respect to the cause of action alleging a violation of Labor Law § 240(1) .. . * * *

Where, as here, a plaintiff's alleged injury arose not from the manner in which the work was performed, but from an allegedly dangerous condition on the premises, a property owner moving for summary judgment dismissing causes of action alleging common-law negligence and a violation of Labor Law § 200 has the initial burden of showing only that it neither created the dangerous condition nor had actual or constructive notice of it ... . A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident such that it could have been discovered and corrected ... . "When a defect is latent and would not be discoverable upon a reasonable inspection, constructive notice may not be imputed" ... . Here, the defendant demonstrated its prima facie entitlement to judgment as a matter of law by establishing that it did not have actual or constructive notice of the defect in the subfloor, which was latent and not discoverable upon a reasonable inspection. The defendant further demonstrated that it did not create the defect. **Carrillo v Circle Manor Apts., 2015 NY Slip Op 06652, 2nd Dept 8-26-15**

Openings Through Which A Worker's Body Could Not Completely Fall Not Actionable Under Labor Law 240(1) Or 241(6)

Plaintiff was injured when his leg slipped into a 12-inch square opening in a rebar grid. The Second Department determined an opening through which a worker's body could not fall through was not an elevation hazard (Labor Law 240(1)) and did not violate a regulation prohibiting "hazardous openings" (Labor Law 241(6):

... [T]he openings of the grid, which were not of a dimension that would have permitted the plaintiff's body to completely fall through and land on the floor below, did not present an elevation-related hazard to which the protective devises enumerated in Labor Law § 240(1) are designed to apply ... .

This Court has repeatedly held that 12 NYCRR 23-1.7, which concerns "hazardous openings," does not apply to openings that are too small for a worker to completely fall through ... . **Vitale v Astoria Energy II, LLC, 2016 NY Slip Op 02986, 2nd Dept 4-20-16**

Ladders (Falling Workers Cont'd)

Injury When Stepping Off a Ladder Not Actionable under Labor Law 240 (1)---Injury Not Related to the Need for the Ladder

"We conclude that Supreme Court erred in denying those parts of [defendant's] motion … for summary judgment dismissing plaintiff's Labor Law § 240 (1) cause of action inasmuch as "plaintiff's injury resulted from a separate hazard wholly unrelated to the danger that brought about the need for the ladder in the first instance—an unnoticed or concealed object on the floor"…". **Smith v Nestle Purina Petcare Co. CA 1201554, 266, 4th Dept, 4-26-13**

Fall from Unfolded Step Ladder Stated Claim

"Plaintiff established prima facie entitlement to summary judgment on his Labor Law § 240 (1) claim as against defendants … by his testimony that: (1) the ladder was the only one available; (2) the ladder could not be properly opened into an A-frame stance due to excess debris in his narrowly confined work space; (3) he asked his foreman for another

ladder, to no avail; (4) the ladder was unusual in that the step treads contained spikes which unexpectedly caught hold of his shoe as he was descending the improperly leaning ladder; (5) he was caused to fall backwards, from a height of approximately six feet; and (6) his right shoulder was injured when it struck the wooden work-zone barrier as he fell. In opposition, defendants failed to raise a triable issue of fact. Contrary to defendants' contention that plaintiff was the sole proximate cause of his accident, the record shows that the ladder was inadequate for the nature of the work performed and the gravity-related risks involved …". **Keenan v Simon Prop Group, Inc, 2013 NY Slip Op 03622, 2nd Dept, 5-21-13**

Losing Balance On Non-Defective Ladder Did Not Support Labor Law 240(1) Cause of Action

"The mere fact that a plaintiff fell from a ladder does not, in and of itself, establish that proper protection was not provided" … . There must be evidence that the ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries … . Where a plaintiff falls off the ladder because he or she lost his or her balance, and there is no evidence that the ladder from which the plaintiff fell was defective or inadequate, liability pursuant to Labor Law § 240 (1) does not attach …".**Hugo v Sarantakos, 2013 NY Slip Op 05512, 2nd Dept 7-31-13**

Evidence of Availability of Ladders Insufficient to Defeat Summary Judgment in Favor of Plaintiff/Plaintiff Fell While Working Standing on Milk Crates

"Under the circumstances, plaintiff established his entitlement to summary judgment on the issue of liability on his Labor Law § 240 (1) claim. The record shows that plaintiff's accident involved an elevation-related risk and his injuries were proximately caused by the failure to provide him with proper protection as required by section 240 (1) … . Defendants' claim that ladders were available on the site is conclusory and fails to raise an issue of fact … . The sole evidentiary support for defendants' argument was an affidavit from an individual who claimed … that there more than enough ladders available for plaintiff's work. Even if admissible, the affidavit failed to raise a triable issue as to whether plaintiff was the sole proximate cause of his injuries since it does not indicate that plaintiff knew that there were ladders available at the site and that he was expected to use them …". **Mutadir v 80-90 Maiden Lane Del LLC, 2013 NY Slip Op 07127, 1st Dept 10-31-13**

Availability of Ladders and Instruction Not to Walk on Suspension Cables Not a Defense; Cable on Which Plaintiff Was Walking Snapped So Plaintiff's Actions Were Not the Sole Proximate Cause of the Injury

…[T]he assertion that ladders were available and workers had been instructed to use them instead of walking across the suspension cables does not raise a triable issue under the circumstances of this claim. This is not a case where claimant lost his balance and fell off the cable while using it instead of the safer way to access the scaffold via a ladder. Here, the cable broke. Hence, a device intended to support a worker at an elevated height failed, and that failure was a proximate cause of claimant's injury. "Under Labor Law § 240 (1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a [claimant's] injury) to occupy the same ground as a [claimant's] sole proximate cause for the injury" … . Accordingly, claimant was entitled to partial summary judgment on his Labor Law § 240 (1) claim. . **Portes v New York State Thruway Authority, 516749, 3rd Dept 12-5-13**

Ladder Which "Kicked Out" from Under Plaintiff Entitled Plaintiff to Partial Summary Judgment/Replacement of Cracked Glass Constituted Covered "Repair" Not Routine Maintenance

"The plaintiff need not demonstrate that the [safety device] was defective or failed to comply with applicable safety regulations," but only that it "proved inadequate to shield [plaintiff] from harm directly flowing from the application of the force of gravity to an object or person" … . The inexplicable shifting of an unsecured ladder may alone support a section 240 (1) claim if a worker is caused to fall due to such shifting … . A worker's prima facie entitlement to partial summary judgment on his or her section 240 (1) claim may be established by proof that the ladder provided collapsed under the worker while he or she was engaged in an enumerated task …".**Soriano v St Mary's Orthodox Church of Rockland, Inc, 2014 NY Slip Op 04419, 1st Dept 6-17-14**

Plaintiff Fell From Ladder While Doing Non-Commercial Window Cleaning

"The plaintiff allegedly was injured when he fell from a 20-foot ladder while washing the windows of a four-story hostel … . … The accident occurred after the plaintiff had been directed by the hostel's manager to clean the external kitchen windows of the hostel." **Pena v Varet & Bogart LLC, 2014 NY Slip Op 05524, 2nd Dept 7-30-14**

Injury While Trying to Prevent a Ladder (Used by a Co-worker) from Falling Is Covered Under Labor Law 240 (1)

"The plaintiff Joseph Passantino was part of a three-man crew installing fiber optic cable at the defendant's property. The crew was working inside a courtyard area where the ground was covered with sand and gravel. Passantino was holding the bottom of an unsecured extension ladder while his coworker stood on the ladder above him, installing the cable. Passantino let go of the ladder in order to reach some cable, the ladder started to "kick out," and began to fall. Passantino reached out in order to stop the ladder and his coworker from falling, allegedly causing him to slip on sand and gravel in the area, and tear a tendon in his arm. Contrary to the defendant's contention, the hazard presented here is one contemplated by Labor Law § 240 (1) … . Indeed, the harm to Passantino was "the direct consequence of the application of the force of gravity" to the ladder … . The plaintiffs met their prima facie burden of establishing their entitlement to judgment as a matter of law on the cause of action alleging a violation of Labor Law § 240 (1) by demonstrating that the defendant failed to provide Passantino with a safety device, and that this violation was a proximate cause of his injuries …".**Passantino v Made Realty Corp, 2014 NY Slip Op 07136, 2nd Dept 10-22-14**

Non-Defective Ladder Tipped Over---Question of Fact Whether Plaintiff's Negligence Was Sole Proximate Cause of Injuries in Labor Law 240(1) Action

The Second Department determined there were questions of fact precluding both plaintiffs' and defendant's motions for summary judgment in a Labor Law 240(1) action. Although the ladder which tipped over was not defective and was appropriate to the task, there were questions whether the ladder was mispositioned and, if so, who mispositioned it. The fact that plaintiff may have been negligent did not preclude recovery under Labor Law 240(1) as long a plaintiff's negligence was not the sole proximate cause of his injury:

In order to prevail on a Labor Law § 240(1) cause of action, a plaintiff must prove that the statute was violated and that the violation was a proximate cause of the injuries ... . Proof that the plaintiff's own negligence was also a proximate cause will not defeat the claim ... . When the evidence establishes, however, that the plaintiff's own negligence was the sole

proximate cause of the injuries, the defendant may not be held liable for those injuries ... . The parties' submissions demonstrated that the ladder itself was not defective and was appropriate to [plaintiff's] task.

There are triable issues of fact ... as to whether the ladder was mispositioned and, if so, who mispositioned it, and, if it was mispositioned by [plaintiff], whether his conduct was the sole proximate cause of the ladder's tipping over ... . **Daley v 250 Park Ave., LLC. 2015 NY Slip Op 01917, 2nd Dept 3-11-15**

Fall from Ladder While Dismantling Shelves--Heavy Shelves Bolted to the Wall Constituted a "Structure" and Dismantling the Shelves Constituted "Demolition" within the Meaning of the Labor Law

The First Department, reversing Supreme Court, granted summary judgment to the plaintiff on liability re: his Labor Law 240(1) and 241(6) claims. The court determined the dismantling of heavy shelves which were bolted to the wall constituted demolition of a structure within the meaning of the Labor Law:

Plaintiff was injured in a fall from an unsecured ladder while working in a warehouse, where his job was to "clean out, remove machines, break down structures . . . and ship them out." The work included removal of heavy machinery and shelves that ran from floor to ceiling across three second-floor walls, each 50 feet long and 8 feet high, and were bolted to the floors and walls. The breaking down and removing of the shelves required the use of impact wrenches and sawzalls to cut the bolts. Removed materials, including shelving, were heavy, and had to be loaded in cages, which were then lifted by a pallet jack, moved to the edge of the second floor, and lowered to the first floor with a forklift. The dismantling of the shelves was a sufficiently complex and difficult task to render the shelving a "structure" within the meaning of Labor Law §§ 240(1) and 241(6) ... . Moreover, in dismantling the shelving, plaintiff was engaged in "demolition" for purposes of §§ 240(1) and 241(6) ... . **Phillips v Powercrat Corp., 2015 NY Slip Op 02407, 1st Dept 3-24-15**

Fall from Ladder; Lessee Who Has Authority to Control the Work Is Considered an Owner Under the Labor Law

The Second Department reversed Supreme Court finding that plaintiff was entitled to summary judgment on his Labor Law 240 (1) claim. Plaintiff alleged that a ladder twisted out from under him when he was carrying materials to the roof and defendant (Sigma) did not raise a question of fact whether plaintiff's conduct was the sole proximate cause of his injuries. The court explained the circumstances under which a tenant, the defendant (Sigma) here, is liable under the Labor Law:

Labor Law § 240(1) applies to owners, contractors, and their agents (see Labor Law § 240[1]...). A party is deemed to be an agent of an owner or contractor under the Labor Law when it has the " ability to control the activity which brought about the injury'" ... . A lessee of real property that hires a contractor and has the right to control the work at the property is considered to be an owner within the meaning of the law ... . Moreover, a lessee of property may be liable as an "owner" when it "has the right or authority to control the work site, even if the lessee did not hire the general contractor" ... . The key question is whether the defendant had the right to insist that proper safety practices were followed ... . Here, the evidence established that Sigma was the lessee of the premises where the accident occurred and that the president of Sigma hired the injured plaintiff to perform the work and controlled his work. **Seferovic v Atlantic Real Estate Holdings, LLC, 2015 NY Slip Op 03343, 2nd Dept 4-22-15**

Plaintiff Entitled to Summary Judgment on Labor Law 240 (1) Cause of Action---Plaintiff Was Standing on an A-Frame Ladder When It Swayed and Tipped Over

The Second Department determined plaintiff, Casasola, was entitled to summary judgment on his Labor Law 240 (1) cause of action. Plaintiff was standing on an unsecured A-frame ladder when it swayed and tipped over. The incident occurred when Casasola was working on property owned by the State of New York. The court noted that, to be liable, the property owner need not have exercised any control over the work. All the plaintiff must show is the violation of a statute proximately caused his injury:

Labor Law § 240(1) provides that "[a]ll contractors and owners and their agents . . . shall furnish or erect, or cause to be furnished or erected . . . scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to [construction workers employed on the premises]" ... . The purpose of this statute, commonly referred to as the "scaffold law," is to protect workers "by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident" ... . **Casasola v State of New York, 2015 NY Slip Op 04798, 2nd Dept 6-10-15**

Defendant-Homeowner's Providing Plaintiff With a Ladder With Allegedly Worn Rubber Feet Raised a Question of Fact About Defendant's Liability for the Ladder's Slipping and Plaintiff's Fall---Cause of Accident Can Be Proven by Circumstantial Evidence

The Second Department determined Supreme Court should not have granted summary judgment to the defendant homeowner. Plaintiff was using defendant's ladder when the ladder slipped and plaintiff fell. Plaintiff alleged the rubber feet on the ladder were totally destroyed. That allegation created a question of fact whether defendant provided dangerous or defective equipment to the plaintiff which caused plaintiff's injury. In response to defendant's argument that plaintiff could not explain the cause of the accident without resort to speculation, the court noted that the cause of an accident can be proven by circumstantial evidence (here the condition of the feet of the ladder and fact that the feet slipped):

"[W]hen a defendant property owner lends allegedly dangerous or defective equipment to a worker that causes injury during its use, the defendant moving for summary judgment must establish that it neither created the alleged danger or defect in the instrumentality nor had actual or constructive notice of the dangerous or defective condition" ... . While lack of constructive notice can generally be established by evidence demonstrating when the area or condition was last inspected relative to the time of the accident ..., the absence of rubber shoes on a ladder is a "visible and apparent defect," evidence of which may be sufficient to raise a triable issue of fact on the issue of constructive notice ... . Here, the defendants satisfied their prima facie burden with evidence that the ladder had been inspected prior to the accident. The defendant Billis Arniotis (hereinafter Billis) testified that, since purchasing the ladder 20 years before the accident, he had used it once per week and had inspected its rubber feet each time. Billis last inspected the ladder one or two weeks before the accident and did not observe any wear at that time. However, the plaintiff testified that he inspected the ladder after the accident and found that its rubber feet were "totally eaten up, worn," and "destroyed." This conflicting evidence, coupled with Billis's testimony that the ladder had not been used between the time of the accident and the plaintiff's inspection, raised a triable issue of fact.

Contrary to the defendants' contention, they failed to make a prima facie showing that the plaintiff cannot identify the cause of his fall without engaging in speculation. A plaintiff's inability to testify exactly as to how an accident occurred does not require dismissal where negligence and causation can be established with circumstantial evidence ... . Here, Billis's testimony establishes that he was present at the time of the accident and that he watched the ladder slide down while the plaintiff was on it. Evidence that the ladder's rubber feet were worn down also is sufficient to permit the inference that this defective condition caused the slippage ... . **Patrikis v Arniotis, 2015 NY Slip Op 05167, 2nd Dept 6-17-15**

Fall from Ladder Doing Routine Cleaning of Basketball Backboard Not Covered by Labor Law 240 (1)

The Second Department determined Supreme Court properly dismissed an action by plaintiff-janitor who fell from an A-frame ladder while cleaning the basketball backboard in a school gymnasium. The Labor Law 240 (1) cause of action was properly dismissed because cleaning the backboard was routine maintenance, not covered by Labor Law 240 (1). The Labor Law 200 and common law negligence causes of action were properly dismissed because the defendant school demonstrated the ladder was not defective and it did not have the authority to control the manner in which plaintiff did his work:

... [T]he injured plaintiff's work did not constitute "cleaning" within the meaning of Labor Law § 240(1). The defendant established that the injured plaintiff was performing routine maintenance of the basketball backboards, done regularly throughout the course of the basketball season, that did not require any specialized equipment, and was unrelated to any ongoing construction or renovation of the school. As such, it was not a covered activity under Labor Law § 240(1) ... . **Torres v St. Francis Coll., 2015 NY Slip Op 05466, 2nd Dept 6-24-15**

Plaintiff's Use of a Partially Open A-Frame Ladder Did Not Constitute Misuse of a Safety Device---Directed Verdict in Favor of Plaintiff on Labor Law 240(1) Cause of Action Was Proper/Plaintiff's Apparent Failure to Turn Over All of the Relevant Medical Records Required a New Trial on Damages

The First Department, over a dissent, determined that the court, after a jury trial, properly directed a verdict in favor of the plaintiff on the Labor Law 240(1) cause of action. Plaintiff was using an A-frame ladder to weld a tank. It was not possible to open the ladder completely unless the ladder was perpendicular to the tank. Because using the ladder in a perpendicular position would have forced plaintiff to twist his body to weld, plaintiff placed the ladder against the tank in a partially open position. The ladder "shook" and plaintiff fell off it. The First Department held that, under those facts, the way plaintiff used the ladder did not constitute misuse of a safety device and, because Labor Law 240(1) was violated, plaintiff's action could not constitute the sole proximate cause of the injury. A new trial was required, however, because the medical records supplied to the defendants pursuant to a subpoena were much less voluminous than the medical records brought to trial by the plaintiff's medical expert, thereby depriving the defendants of the ability to fully cross-examine the expert:

A verdict may be directed only if the "court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party" ... . The benefit of all inferences is afforded to the non moving party, and the facts are viewed in a light most favorable to it (id.). Here, plaintiff argued that there was no issue of fact necessary for a jury to resolve regarding whether defendants violated their obligation under Labor Law § 240(1) to provide him with an appropriate safety device to guard against the elevation-related risk. That is because, he asserts, there was no alternative safety device readily available to him, and he had no choice but to place the ladder in the closed position given the way the tank was situated. Defendants do not dispute that an unsecured ladder, even one in good condition, can give rise to Labor Law section 240(1) liability if the worker falls from it * * *

A worker's decision to use an A-frame ladder in the closed position is not a per se reason to declare him the sole proximate cause of an accident ... . To be sure, we do not disagree with the dissent that, in principle, placement of an A-frame ladder in the closed position "can constitute misuse of a safety device".... . * * *

Here, plaintiff gave a specific reason why he used the ladder in the closed position. Plaintiff testified that using the ladder in an open position and twisting his body to face the tank would have been exhausting, requiring him to take frequent breaks, which defendants did not dispute. Indeed, defendants' assertion that turning the ladder would have presented an issue of "[m]ere expediency or inconvenience" mischaracterizes the record. In any event, we are hesitant to adopt a rule that, in order to permit a worker to enjoy the protection of Labor Law section 240(1), would require him to take extraordinary measures to perform his work, when he has a good faith belief that doing so would cause him acute discomfort while drastically slowing his pace ... . **Noor v City of New York, 2015 NY Slip Op 06295, 1st Dept 7-28-15**

Fall from Ladder Which May Have Been Misused---Labor Law 240 (1) Concerns Only Whether Proper Safety Equipment Was Provided---Comparative Negligence (Misuse of Ladder) Is Not Relevant

The First Department determined plaintiff was entitled to summary judgment under Labor Law 240 (1) for injury incurred while using the top half of an extension ladder which did not have rubber feet. The court noted that contributory or comparative negligence is not a defense to a Labor Law 240 (1) cause of action:

Plaintiff presented evidence establishing that defendants did not provide "proper protection" within the meaning of Labor Law § 240(1). The record indicates that plaintiff "only saw the extension ladder" in the area where he was working. There was no scaffolding available to plaintiff. Plaintiff was not wearing a safety harness, and there was no appropriate anchor point to tie off the ladder.

We reject defendants' assertion that plaintiff's conduct was the sole proximate cause of his injuries. Plaintiff's knowing use of half of the extension ladder without proper rubber footings goes to his culpable conduct and comparative negligence. Comparative negligence is not a defense to a claim based on Labor Law § 240(1), where, as here, defendants failed to provide adequate safety devices ... . Further, defendants failed to show that plaintiff refused to use the safety devices that were provided to him. **Stankey v Tishman Constr. Corp. of N.Y., 2015 NY Slip Op 06643, 1st Dept 8-25-15**

Fall from Non-Defective Ladder After Co-Worker Who Had Been Stabilizing the Ladder Was Called Away---Defendants Did Not Demonstrate Plaintiff Was Adequately Protected---Comparative Negligence Is Not Relevant

The First Department, over a dissent, determined plaintiff's motion for summary judgment for the Labor Law 240 (1) cause of action should have been granted. Plaintiff fell from a non-defective ladder when he lost his balance while attempting to use a drill to install a metal stud. A co-worker, who had been stabilizing the ladder, had been called away five minutes before plaintiff fell. Plaintiff alleged no one else was around who could have stabilized the ladder. The court noted that plaintiff's alleged comparative negligence was not relevant. The only relevant consideration is whether plaintiff was provided with adequate protection, an issue not addressed by defendants:

Supreme Court erred in denying plaintiffs' motion for summary judgment against defendants on the cause of action alleging a violation of Labor Law § 240(1). The dissent mischaracterizes the majority's position. We do not simply hold that "a plaintiff-worker's testimony that he fell from a non-defective ladder while performing work . . . alone establish[es] liability under Labor Law § 240(1). Rather, it is undisputed that no equipment was provided to plaintiff to guard against the risk of falling from the ladder while operating the drill, and that plaintiff's coworker was not stabilizing the ladder at the time of the fall. Under the circumstances, we find that plaintiff's testimony that he fell from the ladder while performing drilling work established prima facie entitlement to summary judgment on the issue of liability on his Labor Law § 240(1) claim ... . In response, defendants failed to raise a triable issue of fact concerning the manner in which the accident occurred or whether the A-frame ladder provided adequate protection. Their arguments that plaintiff caused his own injuries, by allegedly placing himself in a position where he had to lean and reach around the side of the ladder to fix the wall stud, at most establish comparative negligence, which is not a defense to a Labor Law § 240(1) claim ... . **Caceres v Standard Realty Assoc., Inc., 2015 NY Slip Op 06645, 1st Dept 8-25-15**

Question of Fact Whether Plaintiff's Conduct, Placing Ladder on Ice, Was Sole Proximate Cause of Injury

The Fourth Department determined there was a question of fact whether the plaintiff's conduct constituted the sole proximate cause of his injury (re: the Labor Law 240 (1) cause of action). Plaintiff placed his ladder on ice and was injured when the ladder slipped on the ice. The court explained the analytical criteria:

Liability under section 240 (1) "is contingent on a statutory violation and proximate cause" ... . If both elements are established, "contributory negligence cannot defeat the plaintiff's claim" ... . There can be no liability under Labor Law § 240 (1), however, "when there is no violation and the worker's actions . . . are the sole proximate cause' of the accident" ... . It is therefore "conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation" ... .

While we agree with plaintiffs that evidence that a ladder is "structurally sound and not defective is not relevant on the issue of whether it was properly placed" ..., we conclude that there are triable issues of fact whether plaintiff's actions were the sole proximate cause of his injuries ... . * * *

In this case, we conclude that plaintiffs failed to meet their initial burden of establishing entitlement to partial summary judgment on the issue of liability on the Labor Law § 240 (1) cause of action inasmuch as they submitted evidence raising a triable issue of fact whether plaintiff's conduct in "refusing to use available, safe and appropriate equipment" was the sole proximate cause of the accident ... . Specifically, plaintiffs submitted deposition testimony from defendant's customer, who purportedly owned the building on which plaintiff was working. The owner testified that, on the day of the accident, he advised plaintiff that the ladder was not placed in a safe position. The owner offered to retrieve safety equipment from his own truck that would help to remove ice from underneath the ladder and thereby stabilize the ladder. Plaintiff, however, rejected that offer. The owner also attempted to hold the ladder for plaintiff, but plaintiff again rejected the owner's assistance. **Fazekas v Time Warner Cable, Inc., 2015 NY Slip Op 07403, 4th Dept 10-9-15**

The Fact That A (Non-Defective) A-Frame Ladder Fell Over While Plaintiff Held On To It After Plaintiff Was Jolted With Electricity Did Not Justify Summary Judgment On Plaintiff's Labor Law 240 (1) Cause Of Action, Question of Fact Whether Safety Device Should Have Been Provided

The Court of Appeals, reversing (modifying) the Appellate Division, determined plaintiff was not entitled to summary judgment on his Labor Law 240 (1) cause of action. Defendant fell from an A-frame ladder after receiving an electrical shock:

Plaintiff is not entitled to summary judgment under Labor Law § 240 (1). While using an A-frame ladder, plaintiff fell after receiving an electrical shock. Questions of fact exist as to whether the ladder failed to provide proper protection, and whether plaintiff should have been provided with additional safety devices ... . **Nazario v 222 Broadway, LLC, 2016 NY Slip Op 07823, CtApp 11-21-16**

Plaintiff's Leaning To The Side Of A Non-Defective Ladder Was The Sole Proximate Cause Of Injury

The Second Department determined summary judgment was properly granted to defendants in a Labor Law 240 (1) cause of action. Plaintiff was using an A-frame ladder which was not defective. Plaintiff was injured when he leaned to the side of the ladder and the ladder tipped and the plaintiff fell. It was the act of reaching to the side, not a defective ladder, which was the proximate cause of plaintiff's injury:

"Labor Law § 240(1) imposes a nondelegable duty upon owners, lessees that control the work performed, and general contractors to provide safety devices necessary to protect workers from risks inherent in elevated work sites" ... . "To recover on a cause of action pursuant to Labor Law § 240(1), a plaintiff must demonstrate that there was a violation of the statute, and that the violation was a proximate cause of the accident" ... . "Where there is no statutory violation, or where the plaintiff is the sole proximate cause of his or her own injuries, there can be no recovery under Labor Law § 240(1)" ... .

Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 240(1) insofar as asserted against each of them. Their submissions

demonstrated, prima facie, that the injured plaintiff improperly positioned and misused the ladder, which was the sole proximate cause of his injuries ... . **Scofield v Avante Contr. Corp., 2016 NY Slip Op 00493, 2nd Dept 1-27-16**

Plaintiff Need Not Show Ladder Which Fell Was Defective To Be Entitled To Summary Judgment On Labor Law 240 (1) Cause Of Action

The First Department determined plaintiff need not show the ladder which fell was defective to be entitled to summary judgment on his Labor Law 240 (1) cause of action:

Plaintiff made a prima facie showing of his entitlement to summary judgment as to liability on his Labor Law § 240(1) cause of action, by submitting his own testimony that the ladder upon which he was standing to perform his work wobbled, and that both he and the ladder fell to the ground as he descended it to figure out why it had wobbled ... . Plaintiff was not required to offer proof that the ladder was defective ... .

In opposition, defendant failed to show that plaintiff's conduct was the sole proximate cause of the accident ... and that it had provided plaintiff with adequate safety devices to prevent his fall ... . **Ocana v Quasar Realty Partners L.P., 2016 NY Slip Op 01902, 1st Dept 3-17-16**

Ladder Was Not Defective, Fall Not Covered By Labor Law 240

The First Department determined plaintiff's fall from a ladder did not support a Labor Law 240 cause of action. Plaintiff's pant leg caught on an unmarked rebar as he descended from the third rung. The accident was not caused by a defective ladder and was not attributable to an extraordinary elevation-related risk:

... [D]ismissal of the Labor Law § 240 claim was proper, as there is no dispute that the ladder was free from defects, and the record shows that plaintiff's fall was not attributable to the kind of extraordinary elevation-related risk that the statute was designed to prevent. Rather, plaintiff's injuries "were the result of the usual and ordinary dangers at a construction site" ... . **Almodovar v Port Auth. of N.Y. & N.J., 2016 NY Slip Op 03075, 1st Dept 4-21-16**

Fixing A Leaky Roof Not Routine Maintenance, Plaintiff's Labor Law 240(1) Cause Of Action Properly Survived Motion To Dismiss

The First Department determined defendant's motion to dismiss plaintiff's Labor Law 240(1) cause of action was properly denied. Plaintiff climbed up a permanent ladder to fix a roof leak. The ladder was wet with rain, shaky and too close to the wall. Plaintiff fell when he attempted to come back down the ladder from the roof:

... [D]efendant [is not] entitled to dismissal of the Labor Law § 240(1) claim. Plaintiff was engaged in repairing the roof, an activity to which Labor Law § 240(1) applies, and not merely in routine maintenance ... . Moreover, the permanently affixed ladder that provided the sole access to plaintiff's elevated work site was a safety device within the meaning of Labor Law § 240(1) ... . In view of plaintiff's testimony that the ladder shook and was wet and was too close to the wall to allow room for his feet on the rungs, defendant failed to demonstrate as a matter of law that plaintiff was provided with proper protection. **Kolenovic v 56th Realty, LLC, 2016 NY Slip Op 04005, 1st Dept 5-24-16**

Proof Plaintiff Fell When Ladder Wobbled Sufficient For Summary Judgment On The Labor Law 240 (1) Cause Of Action

The First Department held that a proof plaintiff fell after the ladder wobbled was sufficient to support summary judgment on the Labor Law 240 (1) cause of action. Proof the ladder was defective is not necessary:

"Liability under Labor Law § 240(1) depends on whether the injured worker's task creates an elevation-related risk of the kind that safety devices listed in section 240(1) protect against'" ... . "[T]he single decisive question is 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" ... . Under this section of the Labor Law, a plaintiff's comparative fault is not a defense ... . "Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain[s] steady and erect while being used, constitutes a violation of Labor Law § 240(1)" ... . **Hill v City of New York, 2016 NY Slip Op 05019, 1st Dept 6-23-16**

Standing On The Top Step Of An A Frame Ladder Was Not The Sole Proximate Cause Of The Plaintiff's Fall; Summary Judgment On The Labor Law 240(1) Cause Of Action Should Have Been Granted.

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff was injured when he fell descending from the top step of a six-foot A frame ladder. Plaintiff used the six-foot ladder because debris prevented the use of an eight-foot ladder (the eight-foot ladder could not opened due to the debris). Standing on the top step was not the sole proximate cause of the accident:

Denial of summary judgment on plaintiff's claim pursuant to Labor Law § 240(1) was in error where plaintiff electrician was injured when he fell from an A-frame ladder as he was attempting to descend it. Plaintiff's use of a six-foot ladder that required him to stand on the top step did not make him the sole proximate cause of his accident where the eight-foot ladder could not be opened in the space due to the presence of construction debris ... . Defendants' reliance on the affidavit of the high-rise superintendent is misplaced. Although the superintendent speculated that there was sufficient space to open an eight-foot ladder, this was inconsistent with his prior deposition testimony and was thus calculated to create a feigned issue of fact ... .

Nor was plaintiff a recalcitrant worker ... . While the site safety manager who worked for a subcontractor of defendants testified that she told plaintiff that he should not work in the room because it was unsafe due to all the debris, she explicitly denied that she directed plaintiff to stop work, explaining that she had no such authority. **Saavedra v 89 Park Ave. LLC, 2016 NY Slip Op 06974, 1st Dept 10-25-16**

Allegation The Ladder Swayed Sufficient To Demonstrate The Failure To Secure The Ladder Caused The Fall

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law 240(10 cause of action should have been granted. Plaintiff had been hired to install wood paneling. Speakers were removed from wall to install the paneling. Plaintiff was standing on an A-frame ladder, replacing one of the speakers when the ladder swayed and he fell. The Second Department held that plaintiff was engaged in "altering," a covered activity, and the allegation that the ladder swayed was sufficient to link the fall to a failure of a safety device (failure to secure the ladder):

Although the defendant contends that the act of rehanging a speaker does not constitute the "altering" of a building or structure, "[t]he intent of [Labor Law § 240(1)] was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts" ... . The plaintiff was injured while rehanging a speaker that he and his

coworkers had removed to enable them to install the wood paneling and, therefore, we conclude that the plaintiff was injured while performing work that was "ancillary to" a covered activity, entitling him to the protections afforded by Labor Law § 240(1) ... . "To myopically focus on a job title or the plaintiff's activities at the moment of the injury would be to ignore the totality of the circumstances in which the plaintiff and his employer were engaged in contravention of the spirit of the statute which requires a liberal construction in order to accomplish its purpose of protecting workers" ... .

Further, the plaintiff established, prima facie, the existence of a violation of Labor Law § 240(1) that was a substantial factor in causing his injuries ... . "A fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240(1). There must be evidence that the subject ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries" ... . Here, the plaintiff's proof established that the ladder from which he fell was inadequately secured to provide him with proper protection, and that the failure to secure the ladder was a proximate cause of his injuries ... . **Goodwin v Dix Hills Jewish Ctr., 2016 NY Slip Op 07293, 2nd Dept 11-9-16**

Ladder Was Not Used For Protected Activity

The Second Department determined defendant (Nickel) was entitled to summary judgment dismissing the Labor Law 200(1), 246(1) and 240(1) causes of action. Plaintiff was injured when he fell of a ladder while attempting to fix an air conditioner which had stopped running. Plaintiff was not engaged in a protected activity under Labor Law 240(1) or 246(1). The Labor Law 200(1) cause of action was properly dismissed because defendant did not control the manner of plaintiff's work:

Nickel submitted evidence sufficient to establish, prima facie, that the plaintiff was not engaged in an enumerated activity protected under Labor Law § 240(1) at the time of his accident. Furthermore, Nickel submitted evidence sufficient to establish, prima facie, that the plaintiff's accident did not involve construction, demolition, or excavation and, accordingly, that Labor Law § 241(6) does not apply. In opposition, the plaintiff failed to raise a triable issue of fact.

Supreme Court properly granted that branch of Nickel's motion which was for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action insofar as asserted against it, albeit for a different reason. Nickel established, prima facie, that the ladder was not defective, and the plaintiff conceded that fact. Thus, the potential liability of Nickel, contrary to the Supreme Court's finding, was not based on its actual or constructive notice of any dangerous or defective condition of the ladder ... . Instead, the plaintiff allegedly was injured as a result of the manner in which he performed his work. Accordingly, recovery against Nickel under Labor Law § 200 or under the common law may only be found if Nickel had the authority to supervise or control the performance of the work ... . Nickel established, prima facie, that it did not have authority to exercise supervision or control over the means and methods of the plaintiff's work. In opposition, the plaintiff failed to raise a triable issue of fact ... . **Mammone v T.G. Nickel & Assoc., LLC, 2016 NY Slip Op 07300, 2nd Dept 11-9-16**

Fall When Descending A 28-Foot Ladder Entitled Plaintiff To Summary Judgment, Apparently A 40-Foot Ladder Would Have Been Safer But None Was Available, Therefore Use Of The Shorter Ladder Could Not Be The Sole Proximate Cause Of The Injury

The Second Department determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff fell when he attempted to descend a 28-foot ladder. Apparently a 40-foot ladder would have been safer, but there was no showing a 40-foot ladder was available. Therefore plaintiff's use of a 28-foot ladder could not be the sole proximate cause of his injury:

... [T]he plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by demonstrating that he was injured when he fell while descending an unsecured, 28-foot ladder, and that he was not provided with a safety device to prevent him from falling ... . Contrary to Halsted's (defendant's) contention, it failed to

raise a triable issue of fact as to whether the plaintiff's decision to use a 28-foot ladder, rather than a 40-foot ladder, was the sole proximate cause of his injuries. The record reveals that there were no 40-foot ladders readily available to the plaintiff on the date of his accident, and that a Halsted employee nevertheless instructed the plaintiff that he was required to complete his job, or be fired. Under these circumstances, the plaintiff's use of the 28-foot ladder cannot be said to be the sole proximate cause of his injuries ... . **Pacheco v Halsted Communications, Ltd., 2016 NY Slip Op 07303, 2nd Dept 11-9-16**

Plaintiff Entitled To Summary Judgment On Labor Law 240 (1) Cause Of Action, Ladder Kicked Out From Under Him.

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action. There was evidence the ladder kicked out from under plaintiff. There was no need to show the ladder was defective. It was enough the ladder was not secured:

Plaintiff established his entitlement to partial summary judgment on his Labor Law § 240(1) claim through witnesses' testimony that the ladder from which he was descending suddenly kicked out to the left, resulting in his fall ... . Contrary to the motion court's finding, plaintiff was not required to demonstrate that the ladder was defective in order to satisfy his prima facie burden ... .

In opposition, defendants failed to raise a triable issue of fact as to whether plaintiff was the sole proximate cause of the accident. Plaintiff was not responsible for setting up the ladder, and there was no testimony establishing the existence of any other readily available, adequate safety devices at the work site ... . Furthermore, given the undisputed testimony that the ladder kicked out because it was unsecured, the testimony that plaintiff unsafely descended from the ladder by carrying pipe fittings in his arms established, at most, "contributory negligence, a defense inapplicable to a Labor Law § 240(1) claim" ... . **Fletcher v Brookfield Props., 2016 NY Slip Op 08105, 1st Dept 12-1-16**

Stilts (Falling Workers Cont'd)

Slip and Fall On Ice While Wearing Stilts Not an Elevation-Related Event within Meaning of Labor Law 240 (1)

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a dissent, determined that a slip and fall caused by ice on the floor was not an elevation-related event within the meaning of Labor 240(1), despite the fact the worker was using stilts when he slipped and fell:

... [T]he protections of Labor Law § 240 (1) "do not encompass any and all perils that may be connected in some tangential way with the effects of gravity" ... . "Rather, liability [remains] contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" ... . Moreover, section 240 (1) is not applicable unless the plaintiff's injuries result from the elevation-related risk and the inadequacy of the safety device ... . * * *

Here, plaintiff's accident was plainly caused by a separate hazard — ice — unrelated to any elevation risk. Plaintiff testified that stilts were the appropriate device for the type of work that he was undertaking, given the height of this particular ceiling. Plaintiff's testimony further established that it was the ice — not a deficiency or inadequacy of the stilts — that caused his fall. **Nicometi v Vineyards of Fredonia, LLC, 2015 NY Slip Op 02801 CtApp 4-2-15**

Falling Objects, Generally--Elevation Related (Gravity Related) Risk Must Be Involved

Failure to Wear Hard Hat Does Not Preclude 240(1) Claim; Plaintiff Struck by Falling Pipe; No Need to Show Pipe Was Being Hoisted or Secured

"Plaintiff established that his injuries were caused, at least in part, by the absence of proper protection required by the statute. The evidence demonstrates that plaintiff, a welder who was working at a power plant that was being constructed, was struck on the head by a pipe that fell from a height of approximately 85 to 120 feet as a result of a gap in a toeboard installed along a grated walkway near the top of a generator in the power plant … . It is undisputed that there was no netting to prevent objects from falling on workers and contrary to defendants' contention, plaintiff is not required to show exactly how the pipe fell, since, under any of the proffered theories, the lack of protective devices was the proximate cause of his injuries … . Nor is plaintiff required to show that the pipe was being hoisted or secured when it fell, since that is not a precondition to liability pursuant to Labor Law § 240 (1) … . In opposition, defendants failed to raise a triable issue of fact since they failed to show that adequate protective devices required by Labor Law § 240 (1) were employed at the site. That plaintiff was wearing a welding hood but not a hard hat does not raise an issue of fact since "[a] hard hat is not the type of safety device enumerated in Labor Law § 240 (1) to be constructed, placed and operated, so as to give proper protection from extraordinary elevation-related risks to a construction worker" …". **Mercado v Caithness Long Is LLC, 2013 NY Slip Op 02005, 9634, 102473/09, 590277/11, 1st Dept 3-26-13**

Height Differential Need Only Be More than "De Minimis"

"Plaintiff made a prima facie showing that his injuries were caused by a failure to protect against a risk arising from a significant elevation differential. Plaintiff testified that he sustained physical injuries when he was walking across plywood planks covering fresh concrete. The plywood planks buckled and shifted. As a result, an A-frame cart containing Sheetrock and two 500-pound steel beams tipped over toward the plaintiff. The steel beams fell, landing on his left calf and ankle. While the record did not specify the height, the uncontroverted evidence shows that the steel beams fell a short distance from the top of the A-frame cart to plaintiff's leg. Given the beams' total weight of 1,000 pounds and the force they were able to generate during their descent, the height differential was not de minimis … . * * * Moreover, the foreman's affidavit does not sufficiently challenge the conclusion that the steel beams were not properly secured." **Marrero v 2075 Holding Co, LLC, 2013 NY Slip Op 03160, 1st Dept, 5-2-13**

Backhoe Bucket Not "Falling Object" Within Meaning of Labor Law 240 (1)

"… [T]he evidence submitted by plaintiffs, if accepted as true, would establish that "the backhoe bucket crushed plaintiff[ ] . . . not because of gravity, but because of its mechanical operation by an allegedly negligent co-worker" … . Under these circumstances, Supreme Court properly dismissed plaintiffs' section 240 (1) claim because there was no falling object—"the harm [did not] flow[ ] directly from the application of the force of gravity to [an] object"…". **Mohamed v City of Watervliet, 515473, 3rd Dept 5-9-13**

No Action Where Plaintiff Struck by Small Piece of Sheetrock Dropped from Third Floor; Labor Law 240(1) Not Implicated Because Sheetrock Was Not Being Hoisted or Secured

"As the Court of Appeals has observed, not every injury caused by a falling object at a construction site is covered by the extraordinary protections of Labor Law § 240 (1) … . Rather, in a "falling object" case under Labor Law § 240 (1) … , a plaintiff must show that, at the time the object fell, it was "being hoisted or secured" … or "required securing for the purposes of the undertaking" … . The plaintiff also must show that the object fell "*because of* the absence or inadequacy of a safety device of the kind enumerated in the statute" … . The statute does not apply in situations in which a hoisting or securing device of the type enumerated in the statute would not be necessary or expected … .
Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 240 (1)….[T]he sheetrock debris was placed in piles and then bagged. It was not discarded in pieces through the window openings. Because those small pieces of sheetrock were not in the process of being hoisted or secured and did not require hoisting or securing, the "special protection" of Labor Law § 240 (1) was not implicated …". **Moncayo v Curtis Partition Corp, 2013 NY Slip Op 03644, 2nd Dept, 5-22-13**

Alleged Failure to Secure Mirror Which Fell During Removal Required Jury Charge on "Falling Objects" Theory

"…[T]he trial court erred in failing to charge the jury in connection with Labor Law § 240 (1) as it applies to falling objects, such as the mirror in this case. "[L]iability may be imposed where an object or material that fell, causing injury, was 'a load that required securing for the purposes of the undertaking at the time it fell' " … . Moreover, whether the statute applies in a falling object case "does not . . . depend upon whether the object has hit the worker" but "whether the harm flows directly from the application of the force of gravity to the object" … . Here, the plaintiff contended that the accident occurred not only due to the wobbly ladder, but also because the mirror was not properly secured during the removal process, thus causing it to fall. While the object that fell was to be removed as part of the project, the location in which that item was situated and the lack of any device to protect the worker directly below it from a clear risk of injury raise a factual issue as to whether the object required securing for the purposes of the undertaking …". **Saber v 69th Tenants Corp, 2013 NY Slip Op 04591, 2nd Dept, 6-19-13**

Labor Law 240(1) Action Not Implicated by Portion of Ceiling Falling; Not Being Hoisted or Secured; Did Not Fall Because of the Absence of a Safety Device

"Labor Law § 240 (1) requires property owners and contractors to provide workers with "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection" to the workers. The purpose of the statute is to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" … . "With respect to falling objects, Labor Law § 240 (1) applies where the falling of an object is related to 'a significant risk inherent in . . . the relative elevation . . . at which materials or loads must be positioned or secured' " … . Thus, to recover damages for violation of the statute, a "plaintiff must show more than simply that an object fell causing injury to a worker" … . The plaintiff must show that, at the time the object fell, it was "being hoisted or secured" … or "required securing for the purposes of the undertaking" … . The plaintiff also must show that the object fell "*because of* the absence or inadequacy of a safety device of the kind enumerated in the statute" Flossos v Waterside Redevelopment Co LP, 2013 NY Slip Op 05297, 2nd Dept 7-17-13

Sheetrock Resting on Blocks Satisfied Height Differential in Labor Law 240(1) Action

"[T]he Supreme Court correctly held that section 240 (1) applies to this case even though the sheetrock that fell upon plaintiff was located on the same first-floor level as plaintiff … , and was not being hoisted or secured … . We find no inconsistency between plaintiff's deposition testimony and her averment that at the time the sheetrock fell on her, it was leaning against the wall and resting atop blocks of wood approximately two feet high, a sufficient height differential to implicate section 240 (1)'s protections … . However, plaintiff was not entitled to summary judgment on her section 240 (1) claim … . ,,, [H]ere is a "potential 'causal connection between the object[s'] inadequately regulated descent and plaintiff's injury' " … . Nevertheless, it cannot be determined, on the extant record, whether plaintiff's injuries were proximately caused by the lack of a safety device of the kind required by Labor Law § 240 (1) …". **Rodriguez v SRLD Dev Corp, 2013 NY Slip Op 05548, 1st Dept 8-6-13.**

Object's Fall of 1 ½ Feet Constituted Physically Significant Elevation Differential for Purposes of Requiring a Safety Device Pursuant to Labor Law 240 (1)

"Plaintiff was employed as a roofer by a contractor hired by defendants to replace a roof on a shopping center. … [P]laintiff was injured when the handle of a roll carrier—a device used to dispense roofing material (the membrane roll)—hit him in the head as he was helping to unroll the membrane.[FN1] The accident allegedly occurred]when the roll carrier shifted on the slippery roof, causing the membrane roll to drop, thereby forcing the T-handle to rapidly move upward and hit plaintiff in the side of his head. * * * … [W]e agree with Supreme Court's finding here that plaintiff's injuries flowed "directly from the force of the falling [membrane] roll on the T-handle, causing the handle to strike plaintiff." Notwithstanding that plaintiff was not directly struck by the membrane roll that fell, his injuries were the result of his exposure to the risk of gravity while working with heavy materials that were hoisted above the roof's surface on which he was standing … . Thus, it is necessary to determine whether the risk of injury arose from a physically significant elevation differential so as to require defendants to provide plaintiff with protection by means of a safety device as set forth in the statute. We disagree with Supreme Court's finding that it did not. In determining whether an elevation differential is physically significant or de minimis, we must take into account " 'the weight of the [falling] object and the amount of force it was capable of generating, even over the course of a relatively short descent' " … . Here, for purposes of defendants' motion, plaintiff established that a membrane roll weighing between 600 and 800 pounds was hoisted by the roll carrier to a height of approximately 1½ feet off the roof's surface at the time of the accident. In our view, despite the relatively short distance that the membrane roll fell, it constituted a significant elevation differential given its substantial weight and the powerful force it generated when it fell, so as to require a safety device as set forth in Labor Law § 240 (1) …". **Jackson v Heitman Funds/191 Colonie LLC. 516248, 3rd Dept 11-27-13**

Building Collapse (Not Clear Whether Plaintiffs Fell or Were Struck by Falling Building, or Both)

"Plaintiffs established, prima facie, that the partial building collapse that severely injured both of them and killed a coworker was foreseeable, and that defendants owner and general contractor were on notice of the hazard. Since defendants, in opposition, failed to raise a triable issue of fact as to the foresseability of the building collapse, plaintiffs are entitled to partial summary judgment on their section 240 (1) claim.
Section 240 (1) should be "construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" … , since the statute was intended to place "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor" **…". Garcia v Neighborhood Partnership Hous Dev Fund Co Inc, 2014 NY Slip Op 00298, 1st Dept 1-21-14**

In a Falling Object Case, the Device Which Failed Was Not a Safety Device---Defendant Not Liable

“In order to prevail on summary judgment in a section 240 (1) "falling object" case, the injured worker must demonstrate the existence of a hazard contemplated under that statute "and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" … . Essentially, the plaintiff must demonstrate that at the time the object fell, it either was being … "hoisted or secured" … , or "required securing for the purposes of the undertaking" … . Contrary to the dissent's contention, section 240 (1) does not automatically apply simply because an object fell and injured a worker; "[a] plaintiff must show that the object fell . . . *because of* the absence or inadequacy of a *safety device* of the kind enumerated in the statute" … . The Appellate Division properly concluded that plaintiff had not established entitlement to summary judgment on liability. It erred, however, in denying summary judgment to defendants … because they established as a matter of law that the conduit did not fall on plaintiff due to the absence or inadequacy of an enumerated safety device.” **Fabrizi v 1095 Avenue of the Americas…, 15, Ct App 2-20-14**

Block Falling from Pallet Covered Under Labor Law 240(1)

“The injured plaintiff was employed as a masonry laborer … . He alleges that he was injured when a heavy stone block toppled off a pallet and struck his foot. At the time of the accident, the injured plaintiff was standing near the pallet waiting to attach the blocks on the pallet to a type of forklift, known as a "lull," which would then carry the blocks to the area where they were to be used. According to the injured plaintiff, the ground underneath the pallet was uneven and covered with ice, and the blocks were stacked vertically on the pallet and not secured onto it in any manner when the accident occurred. In addition, the injured plaintiff claims that immediately before the accident, a front loader being used to remove snow nearby caused a strong vibration that jarred the blocks on the pallet. * * * Labor Law § 240 (1) mandates that owners and contractors "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." The statute imposes absolute liability on owners and contractors whose failure to "provide proper protection to workers employed on a construction site" proximately causes injury to a worker … . The defendants failed to show that the injured plaintiff's alleged injuries resulted from a general hazard encountered at a construction site and were not "the direct consequence of a failure to provide" an adequate device of the sort enumerated in Labor Law § 240 (1) … . Those devices are intended to protect "against a risk arising from a physically significant elevation differential" … . The defendants' submissions did not establish that the accident was not the result of a failure to provide a protective device contemplated by the statute …”. **Desena v North Shore Hebrew Academy, 2014 NY Slip Op 05149, 2nd Dept 7-9-14**

Falling Block Not Shown to Be Related to the Failure of a Safety Device---Labor Law 240(1) Did Not Apply

“During construction, New Town received concrete stones on wooden pallets. Each pallet measured about three- to four-feet high. Because the construction site was open to the elements, the pallets were covered with a plastic tarp to keep the stones dry. On the day of the accident, plaintiff was constructing a scaffold near an open area where several of these pallets were located. As plaintiff walked by one of the pallets, a stone block that was resting on top of it allegedly fell and struck him on the right knee. The block weighed approximately 25 pounds. The record contains no evidence as to how the block could have come off the pallet. * * * Here, we conclude that plaintiff's injury was not caused by the absence or inadequacy of the kind of safety device enumerated in the statute … . Plaintiff does not contend that the block itself was inadequately secured. Instead, plaintiff argues that section 240 (1) is applicable because his injuries were caused by defendants' failure to provide an adequate safety device to hold the plastic tarp in place. Specifically, plaintiff maintains that the plastic tarp was inadequately secured because, if it had been properly secured, such as with ropes and stakes, plaintiff's injury would not have occurred. Plaintiff's argument is unconvincing. The plastic tarp was not an object that needed to be secured for the purposes of section 240 (1) … , nor is there any indication that the tarp caused plaintiff's injuries. The tarp was in place to keep the stone blocks dry, not to secure the stones stacked on the pallet underneath it.

The purpose of the tarp was to keep possible rain off the object, not to protect the workers from an elevated risk …”. **Guallpa v Leon D DeMatteis Constr Corp, 2014 NY Slip Op 06666, 1st Dept 10-2-14**

Injury Caused by Movement and Toppling of a Dry Wall Cart Not Covered by Labor Law 240(1)

“At the time of the injury, plaintiff and a coworker were in a dormitory room, unloading a double sheet of drywall from a wheeled cart. The remaining drywall on the cart moved and struck them, and the cart also toppled over and allegedly struck plaintiff, causing him to fall to the floor and injure his shoulder. * * * We reject plaintiffs' contention that the court erred in granting that part of the cross motion with respect to Labor Law § 240 (1). At the time of the accident, plaintiff was standing on the ground, the drywall on the cart was not being hoisted or secured, and the cart was not being hoisted or otherwise moved vertically … . We conclude that plaintiff's injuries were not the direct consequence of a failure to provide blocks or stays to protect against a risk arising from a physically significant elevation differential; here, the function of such devices would not have been to protect plaintiff from the effects of gravity … . In our view, defendants established as a matter of law "that the injuries resulted from a general hazard encountered at a construction site and were not 'the direct consequence of a failure to provide' an adequate device of the sort enumerated in Labor Law § 240 (1)", and plaintiffs failed to raise a triable issue of fact …”. **Miles v Buffalo State Alumni Assn Inc, 2014 NY Slip Op 06732, 4th Dept 10-3-14**

Injury While Trying to Prevent a Ladder (Used by a Co-worker) from Falling Is Covered Under Labor Law 240 (1)

“The plaintiff Joseph Passantino was part of a three-man crew installing fiber optic cable at the defendant's property. The crew was working inside a courtyard area where the ground was covered with sand and gravel. Passantino was holding the bottom of an unsecured extension ladder while his coworker stood on the ladder above him, installing the cable. Passantino let go of the ladder in order to reach some cable, the ladder started to "kick out," and began to fall. Passantino reached out in order to stop the ladder and his coworker from falling, allegedly causing him to slip on sand and gravel in the area, and tear a tendon in his arm. Contrary to the defendant's contention, the hazard presented here is one contemplated by Labor Law § 240 (1) … . Indeed, the harm to Passantino was "the direct consequence of the application of the force of gravity" to the ladder … . The plaintiffs met their prima facie burden of establishing their entitlement to judgment as a matter of law on the cause of action alleging a violation of Labor Law § 240 (1) by demonstrating that the defendant failed to provide Passantino with a safety device, and that this violation was a proximate cause of his injuries …”.**Passantino v Made Realty Corp, 2014 NY Slip Op 07136, 2nd Dept 10-22-14**

Worker Struck by Falling Brick Entitled to Summary Judgment; Absence of Protective Netting; Comparative Negligence Is Not a Defense to a Labor Law 240(1) Claim

“Plaintiff established his entitlement to judgment as a matter of law on the issue of liability on his Labor Law § 240 (1) claim by submitting, among other things, his testimony that he was performing his assigned work of cleaning debris from the ground level, just outside the north side of the subject building under construction, when he was suddenly struck by a falling brick, in the absence of any overhead netting or other such protective devices … . Defendants' witnesses further established their liability by confirming that the brick fell out of the hands of a masonry worker several stories above plaintiff, and that safety netting which had been installed on other sides of the building was absent from the north exterior. The lack of overhead protective devices was a proximate cause of plaintiff's injuries under any of the conflicting accounts … , and plaintiff's comparative negligence is not a defense to a Labor Law § 240 (1) … . Moreover, contrary to defendants' argument that plaintiff had been instructed not to cross the barricade or go underneath the scaffolding while any work was

being performed overhead, "an instruction by an employer or owner to avoid using [unsafe equipment or engaging in unsafe practices is not a 'safety device' in the sense that plaintiff's failure to comply with the instruction is equivalent to refusing to use available, safe and appropriate equipment" ,,, . In addition, the conflicting accounts of "what type of work he was doing at the time of the accident" do not raise a triable issue of fact …". **Hill v Acies Group LLC, 2014 NY Slip Op 07601, 2nd Dept 11-6-14**

"Falling Objects" Protection Afforded by Labor Law 240 (1) Explained

In affirming the denial of defendant's motion for summary judgment on the Labor Law 240 (1) cause of action, the Fourth Department explained the law relating to "falling objects:"

Claimant, a painter working on a large-scale bridge painting project on the north Grand Island Bridge, was struck and injured by a falling rigging cable while preparing to return to his work area. * * * Labor Law § 240 (1) "applies to both falling worker' and falling object' cases" ..., and that section 240 (1) guards "workers against the special hazards' that arise when the work site either is itself elevated or is positioned below the level where materials or load [are] hoisted or secured' " ... . To recover under section 240 (1), a worker injured by a falling object must thus establish both (1) that the object was being hoisted or secured, or that it " required securing for the purposes of the undertaking,' " and (2) that the object fell because of the absence or inadequacy of a safety device to guard against a risk involving the application of the force of gravity over a physically significant elevation differential ... . **Floyd v New York State Thruway Auth, 2015 NY Slip Op 01131, 4th Dept 2-6-15**

Fall of a Heavy Rail from a Two- To Three-Foot Stack Was an Elevation-Related Event

The First Department determined the fall of a heavy rail from a stack two to three feet high was an elevation-related event within the meaning of the Labor Law:

We agree with the motion court's finding that the pile of rails that were stacked two and one-half to three feet high was not de minimis, given the approximately 1500 pound weight of the rail and "the amount of force it was capable of generating, even over the course of a relatively short descent" ... . The harm plaintiff suffered was the direct consequence of the application of the force of gravity to the rail that struck plaintiff ... . "What is essential to a conclusion that an object requires securing is that it present a foreseeable elevation risk in light of the work being undertaken" ... . It was foreseeable that during hoisting, a crane could strike the stacked pile of rails causing it to fall ..., and therefore, the rail that struck plaintiff was an object that required securing for the purposes of the undertaking ... . We are not persuaded by the City's contention that plaintiff failed to identify a necessary and expected safety device, as plaintiff demonstrated that the City could have used secure braces, stays, or even additional lines to stabilize the stacked rails ... . **Jordan v City of New York, 2015 NY Slip Op 02565, 1st Dept 3-26-15**

Maneuvering a Heavy Door from a Scissors Lift to the Door Opening on the Second Floor Was Not an Elevation-Related Risk within the Meaning of Labor Law 240(1)

The Fourth Department determined maneuvering a heavy door across a two-foot gap between the scissors lift on which plaintiff was standing and the door opening on the second floor was not an elevation-related risk within the meaning of Labor Law 240(1). Plaintiff's Labor Law 200 and common law negligence causes of action, however, survived defendant's summary judgment motion:

… [T]he court erred in denying that part of its motion and granting that part of plaintiffs' cross motion with respect to the Labor Law § 240 (1) claim, and we therefore modify the order accordingly. "The extraordinary protections of Labor Law § 240 (1) extend only to a narrow class of special hazards, and do not encompass any and all perils that may be connected in some tangential way with the effects of gravity' " ... . Rather, the statute "was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" ... . Here, plaintiff injured his back while maneuvering a heavy door across a lateral gap; the door did not fall or descend even a de minimis distance owing to the application of the force of gravity upon it ... . Although "the injured plaintiff's back injury was tangentially related to the effects of gravity upon" the door he was lifting, "it was not caused by the limited type of elevation-related hazards encompassed by Labor Law § 240 (1)" ... . We thus conclude that the hazard at issue here, i.e., lifting or carrying a heavy object across a lateral gap, even while positioned at a height, is a "routine workplace risk[]" of a construction site and not a "pronounced risk[] arising from construction work site elevation differentials" ... . **Carr v McHugh Painting Co., Inc., 2015 NY Slip Op 02584, 4th Dept 3-27-15**

One Ton Concrete Plank Fell from Jack; A "Contractor" (Within the Meaning of Labor Law 240 (1)) Need Only Have the Authority to Control the Work---It Need Not Actually Exercise that Authority

The Second Department determined summary judgment was properly granted to the plaintiff for his Labor Law 240 (1) cause of action. A one-ton concrete plank fell from a jack onto plaintiff's hand. The court noted that the hearsay submitted by the defendant, claiming that plaintiff was injured when he continued to work after being ordered to stop, was not sufficient to defeat plaintiff's summary judgment motion. Hearsay is admissible in this context but hearsay alone will not suffice to raise a triable issue of fact. The court also found that the defendant was a contractor within the meaning of Labor Law 240 (1). To meet the definition, the contractor must have the authority to enforce safety measures and hire responsible subcontractors, but need not have exercised that authority:

"Although hearsay evidence may be considered in opposition to a motion for summary judgment, such evidence alone is not sufficient to defeat the motion" ... .

... "A party which has the authority to enforce safety standards and choose responsible subcontractors is considered a contractor under Labor Law § 240(1)" ... . [Defendant's] status as a contractor under Labor Law § 240(1) is dependent upon whether it had the authority to exercise control over the work, not whether it actually exercised that right ... . **Guanopatin v Flushing Acquisition Holdings, LLC, 2015 NY Slip Op 02933, 2nd Dept 4-8-15**

Labor Law 240(1) Cause of Action Properly Dismissed---Worker's Hand Crushed by Excavator, Not an Elevation-Related Incident

Plaintiff's hand was crushed by an excavator as he was in a trench directing the operation of the excavator. The Second Department determined the city's motion for summary judgment on the Labor Law 200/common-law negligence, and Labor Law 240(1) causes of action was properly granted. But the Labor Law 241(6) cause of action, based upon an Industrial Code provision (12 NYCRR 23-9.5(c)) prohibiting close proximity to an excavator, should not have been dismissed. Labor Law 241(6) imposes a nondelegable duty to provide a safe workplace and requires compliance with the Industrial Code. The Labor Law 200/common-law negligence causes of action were defeated by the city's demonstration that it did not have the authority to control, direct or supervise the method or manner in which the relevant work was performed. The Labor Law 240(1) cause of action was properly dismissed because the injury was not the result of an elevation-related incident. The court explained the operative principles re: Labor Law 200 and Labor Law 241(6) causes of action. **Torres v City of New York, 2015 NY Slip Op 03519, 2nd Dept 4-29-15**

Lateral Shift of Heavy Equipment, Which Pinned Plaintiff Against a Column, Not Gravity-Related---Not Covered Under Labor Law 240 (1)

The First Department determined Supreme Court should have dismissed plaintiff's Labor Law 240 (1) cause of action because plaintiff's injury was not caused by a falling object. Plaintiff was moving an 8000 pound piece of equipment across a flat platform when the equipment shifted laterally and pinned plaintiff against a column. Because the accident did not flow from the application of the force of gravity, it was not covered under Labor Law 240 (1):

Plaintiff and his coworkers were moving a piece of an 8,000-pound piece of equipment across a flat platform. The ultimate goal was to place the equipment onto the forks of a forklift. Plaintiff testified that because two wheels broke off, the workers were pushing and pulling the equipment when it pinned him against a column on the side of the platform. Plaintiff testified that they did not lift the equipment into the air, and that it did not fall. Nor did he know what caused the equipment to shift laterally towards his side. Plaintiff's testimony established that the piece of equipment that pinned him to the column was not a "falling object" and that he was not a "falling worker," and the accident did not otherwise flow from the application of the force of gravity. Thus, he was not covered by Labor Law § 240(1) under the current case law ... . **Martinez v 342 Prop. LLC, 2015 NY Slip Op 03770, 1st Dept 5-5-15**

Injury Caused by an Unsecured Scaffolding Component Which Fell Approximately Two-Feet, Striking Plaintiff, Was Not the Type of Elevation-Related Risk Which Is Covered by Labor Law 240 (1)

Plaintiff was injured when a component of scaffolding fell about two-feet and struck him. The Third Department determined the incident was not the result of a circumstance covered by Labor Law 240 (1) (the absence of statutorily-required safety equipment), even though the incident was "gravity-related." However, the Labor Law 246 (1) cause of action, alleging a violation of a provision of the Industrial Code, and the Labor Law 200 cause of action against the general contractor which supervised and controlled the work, should not have been dismissed. With respect ot the Labor Law 240 (1) cause of action, the court explained:

Labor Law § 240 (1) "imposes absolute liability on building owners and contractors whose failure to 'provide proper protection to workers employed on a construction site' proximately causes injury to a worker" ... . The statute is intended to provide "extraordinary protections [applicable] only to a narrow class of dangers. More specifically, [the statute] relates only to special hazards presenting elevation-related risks" ... . Accordingly, "section 240 (1) does not automatically apply simply because an object fell and injured a worker; '[a] plaintiff must show that the object fell . . . because of the absence or inadequacy of a safety device of the kind enumerated in the statute'" ... . Where, as here, an injury is caused by a falling object, liability "depends on whether the injured worker's task creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against" ... . An elevation-related risk arises only where there is a "physically significant elevation differential" ... . In order to determine whether a height differential is physically significant, we must consider "the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent" ... . Without a significant elevation differential, Labor Law § 240 (1) does not apply, even if the injury is caused by the application of gravity on an object ... .

Here, "tak[ing] into account the practical differences between the usual and ordinary dangers of a construction site, and . . . the extraordinary elevation risks envisioned by [the statute]," as we must ..., we find that plaintiff's injury, caused by the tipping frame or scaffold component (see 12 NYCRR 23-1.4), did not fall within the scope of Labor Law § 240 (1). Our conclusion remains even if we accept it to be true that the frame was part of a scaffold that was in the process of being assembled or dismantled ... . The record indicates that, at most, the crossbar of the frame, which was upright but not connected to any other component or supporting any planking, was two feet above plaintiff's head. In our view, the facts do not present a physically significant height differential and, while plaintiff was exposed to a general workplace hazard, he was not exposed to an elevation-related risk within the ambit of Labor Law § 240 (1) ... . As such, this cause of action should be dismissed. **Christiansen v Bonacio Constr., Inc., 2015 NY Slip Op 04700, 3rd Dept 6-4-15**

Injury While Lowering a Heavy Tank Entitled Plaintiff to Summary Judgment on His Labor Law 240 (1) Claim

The First Department determined plaintiff was properly awarded summary judgment on his Labor Law 240 (1) claim. A rope attached to a heavy tank being lowered down some stairs by plaintiff severed one finger and a portion of another ("grave injury"). The court found that the incident was gravity-related, plaintiff was not provided with adequate safety devices, and plaintiff's actions were not the sole proximate cause of his injury. The court noted that another party's cross-motion for summary judgment should not have been denied on the ground the pleadings were not attached to the motion papers. The pleadings had been provided to the court by other parties. **Serowik v Leardon Boiler Works Inc., 2015 NY Slip Op 04773, 1st Dept 6-9-15**

Injury Caused by Lifting a Heavy Beam Not Covered by Labor Law 240(1), Despite the Fact the Beam Was Resting on an Elevated Scaffold

The Second Department determined that plaintiff's injury was not related to the type of hazard covered by Labor Law 240(1). Plaintiff injured his back when he lifted a beam which was resting on an elevated scaffold. The court explained:

"[T]he extraordinary protections of Labor Law § 240(1) extend only to a narrow class of special hazards, and do not encompass any and all perils that may be connected in some tangential way with the effects of gravity'" ... . Rather, the statute was designed to prevent accidents in which a protective device, " proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" ... .

Contrary to the plaintiff's contention, the Supreme Court properly granted that branch of [the defendant's] motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law § 240(1). * * * ... [T]he plaintiff failed to raise a triable issue of fact as to whether his injury arose from an elevation-related risk contemplated by the statute, rather than from the usual and ordinary dangers of the construction site ... . The fact that the plaintiff was injured while lifting a heavy object does not give rise to liability pursuant to Labor Law § 240(1) ... . **Cardenas v BBM Constr. Corp., 2015 NY Slip Op 08142, 2nd Dept 11-12-15**

Worker Struck By Debris Which Fell Through A Gap In Protective Netting Entitled To Summary Judgment On Labor Law 240 (1) Cause Of Action

The Second Department, reversing Supreme Court, granted summary judgment on plaintiff's Labor Law 240 (1) cause of action. Workers were using jackhammers to chip away concrete on an elevated structure. Netting had been installed to catch falling pieces of concrete. Plaintiff was struck and severely injured by a four-foot piece of concrete which fell through a gap in the netting. The netting was deemed to be an inadequate safety device:

The plaintiffs' submissions demonstrated that the injured plaintiff suffered harm that "flow[ed] directly from the application of the force of gravity" to the piece of concrete that struck him ... , and that given the nature and purpose of the work that was being performed at the time of his injury, the falling debris presented a significant risk of injury such that the ... defendants were obligated under Labor Law § 240(1) to use appropriate safety devices to safeguard the injured plaintiff from the harm it posed ... . The plaintiffs' submissions also demonstrated that the injured plaintiff's injury was "the direct consequence of a failure to provide adequate protection against [the] risk" of harm posed by the falling debris ... . Indeed, the plaintiffs established that the vertical netting that was installed around the controlled access zone to protect workers from the falling debris had pulled loose from the plywood barricade, creating an opening through which the concrete that struck the injured plaintiff traveled. Under these circumstances, the vertical netting constituted a safety device within the meaning of Labor Law § 240(1) ... , and the plaintiffs demonstrated that it was not "so constructed, placed and operated as to give proper protection" (Labor Law § 240[1]). **Sarata v Metropolitan Transp. Auth., 2015 NY Slip Op 09667, 2nd Dept 12-30-15**

Plaintiff Struck When Two Workers Lost Control Of A Heavy Beam They Were Lowering To The Ground Entitled To Summary Judgment On Labor Law 240 (1) Cause Of Action; Expert Opinion That No Safety Devices Were Necessary Insufficient To Defeat Summary Judgment Motion

The First Department affirmed Supreme Court's grant of summary judgment to the plaintiff in a Labor Law 240 (1) cause of action. Plaintiff was injured when a heavy beam being lowered by two other workers struck him in the chest and leg when the workers lost control of it. The court noted an expert opinion that no safety devices were needed was insufficient to establish the absence of a Labor Law 240 (1) violation:

The court properly found a "causal connection between the object's inadequately regulated descent and plaintiff's injury" ... . By submitting an expert affidavit, plaintiff met his initial burden of showing that the beam "required securing for the purposes of the undertaking" ... , and that statutorily enumerated safety devices could have prevented the accident ... . It is undisputed that no enumerated safety devices were provided, and the testimony and expert opinion that such devices were neither necessary nor customary is insufficient to establish the absence of a Labor Law § 240(1) violation '" . The "height differential cannot be described as de minimis given the amount of force [the beam was] able to generate over [its] descent" ... . Plaintiff was not the sole proximate cause of his injuries, which were caused at least in part by the lack of safety devices to check the beam's descent as well as the manner in which the other two workers lowered the beam; comparative negligence is no defense to the Labor Law § 240(1) claim ... . **Bonaerge v Leighton House Condominium, 2015 NY Slip Op 09632, 1st Dept 12-29-15**

Stacked Scaffolding Frames Which Toppled Onto Plaintiff Did Not Constitute An Elevation Risk, Labor Law 240 (1) Cause Of Action Properly Dismissed; Labor Law 241 (6) Cause Of Action, Based Upon Code Provision Requiring Safe, Stable Storage Of Building Materials, Properly Survived.

Scaffolding frames had been stacked vertically against a column on ground level. Plaintiff, Hebbard, was injured when he attempted to move a frame and other frames toppled onto him. The Third Department determined the accident was not the result of an "elevation risk" and therefore would not support a Labor Law 240 (1) cause of action. However the Labor Law 241 (6) cause of action was supported by an industrial code provision requiring safe, stable storage of building materials:

Here, Hebbard was six feet tall. The frames were about the same height as Hebbard and they were located on the same level as him. He was engaged in moving them from one place on the garage floor to another place on the same floor and did so by carrying one at a time. As he picked up one frame, other frames also located on the same level tipped over. Under the circumstances and in light of recent precedent, the Labor Law § 240 (1) cause of action was properly dismissed.

... Elements of a viable Labor Law § 241 (6) cause of action include "the violation of a regulation setting forth a specific standard of conduct applicable to the working conditions which existed at the time of the injury and that the violation was the proximate cause of the injury" ... . "The Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" ... .

The relevant regulation provides: "All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare" (12 NYCRR 23-2.1 [a] [1]). **Hebbard v United Health Servs. Hosps., Inc., 2016 NY Slip Op 00248, 3rd Dept 1-14-16**

Removing A Crate From A Flatbed Truck Was An Elevation-Related Risk Covered By Labor Law 240(1)

The First Department determined plaintiff's motion for summary judgment on his Labor Law 240(1) cause of action should have been granted. Plaintiff was attempting to maneuver a 1500-pound crate to a sling for removal from a flatbed truck when it fell over on him:

... [P]reparing a six-foot-tall crate weighing at least 1,500 pounds for hoisting posed an elevation-related risk for plaintiff within the meaning of Labor Law § 240(1) ... , and the crate was "an object that required securing for the purposes of the undertaking" ... .

Further, there is unrebutted evidence that various devices, including wooden blocks for bracing, would have stabilized the crate while it was being maneuvered into a position to have slings placed on it for hoisting by the crane. **Grant v Solomon R. Guggenheim Museum, 2016 NY Slip Op 04003, 1st Dept 5-24-16**

Plaintiff Did Not Know Source Of Falling Wood Which Struck Him, Therefore Plaintiff Could Not Demonstrate, As Matter Of Law, A Violation Of Labor Law 240(1)

The Second Department determined plaintiff's motion for summary judgment on a Labor Law 240(1) cause of action was properly denied. Plaintiff was struck by a falling piece of wood, but did not know what caused the wood to fall:

To prevail on a motion for summary judgment in a section 240(1) "falling object" case, the plaintiff must demonstrate that at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking ... . In addition, the plaintiff "must show that the object fell . . . because of the absence or inadequacy of a safety device of the kind enumerated in the statute" ... .

... The evidence submitted by the plaintiff was insufficient to establish that the wood fell because of the absence or inadequacy of a safety device. The plaintiff's mere belief that the wood that struck him was a part of the hoist mechanism is insufficient to establish that it was a component of the safety device itself ... . Moreover, under the circumstances, including that the plaintiff did not see where the wood fell from, the plaintiff did not establish, prima facie, that his injuries were proximately caused by the absence or inadequacy of a safety device or other violation of the statute ... . **Pazmino v 41-50 78th St. Corp., 2016 NY Slip Op 04032, 2nd Dept 5-25-16**

Building Owner Liable Under Labor Law 240(1) For Injury Caused By Falling Elevator

The First Department determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff, McCrea, was repairing an elevator when it fell on him. The court explained the relevant law, including the criteria for demonstrating an injured worker's actions were the sole proximate cause of the injury:

The evidence here establishes that at the time of the accident, McCrea was engaged in "repair" work because the elevator's safety shoes were not operating properly, and the condition was an isolated event, unrelated to normal wear and tear ... . In addition, the elevator was a "falling object" within the meaning of the Labor Law, even though it was not actually being hoisted or secured at the time of the accident, because it required securing for the purpose of McCrea's repair work ... .

As plaintiff was engaged in activity protected by Labor Law § 240(1) at the time of the incident, Arnlie, as owner of the building, is subject to absolute liability for injuries which resulted from its failure to provide plaintiff with proper safety devices ..., without regard to the comparative fault of plaintiff ... . Where the worker is the sole proximate cause of the injury, however, the premises owner will not be liable ... . “[T]o raise a triable issue of fact as to whether a plaintiff was the sole proximate cause of an accident, the defendant must produce evidence that adequate safety devices were available,

that the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained" ... .

Here, there is no indication that plaintiff refused or misused available safety equipment. **McCrea v Arnlie Realty Co. LLC, 2016 NY Slip Op 04330, 1st Dept 6-7-16**

Falling Sheetrock Did Not Support A Labor Law 240(1) Cause Of Action

The Second Department determined defendants' motion for summary judgment on the Labor Law 240(1) cause of action, alleging injury from a falling piece of sheetrock, was properly granted. The sheetrock in question was stored against a wall and was not being hoisted at the time of the incident. [The extensive decision demonstrates the complexity of Labor Law actions as it addresses Labor Law 241(6) and Labor Law 200 causes of action, indemnification issues and the liability of agents and general contractors.] With respect to the Labor Law 240(1) cause of action, the court wrote:

"In order to prevail on summary judgment in a section 240(1) falling object' case, the injured worker must demonstrate the existence of a hazard contemplated under that statute and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein'" ... . "Essentially, the plaintiff must demonstrate that at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking" ... . "[F]or section 240 (1) to apply, a plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell . . . because of the absence or inadequacy of a safety device of the kind enumerated in the statute" ... .

However, Labor Law § 240(1) "does not apply in situations in which a hoisting or securing device of the type enumerated in the statute would not be necessary or expected" ... . Here, the sheetrock, which was being stored against a wall, was not a material being hoisted or a load that required securing for the purposes of the undertaking at the time it fell ... , nor was it expected, under the circumstances of this case, that the sheetrock would require securing for the purposes of the undertaking at the time it fell ... . **Seales v Trident Structural Corp., 2016 NY Slip Op 06204, 2nd Dept 9-28-16**

Accident Caused By High Pressure, Not Gravity; Injury Not Covered By Labor Law 240(1)

The First Department, reversing Supreme Court, determined plaintiff's injury was not the result of the force of gravity and was therefore not covered under Labor Law 240(1):

Plaintiff ... was struck by a pipe while it was being flushed clean with a highly pressurized mixture of air, water, and a rubber "rabbit" device. The movement of this mixture through the pipe failed to bring the mechanism of plaintiff's injury within the ambit of section 240(1) because it did not involve "the direct consequence of the application of the force of gravity to an object" ... . The mixture in the pipe did not move through the exercise of the force of gravity, but was rather intentionally propelled through the pipe through the use of high pressure ... . **Joseph v City of New York, 2016 NY Slip Op 06649, 1st Dept 10-11-16**

Question Of Fact Whether Stacked Scaffolding, Which Was On The Same Level As Plaintiff, Constituted A "Physically Significant Elevation Differential," Summary Judgment Dismissing Plaintiff's Labor Law 240(1) Cause Of Action Should Not Have Been Granted

The Third Department, reversing Supreme Court, determined defendants' motions for summary judgment dismissing plaintiff's Labor Law 240(1) cause of action should not have been granted. Plaintiff was severely injured when a row of stacked scaffolding frames fell forward like "dominos." Whether Labor 240(1) applies depends on whether the scaffolding, which was on the same level as plaintiff, presented a risk related to a significant elevation differential:

... [W]e are unable to glean from the present record whether plaintiff's injury arose from the requisite "physically significant elevation differential" ... . In determining whether an elevation differential is physically significant or de minimis, we must consider not only the height differential itself, but also "the weight of the [falling] object and the amount of force it was capable of generating, even over the course of a relatively short descent" ... . Critically absent from the record is any indication as to plaintiff's height or any other evidence shedding light on the height differential between plaintiff and the stacked frames at the time they fell. Further, issues of fact remain with regard to such other relevant factors as the number of scaffolds stacked in the pile that collapsed, the weight of each scaffold and the manner in which the scaffold(s) struck plaintiff. Given these unresolved factual questions, summary judgment on plaintiff's Labor Law § 240 (1) is not appropriate ... . **Wright v Ellsworth Partners, LLC, 2016 NY Slip Op 06927, 3rd Dept 10-20-16**

Falling Plywood Not Actionable Under Labor Law 240 (1), Plywood Was Not Being Hoisted And Was Not Required To Be Secured, Labor Law 246 (1) Cause Of Action Properly Survived.

The Second Department determined plaintiff's Labor Law 240 (1) cause of action, based upon injury caused by a falling piece of plywood, was properly dismissed because the plywood was not being hoisted and did not need to be secured. Plaintiff's 241 (6) cause of action was properly allowed to proceed:

... [T]he Supreme Court correctly determined that the defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging violations of Labor Law § 240(1) by submitting the deposition transcript of [defendant's] superintendent, which demonstrated that the plywood that fell was not being hoisted or secured and did not require securing for the purposes of the undertaking at the time it fell ... . * * *

As to the Labor Law § 241(6) cause of action, which was predicated upon a violation of 12 NYCRR 23-1.7(a)(1), the Supreme Court ... correctly determined that ... the defendants established their prima facie entitlement to judgment as a matter of law based upon the plaintiff's supervisor's affidavit, in which he averred that the area where the plaintiff was working was not normally exposed to falling material or objects (see 12 NYCRR 23-1.7[a][1]...). In opposition, the plaintiff raised a triable issue of fact by submitting the plaintiff's supervisor's deposition testimony, in which he testified, in contradiction to his affidavit, that it was known that objects were "always" falling at the plaintiff's worksite, and that objects fell "sometimes" and "once in a while" ... . **Millette v Tishman Constr. Corp., 2016 NY Slip Op 08053, 2nd Dept 11-30-16**

Activities Covered by Labor Law 240(1) (In Addition to “Construction and Erection”)

Routine Maintenance Not Covered

Cleaning Clogged Drain Was Routine Maintenance, Not Covered by Labor Law 240(1)

Addressing first the Labor Law § 240 (1) cause of action, we conclude that plaintiff was not "repairing" the corrosion chamber at the time he was injured, and thus that he was not engaged in a protected activity under section 240 (1). Rather, defendants established as a matter of law that plaintiff was involved in "routine maintenance in a non-construction, non-renovation context" … . The court therefore properly granted that part of defendants' motion with respect to that cause of action and denied plaintiffs' cross motion. Neither the corrosion chamber nor the components of the "drainage system," i.e., the floor drain and plastic piping, were in need of "repair." Rather, the drain was clogged, at least in part as a result of the normal operation of the chamber. Plaintiff testified at his deposition that the clog consisted of "paper and what looked to be like pieces of wooden dowel from like Q-tips that they use," i.e., parts of samples that had been placed in the chamber on prior occasions, as well as an unknown substance. Although plaintiff and his supervisor testified that dirty

conditions in the chamber could potentially compromise test results, there is no evidence that the chamber was " 'inoperable or malfunctioning prior to the commencement of the work' " … . Further, there is no evidence that plaintiff had to use specialized tools or any tools at all to take apart the plastic piping. Indeed, defendants' expert averred that the PVC piping had no mechanical fasteners and was "merely a friction fit, therefore, it would be a routine task to remove." Plaintiff then used an air hose, metal wire, and a water hose to remove the clog, all of which were readily accessible to and used by him in the course of his employment. **Leathers v Zaepfel Dev Co Inc, 2014 NY Slip Op 06691, 4th Dept 10-3-14**

Injury While Doing Routine Maintenance Did Not Give Rise To Labor Law Causes Of Action

The Second Department determined plaintiff was doing routine maintenance (checking light fixtures) when he was injured by a loose electric cable and his Labor Law causes of action were properly dismissed:

The defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 240(1) by offering proof that the plaintiff was involved in routine maintenance rather than repair and, therefore, the plaintiff's activity did not fall within the protection of that provision of the Labor Law ... .

The defendants also demonstrated their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 241(6). The plaintiff was not involved in the activity of construction, excavation, or demolition, and the statute does not protect workers involved in maintenance or replacement of parts ... .

The defendants also demonstrated their prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging a violation of Labor Law § 200 and common-law negligence. The defendants demonstrated, prima facie, that they neither created nor had notice of the loose cable that allegedly caused the plaintiff's electric shock ... . **Guevera v Simon Prop. Group, Inc., 2015 NY Slip Op 09254, 2nd Dept 12-16-15**

Repair Of An Air Conditioner Was Not A Protected Activity Under Labor Law 240(1) Or 246(1), Ladder Was Not Defective And Defendant Did Not Control Plaintiff's Work, Therefore No Liability Under Labor Law 200(1) As Well

The Second Department determined defendant (Nickel) was entitled to summary judgment dismissing the Labor Law 200(1), 246(1) and 240(1) causes of action. Plaintiff was injured when he fell of a ladder while attempting to fix an air conditioner which had stopped running. Plaintiff was not engaged in a protected activity under Labor Law 240(1) or 246(1). The Labor Law 200(1) cause of action was properly dismissed because defendant did not control the manner of plaintiff's work:

Nickel submitted evidence sufficient to establish, prima facie, that the plaintiff was not engaged in an enumerated activity protected under Labor Law § 240(1) at the time of his accident. Furthermore, Nickel submitted evidence sufficient to establish, prima facie, that the plaintiff's accident did not involve construction, demolition, or excavation and, accordingly, that Labor Law § 241(6) does not apply. In opposition, the plaintiff failed to raise a triable issue of fact.

Supreme Court properly granted that branch of Nickel's motion which was for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action insofar as asserted against it, albeit for a different reason. Nickel established, prima facie, that the ladder was not defective, and the plaintiff conceded that fact. Thus, the potential liability of Nickel, contrary to the Supreme Court's finding, was not based on its actual or constructive notice of any dangerous or defective condition of the ladder ... . Instead, the plaintiff allegedly was injured as a result of the manner in which he performed his work. Accordingly, recovery against Nickel under Labor Law § 200 or under the common law may only be

found if Nickel had the authority to supervise or control the performance of the work ... . Nickel established, prima facie, that it did not have authority to exercise supervision or control over the means and methods of the plaintiff's work. In opposition, the plaintiff failed to raise a triable issue of fact ... . **Mammone v T.G. Nickel & Assoc., LLC, 2016 NY Slip Op 07300, 2nd Dept 11-9-16**

Demolition (Covered Activities)

"Foreseeability" In the Context of a Building Collapse During Demolition; Foreseeability of an Elevation-Related Risk

Section 240 (1) should be "construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" … , since the statute was intended to place "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor" … . It is elementary, of course, that comparative negligence is not a defense to an action predicated on section 240 (1). A plaintiff in a case involving collapse of a permanent structure must establish that the collapse was "foreseeable," not in a strict negligence sense, but in the sense of foreseeability of exposure to an elevation-related risk … . **Garcia v Neighborhood Partnership Hous Dev Fund Co Inc, 2014 NY Slip Op 00298, 1st Dept 1-21-14**

Dismantling Shelves Constitutes Demolition and Alteration

Addressing first the Labor Law § 240 (1) cause of action, we conclude that plaintiff was not "repairing" the corrosion chamber at the time he was injured, and thus that he was not engaged in a protected activity under section 240 (1). Rather, defendants established as a matter of law that plaintiff was involved in "routine maintenance in a non-construction, non-renovation context" … . The court therefore properly granted that part of defendants' motion with respect to that cause of action and denied plaintiffs' cross motion. Neither the corrosion chamber nor the components of the "drainage system," i.e., the floor drain and plastic piping, were in need of "repair." Rather, the drain was clogged, at least in part as a result of the normal operation of the chamber. Plaintiff testified at his deposition that the clog consisted of "paper and what looked to be like pieces of wooden dowel from like Q-tips that they use," i.e., parts of samples that had been placed in the chamber on prior occasions, as well as an unknown substance. Although plaintiff and his supervisor testified that dirty conditions in the chamber could potentially compromise test results, there is no evidence that the chamber was " 'inoperable or malfunctioning prior to the commencement of the work' " … . Further, there is no evidence that plaintiff had to use specialized tools or any tools at all to take apart the plastic piping. Indeed, defendants' expert averred that the PVC piping had no mechanical fasteners and was "merely a friction fit, therefore, it would be a routine task to remove." Plaintiff then used an air hose, metal wire, and a water hose to remove the clog, all of which were readily accessible to and used by him in the course of his employment. **Leathers v Zaepfel Dev Co Inc, 2014 NY Slip Op 06691, 4th Dept 10-3-14**

Overall Nature of Plaintiff's Work, Rather than the Nature of the Injury-Causing Work, Is Determinative; Here Plaintiff Had Been Doing "Demolition," "Erection," and "Altering" and there Was No Indication the Work Had Been Completed

… [P]laintiff's work at the time of his accident was protected by Labor Law § 240 (1). The court below improperly "isolate[d] the moment of injury and ignore[d] the general context of the work" … . Even assuming, without deciding, that the installation of "slot boards" could not be considering "altering" within the meaning of section 240 (1), a "confluence of factors" brings plaintiff's activity within the statute (*id.* at 883). Plaintiff was employed by a company that was contractually bound by its lease to undertake activity enumerated in section 240 (1), including "demolition," "erection," and "altering."

Furthermore, plaintiff had worked as a carpenter at the same site for three months, during which time his team demolished and reconstructed the internal configuration of the building. There was no competent evidence in the record supporting defendants' contention that all enumerated activity had been completed at the time of the accident. **Mutadir v 80-90 Maiden Lane Del LLC, 2013 NY Slip Op 07127, 1st Dept 10-31-13**

Fall from Ladder While Dismantling Shelves--Heavy Shelves Bolted to the Wall Constituted a "Structure" and Dismantling the Shelves Constituted "Demolition" within the Meaning of the Labor Law

The First Department, reversing Supreme Court, granted summary judgment to the plaintiff on liability re: his Labor Law 240(1) and 241(6) claims. The court determined the dismantling of heavy shelves which were bolted to the wall constituted demolition of a structure within the meaning of the Labor Law:

Plaintiff was injured in a fall from an unsecured ladder while working in a warehouse, where his job was to "clean out, remove machines, break down structures . . . and ship them out." The work included removal of heavy machinery and shelves that ran from floor to ceiling across three second-floor walls, each 50 feet long and 8 feet high, and were bolted to the floors and walls. The breaking down and removing of the shelves required the use of impact wrenches and sawzalls to cut the bolts. Removed materials, including shelving, were heavy, and had to be loaded in cages, which were then lifted by a pallet jack, moved to the edge of the second floor, and lowered to the first floor with a forklift. The dismantling of the shelves was a sufficiently complex and difficult task to render the shelving a "structure" within the meaning of Labor Law §§ 240(1) and 241(6) ... . Moreover, in dismantling the shelving, plaintiff was engaged in "demolition" for purposes of §§ 240(1) and 241(6) ... . **Phillips v Powercrat Corp., 2015 NY Slip Op 02407, 1st Dept 3-24-15**

Alteration (Covered Activities)

Attaching a Temporary Sign Was Not “Altering”

Dismissal of the Labor Law § 240 (1) claim is warranted since plaintiff's work was outside the scope of activity protected by the statute. Plaintiff testified that on the day of the accident, he was to drill several holes in the roof of a motel in order to attach a temporary sign. After ascending to the motel's roof, but prior to performing such work, plaintiff slipped off the roof and fell to the ground. The record demonstrates that the work plaintiff was to perform would have entailed making only a slight change to the building by drilling a few holes in the roof and did not constitute "altering" for the purposes of Labor Law § 240 (1). **Bodtman v Living Manor Love, Inc, et al, 9703, 113921/08, 1st Dept 4-2-13**

Dismantling Shelves Constitutes Demolition and Alteration

Addressing first the Labor Law § 240 (1) cause of action, we conclude that plaintiff was not "repairing" the corrosion chamber at the time he was injured, and thus that he was not engaged in a protected activity under section 240 (1). Rather, defendants established as a matter of law that plaintiff was involved in "routine maintenance in a non-construction, non-renovation context" … . The court therefore properly granted that part of defendants' motion with respect to that cause of action and denied plaintiffs' cross motion. Neither the corrosion chamber nor the components of the "drainage system," i.e., the floor drain and plastic piping, were in need of "repair." Rather, the drain was clogged, at least in part as a result of the normal operation of the chamber. Plaintiff testified at his deposition that the clog consisted of "paper and what looked to be like pieces of wooden dowel from like Q-tips that they use," i.e., parts of samples that had been placed in the chamber on prior occasions, as well as an unknown substance. Although plaintiff and his supervisor testified that dirty

conditions in the chamber could potentially compromise test results, there is no evidence that the chamber was " 'inoperable or malfunctioning prior to the commencement of the work' " … . Further, there is no evidence that plaintiff had to use specialized tools or any tools at all to take apart the plastic piping. Indeed, defendants' expert averred that the PVC piping had no mechanical fasteners and was "merely a friction fit, therefore, it would be a routine task to remove." Plaintiff then used an air hose, metal wire, and a water hose to remove the clog, all of which were readily accessible to and used by him in the course of his employment. **Leathers v Zaepfel Dev Co Inc, 2014 NY Slip Op 06691, 4th Dept 10-3-14**

Overall Nature of Plaintiff's Work, Rather than the Nature of the Injury-Causing Work, Is Determinative; Here Plaintiff Had Been Doing "Demolition," "Erection," and "Altering" and there Was No Indication the Work Had Been Completed

… [P]laintiff's work at the time of his accident was protected by Labor Law § 240 (1). The court below improperly "isolate[d] the moment of injury and ignore[d] the general context of the work" … . Even assuming, without deciding, that the installation of "slot boards" could not be considering "altering" within the meaning of section 240 (1), a "confluence of factors" brings plaintiff's activity within the statute … . Plaintiff was employed by a company that was contractually bound by its lease to undertake activity enumerated in section 240 (1), including "demolition," "erection," and "altering." Furthermore, plaintiff had worked as a carpenter at the same site for three months, during which time his team demolished and reconstructed the internal configuration of the building. There was no competent evidence in the record supporting defendants' contention that all enumerated activity had been completed at the time of the accident. **Mutadir v 80-90 Maiden Lane Del LLC, 2013 NY Slip Op 07127, 1st Dept 10-31-13**

Work on Billboard Was "Alteration" within Meaning of Labor Law 240 (1) and "Construction" within Meaning of Labor Law 241 (6)

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined that plaintiff, who fell putting up advertisement on a billboard, was engaged in covered activities pursuant to Labor Law 240 (1) (alteration), 240 (2) (no guardrail) and 241 (6) (construction):

[W]e conclude that plaintiff was engaged in work that constitutes an alteration within the meaning of the statute. In reaching this determination we apply the definition the Court adopted in Joblon, that the term "altering" in section 240 (1) "requires making a significant physical change to the configuration or composition of the building or structure" (Joblon, 91 NY2d at 465). This definition excludes "routine maintenance" and "decorative modifications" (id.). Whether a physical change is significant depends on its effect on the physical structure. Thus, the Court held that the plaintiff in Joblon who was injured when he fell off a ladder while in the process of chiseling a hole through a concrete block wall so that he could run electrical wires from one room to another to install a wall clock was engaged in "altering" under section 240 (1). As the Court held, extending the wiring and chiseling a hole through the concrete constituted a significant change and entailed "more than a simple, routine activity" (id. at 465-66).

Here, plaintiff's job was to install a new advertisement. In order to do so he and the other members of the construction crew had to attach extensions that changed the dimensions of the billboard's frame and transformed the shape of the billboard to accommodate the advertisement's artwork. Plaintiff was injured when in furtherance of this task he fell while assisting the other crew members with the removal of the old vinyl advertisement from the billboard's side panels. The vinyl removal was a prerequisite to the attachment of the extensions and therefore an integral part of the installation of the extensions. We have little difficulty concluding that the plaintiff's work entails a significant change to the billboard structure because once the vinyl is removed, the billboard is enlarged by the attachment of the extensions, work accomplished by the use of the angle iron on the back of each extension, and application of nuts, bolts and nails. **Saint v Syracuse Supply Co., 2015 NY Slip Op 02802, CtApp 4-2-15**

Installation Of Temporary Flag Holders Not A Protected Activity Under Labor Law 240 (1)

The First Department determined plaintiff's injuries from a two-story fall were not covered by Labor Law 240 (1). Plaintiff was installing temporary flag holders at the time of the fall:

The record establishes that plaintiff was not engaged in a protected activity under Labor Law § 240(1) at the time of his accident. Plaintiff testified that the installation of the three flag holder brackets entailed marking the location of the screws, drilling three holes for each bracket, placing plastic fasteners in the holes, and attaching each flag holder with three screws to hold it in place. Such work did not constitute "altering" since it did not result in a "significant physical change" to the building's structure ... . The cosmetic and nonstructural nature of the work is reflected by the temporary placement of the flags to enhance the exterior appearance of the building during the St. Patrick's Day celebration, after which they were removed ... . L**annon v 356 W. 44th St. Rest., Inc., 2016 NY Slip Op 01129, 1st Dept 2-16-16**

Fall From Ladder While Setting Up Audiovisual Equipment Not Covered By Labor Law 240 (1)

The First Department determined plaintiff's fall from a ladder while setting up audiovisual equipment was not covered by Labor Law 240 (1):

While the work that the injured plaintiff was doing immediately before his accident should not be viewed in isolation in determining whether he has a potentially viable claim under Labor Law § 240(1) ... , the motion court correctly found that the his work was outside the scope of activity protected by that statute. Plaintiff, a lighting engineer, fell off a ladder while attempting to replace a gel that altered the color of one light on a temporary lighting stand secured to the floor by sandbags. The work performed by plaintiff and his employer entailed moving audiovisual, staging and lighting equipment into a hotel ballroom, assembling, setting up, and positioning the equipment as necessary for its use in an event, and removing it after the event ended. There is no evidence that any of this work "altered" or caused a substantial, or indeed any, physical change to the building ... . **Royce v DIG EH Hotels, LLC, 2016 NY Slip Op 03985, 1st Dept 5-19-16**

Replacing A Speaker In Conjunction With Installing Paneling Constituted Altering, Allegation The Ladder Swayed Sufficient To Demonstrate The Failure To Secure The Ladder Caused The Fall

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law 240(10 cause of action should have been granted. Plaintiff had been hired to install wood paneling. Speakers were removed from wall to install the paneling. Plaintiff was standing on an A-frame ladder, replacing one of the speakers when the ladder swayed and he fell. The Second Department held that plaintiff was engaged in "altering," a covered activity, and the allegation that the ladder swayed was sufficient to link the fall to a failure of a safety device (failure to secure the ladder):

Although the defendant contends that the act of rehanging a speaker does not constitute the "altering" of a building or structure, "[t]he intent of [Labor Law § 240(1)] was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts" ... . The plaintiff was injured while rehanging a speaker that he and his coworkers had removed to enable them to install the wood paneling and, therefore, we conclude that the plaintiff was injured while performing work that was "ancillary to" a covered activity, entitling him to the protections afforded by Labor Law § 240(1) ... . "To myopically focus on a job title or the plaintiff's activities at the moment of the injury would be to ignore the totality of the circumstances in which the plaintiff and his employer were engaged in contravention of the spirit of the statute which requires a liberal construction in order to accomplish its purpose of protecting workers" ... .

Further, the plaintiff established, prima facie, the existence of a violation of Labor Law § 240(1) that was a substantial factor in causing his injuries ... . "A fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240(1). There must be evidence that the subject ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries" ... . Here, the plaintiff's proof established that the ladder from which he fell was inadequately secured to provide him with proper protection, and that the

failure to secure the ladder was a proximate cause of his injuries ... . **Goodwin v Dix Hills Jewish Ctr., 2016 NY Slip Op 07293, 2nd Dept 11-9-16**

Tree Removal and Trimming (Covered Activities)

Cutting Trees to Expand a Parking Lot Not a Covered Activity (No Building or Structure) Under Labor Law 240 (1)

Plaintiff's employer was hired to expand the parking area outside of an apartment building which necessitated the removal of several trees. While plaintiff was removing tree limbs with a chainsaw as part of that project, he was injured when a limb he cut knocked over the ladder he was using and caused him to fall. He thereafter commenced this action against defendants, the owner and managers of the apartment building, and asserted claims sounding in negligence and violations of Labor Law §§ 240 (1) and 241 (6). * * * In order to recover under Labor Law § 240 (1), plaintiff is obliged to show that he was injured in the course of "the erection, demolition, repairing, altering, painting, cleaning or pointing of a *building or structure*" (emphasis added). A tree is a naturally occurring object that is "clearly not a 'building' or a 'structure' within" the meaning of the statute … . Plaintiff argues that he is nevertheless entitled to recover under Labor Law § 240 (1) because he was employed in "duties ancillary to" work encompassed by the statute, namely, the expansion of the parking lot … . His argument is unavailing for the simple reason that construction work, as here, involving only a parking area or highway and nothing more, "does not constitute work on a [building or] structure for purposes of Labor Law § 240 (1)" … . **Juett v Lucente…, 517075, 3rd Dept 12-12-13**

Injury During Tree-Removal Not Covered by Labor Law Even though the Tree-Removal Was a Prerequisite to the Removal of a Fence---Work on the Fence Had Not Begun at the Time of the Injury

Plaintiff was injured during the cutting and removal of trees along a property line which included a fence. Although the fence was to be removed, the fence-removal project had not been started at the time of the accident. A fence is a "structure" within the meaning of the Labor Law, so injury while removing a fence would be covered. But because tree-related work is not covered by the Labor Law, and because the fence removal was not underway at the time of the injury, defendants' motion for summary judgment was properly granted:

Labor Law § 240 (1) affords protection to workers engaged in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." Under settled case law, a tree does not qualify as a building or structure ..., and — generally speaking — neither tree removal ... constitutes one of the enumerated statutory activities. Although plaintiff correctly notes that a fence qualifies as a structure within the meaning of Labor Law § 240 (1) ... and, further, that the statutory protections extend to duties that are ancillary to the enumerated activities set forth therein ..., the fact remains that Labor Law § 240 (1) "afford[s] no protection to a plaintiff [who is] injured before any activity listed in the statute [is] under way" ... . **Cicchetti v Tower Windsor Terrace, LLC, 2015 NY Slip Op 04375, 3rd Dept 5-21-15**

Tree Removal Was First Step in Making Structural Repairs, Injury During Tree Removal Covered Under Labor Law 240 (1)

The Second Department determined removal of a tree which had fallen on a house, causing structural damage, was the first step in repairing the structure. Therefore, plaintiff, who fell while attempting the remove the tree, was engaged in an activity covered by Labor Law 240 (1) and 241 (6):

"… [T]he protections of Labor Law § 240(1) are to be afforded to tree removal when undertaken during the repair of a structure ... . * * * Since the plaintiff was engaged in activities ancillary to the repair of the building from which he fell, the

provisions of Labor Law § 241(6) are also applicable to the facts of this case." **Moreira v Osvaldo J. Ponzo, 2015 NY Slip Op 06792, 2nd Dept. 9-16-15**

Cleaning (Covered Activities)

Cleaning Gutters Not Covered

Although Labor Law § 240 (1) applies to commercial "cleaning" which is not part of construction, demolition, or repair … , it does not apply to work that is incidental to regular maintenance, such as clearing gutters of debris … . **Hull v Fieldpoint Community Assn Inc, 2013 NY Slip Op 06837, 2nd Dept 10-23-13**

Question of Fact Whether Vacuuming an HVAC Duct Was a Covered Cleaning Activity Under the Labor Law

Outside the sphere of commercial window washing (which is covered by Labor Law § 240 [1]), the determination of whether an activity may be characterized as "cleaning" under the statute depends on a consideration of four factors. An activity cannot be considered "cleaning" under the statute if it: "(1) is routine, in the sense that it is the type of job that occurs on a daily,]weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises; (2) requires neither specialized equipment or expertise, nor the unusual deployment of labor; (3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and (4) in light of the core purpose of Labor Law § 240 (1) to protect construction workers, is unrelated to any ongoing construction, renovation, painting, alteration or repair project" … .
In support of its motion, the defendant failed to submit evidence sufficient to establish, prima facie, that the plaintiff's activity at the time of the accident could not be characterized as "cleaning" under Labor Law § 240 (1). There was insufficient evidence regarding whether the plaintiff's task was "routine, in the sense that it [was] the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises" … . **Collymore v 1895 WWA, LLC, 2014 NY Slip Op 00320, 2nd Dept 1-22-14**

"Cleaning" Within the Meaning of Labor Law 240(1) Explained/Question of Fact Whether Non-Commercial Window Cleaning Was Covered

Here, the defendants failed to meet their prima facie burden of demonstrating their entitlement to judgment as a matter of law dismissing the Labor Law § 240 (1) cause of action. Labor Law § 240 (1) provides protection for those workers performing maintenance that involves painting, cleaning, or pointing … . Other than commercial window cleaning, which is afforded protection pursuant to the statute … , whether an activity is considered "cleaning" for the purpose of Labor Law § 240 (1) depends on certain factors. An activity is not considered "cleaning" when (1) it is performed on a routine or recurring basis as part of the ordinary maintenance and care of commercial premises, (2) does not require specialized equipment or expertise, (3) usually involves insignificant elevation risks comparable to those encountered during typical domestic or household cleaning, and (4) is unrelated to any ongoing construction, renovation, painting, alteration, or repair project … . "Whether [an] activity is 'cleaning' is an issue for the court to decide after reviewing all of the factors. The presence or absence of any one is not necessarily dispositive if, viewed in totality, the remaining considerations militate in favor of placing the task in one category or the other" … . The evidence submitted by the defendants in support of their motion failed to establish, prima facie, that the plaintiff's activity at the time of the accident could not be characterized as "cleaning" under Labor Law § 240 (1). The evidence did not definitively demonstrate that the plaintiff was performing a routine task or that it was a task that involved an insignificant elevation risk which was comparable to those risks inherent in typical household cleaning … . **Pena v Varet & Bogart LLC, 2014 NY Slip Op 05524, 2nd Dept 7-30-14**

Routine Cleaning of Basketball Backboard Not Covered by Labor Law 240 (1)

The Second Department determined Supreme Court properly dismissed an action by plaintiff-janitor who fell from an A-frame ladder while cleaning the basketball backboard in a school gymnasium. The Labor Law 240 (1) cause of action was properly dismissed because cleaning the backboard was routine maintenance, not covered by Labor Law 240 (1). The Labor Law 200 and common law negligence causes of action were properly dismissed because the defendant school demonstrated the ladder was not defective and it did not have the authority to control the manner in which plaintiff did his work:

... [T]he injured plaintiff's work did not constitute "cleaning" within the meaning of Labor Law § 240(1). The defendant established that the injured plaintiff was performing routine maintenance of the basketball backboards, done regularly throughout the course of the basketball season, that did not require any specialized equipment, and was unrelated to any ongoing construction or renovation of the school. As such, it was not a covered activity under Labor Law § 240(1) ... . **Torres v St. Francis Coll., 2015 NY Slip Op 05466, 2nd Dept 6-24-15**

Window Cleaning (Commercial) (Covered Activities)

Unsafe Access to Roof Supported Summary Judgment

To access the roof and the steel carriage rail, … [P]laintiff … , had to climb a ladder located on the sixth floor of the Opera House and exit onto the roof through a hatch door in the ceiling. Plaintiff and his witnesses testified that the hatch door was easy to open, but difficult to close, in part because of a broken hinge, and that two hands were required to close it. Indeed, Lincoln Center's chief engineer, who had used the hatch at least 100 times, testified that to close the hatch a worker had to break three-point contact with the ladder and somehow wedge his body up against the concrete side of the hatch so as to safely reach up with both hands to close the door. … [P]laintiff fell off the ladder while trying to close the hatch using both hands. The record demonstrates that the Met and Lincoln Center failed to provide adequate safety devices to protect plaintiff from the risks associated with gaining access to the Opera House roof and the steel carriage rail, and therefore they are liable for plaintiff's injuries under Labor Law § 240 (1) … . Not only did plaintiff have to be elevated to the roof of the Opera House from the sixth floor, for which a ladder was provided, but he also had to use both hands to close the hatch door while standing on the ladder. No safety device was provided to protect him against the risk associated with breaking three-point contact with the ladder so as to use both hands to close the hatch door. **Mayo v Metropolitan Opera Assn Inc, 2013 NY Slip Op 04993, 1st Dept 7-2-13**

Repairing (Covered Activities)

Response to Flooding Caused by Storm Not "Routine Maintenance"

Plaintiff, a laborer, was injured when he fell into a steam manhole that was part of defendant's steam distribution system in lower Manhattan. … At around the time of the accident, New York City was beset by a nor'easter that threatened the metropolitan area with heavy rain, strong wind gusts and high tides. Due to the severity of the storm, defendant engaged [defendant's employer] to supplement its effort in responding to vapor conditions and pumping water out of flooded manholes. … A gust of wind caused plaintiff to stumble and fall into the manhole which his coworker had uncovered. Plaintiff landed in a pool of boiling water that reached his chest. The boiling water was caused by torrential rain that flooded the manhole and contacted the steam main. * * * Labor Law § 240 (1) affords protection to workers engaged in

"the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." Whether a particular activity constitutes a "repair" or routine maintenance must be decided on a case-by-case basis, depending on the context of the work … . A factor to be taken into consideration is whether the work in question was occasioned by an isolated event as opposed to a recurring condition. … The record here demonstrates that the work performed by plaintiff at the time of his injury was far from routine. * * *The motion court correctly found that the manhole meets the definition of a structure as that term is used in the statute. A structure is "a production or piece of work artificially built up or composed of parts joined together in some definite manner" … . Moreover, it is undisputed that plaintiff and his co-worker had to expose the manhole in order to pump out the subterranean water. Therefore, the motion court correctly found that plaintiff's injury resulted from an elevation-related hazard that Labor Law § 240 (1) is intended to obviate… . **Dos Santos v Consolidated Edison of NY, Inc, 2013 NY Slip Op 02140, 8914, 105861/08, 1st Dept 3-28-13**

Caulking Is a Protected Activity Under Labor Law 240 (1)

Although plaintiff was not operating the scaffold in his capacity as a window washer at the time of the accident, he was operating it for the caulkers who could not have safely discharged their duties without him. Since caulking is an activity of the sort enumerated in Labor Law § 240 (1) … , plaintiff is entitled to the same statutory protection as the caulkers, and his Labor Law § 240 (1) should not be dismissed. Further, given the evidence that the lanyard and harness provided to plaintiff proved inadequate to shield him from falling through the rail track, plaintiff is entitled to summary judgment on the issue of liability on that claim … **DeJesus v 888 Seventh Ave LLC, 2014 NY Slip Op 01273, 1st Dept 2-25-14**

Replacement of Cracked Glass Constituted Covered "Repair" Not Routine Maintenance

The crux of this case involves the question of whether plaintiff was involved in repair or maintenance work. "Essentially, routine maintenance for purposes of the statute is work that does not rise to the level of an enumerated term such as repairing or altering" … . In distinguishing between what constitutes repair as opposed to routine maintenance, courts will consider such factors as "whether the work in question was occasioned by an isolated event as opposed to a recurring condition" … ; whether the object being replaced was "a worn-out component" in something that was otherwise "operable" … ; and whether the device or component that was being fixed or replaced was intended to have a limited life span or to require periodic adjustment or replacement … . Here, plaintiff described the panes as being constructed of "heavy plate glass" with wire running through them and stated that they simply "do not crack or wear out over time." Plaintiff showed, without contradiction, that these panes were not being replaced as a result of normal wear and tear, as they were not expected to be regularly replaced. In fact, defendant presented no evidence that the panes ever had to be replaced or repaired from the time the steeple had been built. As an experienced glazier with over 30 years of experience, plaintiff was more than competent to state that the replacement of these panes constituted repair work, and was not routine maintenance. **Soriano v St Mary's Orthodox Church of Rockland, Inc, 2014 NY Slip Op 04419, 1st Dept 6-17-14**

Fixing A Leaky Roof Not Routine Maintenance, Plaintiff's Labor Law 240(1) Cause Of Action Properly Survived Motion To Dismiss

The First Department determined defendant's motion to dismiss plaintiff's Labor Law 240(1) cause of action was properly denied. Plaintiff climbed up a permanent ladder to fix a roof leak. The ladder was wet with rain, shaky and too close to the wall. Plaintiff fell when he attempted to come back down the ladder from the roof:

... [D]efendant [is not] entitled to dismissal of the Labor Law § 240(1) claim. Plaintiff was engaged in repairing the roof, an activity to which Labor Law § 240(1) applies, and not merely in routine maintenance ... . Moreover, the permanently affixed ladder that provided the sole access to plaintiff's elevated work site was a safety device within the meaning of Labor Law § 240(1) ... . In view of plaintiff's testimony that the ladder shook and was wet and was too close to the wall to allow room for his feet on the rungs, defendant failed to demonstrate as a matter of law that plaintiff was provided with proper protection. **Kolenovic v 56th Realty, LLC, 2016 NY Slip Op 04005, 1st Dept 5-24-16**

Investigating A Malfunction Constitutes Covered Repair Under Labor Law 240(1)

The Fourth Department, over a two-justice dissent, determined plaintiff was covered by Labor Law 240(1) when he was diagnosing a problem on a cell tower, which constituted "repair" under the statute. The Fourth Department further concluded the defendants raised a question of fact about whether plaintiff had been provided with sufficient safety equipment (the dissent argued defendants had not raised a question of fact on that issue):

Here, plaintiff testified that he never performed preventive maintenance on the towers, and that he and his coworkers were dispatched to a tower only when something was in need of repair ... . Indeed, plaintiff's submissions establish that an item on the tower was malfunctioning prior to commencement of the work, and that plaintiff was injured after climbing approximately 180 feet to conduct an investigation into the cause of the alarm and to remedy the malfunction ... . Where, as here, " a person is investigating a malfunction, . . . efforts in furtherance of that investigation are protected activities under Labor Law § 240 (1)' " ... . **Cullen v AT&T, Inc., 2016 NY Slip Op 04503, 4th Dept 6-10-16**

Safety Devices Covered under Labor Law 240(1)

Generally, Liability Stems from Failure to Provide Adequate Safety Devices

A Hard Hat Is Not a Safety Device Within the Meaning of Labor Law 240(1)

The evidence demonstrates that plaintiff, a welder who was working at a power plant that was being constructed, was struck on the head by a pipe that fell from a height of approximately 85 to 120 feet as a result of a gap in a toeboard installed along a grated walkway near the top of a generator in the power plant … . It is undisputed that there was no netting to prevent objects from falling on workers and contrary to defendants' contention, plaintiff is not required to show exactly how the pipe fell, since, under any of the proffered theories, the lack of protective devices was the proximate cause of his injuries … . Nor is plaintiff required to show that the pipe was being hoisted or secured when it fell, since that is not a precondition to liability pursuant to Labor Law § 240 (1) … ,. In opposition, defendants failed to raise a triable issue of fact since they failed to show that adequate protective devices required by Labor Law § 240 (1) were employed at the site. That plaintiff was wearing a welding hood but not a hard hat does not raise an issue of fact since "[a] hard hat is not the type of safety device enumerated in Labor Law § 240 (1) to be constructed, placed and operated, so as to give proper protection from extraordinary elevation-related risks to a construction worker" … .**Mercado v Caithness Long Is LLC, 2013 NY Slip Op 02005, 9634, 102473/09, 590277/11, 1st Dept 3-26-13**

Plaintiff Fell While Working Standing on Milk Crates, Proper Protection Not Provided

Plaintiff alleged that prior to performing his work he unsuccessfully looked for a ladder to use and was directed by the acting foreman to use the milk crates. Under the circumstances, plaintiff established his entitlement to summary judgment on the issue of liability on his Labor Law § 240 (1) claim. The record shows that plaintiff's accident involved an elevation-related risk and his injuries were proximately caused by the failure to provide him with proper protection as required by section 240 (1) … . Defendants' claim that ladders were available on the site is conclusory and fails to raise an issue of fact … . The sole evidentiary support for defendants' argument was an affidavit from an individual who claimed … that there more than enough ladders available for plaintiff's work. Even if admissible, the affidavit failed to raise a triable issue as to whether plaintiff was the sole proximate cause of his injuries since it does not indicate that plaintiff knew that there were ladders available at the site and that he was expected to use them … . **Mutadir v 80-90 Maiden Lane Del LLC, 2013 NY Slip Op 07127, 1st Dept 10-31-13**

In a Falling Object Case, the Device Which Failed Was Not a Safety Device---Defendant Not Liable

“In order to prevail on summary judgment in a section 240 (1) "falling object" case, the injured worker must demonstrate the existence of a hazard contemplated under that statute "and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" … . Essentially, the plaintiff must demonstrate that at the time the object fell, it either was being … "hoisted or secured" … , or "required securing for the purposes of the undertaking" … . Contrary to the dissent's contention, section 240 (1) does not automatically apply simply because an object fell and injured a worker; "[a] plaintiff must show that the object fell . . . *because of* the absence or inadequacy of a *safety device* of the kind enumerated in the statute" … . The Appellate Division properly concluded that plaintiff had not established entitlement to summary judgment on liability. It erred, however, in denying summary judgment to defendants … because they established as a matter of law that the conduit did not fall on plaintiff due to the absence or inadequacy of an enumerated safety device.” **Fabrizi v 1095 Avenue of the Americas…, 15, Ct App 2-20-14**

Block Falling from Pallet, Defendants Failed to Establish the Incident Was Not the Result of the Failure to Provide a Safety Device (Pallet Not Secured?)

“The injured plaintiff was employed as a masonry laborer … . He alleges that he was injured when a heavy stone block toppled off a pallet and struck his foot. At the time of the accident, the injured plaintiff was standing near the pallet waiting to attach the blocks on the pallet to a type of forklift, known as a "lull," which would then carry the blocks to the area where they were to be used. According to the injured plaintiff, the ground underneath the pallet was uneven and covered with ice, and the blocks were stacked vertically on the pallet and not secured onto it in any manner when the accident occurred. In addition, the injured plaintiff claims that immediately before the accident, a front loader being used to remove snow nearby caused a strong vibration that jarred the blocks on the pallet. * * * Labor Law § 240 (1) mandates that owners and contractors "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." The statute imposes absolute liability on owners and contractors whose failure to "provide proper protection to workers employed on a construction site" proximately causes injury to a worker … . The defendants failed to show that the injured plaintiff's alleged injuries resulted from a general hazard encountered at a construction site and were not "the direct consequence of a failure to provide" an adequate device of the sort enumerated in Labor Law § 240 (1) … . Those devices are intended to protect "against a risk arising from a physically significant elevation differential" … . The defendants' submissions did not establish that the accident was not the result of a failure to provide a protective device contemplated by the statute …”. **Desena v North Shore Hebrew Academy, 2014 NY Slip Op 05149, 2nd Dept 7-9-14**

Falling Block Not Related to the Failure of a Safety Device---Labor Law 240(1) Did Not Apply

"During construction, New Town received concrete stones on wooden pallets. Each pallet measured about three- to four-feet high. Because the construction site was open to the elements, the pallets were covered with a plastic tarp to keep the stones dry. On the day of the accident, plaintiff was constructing a scaffold near an open area where several of these pallets were located. As plaintiff walked by one of the pallets, a stone block that was resting on top of it allegedly fell and struck him on the right knee. The block weighed approximately 25 pounds. The record contains no evidence as to how the block could have come off the pallet. * * * Here, we conclude that plaintiff's injury was not caused by the absence or inadequacy of the kind of safety device enumerated in the statute … . Plaintiff does not contend that the block itself was inadequately secured. Instead, plaintiff argues that section 240 (1) is applicable because his injuries were caused by defendants' failure to provide an adequate safety device to hold the plastic tarp in place. Specifically, plaintiff maintains that the plastic tarp was inadequately secured because, if it had been properly secured, such as with ropes and stakes, plaintiff's injury would not have occurred. Plaintiff's argument is unconvincing. The plastic tarp was not an object that needed to be secured for the purposes of section 240 (1) … , nor is there any indication that the tarp caused plaintiff's injuries. The tarp was in place to keep the stone blocks dry, not to secure the stones stacked on the pallet underneath it. The purpose of the tarp was to keep possible rain off the object, not to protect the workers from an elevated risk …". **Guallpa v Leon D DeMatteis Constr Corp, 2014 NY Slip Op 06666, 1st Dept 10-2-14**

Injury Caused by Movement and Toppling of a Dry Wall Cart Not Direct Consequence of Failure to Provide a Safety Device

"At the time of the injury, plaintiff and a coworker were in a dormitory room, unloading a double sheet of drywall from a wheeled cart. The remaining drywall on the cart moved and struck them, and the cart also toppled over and allegedly struck plaintiff, causing him to fall to the floor and injure his shoulder. * * * We reject plaintiffs' contention that the court erred in granting that part of the cross motion with respect to Labor Law § 240 (1). At the time of the accident, plaintiff was standing on the ground, the drywall on the cart was not being hoisted or secured, and the cart was not being hoisted or otherwise moved vertically … . We conclude that plaintiff's injuries were not the direct consequence of a failure to provide blocks or stays to protect against a risk arising from a physically significant elevation differential; here, the function of such devices would not have been to protect plaintiff from the effects of gravity … . In our view, defendants established as a matter of law "that the injuries resulted from a general hazard encountered at a construction site and were not 'the direct consequence of a failure to provide' an adequate device of the sort enumerated in Labor Law § 240 (1)", and plaintiffs failed to raise a triable issue of fact …". **Miles v Buffalo State Alumni Assn Inc, 2014 NY Slip Op 06732, 4th Dept 10-3-14**

Injury Caused by the Failure of a Scaffolding Plank, the Primary Safety Device

"Here, the facts are undisputed that, in an effort to assist with the construction of a platform, claimant stepped onto a plank on the existing scaffold, which was the primary safety device erected for the work, and the plank collapsed, causing claimant to fall and sustain his injuries. Accordingly, claimant's decision not to wear an available safety harness, or employ other safety measures that might have been available, could not have been the sole proximate cause of the accident, and the Court of Claims correctly awarded claimants partial summary judgment on the issue of liability with respect to their Labor Law § 240 (1) claim …". Similarly, because claimant's actions could not constitute the sole proximate cause of his accident, the Court of Claims did not err in denying defendant's motion for summary judgment with respect to claimants' Labor Law § 241 (6) cause of action." **Fabiano v State of New York, 2014 NY Slip Op 08695, 3rd Dept 12-11-14**

Elevator Not A Safety Device, Labor Law 240(1) Cause Of Action Properly Dismissed

The First Department determined plaintiff's Labor Law 240(1) cause of action, which was based upon injury incurred in an elevator, was properly dismissed. Under the circumstances (not explained in the decision) the elevator could not be considered a safety device. Plaintiff's Labor Law 241(6) cause of action, alleging debris as a slipping hazard, should not have been dismissed:

Dismissal was properly granted with respect to plaintiff's Labor Law § 240(1) cause of action in that plaintiff alleged that he was injured while riding in one of the building's elevators. In this case, the passenger elevator was not a safety device for protecting a construction worker from a risk posed by elevation as contemplated by Labor Law § 240(1) ... .

The court erred, however, in dismissing that portion of plaintiff's Labor Law § 241(6) claim to the extent the claim was predicated on violations of Industrial Code ... . While there were no facts alleged to support a claim that plaintiff was injured as the result of a slipping hazard, plaintiff's complaint, as supplemented by his affidavit in opposition to defendant's motion, sufficiently alleged that debris was one of the causes of his fall ... . **Smith v Extell W. 45th St. LLC, 2016 NY Slip Op 07089, 1st Dept 10-27-16**

Netting (Safety Devices Cont'd)

Netting Deemed Inadequate Safety Device; Worker Struck By Debris Which Fell Through A Gap In Protective Netting Entitled To Summary Judgment On Labor Law 240 (1) Cause Of Action

The Second Department, reversing Supreme Court, granted summary judgment on plaintiff's Labor Law 240 (1) cause of action. Workers were using jackhammers to chip away concrete on an elevated structure. Netting had been installed to catch falling pieces of concrete. Plaintiff was struck and severely injured by a four-foot piece of concrete which fell through a gap in the netting. The netting was deemed to be an inadequate safety device:

The plaintiffs' submissions demonstrated that the injured plaintiff suffered harm that "flow[ed] directly from the application of the force of gravity" to the piece of concrete that struck him ... , and that given the nature and purpose of the work that was being performed at the time of his injury, the falling debris presented a significant risk of injury such that the ... defendants were obligated under Labor Law § 240(1) to use appropriate safety devices to safeguard the injured plaintiff from the harm it posed ... . The plaintiffs' submissions also demonstrated that the injured plaintiff's injury was "the direct consequence of a failure to provide adequate protection against [the] risk" of harm posed by the falling debris ... . Indeed, the plaintiffs established that the vertical netting that was installed around the controlled access zone to protect workers from the falling debris had pulled loose from the plywood barricade, creating an opening through which the concrete that struck the injured plaintiff traveled. Under these circumstances, the vertical netting constituted a safety device within the meaning of Labor Law § 240(1) ... , and the plaintiffs demonstrated that it was not "so constructed, placed and operated as to give proper protection" (Labor Law § 240[1]). **Sarata v Metropolitan Transp. Auth., 2015 NY Slip Op 09667, 2nd Dept 12-30-15**

Stairs (Safety Devices Cont'd)

Plaintiff Entitled to Summary Judgment on His Labor Law 240 (1) Cause of Action---Plaintiff Fell from Temporary Staircase Which Was Wet from Rain

The First Department, over an extensive dissent, determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action based upon his fall from a temporary staircase which was wet from rain. The dissent argued that there was a question of fact whether a safer temporary staircase could have been provided, and, therefore, summary judgment in plaintiff's favor was not appropriate. The majority wrote:

Plaintiff is entitled to partial summary judgment on his Labor Law § 240(1) claim. As the dissent recognizes, plaintiff was engaged in a covered activity at the time he slipped and fell down the stairs of a temporary tower scaffold. A fall down a temporary staircase is the type of elevation-related risk to which section 240(1) applies, and the staircase, which had been erected to allow workers access to different levels of the worksite, is a safety device within the meaning of the statute ... . As we stated in Ervin v Consolidated Edison of N.Y. (93 AD3d 485, 485 [1st Dept 2012]), involving a worker who fell when the temporary structure he was descending gave way, "It is irrelevant whether the structure constituted a staircase, ramp, or passageway since it was a safety device that failed to afford him proper protection from a gravity-related risk." We are thus at a loss to comprehend the dissent's reasoning that although the temporary staircase was a safety device and although it admittedly did not prevent plaintiff's fall, there is nonetheless a factual issue which would defeat plaintiff's entitlement to partial summary judgment on his section 240(1) claim.

The fact that the affidavits of plaintiff's and defendant's experts conflict as to the adequacy and safety of the temporary stairs does not preclude summary judgment in plaintiff's favor. A plaintiff is entitled to partial summary judgment on a section 240(1) claim where, as here, stairs prove inadequate to shield him against harm resulting from the force of gravity, and his injuries are at least in part attributable to the defendants' failure to take mandated safety measures to protect him against an elevation-related risk ... . Plaintiff's expert opined, inter alia, that the stairs showed obvious signs of longstanding use, wear and tear; therefore, a decrease in anti-slip properties was to be expected. Given that it is undisputed that the staircase, a safety device, malfunctioned or was inadequate to protect plaintiff against the risk of falling, plaintiff is entitled to summary judgment, whatever the weather conditions might have been. **O'Brien v Port Auth. of N.Y. & N.J., 2015 NY Slip Op 06749, 1st Dept 9-8-15**

Scaffolds (Safety Devices, Cont'd)

Scaffold, Safety Railing and Cross Braces Are Safety Devices, Question of Fact Whether Additional Safety Devices Were Required

Here, plaintiff contends that he is entitled to judgment on liability under Labor Law § 240 (1) as a matter of law because defendants failed to provide him with adequate safety devices that could have prevented his fall, namely, a safety belt and lanyard. Plaintiff further contends that it is irrelevant whether a wood safety railing and cross braces were present on the scaffold when he fell because those items are not safety devices and, in any event, they would not have prevented him from falling even if they were in place. We agree with defendants, however, that the scaffold itself and the safety railing and cross braces on it constitute safety devices, and that the evidence submitted by plaintiff raises an issue of fact whether the safety devices provided by defendants afforded him proper protection, or whether additional devices were necessary … . The evidence submitted by plaintiff also raises an issue of fact whether he intentionally removed the safety railing and cross braces from the scaffold and whether such conduct by plaintiff was the sole proximate cause of his injuries … . Kuntz v WNYG Housing Development Fund Company, Inc., et al, 1382, CA 12-00986, 4th Dept. 3-22-13

Suspended Cable On Which Claimant Was Walking to Access Scaffolding Broke

The suspension cable that broke was one of approximately 28 such cables that had been positioned under the bridge and provided support for scaffolds attached to the cables. According to claimant, workers routinely accessed the scaffold by walking on a suspension cable while holding a bridge beam above them. He further stated that he had attached his lanyard to the cable upon which he was walking because it was the only available cable in that there were no safety cables close enough to use. Defendant countered with proof that workers were instructed not to use the suspension cables to get to or from the scaffold, ladders were available to access the scaffold and adequate safety cables were available for claimant's lanyard. The purpose of the suspension cables at the work site was to support workers and materials at the elevated height where the work necessarily occurred. The cable that broke failed to fulfill this fundamental function, and that failure resulted in claimant's fall. Claimant established a prima facie case for liability under Labor Law §

240 (1). Defendant produced proof that, contrary to claimant's assertion, a separate safety cable was available that he should have used instead of attaching his lanyard to the cable upon which he was walking. By attaching his lanyard to the suspension cable, claimant protected against the risk of falling but not the possibility of the cable breaking. While this action by claimant could go to comparative negligence (which is not available in a Labor Law § 240 [1] action), it was not the sole proximate cause of the accident and does not establish the recalcitrant worker defense … . **Portes v New York State Thruway Authority, 516749, 3rd Dept 12-5-13**

Operation of Window Washer Scaffold Covered by Labor Law 240 (1), Proof that Lanyard and Harness Did Not Protect Plaintiff Entitled Plaintiff to Summary Judgment

Although plaintiff was not operating the scaffold in his capacity as a window washer at the time of the accident, he was operating it for the caulkers who could not have safely discharged their duties without him. Since caulking is an activity of the sort enumerated in Labor Law § 240 (1) … , plaintiff is entitled to the same statutory protection as the caulkers, and his Labor Law § 240 (1) should not be dismissed. Further, given the evidence that the lanyard and harness provided to plaintiff proved inadequate to shield him from falling through the rail track, plaintiff is entitled to summary judgment on the issue of liability on that claim … **DeJesus v 888 Seventh Ave LLC, 2014 NY Slip Op 01273, 1st Dept 2-25-14**

Failure of a Scaffolding Plank Entitled Plaintiff to Summary Judgment on the Labor Law 240(1) Claim

"Here, the facts are undisputed that, in an effort to assist with the construction of a platform, claimant stepped onto a plank on the existing scaffold, which was the primary safety device erected for the work, and the plank collapsed, causing claimant to fall and sustain his injuries. Accordingly, claimant's decision not to wear an available safety harness, or employ other safety measures that might have been available, could not have been the sole proximate cause of the accident, and the Court of Claims correctly awarded claimants partial summary judgment on the issue of liability with respect to their Labor Law § 240 (1) claim …". Similarly, because claimant's actions could not constitute the sole proximate cause of his accident, the Court of Claims did not err in denying defendant's motion for summary judgment with respect to claimants' Labor Law § 241 (6) cause of action." **Fabiano v State of New York, 2014 NY Slip Op 08695, 3rd Dept 12-11-14**

Collapse of Makeshift Scaffold Entitled Plaintiff to Summary Judgment in Labor Law 240(1) Action---Plaintiff's Comparative Negligence Is Not a Defense

The Fourth Department determined summary judgment should have been granted to the plaintiff in the Labor Law 240 (1) action. Plaintiff was not provided with a scaffold or safety equipment. Plaintiff fashioned a makeshift scaffold which collapsed. The court noted plaintiff's comparative negligence (in the construction of the scaffold) is not a defense under Labor Law 240 (1):

We conclude that "[t]he fact that the scaffold collapsed is sufficient to establish as a matter of law that the [scaffold] was not so placed . . . as to give proper protection to plaintiff pursuant to the statute" ... . Contrary to defendant's contention, there is no issue of fact whether the safety equipment provided to plaintiff was sufficient to afford him proper protection under Labor Law § 240 (1). The only safety device provided to plaintiff at the work site was a 14-foot-long pick [an aluminum plank]. "There were no harnesses, lanyards, safety lines, or similar safety devices available for use to prevent [plaintiff's] fall" ... . To perform the work of installing siding on the building, plaintiff therefore had to create what the court accurately referred to as a "makeshift" scaffold by placing one end of the pick in the shovel of a backhoe and the other end between two pieces of wood he or a coworker nailed into the side of the building. "[T]he onus [was not] on plaintiff to construct an adequate safety device, using assorted materials on site [that were] not themselves adequate safety devices but which may [have been] used to construct a safety device" ... . **Bernard v Town of Lysander, 2015 NY Slip Op 00050, 4th Dept 1-2-15**

Inability to Remember Fall and Absence of Witnesses Did Not Preclude Summary Judgment on Labor Law 240(1) Cause of Action---Fall from Scaffold

The First Department determined the plaintiff's inability to remember his fall from a scaffold and the absence of witnesses did not preclude summary judgment in his favor for the Labor Law 240(1) cause of action:

Plaintiff established his entitlement to judgment as a matter of law on the issue of liability in this action where he sustained injuries when, while performing asbestos removal work in a building owned by defendant, he fell from a baker's scaffold. Plaintiff's testimony that he was standing on the scaffold working, and then woke up on the ground with the scaffold tipped over near him, established a prima facie violation of the statute and that such violation proximately caused his injuries ... . That plaintiff could not remember how he fell does not bar summary judgment ... . Nor does the fact that he was the only witness raise an issue as to his credibility where, as here, his proof was not inconsistent or contradictory as to how the accident occurred, or with any other evidence ... . **Strojek v 33 E. 70th St. Corp., 2015 NY Slip Op 04203, 1st Dept 5-14-15**

A Three-and-a-Half-Foot Fall from a Railing to a Raised Platform Was Covered by Labor Law 240(1)---Platform Accessed by Climbing Scaffolding

The Second Department determined plaintiff's Labor Law 240(1) cause of action should not have been dismissed. Plaintiff climbed up scaffolding to access a platform and, as he attempted to climb over the three-and-a-half-foot platform railing, plaintiff fell to the platform and was injured. Plaintiff was not instructed to access the platform any other way, so plaintiff's failure to use a ladder located 25 to 30 feet away could not be considered the sole proximate cause of the accident. In addition, the Second Department noted that the Labor Law 241(6) cause of action should not have been dismissed. Plaintiff's failure to state the particular provision of the Industrial Code alleged to have been violated in the complaint or bill of particulars was not fatal to the cause of action. The belated identification of the relevant code provision involved no new factual allegations and no new theories of liability. The Second Department also held the Labor Law 200 cause of action should not have been dismissed, explaining the elements. With respect to the Labor Law 240(1) cause of action, the court wrote:

Labor Law § 240(1) imposes absolute liability on owners, contractors, and their agents when their "failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker" ... . However, liability may "be imposed under the statute only where the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential'" ... .

Contrary to the contention of the defendants and Newtron, Labor Law § 240(1) applies to the facts of this case, even though the plaintiff fell only from the railing to the platform ... . The plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability on his cause of action alleging a violation of Labor Law § 240(1) by submitting evidence demonstrating that the defendants failed to provide him with an adequate safety device, and that such failure was a proximate cause of his injuries ... .

In opposition, the defendants failed to raise a triable issue of fact as to whether the plaintiff's actions in using the scaffolding and climbing over the railing, rather than using a permanent ladder that was approximately 25 to 30 feet from the scaffolding ladder, to access the permanent platform was the sole proximate cause of his injuries. A plaintiff's negligence is the sole proximate cause of his or her injuries "when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he [or she] was expected to use them but for no good reason chose not to do so, causing an accident" ... . Here, there is no evidence that anyone instructed the plaintiff that he was "expected to" use the permanent ladder rather than the scaffolding ... . **Doto v Astoria Energy II, LLC, 2015 NY Slip Op 04605, 2nd Dept 6-3-15**

Plaintiff Who Fell From Scaffolding Which Did Not Have Safety Rails Entitled to Summary Judgment on His Labor Law 240(1) Cause of Action

The Second Department determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action based upon his fall from scaffolding which did not have safety rails. The relevant law was succinctly explained:

Labor Law § 240(1) imposes a nondelegable duty upon owners, lessees that control the work performed, and general contractors to provide safety devices necessary to protect workers from risks inherent in elevated work sites ... . "To recover on a cause of action pursuant to Labor Law § 240(1), a plaintiff must demonstrate that there was a violation of the statute, and that the violation was a proximate cause of the accident" ... . Here, the plaintiff established his prima facie entitlement to judgment as a matter of law by demonstrating that he was injured when he fell from a scaffold which lacked safety rails on the sides and that he was not provided with a safety device to prevent him from falling ... . **Vasquez-Roldan v Two Little Red Hens, Ltd., 2015 NY Slip Op 04842, 2nd Dept 6-10-15**

Absence Of Safety Rail On Scaffolding Entitled Plaintiff To Summary Judgment On Labor Law 240(1) Cause Of Action

The Second Department determined plaintiff was entitled to summary judgment on the Labor Law 240(1) cause of action. Plaintiff fell from scaffolding after suffering an electric shock. There was no safety rail on the scaffolding:

Labor Law § 240(1) is to be "interpreted liberally to accomplish its purpose" ... . To establish liability pursuant to Labor Law § 240(1), a plaintiff must demonstrate a violation of the statute and that such violation was a proximate cause of his or her injuries ... . Here, the plaintiff established his prima facie entitlement to judgment as a matter of law by demonstrating that he was injured when he fell from a scaffold that lacked a safety railing, and that he was not provided with a safety device to prevent him from falling ... . **Viera v WFJ Realty Corp., 2016 NY Slip Op 04202, 2nd Dept 6-1-16**

Plaintiff Fell to Ground While Attempting to Move from Roof to Scaffold; Plaintiff's Allegedly Inconsistent Accounts Of The Cause Of His Fall Created A Question Of Fact; Plaintiff Alleged Wire Attaching Scaffold to Building Snapped; No Witnesses

The First Department, with a two-justice concurring memorandum, determined conflicting testimony raised questions of fact about whether a safety harness was available and whether the scaffold was defective. Plaintiff was not wearing a harness when he attempted to move from the roof to a scaffold and fell. With respect to the scaffold, the court noted that plaintiff's allegedly inconsistent accounts of the cause of the fall raised a question of fact:

According to plaintiff, as he attempted to swing down from the roof to the scaffold, a wire attaching the scaffold to the building snapped, causing the scaffold to swing away from the wall and resulting in plaintiff's fall to the ground below. The foreman, however, testified that, in conversation after the accident, plaintiff had admitted to him that he fell because his foot had slipped as he stepped onto the scaffold from the roof, without mentioning any movement of the scaffold. These two versions of how the accident happened, each given by plaintiff, the sole witness to the incident, are inconsistent with each other and give rise to an issue of fact as to whether plaintiff's fall was caused by a failure of a safety device within the purview of § 240(1). As this Court recently noted, "[W]here a plaintiff is the sole witness to an accident, an issue of fact may exist where he or she provides inconsistent accounts of the accident" ... . **Albino v 221-223 W. 82 Owners Corp., 2016 NY Slip Op 05953, 1st Dept 9-8-16**

Fall From A Scaffold Did Not Warrant Summary Judgment On Plaintiff's Labor Law 240 (1) Cause Of Action, Plaintiff Did Not Demonstrate The Failure To Provide Proper Protection

The Second Department determined summary judgment should not have been granted to plaintiff on his Labor Law 240 (1) cause of action. Plaintiff fell from a scaffold but his papers did not make out a prima facie case:

To establish liability pursuant to Labor Law § 240(1), a plaintiff must show that the statute was violated, and that the violation was a proximate cause of his or her injuries ... . The mere fact that a plaintiff fell from a scaffold " does not establish, in and of itself, that proper protection was not provided, and the issue of whether a particular safety device provided proper protection is generally a question of fact for the jury'" ... . Here, the plaintiff's own submissions demonstrated the existence of triable issues of fact as to how the accident occurred and it cannot be concluded, as a matter of law, that the alleged failure to provide him with protection proximately caused his injuries ... . **Karwowski v Grolier Club of City of N.Y., 2016 NY Slip Op 07625, 2nd Dept 11-16-16**

Scaffold Did Not Have A Safety Railing, Plaintiff Entitled To Summary Judgment On 240 (1) Cause Of Action

The First Department determined plaintiff was properly awarded summary judgment in this Labor Law 240(1) action. Plaintiff fell from a scaffold which did not have safety railings. Any comparative negligence on plaintiff's part (not locking the wheels) was irrelevant:

Plaintiff made a prima facie showing of entitlement to judgment as a matter of law on the Labor Law § 240(1) claim by presenting undisputed evidence that he "fell off a scaffold without guardrails that would have prevented his fall" ... . Plaintiff's alleged "failure to use the locking wheel devices and his movement of the scaffold while standing on it" were at most comparative negligence, which is not a defense to a Labor Law § 240(1) claim ... . **Celaj v Cornell, 2016 NY Slip Op 07996, 1st Dept 11-29-16**

Fall From Scaffold With No Side Rails Entitled Plaintiff To Summary Judgment

The First Department determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action. Plaintiff fell from a Baker's scaffold that had no side rails. Although hearsay can be submitted in opposition to a summary judgment motion, the motion will not be defeated by hearsay alone (the case here). The court noted that the plaintiff's unsigned deposition transcript was properly considered because it was certified by the reporter, its accuracy was not challenged by the defendant, and plaintiff adopted it as accurate by submitting it:

Plaintiff was entitled to summary judgment on his Labor Law § 240(1) claim where he fell from a six-foot-high Baker's scaffold, which he was directed to use in order to plaster a ceiling. The record shows that the scaffold "had no side rails, and no other protective device was provided to protect him from falling off the sides" ... .

... [T]he statement in the affidavit of [defendant's] owner that a subcontractor had assured him that the subcontractor had instructed all his employees to use the lifeline, belt and harness is insufficient raise a triable issue of fact as to whether plaintiff may be the sole proximate cause for disregarding such an instruction ... . While hearsay may be considered in opposition to defeat a summary judgment motion if it is not the only evidence upon which opposition to the motion is

predicated, because it was the only evidence establishing that plaintiff disregarded an instruction to use the safety devices, it is insufficient to defeat plaintiff's motion ... . **Chong v 457 W. 22nd St. Tenants Corp., 2016 NY Slip Op 07997, 1st Dept 11-29-16**

Braces (Safety Devices Cont'd)

Scaffold, Safety Railing and Cross Braces Are Safety Devices, Question of Fact Whether Additional Safety Devices Were Required

Here, plaintiff contends that he is entitled to judgment on liability under Labor Law § 240 (1) as a matter of law because defendants failed to provide him with adequate safety devices that could have prevented his fall, namely, a safety belt and lanyard. Plaintiff further contends that it is irrelevant whether a wood safety railing and cross braces were present on the scaffold when he fell because those items are not safety devices and, in any event, they would not have prevented him from falling even if they were in place. We agree with defendants, however, that the scaffold itself and the safety railing and cross braces on it constitute safety devices, and that the evidence submitted by plaintiff raises an issue of fact whether the safety devices provided by defendants afforded him proper protection, or whether additional devices were necessary … . The evidence submitted by plaintiff also raises an issue of fact whether he intentionally removed the safety railing and cross braces from the scaffold and whether such conduct by plaintiff was the sole proximate cause of his injuries … . Kuntz v WNYG Housing Development Fund Company, Inc., et al, 1382, CA 12-00986, 4th Dept. 3-22-13

Planking and Ramps (Safety Devices Cont'd)

Failure of a Scaffolding Plank Entitled Plaintiff to Summary Judgment on the Labor Law 240(1) Claim

"Here, the facts are undisputed that, in an effort to assist with the construction of a platform, claimant stepped onto a plank on the existing scaffold, which was the primary safety device erected for the work, and the plank collapsed, causing claimant to fall and sustain his injuries. Accordingly, claimant's decision not to wear an available safety harness, or employ other safety measures that might have been available, could not have been the sole proximate cause of the accident, and the Court of Claims correctly awarded claimants partial summary judgment on the issue of liability with respect to their Labor Law § 240 (1) claim …". Similarly, because claimant's actions could not constitute the sole proximate cause of his accident, the Court of Claims did not err in denying defendant's motion for summary judgment with respect to claimants' Labor Law § 241 (6) cause of action." **Fabiano v State of New York, 2014 NY Slip Op 08695, 3rd Dept 12-11-14**

Defenses to Labor Law 240(1) Liability

Sole Proximate Cause (Defense)

Failure to Wear a Safety Harness Could Not Constitute the Sole Proximate Cause of Plaintiff's Fall, Caused by the Failure of a Scaffolding Plank

"Here, the facts are undisputed that, in an effort to assist with the construction of a platform, claimant stepped onto a plank on the existing scaffold, which was the primary safety device erected for the work, and the plank collapsed, causing claimant to fall and sustain his injuries. Accordingly, claimant's decision not to wear an available safety harness, or employ other safety measures that might have been available, could not have been the sole proximate cause of the accident, and the Court of Claims correctly awarded claimants partial summary judgment on the issue of liability with respect to their Labor Law § 240 (1) claim …". Similarly, because claimant's actions could not constitute the sole proximate cause of his accident, the Court of Claims did not err in denying defendant's motion for summary judgment with respect to claimants' Labor Law § 241 (6) cause of action." **Fabiano v State of New York, 2014 NY Slip Op 08695, 3rd Dept 12-11-14**

Failure to Attach Lanyard Could Not Constitute Sole Proximate Cause, Cable On Which Plaintiff Was Walking Snapped

The purpose of the suspension cables at the work site was to support workers and materials at the elevated height where the work necessarily occurred. The cable that broke failed to fulfill this fundamental function, and that failure resulted in claimant's fall. Claimant established a prima facie case for liability under Labor Law § 240 (1). Defendant produced proof that, contrary to claimant's assertion, a separate safety cable was available that he should have used instead of attaching his lanyard to the cable upon which he was walking. By attaching his lanyard to the suspension cable, claimant protected against the risk of falling but not the possibility of the cable breaking. While this action by claimant could go to comparative negligence (which is not available in a Labor Law § 240 [1] action), it was not the sole proximate cause of the accident and does not establish the recalcitrant worker defense … . **Portes v New York State Thruway Authority, 516749, 3rd Dept 12-5-13**

Question of Fact Whether Failure to Wear a Harness Precluded Recovery in a Labor Law 240 (1) Action

The Second Department determined defendant had raised a question of fact whether plaintiff's actions were the sole proximate cause of the accident (which would preclude recovery in a Labor Law 240 (1) action). Plaintiff was injured when plywood flooring collapsed. However the defendant presented evidence plaintiff was aware he was required to wear a harness which would have prevented him from falling to the floor below:

" Labor Law § 240(1) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites'" ... . To prevail on a cause of action pursuant to Labor Law § 240(1), the plaintiff must establish a violation of the statute and that the violation was a proximate cause of his injuries ... . Although contributory negligence on the part of the worker is not a defense to a Labor Law § 240(1) claim ..., where a plaintiff's actions are the sole proximate cause of his injuries, liability under Labor Law § 240(1) does not attach ... .Here, although the plaintiff met his prima facie burden of establishing a violation of Labor Law § 240(1) ... the defendants produced evidence that a safety harness and line were available to the plaintiff, that he was aware that he was required to anchor the line on the floor where he was working, and that the anchors, harness, and line would have prevented him from falling to the 14th floor, but that the plaintiff had consciously decided not to anchor his line on the 15th floor as instructed. The defendant's submissions were sufficient to raise a triable issue of fact as to whether the plaintiff's actions were the sole proximate cause of his accident ... . **Bascombe v West 44th St Hotel LLC, 2015 NY Slip Op 00712, 2nd Dept 1-28-15**

Question of Fact Whether Plaintiff's Negligence Was Sole Proximate Cause of Injuries in Labor Law 240(1) Action

The Second Department determined there were questions of fact precluding both plaintiffs' and defendant's motions for summary judgment in a Labor Law 240(1) action. Although the ladder which tipped over was not defective and was appropriate to the task, there were questions whether the ladder was mispositioned and, if so, who mispositioned it. The fact that plaintiff may have been negligent did not preclude recovery under Labor Law 240(1) as long a plaintiff's negligence was not the sole proximate cause of his injury:

In order to prevail on a Labor Law § 240(1) cause of action, a plaintiff must prove that the statute was violated and that the violation was a proximate cause of the injuries ... . Proof that the plaintiff's own negligence was also a proximate cause will not defeat the claim ... . When the evidence establishes, however, that the plaintiff's own negligence was the sole proximate cause of the injuries, the defendant may not be held liable for those injuries ... . The parties' submissions demonstrated that the ladder itself was not defective and was appropriate to [plaintiff's] task.

There are triable issues of fact ... as to whether the ladder was mispositioned and, if so, who mispositioned it, and, if it was mispositioned by [plaintiff], whether his conduct was the sole proximate cause of the ladder's tipping over ... . **Daley v 250 Park Ave., LLC. 2015 NY Slip Op 01917, 2nd Dept 3-11-15**

Question of Fact Whether Plaintiff's Conduct, Placing Ladder on Ice, Was Sole Proximate Cause of Injury

The Fourth Department determined there was a question of fact whether the plaintiff's conduct constituted the sole proximate cause of his injury (re: the Labor Law 240 (1) cause of action). Plaintiff placed his ladder on ice and was injured when the ladder slipped on the ice. The court explained the analytical criteria:

Liability under section 240 (1) "is contingent on a statutory violation and proximate cause" ... . If both elements are established, "contributory negligence cannot defeat the plaintiff's claim" ... . There can be no liability under Labor Law § 240 (1), however, "when there is no violation and the worker's actions . . . are the sole proximate cause' of the accident" ... . It is therefore "conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation" ... .

While we agree with plaintiffs that evidence that a ladder is "structurally sound and not defective is not relevant on the issue of whether it was properly placed" ..., we conclude that there are triable issues of fact whether plaintiff's actions were the sole proximate cause of his injuries ... . * * *

In this case, we conclude that plaintiffs failed to meet their initial burden of establishing entitlement to partial summary judgment on the issue of liability on the Labor Law § 240 (1) cause of action inasmuch as they submitted evidence raising a triable issue of fact whether plaintiff's conduct in "refusing to use available, safe and appropriate equipment" was the sole proximate cause of the accident ... . Specifically, plaintiffs submitted deposition testimony from defendant's customer, who purportedly owned the building on which plaintiff was working. The owner testified that, on the day of the accident, he advised plaintiff that the ladder was not placed in a safe position. The owner offered to retrieve safety equipment from his own truck that would help to remove ice from underneath the ladder and thereby stabilize the ladder. Plaintiff, however, rejected that offer. The owner also attempted to hold the ladder for plaintiff, but plaintiff again rejected the owner's assistance. **Fazekas v Time Warner Cable, Inc., 2015 NY Slip Op 07403, 4th Dept 10-9-15**

Question of Fact Whether Plaintiff's Actions Were Sole Proximate Cause of His Injury

The First Department, in a full-fledged opinion by Justice Andrias, over an extensive two-justice dissent, determined that was a question of fact whether plaintiff's actions constituted the sole proximate cause of his injury in a Labor Law 240(1) action. Plaintiff stood on concrete blocks to work on a billboard, fell and was injured. Plaintiff had access to a cherry picker, ladders and safety harnesses but did not use them. Although plaintiff argued none of the safety devices were usable, the defendant raised a question of fact whether the safety devices could have been used:

Here, the record includes conflicting evidence regarding whether plaintiff was provided with adequate safety devices but failed to use them, which raises a triable issue of fact whether his conduct was the sole proximate cause of his injuries ... . Unlike cases where a plaintiff was injured when he used his discretion to choose one of several safety devices provided and that device proved inadequate, in this case plaintiff was supplied with four safety devices and chose not to use any of them, electing instead to go straight to the concrete blocks, whose intended purpose was to act as a counterweight, not as a platform. * * *

... [A]n issue exists as to whether safe alternative means of painting the billboard were available to plaintiff and whether his failure to use those means was the sole proximate cause of his accident... . **Quinones v Olmstead Props., Inc., 2015 NY Slip Op 07571, 1st Dept 10-15-15**

Plaintiff's Leaning To The Side Of A Non-Defective Ladder Was The Sole Proximate Cause Of Injury

The Second Department determined summary judgment was properly granted to defendants in a Labor Law 240 (1) cause of action. Plaintiff was using an A-frame ladder which was not defective. Plaintiff was injured when he leaned to the side of the ladder and the ladder tipped and the plaintiff fell. It was the act of reaching to the side, not a defective ladder, which was the proximate cause of plaintiff's injury:

"Labor Law § 240(1) imposes a nondelegable duty upon owners, lessees that control the work performed, and general contractors to provide safety devices necessary to protect workers from risks inherent in elevated work sites" ... . "To recover on a cause of action pursuant to Labor Law § 240(1), a plaintiff must demonstrate that there was a violation of the statute, and that the violation was a proximate cause of the accident" ... . "Where there is no statutory violation, or where the plaintiff is the sole proximate cause of his or her own injuries, there can be no recovery under Labor Law § 240(1)" ... .

Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 240(1) insofar as asserted against each of them. Their submissions demonstrated, prima facie, that the injured plaintiff improperly positioned and misused the ladder, which was the sole proximate cause of his injuries ... . **Scofield v Avante Contr. Corp., 2016 NY Slip Op 00493, 2nd Dept 1-27-16**

Standing On The Top Step Of An A Frame Ladder Was Not The Sole Proximate Cause Of The Plaintiff's Fall; Summary Judgment On The Labor Law 240(1) Cause Of Action Should Have Been Granted

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff was injured when he fell descending from the top step of a six-foot A frame ladder. Plaintiff used the six-foot ladder because debris prevented the use of an eight-foot ladder (the eight-foot ladder could not opened due to the debris). Standing on the top step was not the sole proximate cause of the accident:

Denial of summary judgment on plaintiff's claim pursuant to Labor Law § 240(1) was in error where plaintiff electrician was injured when he fell from an A-frame ladder as he was attempting to descend it. Plaintiff's use of a six-foot ladder that required him to stand on the top step did not make him the sole proximate cause of his accident where the eight-foot

ladder could not be opened in the space due to the presence of construction debris ... . Defendants' reliance on the affidavit of the high-rise superintendent is misplaced. Although the superintendent speculated that there was sufficient space to open an eight-foot ladder, this was inconsistent with his prior deposition testimony and was thus calculated to create a feigned issue of fact ... .

Nor was plaintiff a recalcitrant worker ... . While the site safety manager who worked for a subcontractor of defendants testified that she told plaintiff that he should not work in the room because it was unsafe due to all the debris, she explicitly denied that she directed plaintiff to stop work, explaining that she had no such authority. **Saavedra v 89 Park Ave. LLC, 2016 NY Slip Op 06974, 1st Dept 10-25-16**

Plaintiff's Motion Papers Raised A Question Of Fact Whether His Failure To Use A Ladder Was The Sole Proximate Cause Of His Fall, Plaintiff's Motion For Summary Judgment Should Have Been Denied Without Reference To The Opposing Papers

The Fourth Department, over a two-justice dissent, reversing Supreme Court, determined plaintiff's motion papers in the Labor Law 240(1) action raised a triable issue of fact whether his failure to use an available ladder was the sole proximate cause of his fall from a wall. Plaintiff's motion must therefore be denied without any need to consider the opposing papers:

Liability under section 240 (1) does not attach when the safety devices that [the] plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and [the] plaintiff knew he [or she] was expected to use them but for no good reason chose not to do so, causing an accident" ... . Under those circumstances, the "plaintiff's own negligence is the sole proximate cause of his [or her] injury" ... .

Where the plaintiff's submissions in support of the motion raise a triable issue of fact whether his or her own actions were the sole proximate cause of the injury, the plaintiff has failed to make a prima facie showing of entitlement to judgment as a matter of law on the issue of liability because "if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation" ... . In this case, plaintiff's submissions raised triable issues of fact whether plaintiff knew that he was expected to use a readily available ladder at the work site to perform his task, but for no good reason chose not to do so, and whether he would not have been injured had he not made that choice ... . **Scruton v Acro-Fab Ltd., 2016 NY Slip Op 07428, 4th Dept 11-10-16**

Fall When Descending A 28-Foot Ladder Entitled Plaintiff To Summary Judgment, Apparently A 40-Foot Ladder Would Have Been Safer But None Was Available, Therefore Use Of The Shorter Ladder Could Not Be The Sole Proximate Cause Of The Injury

The Second Department determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff fell when he attempted to descend a 28-foot ladder. Apparently a 40-foot ladder would have been safer, but there was no showing a 40-foot ladder was available. Therefore plaintiff's use of a 28-foot ladder could not be the sole proximate cause of his injury:

... [T]he plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by demonstrating that he was injured when he fell while descending an unsecured, 28-foot ladder, and that he was not provided with a safety device to prevent him from falling ... . Contrary to Halsted's (defendant's) contention, it failed to raise a triable issue of fact as to whether the plaintiff's decision to use a 28-foot ladder, rather than a 40-foot ladder, was the sole proximate cause of his injuries. The record reveals that there were no 40-foot ladders readily available to the plaintiff on the date of his accident, and that a Halsted employee nevertheless instructed the plaintiff that he was required to complete his job, or be fired. Under these circumstances, the plaintiff's use of the 28-foot ladder cannot be said to be the sole proximate cause of his injuries ... . **Pacheco v Halsted Communications, Ltd., 2016 NY Slip Op 07303, 2nd Dept 11-9-16**

Fall Off Back Of Flatbed Truck Warranted Summary Judgment On Labor Law 240 (1) Cause Of Action (Plaintiff Was Not Sole Proximate Cause)

The First Department determined plaintiff's motion for summary judgment on his Labor Law 240 (1) cause of action should have been granted. Plaintiff was knocked off the back of a flatbed truck. The Labor Law 241(6) cause of action was properly dismissed (no sufficiently specific industrial code regulation applied). And defendants' control over the injury-producing work was insufficient to support the Labor Law 200 cause of action:

The injured plaintiff testified that a metal beam, while being placed on a flatbed truck, fell off the blades of a forklift, slamming plaintiff's foot and causing him to fall off the truck. This unrefuted testimony established prima facie that "plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" and therefore that liability exists under Labor Law § 240(1) ... . The cases that defendants rely on are inapposite, since they involve not objects falling on or toward workers on flatbeds but workers falling from flatbeds, implicating only the adequacy of safety devices for falling workers, which is not at issue here ... .

Nor was plaintiff the sole proximate cause of his injuries since the injuries "were caused at least in part by the lack of safety devices to check the beam's descent as well as the manner in which [his coworker] lowered the beam" ... . **McLean v Tishman Constr. Corp., 2016 NY Slip Op 07754, 1st Dept 11-17-16**

Recalcitrant Worker (Defense)

Fact that Plaintiff May Have Been Comparatively Negligent and May Have Been Instructed Not to Walk on the Cable Which Snapped Did Not Establish the Recalcitrant Worker Defense

Defendant [submitted] proof that workers were instructed not to use the suspension cables to get to or from the scaffold, ladders were available to access the scaffold and adequate safety cables were available for claimant's lanyard. The purpose of the suspension cables at the work site was to support workers and materials at the elevated height where the work necessarily occurred. The cable that broke failed to fulfill this fundamental function, and that failure resulted in claimant's fall. Claimant established a prima facie case for liability under Labor Law § 240 (1). The suspension cable that broke was one of approximately 28 such cables that had been positioned under the bridge and provided support for scaffolds attached to the cables. According to claimant, workers routinely accessed the scaffold by walking on a suspension cable while holding a bridge beam above them. He further stated that he had attached his lanyard to the cable upon which he was walking because it was the only available cable in that there were no safety cables close enough to use. Defendant produced proof that, contrary to claimant's assertion, a separate safety cable was available that he should have used instead of attaching his lanyard to the cable upon which he was walking. By attaching his lanyard to the suspension cable, claimant protected against the risk of falling but not the possibility of the cable breaking. While this action by claimant could go to comparative negligence (which is not available in a Labor Law § 240 [1] action), it was not the sole proximate cause of the accident and does not establish the recalcitrant worker defense … . **Portes v New York State Thruway Authority, 516749, 3rd Dept 12-5-13**

Availability of Safety Device and Instruction to Use It Not Enough to Establish Recalcitrant Worker Defense

"[T]he nondelegable duty imposed upon the owner and general contractor under Labor Law § 240 (1) is not met merely by providing safety instructions or by making other safety devices available, but [instead is met] by furnishing, placing and operating such devices so as to give [a worker] proper protection" … . Although plaintiff concedes that he was instructed to use a harness, we conclude that "[d]efendants did not establish [a recalcitrant worker] **defense** merely by showing that plaintiff was instructed to avoid an unsafe practice" … . **Thompson v. Sithe/Independence 2013 NY Slip Op 04134, 4th Dept 6-7-13**

Standing On The Top Step Of An A Frame Ladder Was Not The Sole Proximate Cause Of The Plaintiff's Fall; Plaintiff Was Not a Recalcitrant Worker; Summary Judgment On The Labor Law 240(1) Cause Of Action Should Have Been Granted

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff was injured when he fell descending from the top step of a six-foot A frame ladder. Plaintiff used the six-foot ladder because debris prevented the use of an eight-foot ladder (the eight-foot ladder could not opened due to the debris). Standing on the top step was not the sole proximate cause of the accident:

Denial of summary judgment on plaintiff's claim pursuant to Labor Law § 240(1) was in error where plaintiff electrician was injured when he fell from an A-frame ladder as he was attempting to descend it. Plaintiff's use of a six-foot ladder that required him to stand on the top step did not make him the sole proximate cause of his accident where the eight-foot ladder could not be opened in the space due to the presence of construction debris ... . Defendants' reliance on the affidavit of the high-rise superintendent is misplaced. Although the superintendent speculated that there was sufficient space to open an eight-foot ladder, this was inconsistent with his prior deposition testimony and was thus calculated to create a feigned issue of fact ... .

Nor was plaintiff a recalcitrant worker ... . While the site safety manager who worked for a subcontractor of defendants testified that she told plaintiff that he should not work in the room because it was unsafe due to all the debris, she explicitly denied that she directed plaintiff to stop work, explaining that she had no such authority. **Saavedra v 89 Park Ave. LLC, 2016 NY Slip Op 06974, 1st Dept 10-25-16**

Injury Not Related to Gravity

Although Plaintiff Was On A Ladder When Injured, The Injury Was Not Caused By Gravity, Labor Law 240 (1) Cause Of Action Properly Dismissed, Defendant Did Not Have Sufficient Control Over The Injury-Producing Work To Be Liable Under Labor Law 200.

The Second Department determined plaintiff's Labor Law 240 (1) and 200 causes of action were properly dismissed. Plaintiff was on a ladder bolting an elevated steel beam when a forklift struck another (connected) beam pinning plaintiff's arm between the beam he was working on and the wall. The injury was deemed unrelated to the force of gravity. In addition the court found that defendant did not exercise sufficient control over the injury-producing work to be liable under

Labor Law 200. However, certain Labor Law 241 (6) causes of action, alleging the injury was linked to violations of the industrial code, should not have been dismissed:

Labor Law § 240(1) " was designed to provide exceptional protection for workers against the special hazards which stem from a work site that is either elevated or positioned below the level where materials are hoisted or secured'" ... . Its purpose is "to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction work site elevation differentials" ... . Merely because "a worker is injured while working above ground does not ipso facto mean that the injury resulted from an elevation-related risk contemplated by Section 240(1) of the Labor Law" ... . * * *

To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have the authority to exercise supervision and control over the work ... . " A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed'" ... . " [T]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence'"... . **Guallpa v Canarsie Plaza, LLC, 2016 NY Slip Op 08046, 2nd Dept 11-30-16**