GOLDBERG SEGALLA

FALL 2022

Labor Law Update

Keeping clients informed about significant cases and changes in New York's Labor Law

IN THIS ISSUE:

- Standard of liability under § 241(6)
- Sole proximate cause defense
- Cases against a construction manager

Attorney Advertising

Goldberg Segalla *Labor Law Update*
Fall 2022

Goldberg Segalla's *Labor Law Update* keeps clients informed about significant changes and cases involving New York's Labor Law. Cases are organized by court and date. If you have any questions about cases reported in this *Labor Law Update* or questions concerning Labor Law §§ 200, 240(1) and 241(6) in general, please contact **Theodore W. Ucinski III** or **Kelly A. McGee.**

In This Issue

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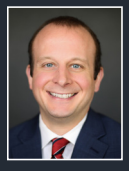

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EDITOR'S NOTE

The Court of Appeals decided four Labor Law cases in spring 2022, all of which resulted in favorable rulings for the defendants. Issues such as the sole proximate cause defense, "covered work," required specificity in predicate violations to § 241(6) claims, and causation were brought before the court.

In *Toussaint,* the court reversed a Labor Law § 241(6) ruling predicated on NYCRR 23-9.9 (a) finding that the industrial code mandates compliance with concrete specifications to give rise to a § 241(6) claim. The court relied on *Ross v. Curtis Palmer*, which refined the standard of liability under § 241(6) by requiring that the rule alleged to have been breached be a "specific positive command." The plaintiff in *Toussaint* was injured when he was struck by a construction vehicle (buggy) that was operated by an undesignated worker. Rule NYCRR 23-9.9 (a) states "no person other than a trained and competent operator designated by the employer shall operate a power buggy." In assessing whether that regulation is specific enough to support a § 241(6) claim, the court agreed that the "trained and competent operator" requirement is general, as it lacks a specific requirement or standard of conduct. Most notable in the *Toussaint* decision is the ten-page fervent dissent by Justice Wilson that covers a historical perspective of the law. (See, *Toussaint v. Port Auth. of NY, 168 N.Y.S.3d 379).*

In *Healy v. EST Downtown LLC,* the court ruled on an issue of "covered work" and found that removal of a birds' nest from a gutter on a commercial building is "routine work." The court cites to *Soto v. J. Crew, Inc.* in that routine work is a task that occurs on a daily, weekly or other relatively frequent and recurring basis as part of ordinary maintenance and care of a commercial premises, which is not the type of work covered by the NY Labor Law. (See, *Healy v. EST Downtown, LLC, 38 N.Y.3d 998*).

In *Cutaia,* the plaintiff was performing electrical work in a wall while standing on an A-frame ladder that was not opened—rather it was folded, unlocked and leaning against the wall. The plaintiff received an electric shock and fell to the ground. Again, the court reversed the Appellate Division order granting the plaintiff partial summary judgment on his Labor Law § 240 claim. There were questions of fact as to whether the ladder failed to provide proper protection, whether the plaintiff should have been provided additional safety devices, and whether the ladder's purported inadequacy, or the absence of additional safety devices, was the proximate cause of the plaintiff's accident. (See, *Cutaia v. Board of Managers of the 160/170 Varick Street Condo, 38 N.Y.3d 1037*).

Once again, the sole proximate cause defense is at issue in the high court and surprisingly, found in favor of the defendants. In what looks to be a garden-variety ladder case, the *Bonczar* plaintiff admitted in testimony that he did not check the ladder and did not lock the ladder in place before getting onto it. The Court of Appeals affirmed the Appellate Court's finding that a rational trier of fact could have found in the defendant's favor on the Labor Law § 240 claim. Here, factual questions existed as to proximate cause or, more specifically, as to whether the plaintiff's own acts or omissions were the sole proximate cause of his accident. (See, *Bonczar v. American Multi-Cinema, Inc., 38 N.Y.3d 1023*).

Please note Goldberg Segalla has a number of construction- and Labor Law-related publications, blogs, and rapid-response teams. For more information, please refer to the back page of our update, or contact us directly.

As always, we hope you find this edition of the *Labor Law Update* to be a helpful and practical resource. If you have any questions about the cases or topics discussed, or have any feedback on how we can make the *Labor Law Update* more useful, please do not hesitate to contact us.

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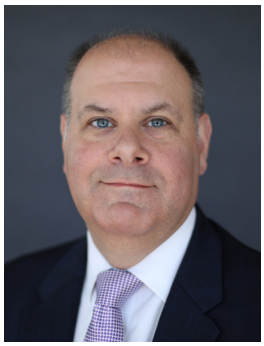

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COURT OF APPEALS

TOPICS: *Labor Law § 241(6), "Trained and competent operator"*

TOUSSAINT V. PORT AUTHORITY OF NEW YORK

168 N.Y.S.3d 379
March 22, 2022

The plaintiff was struck by a power buggy while working at a construction site. All power buggies; small, self-powered vehicles operated by one person and used to move materials on construction sites, were owned and operated by contractors and subcontractors. On the date of the accident, a trained and properly designated operator drove the buggy into the area near the plaintiff's workstation. That operator got off the vehicle and a short time later another worker, who was not designated or trained to do so, got on and drove the buggy a short way before losing control, crashing into the plaintiff and injuring him. Plaintiff's § 241(6) claim predicated on NYCRR 23-9.9 (a) was dismissed because the regulation relied on by the plaintiff provides that "no person other than a trained and competent operator designated by the employer shall operate a power buggy." In assessing whether that regulation is specific enough to support a § 241(6) claim, the court agreed that the "trained and competent operator" requirement is general, as it lacks a specific requirement or standard of conduct. The Court of Appeals found that because the regulation does not mandate compliance with concrete specifications, the plaintiff's § 241(6) claim must be dismissed.

PRACTICE NOTE: A Labor Law § 241(6) claim must be predicated on a sufficiently specific industrial code violation.

TOPICS: *Routine cleaning, Maintenance, Enumerated activity*

HEALY V. EST DOWNTOWN, LLC

38 N.Y.3d 998
April 28, 2022

The plaintiff, a maintenance worker, was injured when he fell from a ladder while clearing a bird's nest from a gutter. The Court of Appeals reversed the Appellate Division and determined that the plaintiff's work was not covered by the Labor Law. The plaintiff's work was "routine" in that it is the type of job that occurs on a daily, weekly or other relatively frequent and recurring basis as part of ordinary maintenance and care of a commercial premises.

PRACTICE NOTE: For Labor Law to apply, the plaintiff's work must not be routine maintenance or cleaning.

TOPICS: *Fall from ladder, Sole proximate cause*

BONCZAR V. AMERICAN MULTI-CINEMA, INC.

38 N.Y.3d 1023
April 28, 2022

The plaintiff fell from a ladder while working on a fire suppression system at a movie theatre. He admitted in testimony that he did not check the ladder and did not lock the ladder in place before getting onto it. The plaintiff's Labor Law § 240 claim was tried to a jury. At the close of evidence, the plaintiff moved for a directed verdict. The court reserved judgment and the jury returned a verdict for the defendant finding no violation of § 240 and that the plaintiff's failure to position the ladder properly was the sole proximate cause of his injuries. The court denied the plaintiff's motion to set aside the verdict as against the weight of the evidence. The Appellate Division affirmed the judgment in the defendant's favor. The Court of Appeals affirmed finding that a rational trier of fact could have found in the defendant's favor on the Labor Law § 240 claim.

PRACTICE NOTE: A sole proximate cause defense should be asserted when the plaintiff knew to implement safety procedures in using a safety device and failed to do them.

TOPICS: *Ladder, Proximate cause, Safety devices, Defect*

CUTAIA V. BOARD OF MANAGERS OF THE 160/170 VARICK STREET CONDO

38 N.Y.3d 1037
April 28, 2022

The plaintiff was doing electrical work in a wall while standing on an A-frame ladder that was not open; rather it was folded, unlocked and leaning against the wall. The plaintiff received an electric shock and fell to the ground. The court agreed that the plaintiff was not entitled to partial summary judgment on his Labor Law § 240 claim. There were questions of fact as to whether the ladder failed to provide proper protection, whether the plaintiff should have been provided with additional safety devices and whether the ladder's purported inadequacy, or the absence of additional safety devices, was the proximate cause of the plaintiff's accident.

PRACTICE NOTE: If a safety device is proper for the work and not defective, investigate whether there are issues of fact as to the cause of the plaintiff's accident.

TOPICS: *Labor Law § 241(6), Integral to the work*

MATEO V. IANNELLI CONSTRUCTION CO., INC.

201 A.D.3d 411
January 4, 2022

The plaintiff, a demolition worker, fell after trying to climb over an air duct that was left on the floor as part of the demolition work his employer was subcontracted to perform. Accordingly, the air duct constituted an integral part of the work and Labor Law § 12 NYCRR 23-1.7 (e-2) was a predicate for the Labor Law § 241(6) claim was found inapplicable. The Appellate Court found that defendant cannot be liable under Labor Law § 200 because the presence of the air duct on the floor was a condition created by the means and methods of the work performed by the plaintiff or his employer, and the record demonstrates that the defendant had only general supervisory authority over the construction site and did not control the plaintiff's work.

PRACTICE NOTE: Investigate whether an alleged slip/trip and fall defect is part of the work that the plaintiff was performing at the time of his accident.

TOPICS: *Staircase, Labor Law § 241(6), Passageway*

TOLK V. 11 W. 42ND REALTY INVESTORS, LLC

201 A.D.3d 491
January 11, 2022

The plaintiff was required to use a loading dock entrance where they would check in with security and walk down to the basement level. From the basement, the workers proceeded to the floors where construction was ongoing. Although workers had the option of using a single-stop elevator to gain access to the basement, the plaintiff's uncontradicted testimony showed that the workers used the staircase, not the elevator. At the time of his accident, the plaintiff was with several coworkers using the staircase. For the purposes of the applicability of the Industrial Code § 12 NYCRR 23-1.7 (d), a staircase may constitute a passageway when that staircase is the sole access to the worksite. In the plaintiff's case, where the staircase on which he fell was the way in which the workers generally accessed the basement level, the staircase was a passageway for Labor Law § 241 (6) purposes.

PRACTICE NOTE: If workers are generally using a stairway, rather than a provided elevator, the stairway may be considered a "passageway" within the meaning of 12 NYCRR 23-1.7 (d), giving rise to a § 241(6) finding.

TOPICS: *Slip and fall, Snow, Ice*

VENEZIA V. LTS 711 11TH AVENUE

201 A.D.3d 493
January 11, 2022

The plaintiff, a mason, slipped and fell on ice or snow while walking from an area on a roof where he was performing work. He brought claims for violations of Labor Law § 200 and § 241(6). The § 241(6) claim was predicated on Industrial Code § 23-1.7 (d) governing passageways, walkways, scaffolds and platforms, and working surfaces which are in a slippery condition i.e. ice, snow, water, grease or other foreign substances. The court found that summary judgment on liability was properly denied, as there were outstanding issues of fact that could not be resolved. The record contained competing evidence as to the location of the accident, whether a path had been cleared so that workers could safely walk between the stairway and the location on the roof where work was being performed, and whether it was necessary for the plaintiff to traverse the area where he allegedly fell. There was also conflicting testimony as to the location of the accident.

PRACTICE NOTE: Contradicting testimony regarding the location and condition of the alleged accident site may create issues of fact.

TOPICS: *Scaffold, Guardrails, Sole proximate cause*

VARGAS V. 1166 LLC

201 A.D.3d 614
January 27, 2022

The plaintiff fell from a scaffold and claims that, although he asked his foreman for guardrails, they were never provided to him. The defendant testified that workers were specifically instructed to use guardrails when assembling scaffolds and that guardrails were readily available for workers' use. However, the plaintiff did not use the guardrails. The plaintiff established entitlement to summary judgment on Labor Law § 240. However, through the testimony that the plaintiff declined use of guardrails even though he was instructed to do so, even though guardrails were available, defendants raise an issue of fact as to whether the plaintiff was the sole proximate cause of his accident, thus rendering summary judgment in the plaintiff's favor inappropriate. Although the plaintiff's supervisor did not witness the accident, he attested that he arrived on the scene as the plaintiff was getting into the ambulance, and proceeded to the worksite where he found the Baker scaffold the plaintiff had been using to be in good condition, but the guardrails that the plaintiff had been instructed to use leaning up against a nearby wall. This testimony was sufficient to raise an issue of fact.

PRACTICE NOTE: When asserting a sole proximate cause defense, you must prove that the safety device was proper and adequate for the work, provided to the plaintiff, and the plaintiff for no good reason did not use it and his/her failure to use it was the proximate cause of the injury.

TOPICS: *Falling object, Labor Law § 240*

RINCON V. NEW YORK CITY HOUSING AUTHORITY

202 A.D.3d 421
February 1, 2022

The plaintiff's coworker was working on a roof near a parapet wall when a wrench accidentally slipped out of his hand and fell 10-15 feet, striking the plaintiff who was working below on a hanging scaffold. The plaintiff was entitled to summary judgment on Labor Law § 240. The defendant's expert opinion that a wrench could not have been functionally employed if it was secured or tethered to the parapet wall completely misses the point since the wrench could have been tethered to the worker.

PRACTICE NOTE: In falling object cases, investigate whether proper safety devices were employed.

TOPICS: *Sidewalk shed, Fall from height*

GALENO V. EVEREST SCAFFOLDING, INC.

202 A.D.3d 433
February 3, 2022

Plaintiff fell through the roof of a sidewalk shed to the ground below while engaged in façade repair of a building. The court found issues of

fact as to what proximately caused the accident. Specifically whether negligence by Everest or a codefendant was the proximate cause of the accident.

PRACTICE NOTE: Investigate fact issues to determine the proximate cause of the alleged accident.

TOPICS: *Fall from height, Labor Law § 240*

GUTIERREZ V. TURNER TOWERS TENANTS CORP.

202 A.D.3d 437
February 3, 2022

The plaintiff was injured when he fell from a sidewalk bridge after stepping on a rotted wood plank that broke beneath him. The facts demonstrate a *prima facie* violation of Labor Law § 240 to the owner and general contractor. Regardless of whether the plaintiff's accident occurred when he was walking across the sidewalk bridge or stepping onto the rotted plank from a ladder as described in the accident report, the plank he slipped on broke and he had not been provided with a safety device to protect him from falling. The fact that the accident was unwitnessed does not bar summary judgment in the plaintiff's favor, as there is nothing in the record that contradicts the plaintiff's version of the accident or raises an issue as to his credibility.

PRACTICE NOTE: In an unwitnessed accident, investigate alternative and/or contradicting evidence.

TOPICS: *Slip and fall, Snow, Ice*

LAPINSKY V. EXTELL DEV. CO.

202 A.D.3d 478
February 8, 2022

The plaintiff was injured when he slipped on a slippery condition, specifically ice and snow, as he passed through a perimeter gate towards his employer's shanty upon arriving to work. The defendant testified that the area of the accident was commonly used as a roadway for egress. The court found that the record was not clear as to whether there was a defined path where the plaintiff fell or whether it was a roadway for egress. The court found issues of fact with regard to whether the plaintiff's accident occurred in a defined walkway within the meaning of Industrial Code § 23-1.7 (d). With regard to Labor Law § 200, the plaintiff was entitled to summary judgment against the defendant because it had notice of the hazardous condition and failed to remedy it. There was unrefuted testimony that it had snowed days prior to the plaintiff's accident and the snow covering the ground at the time of his accident was not fresh snow.

PRACTICE NOTE: In Labor Law § 200 cases, the plaintiff must prove that the defendant created the condition or had constructive or actual notice of the condition and failed to remedy it within a reasonable time prior to the accident.

TOPICS: *Slip and fall, Defective condition, Labor Law § 200, Authority, Control*

LOCKE V. URS ARCHITECTURE & ENGINEERING, P.C.

202 A.D.3d 505
February 10, 2022

The plaintiff slipped and fell on soapy water on the floor of a restroom designated by the construction manager at a worksite for use by construction workers. The court found that the construction manager was liable under Labor Law § 200 because it had the authority over the dangerous area of the worksite and notice of the unsafe condition.

PRACTICE NOTE: In Labor Law § 200 cases against a construction manager, the plaintiff must prove that they had authority to control the work area. The plaintiff must also prove that they created the condition or had constructive or actual notice of the condition and failed to remedy it within a reasonable time prior to the accident.

TOPICS: *Slip and fall, Defective condition, Ownership, Control*

ARNOLD V. EMPIRE 326 GRAND LLC

202 A.D.3d 528
February 15, 2022

The plaintiff slipped and fell at a worksite after a coworker mopped the area by dumping a large amount of water on the ground. The defendant owner had moved for summary judgment arguing that it was not the owner and therefore not a Labor Law defendant because another entity had assumed *de facto* ownership and control of the property. It also argued that it had no notice of the hazardous condition and did not control or supervise the means and methods of the plaintiff's work. The Supreme Court dismissed the plaintiff's Labor Law § 240 claim. The court found that the owner was the title owner of the premises at the time of accident and was a proper Labor Law defendant.

PRACTICE NOTE: Investigate ownership and authority to control the plaintiff's worksite in order to determine Labor Law exposure.

TOPICS: *Falling object, Secured object, Safety devices*

MAYORQUIN V. CARRIAGE HOUSE OWNERS CORP.

202 A.D.3d 541
February 15, 2022

The plaintiff was struck by an unsecured brick and the court properly granted liability on a Labor Law § 240 claim. The court found that an accident report containing the statement of the plaintiff's foreman concerning how the accident occurred was properly admitted under the business record exception to the hearsay rule. The court stated that the brick was an object that required securing for the purposes of the undertaking. Also, the plaintiff testified that netting was provided but it proved inadequate to protect him against falling debris. As such, the safety device was not proper.

PRACTICE NOTE: In falling object cases, investigate whether the object required securing.

TOPICS: *Labor Law § 240(1), Scaffold, Recalcitrant worker, Sole proximate cause, Experts, Witness disclosure*

QUIROZ V. MEMORIAL HOSP. FOR CANCER & ALLIED DISEASES

202 A.D.3d 601
February 22, 2022

The plaintiff fell from a scaffold while working with a large chipping gun. The plaintiff admitted that the gun's kickback caused the fall, but also alleged that the scaffold had uneven footing and no railings. The plaintiff was granted summary judgment on Labor Law § 240(1) and the decision was affirmed. The defendants asserted a sole proximate cause defense, claiming that the plaintiff was trained to install railings on the scaffold, was aware he needed to use them, and they were readily available for his use. The court agreed with the plaintiff's

argument that he would have fallen due to the improperly placed scaffold regardless of the missing railings. The court specifically noted it is conceptually impossible for the statutory violation to occupy the same ground as the plaintiff's sole proximate cause.

PRACTICE NOTE: The sole proximate cause defense will fail unless it is proven that the plaintiff's failure to use a provided, proper safety device is the proximate cause of the injury.

TOPICS: *Homeowner's exemption*

RAMIREZ V. HANSUM

202 A.D.3d 605
February 22, 2022

The plaintiff was injured when he fell from a ladder while performing work on the roof of a single-family home owned by the defendants. The Appellate Division affirmed summary judgment to the defendants based upon the Homeowner's Exemption of the New York Labor Law. It found that the defendants met their burden of proof of showing that the home was a one-family dwelling used as a personal residence. The court specifically noted the plaintiff's arguments that the home was to be used for commercial and investment purposes to be unfounded and wholly speculative.

PRACTICE NOTE: The court employs a use and purpose test to determine if the homeowner is entitled to exemption from the Labor Law. It will look to the use and purpose of the home at the time the accident occurred, and not what ultimately was done with home post-accident.

TOPICS: *Contractual indemnification, Triggering language*

HARRIS V. CITY OF NEW YORK

202 A.D.3d 624
February 24, 2022

The plaintiff sued the City of New York as the owner and the general contractor after he fell due to a missing barricade railing. The general contractor secured a dismissal of the Labor Law § 241(6) claim at the trial level, but the court did not reach the portion of their motion which sought to dismiss the indemnification claims brought against them by the city. On appeal, the Appellate Division found that the general contractor was entitled to dismissal of the indemnification claims because they did not construct or maintain the barricade railing system and they did not supervise or control the plaintiff's work. As a result, the accident did not "arise out of" the general contractor's work, so the contractual indemnification provision was not triggered.

PRACTICE NOTE: When evaluating a contractual indemnification claim the triggering language is critical. The ability to establish an accident "arises out of" a subcontractor's work is a lighter burden than where the triggering language requires an accident to "arise out of the negligence" of a contractor.

TOPICS: *Contractual indemnification, Common law indemnification*

NAVEDO V. VNO 225 W. 58TH STREET LLC

203 A.D.3d 406
March 1, 2022

The plaintiff was injured while taking measurements for a curtain wall when he touched a safety cable that was around the perimeter of the building that had inexplicably become electrified. The plaintiff brought suit alleging a violation of Labor Law § 241(6). The owner and general contractor in turn brought a third-party action against the electrical subcontractor who was required to provide the contractors working at various floors with electrical power. The court held the electrical subcontractor was entitled to dismissal of the common law indemnification and contribution claims because no negligence was found against it. The subcontractor came forth with its foreman's testimony, which established the subcontractor tested all of the cables and wires in the vicinity of the accident immediately after the accident and found no live currents. He also prepared a report containing a statement confirming the test results by the electrician who performed the tests. Finally, they submitted a purchase order showing that the plaintiff's employer and another nonparty were in charge of providing and maintaining the cables by which the plaintiff was shocked. With regard to contractual indemnification, the subcontractor established that the accident did not "arise out of" its work.

PRACTICE NOTE: When evaluating a contractual indemnification claim, the triggering language is critical. The ability to establish an accident "arises out of" a subcontractor's work is a lighter burden than where the triggering language requires an accident to "arise out of the negligence" of a contractor.

TOPICS: *Labor Law § 240(1), Gravity related, Safety devices*

HEALY V. BOP ONE N. END LLC

203 A.D.3d 428
March 3, 2022

The plaintiff was injured while using a manlift. He raised the manlift to the area he needed to work but was unable to get it into position because of ductwork. The plaintiff then worked standing on the railing of the manlift and was injured when he was shocked and fell from where he was working. The plaintiff moved for summary judgment on Labor Law § 240(1) and the defendants cross-moved to dismiss same. The court granted the plaintiff summary judgment and denied the defendant's motion citing to the fact that the manlift was inappropriate for the task at hand in light of the configuration of the building, and failed to provide the plaintiff with adequate protection pursuant to the statute.

PRACTICE NOTE: The failure of a safety device to protect a worker from harm that flows from the effects of gravity will lead to a violation of Labor Law § 240(1).

TOPICS: *Labor Law § 240(1), Gravity related, Ladder, Experts, Owner*

DURASNO V. 680 FIFTH AVE. ASSOC., L.P.

203 A.D.3d 455
March 8, 2022

The plaintiff alleged to have fallen while using a squeegee on a 12-foot pole, and standing one or two rungs down from the top of a 12-foot ladder to clean windows about 15 feet in height. The defendant moved to dismiss the § 240(1) claim using a video of the accident that showed the plaintiff was not using an extension on the squeegee and was standing at the top of an eight-foot ladder. The defendant's expert engineer opined that the plaintiff could have reached the glass he was cleaning if he had, in fact, used the 12-foot extension pole and stood on the ground. Despite the difference between the plaintiff's testimony and the video, the court denied the defendant's summary judgement on the § 240(1) cause of action. The court found that the expert's affidavit and report was vague and did not address whether the plaintiff could assert sufficient force from the ground to clean the windows using the extension pole.

PRACTICE NOTE: Attacking the plaintiff's credibility is not sufficient to create an issue of fact on a Labor Law motion. Courts will still grant

summary judgment to a plaintiff even if more than one version of events exists as long as a violation of the Labor Law is proven.

TOPICS: *Labor Law § 240(1), Labor Law § 241(6), Falling object, Gravity related*

KUYLEN V. KPP 107TH ST., LLC

203 A.D.3d 465
March 8, 2022

The plaintiff, who was working on a building renovation, was injured when he entered an apartment to speak to a coworker and a stack of 25 to 30 sheetrock boards leaning against the wall fell on him. The building owner moved for summary judgment seeking to dismiss the Labor Law §§ 240(1) and 241(6) causes of action brought by plaintiff. The plaintiff's § 241(6) claim was predicated upon a violation of 12 N.Y.C.R.R. § 23-2.1(a)(1). The court found as a matter of law the accident did not occur in a passageway, hallway, stairway, or other walkway and granted summary judgement to the owner. With regard to the § 240(1) claim, the court found issues of fact existed as to whether the plaintiff's injuries flowed from the application of the force of gravity, whether the elevation differential was *de minimus,* and whether the combined weight of the sheetrock panels could generate a significant amount of force.

PRACTICE NOTE: In a § 241(6) claim predicated on § 23-2.1(a)(1), the plaintiff must prove that the accident occurred in a passageway, hallway, stairway, or walkway as proscribed by the industrial code.

TOPICS: *Labor Law § 241(6), Industrial code violations, Tripping hazard*

FUENTES V. LINDSAY PARK HOUS. CORP.

203 A.D.3d 487
March 10, 2022

The Appellate Division found an issue of fact as to whether the plaintiff was entitled to the protection of Labor Law § 241(6) when he was caused to trip and fall over plastic sheeting that was placed over a newly installed floor in an apartment he was painting and plastering. More specifically, the court focused on whether the plastic sheet was a tripping hazard under 12 NYCRR § 23-1.7(e).

PRACTICE NOTE: While the industrial code provides that workers must be kept safe from slipping and tripping hazards within a construction area, materials which may be integral to the work, such as the plastic sheeting above, will create an issue of fact as to the applicability of § 241(6).

TOPICS: *Burden of proof, Evidence*

PUBLIC ADM'R OF QUEENS COUNTY V. 124 RIDGE LLC

203 A.D.3d 493
March 10, 2022

The decedent was performing renovation work when he fell from an extension ladder. There were no witnesses to the accident. Labor Law claims were dismissed on the grounds that there was no evidence as to how the accident occurred. The court noted that any conclusion by the trier of fact would be pure speculation since there was nothing to establish the accident occurred due to a defective or improperly secured ladder, misstep, or loss of balance.

PRACTICE NOTE: The plaintiff argued in this case that they were entitled to a lower burden of proof because of the *Noseworthy Doctrine,* which entitles a plaintiff who cannot provide relevant facts due to his injuries to establish their case by a lower standard. However, the court specifically noted that since the plaintiff was not at a disadvantage because no party knew what happened, the doctrine was inapplicable.

TOPICS: *Labor Law § 240(1), Labor Law § 241(6), Elevation differential*

HERRERA V. KENT AVE. PROP. III LLC

203 A.D.3d 512
March 15, 2022

The plaintiff was injured when he was struck by an excavator while bringing debris up an earthen ramp, causing him to roll down the ramp. In dismissing the plaintiff's § 240(1) claim, the court found that the plaintiff's injuries were not "the direct consequence of a failure to provide adequate protection against a risk from a physically significant elevation differential."

PRACTICE NOTE: Labor Law § 240(1) is not applicable where the plaintiff's injuries are not "the direct consequence of a failure to provide adequate protection against a risk from a physically significant elevation differential."

TOPICS: *Proper parties, Pleadings*

VALENTINE V. 2147 SECOND AVE. LLC

203 A.D.3d 531
March 15, 2022

The plaintiff was a site safety coordinator who was injured during the course of his employment at a demolition and construction site. The plaintiff sued the owner, and architect, in common law negligence. The plaintiff sued the general contractor and successor general contractor as well, in a Supplemental Bill of Particulars served nearly eight years after the accident. The court dismissed the case against the architect since they established they were a design professional who had no involvement in the work (the architect exception to the Labor Law was not applicable since the plaintiff had not sued under that theory). Likewise, the court dismissed the case as to the successor general contractor since they established they were not on site until after the accident. Finally, the court held that the plaintiff had never properly pled a violation of the Labor Law and claiming same in a Bill of Particulars was improper since a Bill of Particulars is designed to amplify a pleading and not create a new cause of action.

PRACTICE NOTE: This case serves as an example of what can go wrong for a plaintiff when they do not regularly practice in the area of the Labor Law. Claims professionals and their counsel should be mindful that the Labor Law is a niche practice and not something to be dabbled in by either plaintiffs or defendants.

TOPICS: *Labor Law § 240(1), Labor Law § 241(6), Enumerated activity, Contractual indemnification*

PAYNE V. NSH COMMUNITY SERVS., INC.

203 A.D.3d 546
March 17, 2022

The plaintiff and his coworkers were traversing a rebar mat to exit a parking garage during their coffee break. The rebar mat had just been installed in the garage and was to have cement

poured over it to form a ramp for the garage. The subcontractor who installed the mat was required by their contract with the general contractor to provide a solid walking surface over the rebar mat if the rebar had to be crossed by any trade. No such walking surface was provided. With regard to the defendants' motion to dismiss the Labor Law § 240(1) claim, the court denied same because there was an issue of fact as to whether the fall was an elevation-related hazard as well as to whether the plaintiff was engaged in an enumerated activity at the time of the fall. The court dismissed the plaintiff's claim under Labor Law § 241(6) because the industrial code section the plaintiff relied upon dealt with scaffold planking and not rebar mats. Finally, the court granted contractual indemnification to the owner and general contractor as the accident arose out of the subcontractor work and violation of the contract by failing to provide a solid walking surface over the rebar.

PRACTICE NOTE: The first step in any Labor Law analysis should always be whether the worker was a covered person engaged in an enumerated activity.

TOPICS: *Labor Law § 240(1), Labor Law § 241(6), Industrial code violations, Permanent stairway*

WALDRON V. CITY OF NEW YORK

203 A.D.3d 565
March 17, 2022

The plaintiff was an electrical foreman on a building renovation project who was injured when he suffered a fall down a stairway in a building. The stairway had no handrails at the time of the accident and the plaintiff claimed he reached for same but none were present. The plaintiff moved for summary judgment on Labor Law § 240(1). The defendant successfully raised an issue of fact as to whether the stairway was a safety device under the statute. The plaintiff was also denied summary judgment on Labor Law § 241(6) premised upon 12 N.Y.C.R.R. 23-2.7(e) which requires handrails in stairways. The court held an issue of fact existed as to whether the lack of a handrail proximately caused the fall.

PRACTICE NOTE: The general rule is that a fall on a permanent stairway is not something that falls within the ambit of § 240(1). However, under certain specific factual scenarios the court will find an exception to this rule such as where the plaintiff is actually working on the stairwell or if the stairwell serves as the only means of egress for the plaintiff's work.

TOPICS: *Labor Law § 240(1), Burden of proof, Evidence*

MUCO V. BOARD OF EDUC. OF THE CITY OF N.Y.

203 A.D.3d 610
March 24, 2022

The plaintiff was caused to fall from a stairway attached to a scaffold when it suddenly moved, and also claimed the stairway lacked handrails and the scaffold was not properly secured. The plaintiff's motion for summary judgment on Labor Law § 240(1) was denied due to an issue of fact. The defendant established that immediately after the accident the scaffold was inspected and all safety railings were in place. In addition, the inspection showed the scaffold was stable and properly secured in place. The information provided directly contradicted the plaintiff's version of events.

PRACTICE NOTE: A comprehensive post-accident investigation can make the difference between summary judgment and an issue of fact.

TOPICS: *Labor Law § 241(6), Industrial Code § 23-1.7(d), Integral to the work, Coverings, Stairs, Escalators*

BAZDARIC V. ALMAH PARTNERS LLC

203 A.D.3d 643
March 31, 2022

The plaintiff alleges that he was injured when he tripped and fell on a heavy-duty plastic covering that was placed on the stairs of an escalator to protect it from dripping paint while the plaintiff was painting. The plaintiff brought his claim under Labor Law § 241(6) alleging that the defendants violated Industrial Code § 12 NYCRR 23-1.7(d). The court dismissed the plaintiff's § 241(6) claim because of the integral to work defense that found the covering was an integral part of the plaintiff's work. Additionally, the court specifically addressed the question of whether the plastic covering was the best choice for the specific task. Disagreeing with the lower court and the dissent's opinion, the court shows that there is no precedent to suggest that a court should determine what material was best to use, only whether the material chosen was integral to the renovation or work.

PRACTICE NOTE: Defendants are entitled to summary judgment on a plaintiff's claim brought under Labor Law § 241(6) when the incident conditions are integral to the work the plaintiff was performing.

TOPICS: *Labor Law § 240(1), Labor Law § 241(6), Industrial Code § 23-2.1(a)(1), Industrial Code § 23-1.5(c)(3), Industrial Code § 23-6.1(b)*

ORMSBEE V. TIME WARNER REALTY INC.

203 A.D.3d 630
March 29, 2022

The plaintiff alleges violations of Labor Law §§ 240(1) and 241(6) predicated on Industrial Code §§ 23-2.1(a)(1), 23-1.5(c)(3), and 23-6.1(b). The plaintiff was lifting the lid of a gang box at a construction site to retrieve tools when the lid suddenly fell, causing him injury to his shoulders. The court found that § 240(1) was inapplicable. The lifting of a gang box did not qualify as a covered activity because there was no risk of injury relative to elevation. As for the Industrial Code, § 23-2.1(a)(1) was not applicable because the incident did not occur in a passageway, hallway, stairway, or other thoroughfare. Following, § 23-6.1(b) was not applicable because the plaintiff only raised the argument in their reply papers. The only claim to survive summary judgment was the plaintiff's § 23-1.5(c)(3) because the gang box was not kept in good repair since it was undisputed that the hydraulic pumps in the gang box that were intended to open and close the lid were not functional at the time of the accident.

PRACTICE NOTE: Labor Law § 240(1) claims do not encompass injuries when the risk was part of the usual and ordinary dangers of a construction site and not because of the elevation.

TOPICS: *Labor Law § 240(1), Stairs, Ramp*

ROYLAND V. MCGOVERN & CO., LLC

203 A.D.3d 677
March 31, 2022

The plaintiff was injured when pulling a floor-buffing machine up a ramp placed over the stairs of a church when the top section of the three-part ramp came loose and slid down the other two sections, taking the plaintiff down with it. The ramp had been installed by a third-party defendant for the moving of the church's pipe organ. The court found that the plaintiff established a *prima facie* case regarding Labor Law § 240(1) because the accident arose from an elevation-related hazard contemplated by the statute because the ramp served as a tool to aid the worker in transporting equipment even though the ramp's purpose was not for the plaintiff's intended use.

PRACTICE NOTE: It did not matter to the court that the ramp had not been placed for the work being performed by the plaintiff, only that the ramp was a tool assessable to the plaintiff that caused an injury due to elevation.

TOPICS: *Labor Law § 200, Labor Law § 241(6), Industrial Code § 23-2.1(a)(1), Proximate cause*

PADILLA V. TOURO COLL. UNIV. SYS.

204 A.D.3d 415
April 5, 2022

The plaintiff, a security system installer employed by third-party defendant, T.R. Joy, was injured when he attempted to move a stack of sheetrock boards leaning against a wall that was allegedly pinching security system wires when those sheetrock boards fell and injured him. The plaintiff brought claims under Labor Law §§ 240 and 241(6). As to § 240, the court determined there was not enough evidence on the record as to whether the plaintiff's injuries were proximately caused by the lack of a safety device of the kind required by § 240. There was also an issue of fact under § 241(6), Industrial Code § 23-2.1(a)(1), as to whether the accident occurred in a passageway, walkway, stairway, or other thoroughfare.

PRACTICE NOTE: Summary judgment may be denied when issues of fact concerning the proximate cause of the plaintiff's injuries exist.

TOPICS: *Labor Law § 240(1), Labor Law § 241(6), Industrial Code § 23-1.7(b)(1)(i), Industrial Code § 23-1.15(a), Proximate cause, Elevator, Ramp*

ROONEY V. D.P. CONSULTING CORP.

204 A.D.3d 428
April 5, 2022

The plaintiff was working on the top of a freight elevator in a basement, claiming injury by way of tripping on a wooden ramp that led from a loading dock to the elevator. The court overturned the lower court's findings for the defendant, and instead found that an issue of fact as to whether the plaintiff's work could be covered under Labor Law §§ 240(1) and 241(6). The court reasoned that the plaintiff was engaged in a renovation project that would alter the premises because his work was intended to secure the premises in preparation for the project. Additionally, under § 241(6), Industrial Code §§ 23-1.7(b)(1)(i) and 23-1.15(a), the court

found these violations contain an issue of fact as to whether the plaintiff's accident was proximately caused by the lack of a compliant safety railing.

PRACTICE NOTE: The defendant's defense of routine maintenance was unfounded when the plaintiff was hired for a renovation project.

TOPICS: *Labor Law § 200, Labor Law § 240(1), Issues of fact, Safety devices*

LEWIS V. 96 WYTHE ACQUISITION LLC

204 A.D.3d 470
April 12, 2022

Claiming injury from a metal beam, the plaintiff moved for summary judgment under Labor Law §§ 200 and 240(1). The plaintiff, as the sole witness to the incident, gave inconsistent statements regarding how the metal beam caused him injury. The court found that the plaintiff's accident gave rise to an issue of fact under §§ 200 and 240(1) on whether the failure of a safety device caused the injury or was the proximate cause of the plaintiff's injuries.

PRACTICE NOTE: The plaintiff's partial motion for summary judgment should have been denied where the plaintiff as the sole witness gave contradictory statements about how the incident occurred.

TOPICS: *Labor Law § 240(1), Labor Law § 241(6), Industrial Code § 23-2.5(a)(1), Falling debris, Adequate protection*

PETERS V. STRUCTURE TONE, INC.

204 A.D.3d 522
April 19, 2022

The court denied both parties summary judgment under Labor Law §§ 240(1) and 241(6). Under § 240(1) there were issues of fact as to whether the debris that fell on the plaintiff was a load that required securing for the purposes of the undertaking at the time it fell and whether the injury was a direct consequence of the defendant's failure to provide adequate protection. As to § 241(6), Industrial Code § 23-2.5(a)(1), a fact finder could find that a covering less than two stories above the plaintiff might not have protected him, the issue of the defendant's violation of the regulation could therefore be found not unreasonable under the circumstances.

PRACTICE NOTE: A worker being injured from falling material does not create an automatic violation of Labor Law § 240(1) because the injuries from the falling material could be the result of the usual and ordinary danger of a construction site.

TOPICS: *Labor Law § 240(1), Unsecured, Object*

GRIGORYAN V. 108 CHAMBERS ST. OWNER, LLC

204 A.D.3d 534
April 21, 2022

The plaintiff was injured when a large unsecured fire pump (three- to four-feet tall, 300 to 500+ pounds), on the same level as him, fell on his leg. The injury occurred while the plaintiff was standing in a room deciding how to proceed with running conduits along a wall and ceiling of a fire pump room. The court found in favor of the plaintiff's summary judgment that Labor Law § 240(1) applied due to the unsecured fire pump's weight allowing the pump to generate significant force in falling and causing injury.

PRACTICE NOTE: Labor Law § 240(1) will apply even when the object is on the same level but is able to generate significant force because of its weight.

TOPICS: *Labor Law § 240(1), Ladder, Summary judgment*

LAPORTA V. PPC COMMERCIAL, LLC

204 A.D.3d 538
April 21, 2022

Before depositions, the plaintiff was able to establish a *prima facie* case under Labor Law § 240(1) through affidavits that an unstable eight-foot A-frame ladder, which was missing rubber feet, shifted and caused him to fall. The plaintiff was also able to show that the work he was doing, retrofitting light fixtures, was covered under § 240(1) and not mere maintenance work. Defendant's sole argument that fact depositions had not yet been taken was unavailing to the court. The court found that the defendant was unable to show that further discovery would lead to facts that would support its opposition to the plaintiff's motion for summary judgment.

PRACTICE NOTE: Hope for finding evidence in a deposition that would defeat a motion for summary judgment is insufficient to deny the motion.

TOPICS: *Labor Law § 200, Actual notice, Constructive notice*

VILLANUEVA V. O'MARA ORG., INC.

204 A.D.3d.557
April 21, 2022

The plaintiff was a freight elevator operator. His role was to bring workers and materials between the ground floor and the worksite (10th and 11th floor). The plaintiff was injured when a group of unbundled electrical metallic tubes toppled, hitting the plaintiff in the head as he was exiting the elevator. The court found that the plaintiff had been properly awarded partial summary judgment on common law negligence towards one defendant who created the dangerous condition but denied to another defendant due to a genuine issue of fact as to whether under Labor Law § 200 the defendant had control over the worksite, and actual or constructive notice of the dangerous condition.

PRACTICE NOTE: Under Labor Law § 200, the plaintiff needs to show both control and actual or constructive notice of the dangerous condition to win summary judgment.

TOPICS: *Labor Law § 240(1), Elevator, Gravity related*

LUNA V. BRODCOM W. DEV. CO. LLC

204 AD.3d 609
April 28, 2022

The plaintiff, a mechanic, was killed when he entered an elevator shaft on the lobby level, under the elevator. The call button was pressed, causing the elevator to automatically descend, crushing the plaintiff. The court found that the plaintiff's § 240(1) claim had to be dismissed because the elevator did not fall as a result of the force of gravity but descended in automatic mode, as it was designed to do. With no surviving claims against the defendant, the third-party defendants were also dismissed.

PRACTICE NOTE: An elevator working in its programmable state that causes injury does not fall under Labor Law § 240(1) because gravity is not the propelling cause of the descent of the elevator.

TOPICS: *Labor Law § 240(1), Cleaning, Elevation differential, Sole proximate cause, Recalcitrant worker defense*

MAZZARISI V. NEW YORK SOCY. FOR THE RELIEF OF THE RUPTURED & CRIPPLED

205 A.D.3d 424
May 3, 2022

The plaintiff was injured when he was power washing HVAC chillers. The court found that the plaintiff made a *prima facie* showing of entitlement to summary judgment as to liability on § 240(1) since this task is considered "cleaning" within the meaning of § 240(1) and was not merely routine as there was no recurring schedule as part of the ordinary care of the premises. Moreover, the task involved elevation risks different from domestic cleaning and required specialized equipment. Although the defendants established that it was the policy of the plaintiff's employer not to use equipment from other trades, and that the plaintiff should have contacted a supervisor when he realized the work involved a height differential because there was no evidence these policies were communicated to the plaintiff, the court found that the plaintiff's actions were not the sole proximate cause of the accident.

PRACTICE NOTE: A sole proximate cause defense is difficult to establish and requires evidence that safety equipment was available to a plaintiff, and that plaintiff was provided with direct instructions to use the available safety device or a standing order to not act in the manner ultimately chosen by plaintiff.

TOPICS: *Labor Law § 240(1), Ladder, Sole proximate cause, Recalcitrant worker defense, Comparative negligence*

VITUCCI V. DURST PYRAMID LLC

205 A.D.3d 411
May 3, 2022

The plaintiff, an employee of a plumbing subcontractor, was injured when he was standing on the edge of a bathtub attempting to tighten the nut on a shower curtain rod. The task required the plaintiff to use a ladder. However, in finding that the plaintiff made a *prima facie* showing of entitlement to summary judgment as to liability on §240(1), the court noted since there were appliance boxes on the floor and no room to place an A-frame ladder inside the bathroom, it was necessary for the worker to stand on the edge of the tub. The defendants failed to establish that the plaintiff was a recalcitrant worker as they did not show that plaintiff deliberately refused to obey a direct and immediate instruction to use an available safety device, or a standing order to not stand on the edge of the bathtub, despite evidence that workers could safely perform the task without the use of a ladder while standing on the ground or in the bathtub; as same is simply a disguised claim for comparative negligence which does not make out a sole proximate cause defense.

PRACTICE NOTE: A worker cannot be faulted for failing to use safety devices or instrumentalities that cannot be effectively used at worksites.

TOPICS: *Labor Law § 240(1), Hazardous opening, Sole proximate cause, Comparative negligence*

CAZHO V. URBAN BLDRS. GROUP, INC.

2022 NY SLIP OP 02943
May 3, 2022

While working on the roof of a residential building, the plaintiff fell through an opening while moving a skylight cover. The plaintiff was entitled to summary judgment on § 240(1) by establishing that the defendants failed to provide any safety device or equipment to protect the plaintiff from an elevation-related hazard. As the plaintiff was following the directions of his supervisor at the time of the incident, the defendants failed to submit sufficient evidence that the plaintiff's actions were the sole proximate cause of the accident.

PRACTICE NOTE: Labor Law § 240(1) does not require a plaintiff to have acted in a manner that is completely free from negligence. If a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it.

TOPICS: *Labor Law § 240(1), Labor Law § 241(6).*

GUEVARA-AYALA V. TRUMP PALACE/PARC LLC

205 A.D.3d 450
May 5, 2022

The plaintiff, an employee of a façade subcontractor, was injured after a wooden plank broke when he attempted to descend from the roof to a wooden walkway via pipes laid down as part of a scaffold system instead of using the scaffold system walkway. The court dismissed the plaintiff's §§ 240(1) and 241(6) claims as against the scaffold system subcontractor because the scaffold subcontractor was not a contractor or owner within the meaning of the statutes nor was it the owner's statutory agent. Although the scaffolding system subcontractor contractually retained the right to re-enter the premises and inspect the scaffold system, the subcontractor did not have any employees onsite during the work and did not inspect the scaffold system while it was in place. Once the scaffold contractor constructed the scaffold system, it returned to the premises only to deliver supplies and dismantle the scaffold system at the end of the project.

PRACTICE NOTE: Labor Law claims do not apply to entities that are not considered or defined as owners, contractors or statutory agents under the Labor Law.

TOPICS: *Labor Law § 240(1), Labor Law § 241(6), Sole proximate cause*

FERGUSON V. DURST PYRAMID LLC

205 A.D. 3d 518
May 17, 2022

The court properly denied the defendants' motion to dismiss the plaintiff's §§ 240(1) and 241(6) claims as the defendants failed to establish that the plaintiff was the sole proximate cause of his accident. In commenting on a non-party affidavit that refuted the defendants' sole proximate cause defense, the court noted that the non-party's incorrect claim that he was the foreman on the day of the accident does not undermine the fact that he witnessed the accident and was familiar with the conditions at the worksite. Further, the fact that the non-party witness was previously represented by the plaintiff's counsel in a different workplace accident has little bearing on the factual issues in the case at bar and is insufficient to raise questions as to his credibility.

PRACTICE NOTE: A sole proximate cause defense is difficult to establish and requires undisputed facts that plaintiff was provided with direct instructions to use the available safety device or a standing order to not act in the manner ultimately chosen by the plaintiff.

TOPICS: *Labor Law § 240(1), Labor Law § 241(6), Leave to amend, Means and methods*

HENRY V. SPLIT ROCK REHABILITATION & HEALTH CARE CTR. LLC

2022 NY SLIP OP 03319
May 19, 2022

The plaintiff moved to amend his complaint to include claims under §§ 200 and 241(6). The court does not decide the merits of proposed pleadings on motions for leave to amend. However, in commenting on the potential viability of these claims, the court noted that although there is no evidence that the defendants supervised the plaintiff; the plaintiff is not proceeding on a "means and methods" theory, but rather, a defect in the premises. Further, while the defendants argue that the plaintiff was not involved in construction within the meaning of the statute, the defendants have not cited any authority demonstrating that the discretionary grant of leave to amend should be overturned on appeal.

PRACTICE NOTE: Motions for leave to amend a complaint to add additional Labor Law claims will be freely granted and will not be decided on the merits unless the defendants can establish the grant of leave to amend will be overturned on appeal.

TOPICS: *Labor Law § 240(1), Harness, Tie-off locations, Sole proximate cause*

LATTERI V. PORT OF AUTH. OF N.Y. & N.J.

2022 NY SLIP OP 03324
May 19, 2022

The plaintiff, a mechanical technician, was injured when he attempting to repair an escalator. In order to reach the work area, the plaintiff utilized an enclosed crawl space ramp located beneath the escalator to travel to an upper area of the escalator. After diagnosing the issue and attempting to walk back down the 15-foot ramp, he slipped and grabbed an overhead metal truss to avoid falling, and he injured his shoulder. In granting summary judgment under § 240(1), the court found that evidence established that the internal ramp lacked side rails for support, and noted that the defendant's sole proximate cause defense premised on the plaintiff's decision not to wear a harness issued by his employer was unavailing as the defendant offered no evidence of tie-off locations, that the harness would have prevented injury, that the plaintiff knew he was supposed to use a harness, or that he disregarded specific instructions to wear a harness. Further, the court found that defendant's argument that plaintiff was engaged in routine maintenance in a non-construction context, rather than a repair, was unpreserved.

PRACTICE NOTE: Providing an inadequate safety device for an elevation-related hazard, such as a safety harness with no tie-off location or a safety harness that otherwise would not have prevented the injury, does not insulate defendants from liability under Labor Law § 240(1).

TOPICS: *Labor Law § 240(1), Ladder, Cleaning, Indemnification, Owner's agent*

TAVAREZ V. LIC DEV. OWNER L.P.

205 A.D.3d 565
May 19, 2022

The plaintiff was injured when she fell from a ladder while performing window cleaning and light bulb maintenance services. The contract for these services was executed between a non-party property manager as the agent for the owner and the plaintiff's employer. The owner of the premises brought a third-party action against the plaintiff's employer for contractual and common law indemnification. The indemnification provision in the contract required the plaintiff's employer to hold harmless the "owner's agent," but the owner is neither identified nor included under the indemnification provision. Accordingly, the court dismissed the owner's third-party complaint for contractual indemnification. The court further dismissed the owner's third-party complaint for common law indemnification as barred by Workers' Compensation Law § 11 as the plaintiff did not sustain a "grave injury."

PRACTICE NOTE: Third-party actions for contractual indemnification against a plaintiff's employer can only be sustained if the third-party plaintiff contracted directly with the third-party defendant or was specifically identified in the contractual indemnification provision. Claims for common law indemnification against a plaintiff's employer can only be maintained if a "grave injury" is alleged.

TOPICS: *Labor Law § 200, Ramp, Means and methods, Constructive notice*

JACKSON V. HUNTER ROBERTS CONSTR. LLC

205 A.D.3d 542
May 19, 2022

The plaintiff, a plumber, alleges that he was injured when he tripped and fell while carrying a section of a pipe over a piece of plywood, approximately four feet by eight feet, being used as a ramp. Although the defendants established that they did not have authority to supervise or control the means and methods of the plaintiff's work and did not have actual knowledge of the plywood ramp, because the plaintiff testified that he had seen the plywood ramp in place prior to the incident, the defendants did not successfully refute constructive notice, and therefore, were not entitled dismissal of the plaintiff's § 200 and common law negligence claims.

PRACTICE NOTE: In order to refute Labor Law § 200 claims under a defective condition theory, defendants must not only establish that they did not create the alleged defect, but also establish that they did not have actual or constructive notice of the defect.

TOPICS: *Labor Law § 240(1), Safety devices, Sole proximate cause*

DOUGLAS V. TISHMAN CONSTR. CORP.

205 A.D.3d 570
May 24, 2022

The plaintiff, an employee of a concrete subcontractor, was injured when he was struck by a wooden door form, approximately 15 to 20 feet high and eight feet wide, causing him to fall off a ledge approximately three feet from ground level. The plaintiff was entitled to summary judgment under § 240(1) as he established a statutory violation, i.e., the defendants' failure to secure the door form with an adequate safety device, as the proximate cause of his injury. The defendants failed to raise a triable issue of fact as to whether the plaintiff's conduct was the sole proximate cause of the accident.

PRACTICE NOTE: Failure to provide adequate safety devices for elevation-related hazards is a statutory violation under Labor Law § 240(1).

TOPICS: *Labor Law § 240(1), Safety devices, Sole proximate cause*

PIMENTEL V. DE FRGT. LLC

205 A.D.3d 591
May 24, 2022

The plaintiff, an elevator constructor, was injured as he stood on the lift gate of a freight delivery truck in order to stabilize 400 pounds of elevator equipment as it was being lowered to the ground. As the lift gate descended, it collapsed to the ground, causing plaintiff to fall backwards onto the street. In granting the plaintiff summary judgment under § 240(1), the court found that the plaintiff was exposed to an elevation-related hazard and the safety device, the lift gate of the freight truck, was inadequate. The defendants' sole proximate cause defense that plaintiff should not have been standing on the lift gate and instead, on a nearby available ladder, was inadequate because that establishes, at most, comparative negligence, which is not a viable defense to § 240(1).

PRACTICE NOTE: Where the plaintiff elects to use one of two or more provided safety devices, and that safety device fails, that constitutes a statutory violation, and the plaintiff's failure to use one of the other available safety devices amounts to, at most, comparative negligence, not the sole proximate cause of the injury unless the plaintiff was provided with direct instructions to use another available safety device or there was a standing order to not act in the manner ultimately chosen by the plaintiff.

TOPICS: *Labor Law § 240(1), Ladder, Issues of fact.*

CABRERA V. DIRECTV LLC

2022 NY SLIP OP 03438
May 26, 2022

The plaintiff alleges that he was injured when he fell from a ladder. In denying the plaintiff summary judgment under § 240(1), the court found that there was an issue of fact as to whether the plaintiff fell and broke the ladder or the ladder broke, causing the plaintiff to fall.

PRACTICE NOTE: Not every injury from an elevation-related risk constitutes an automatic violation of Labor Law § 240(1). With respect to a fall from a ladder, the plaintiff must establish that the ladder was inadequately secured.

TOPICS: *Labor Law § 200, Labor Law § 241(6), Industrial code violations*

NICHOLSON V. SABEY DATA CTR. PROPS., LLC

205 A.D.3d 620
May 26, 2022

The plaintiff was injured while attempting to reverse a pallet jack when it suddenly jumped back and propelled him onto a loose pipe. The plaintiff fell to the ground and the pallet jack pinned his ankle against the pipe. The plaintiff brought a claim for § 241(6) alleging multiple violations of the Industrial Code, including §§ 23-1.7(e)(1) (passageways), 23-1.7(e)(2) (working areas), 23-1.5(c)(3) (condition of safety devices), 23-2.1(a)(1) (storage of building materials), and 23-9.2(a) (maintenance of power equipment). The court denied the property owner's motion for summary judgment based on testimonial evidence of loose pipes on the floor in a passageway and storage room where the accident occurred. There was also evidence that the defendants had notice that the pallet jack was problematic prior to the accident. The court also denied the owner's motion on the plaintiff's § 200 claim, finding that the owner did not demonstrate that it lacked control over the means and methods of the plaintiff's work.

PRACTICE NOTE: Because there were issues of fact as to the owner's negligence with respect to the industrial code violations, the court also denied the owner's motion for common law indemnification against the site safety company that was also a defendant in the action.

TOPICS: *Labor Law § 240(1), Sole proximate cause, Indemnification*

PICCONE V. METROPOLITAN TR. AUTH.

205 A.D.3d 628
May 26, 2022

The plaintiff was injured while working on a construction site when he fell into an open and unguarded manhole that he had been instructed to cover. As the plaintiff stepped over the manhole, another individual bumped into him, causing him to fall. The court granted summary judgment on the plaintiff's § 240(1) claim. In doing so, the court found that the lack of protective railing or other safety devices around the manhole made the defendant's sole proximate cause argument unavailing. The court then denied summary judgment on defendants' third-party indemnification claims, finding issues of fact as to whether the accident arose out of, or in connection with, the subcontract work and whether the accident was caused by the failure to provide adequate safety devices around the manhole.

PRACTICE NOTE: Because the court granted summary judgment on plaintiff's § 240(1) claim, it did not consider the plaintiff's § 241(6) claim, finding it to be academic.

TOPICS: *Industrial Code § 23-3.3(c), Labor Law § 200, Labor Law § 240(1), Summary judgment*

BERNARDEZ V. 70 FRANKLIN PLACE LLC

205 A.D.3d 642
May 31, 2022

The plaintiff was injured while working as an electrician in a basement when the floor beneath him collapsed and he fell partially through the opening. The plaintiff appealed the lower court's denial of the plaintiff's motion to amend the bill of particulars to add allegations that the defendants violated the Industrial Code § 23-3.3(c). The court upheld the lower court's decision, dismissing the plaintiff's Labor Law § 241(6) claim because there was no evidence that the hand demolition work performed by the plaintiff in removing the old electrical equipment from the basement walls had a causal relationship with the fall. The plaintiff's motion on his Labor Law §§ 200 and 240(1) claims was also denied because a question of fact existed as to whether the defendants were on notice that the collapse was foreseeable in light of the condition of the basement and subbasement.

PRACTICE NOTE: Summary judgment will be denied when there is an issue of fact as to the foreseeability of the injuring condition.

TOPICS: *Labor Law § 240(1), Safety devices, Elevation-related risk*

SCHOENDORF V. 589 FIFTH TIC I LLC

2022 NY SLIP OP 03580
June 2, 2022

The plaintiff tried to move a 400-pound elevator platform from the front of a flatbed truck to the tailgate. The platform was resting on a pallet jack that was too small to keep the platform from touching the flatbed. The plaintiff was injured when he lifted the platform about four or five inches off the pallet jack in order to place another pallet underneath the platform. The court granted the plaintiff summary judgment on his § 240(1) claim. In doing so, the court

found that the pallet jack was a safety device that was insufficient to allow the plaintiff to move the platform. The court also found that even though the platform only fell a short distance, its heavy weight made this a significant elevation differential.

PRACTICE NOTE: Because the court granted summary judgment on plaintiff's § 240(1) claim, it did not consider the plaintiff's § 241(6) claim, finding it to be academic.

TOPICS: *Labor Law § 240(1), Scaffold, Sole proximate cause*

ROMAN V. ZAPCO 1500 INV., L.P.

2022 NY SLIP OP 03699
June 7, 2022

The plaintiff was injured when a 400-pound granite panel fell on him due to the absence of a safety device. The court granted the plaintiff summary judgment on his § 240(1) claim. The court found that the defendant failed to raise an issue of fact as to whether the plaintiff was the sole proximate cause of his accident. The defendant did not refute evidence that the plaintiff's supervisor refused the request for a safety device. The defendant also failed to establish that a baker scaffold was readily available for the plaintiff's use. Further, the defendant failed to rebut the conclusion of the plaintiff's expert that a baker scaffold was not an appropriate safety device for the job.

PRACTICE NOTE: In finding that the baker scaffold was not readily available, the court noted that although it was in fact located in the defendant's office in Queens. The jobsite where the plaintiff was working was in Manhattan.

TOPICS: *Labor Law § 200, Sole proximate cause, Recalcitrant worker*

ZHERKA V. HUDSON MERIDIAN CONSTR. GROUP LLC

2022 SLIP OP 03704
June 7, 2022

The undisputed evidence established that the plaintiff was injured when a beam fell on top of him due to either the absence or inadequacy of a safety device. The defendant general contractor argued that the plaintiff was the sole proximate cause of his accident because he did not listen to the general contractor's instruction to stop work until proper safety devices were obtained. The court rejected this argument, as it was undisputed that the plaintiff was already raising the subject beam when the general contractor arrived at the site. The court also rejected the general contractor's recalcitrant worker arguments based upon the undisputed fact that no safety devices were provided. The court reversed the granting of summary judgment on the plaintiff's § 200 claim against the general contractor. The court noted that the accident arose from the manner in which the work was performed, and the plaintiff failed to establish that the general contractor had anything more than general supervisory authority over the plaintiff's work.

PRACTICE NOTE: The trial court had originally granted summary judgment on the plaintiff's § 200 claim. The Appellate Court noted that the trial court's decision incorrectly found that the plaintiff's accident arose from a dangerous premises condition, rather than the manner in which the work was performed.

TOPICS: *Labor Law § 200, Common law indemnification, Contractual indemnification, Conditional indemnification*

WINKLER V. HALMAR INTL., LLC

2022 NY SLIP OP 03806
June 9, 2022

The plaintiff's decedent and a coworker were killed when the concrete formwork they were working from collapsed. The trial court dismissed the plaintiff's § 200 claim against the city of New York, but the Appellate Court reversed the decision. The Appellate Court found that, although the general contractor improperly constructed the framework, there were issues of fact as to whether the city had the authority to control the framework's inspection and ensure that it was stable before any work took place. The city was not entitled to dismissal of the common law negligence claims against it for the same reason. Because the evidence did not establish that the city was free from active negligence, summary judgment on its cross claim against the general contractor for common law indemnification was improper. The court then found that the city was entitled to conditional contractual indemnification against the general contractor, the safety-engineering firm, and the engineering consultant. This is because the city's contract contemplated indemnification "to the fullest extent of the law." Therefore, the extent that the city was entitled to indemnification depended on the extent the city's negligence contributed to the accident.

PRACTICE NOTE: Although the court noted that the city's indemnification provisions were very broad, they were still enforceable due to the fact that they did not seek indemnification for the city's own negligence.

TOPICS: *Labor Law § 240(1), Sole proximate cause, Ladder*

DALY V. METROPOLITAN TRANSP. AUTH.

2022 NY SLIP OP 03867
June 14, 2022

The plaintiff was injured when the A-frame ladder he was climbing suddenly shifted, causing him to fall to the ground. In granting summary judgment to the plaintiff on his § 240(1) claim, the court found that the defendants failed to raise an issue of fact as to whether the plaintiff was the sole proximate cause of his accident. The court found that regardless of the availability of other safety devices at the site, there was no admissible evidence that the plaintiff knew he was expected to use them. The fact that the plaintiff failed to secure the ladder or make sure that it was properly set up prior to using it constituted, at most, comparative negligence.

PRACTICE NOTE: The defendant submitted a supplemental affidavit from a witness stating that the plaintiff was instructed to use an extension ladder prior to the accident. The court found this affidavit to create, at most, a feigned issue of fact, as it contradicted the witness's prior deposition testimony.

TOPICS: *Labor Law § 240(1), Safety devices, Labor Law § 200, Contractual indemnification*

GONZALEZ V. DOLP 205 PROPS. II, LLC

2022 NY SLIP OP 03868
June 14, 2022

The plaintiff was injured when he fell to the ground while working on stilts. The court reversed the granting of summary judgment on the plaintiff's § 240(1) claim. In doing so, the court found that although the accident involved a physically significant elevation, there was evidence that the plaintiff received instructions from his boss to only work at the ground level and not use stilts. This raised an issue of

fact as to whether the plaintiff's duties were expressly limited to work that would not have exposed him to an elevation-related hazard. The plaintiff testified that he felt his stilts become unstable prior to his accident. The court found that this presented issues of fact as to whether he should have requested new stilts rather than continue working on them. The court upheld the dismissal of the plaintiff's § 200 claims against the property owner and granted it contractual indemnification against the plaintiff's employer. The court found dismissal to be proper because the plaintiff's accident involved the means and methods of the work, and there was no evidence that the owner had actual supervision or control over the plaintiff's work. The court then upheld the granting of contractual indemnification in favor of the owner against the plaintiff's employer, finding that the indemnification provision in the contract was triggered by personal injury arising out of or in connection with or as a consequence of the performance of the plaintiff's employer's work. Further, the indemnification provision did not attempt to indemnify the owner from its own negligence.

PRACTICE NOTE: The court rejected the plaintiff's arguments that his boss's instructions were superseded by another employee who was allegedly the boss's assistant. The plaintiff's boss provided an affidavit that he did not remember any such person on the job site and that he did not delegate any authority to such person.

TOPICS: *Supervision and control, Indemnification, Contribution*

WINKLER V. HALMAR INTL., LLC

2022 NY SLIP OP 03984
June 16, 2022

The Appellate Court upheld the lower court's denial of summary judgment, dismissing claims against the defendant engineering consultant. The court agreed that the evidence showed that this defendant had the authority to supervise and control the injury-producing work and had done so prior to the accident. This established liability against the engineering consultant for §§ 200, 240(1), and 241(6). The court also found that the engineering consultant was not entitled to summary judgment dismissing the common law indemnification claims brought by the City of New York, as the city was only found to be passively negligent. The general contractor and safety-engineering firm were found to be actively negligent, however, so their common law indemnification claims against the engineering consultant were properly dismissed.

PRACTICE NOTES: While parties brought cross claims for failure to procure insurance against the engineering consultant, no party defended them and therefore the court dismissed them as abandoned.

TOPICS: *Labor Law § 240(1), Sole proximate cause, Indemnification*

CORLETO V. HENRY RESTORATION LTD.

2022 NY SLIP OP 04090
June 23, 2022

The plaintiff was injured after he fell through an unguarded side of a scaffold after he and a coworker attempted to manually move it along a building's exterior. The court upheld the granting of summary judgment on the plaintiff's § 240(1) claim. A witness for the plaintiff's employer testified that he was informed by one of the plaintiff's coworkers that the plaintiff was rushing prior to his accident and may have deliberately jumped from the scaffold platform. The court rejected this testimony, finding it to be inadmissible hearsay. The court also upheld summary judgment on the owner's indemnification claims against the general contractor. The court found that the indemnification provision required the general contractor to indemnify owner for any negligence on behalf of the general contractor or one of its subcontractors. Further, there was no evidence that the owner was responsible for the accident in any way.

PRACTICE NOTE: Although the plaintiff allegedly made a statement to his employer while at the hospital, this statement was found to be too vague to qualify as an admission against interest.

TOPICS: *Labor Law § 241(6), Industrial code violations, Sole proximate cause*

SUTHERLAND V. TUTOR PERINI BLDG. CORP.

2022 NY SLIP OP 04228
June 30, 2022

The plaintiff, a supervisor for the subcontractor, was injured when he slipped and fell onto a plywood floor. It had been continuously raining all day prior to his accident, which caused the plywood to become slippery. The trial court granted summary judgment on the plaintiff's § 241(6) claim. The Appellate Division reversed, finding issues of fact as to whether the slippery plywood violated §23-1.7(d) (slipping hazards) of the industrial code, or whether the sole proximate cause was the plaintiff's decision as a foreman to work on the wet plywood surface while it was raining. The court found conflicting testimony as to whether it was the plaintiff's decision as foreman to work in the rain, or whether he was following the direction of a general foreman.

PRACTICE NOTE: The plaintiff's own authority as a foreman, his prior work experience, and the site conditions presented issues of fact as to whether he could, or should have, stopped the work, even though there was evidence that a general foreman instructed plaintiff prior to the accident.

TOPICS: *Labor Law § 200, Supervision and control, Trial*

ABELLEIRA V. CITY OF NEW YORK

201 A.D.3d 679
January 12, 2022

The plaintiff was pressure testing a sewer pipe when a plug exploded and injured him. A jury trial ultimately resulted in a verdict for the defendants as to the plaintiff's claims for § 200 and common law negligence. The plaintiff then made a motion to set aside the verdict and for judgment as a matter of law. This motion resulted in a judgment in favor of the defendants, which plaintiff then appealed. The Appellate Court upheld the judgment and found that the jury's verdict was not contrary to the weight of the evidence. The jury could have reasonably concluded that the defendants did not have the authority to supervise or control the work that led to the plaintiff's injury. The court noted that a defendant has authority to supervise or control work when that defendant bears the responsibility for the manner in which the work was performed.

PRACTICE NOTE: The court also noted that the right to generally supervise work, stop work for safety violations, or ensure compliance with safety and/or contract specifications, is insufficient to impose liability under § 200.

TOPICS: *Labor Law § 240(1), Elevation-related hazard, Labor Law § 241(6), Industrial code violations*

SANCHEZ V. 74 WOOSTER HOLDING, LLC

201 A.D.3d 755
January 12, 2022

The plaintiff was injured after he tripped and fell into an empty swimming pool at a construction site. Just before the plaintiff tripped and fell into the pool, he was walking on an adjacent, level patio. The court denied the plaintiff's motion for summary judgment on his § 240(1) claim, finding that the plaintiff's accident did not involve the type of elevation-related hazard contemplated by § 240(1). The court also denied the plaintiff summary judgment on his § 241(6) claim, finding that he failed to establish a violation of the industrial code.

PRACTICE NOTE: With respect to the § 240(1) claim, the court noted that the most important question in determining liability is whether a plaintiff's injuries were the direct consequence of the failure to provide adequate protection against a risk arising from a physically significant elevation differential.

TOPICS: *Labor Law § 241(6), Labor Law § 240(1), Safety devices*

VENEGAS V. SHYMER

201 A.D.3d 1001
January 26, 2022

The plaintiff was injured when he fell 25 feet while installing a prefabricated roof truss. The Second Department reversed the lower court's decision denying the plaintiff's motion for summary judgment as to his Labor Law § 240(1) claim and held that the plaintiff demonstrated that his injuries were proximately caused by the defendants' failure to provide appropriate safety devices that could have prevented his fall. The Second Department upheld the denial of summary judgment on the plaintiff's Labor Law § 241(6) claim as it was premised on violations of 12 NYCRR 23-1.16 and 23-1.17, which set standards for safety belts and life nets. The court held the standards were inapplicable as the plaintiff's own testimony showed that he was not provided with any safety devices.

PRACTICE NOTE: A defendant faces liability under Labor Law § 240(1) when a worker's injuries are proximately caused by the failure of a defendant owner or general contractor to provide appropriate safety devices that could have prevented a fall.

TOPICS: *Labor Law § 240(1), Contractors*

ALVAREZ V. 2455 8 AVE, LLC

202 A.D.3d 724
February 9, 2022

The plaintiff was injured when he fell from an A-frame ladder during a renovation project. The Second Department held that the lower court properly denied the plaintiff's motion for summary judgment as to his Labor Law § 240(1) claim on the grounds that the defendant raised an issue of fact through an affidavit from the plaintiff's supervisor calling the plaintiff's credibility as to how the accident occurred into question. The Second Department also held that the defendant's motion for summary judgment arguing that it was not the general contractor at the time of the accident was properly denied, as there were issues of fact regarding its status at the time of the accident.

PRACTICE NOTE: Summary judgment on a Labor Law § 240(1) claim in favor of a plaintiff is inappropriate where the plaintiff is the sole witness to the accident and his or her credibility has been placed in issue.

TOPICS: *Labor Law § 241(6), Labor Law § 200, Common law negligence*

SANCHEZ V. BBL CONSTR. SERVS., LLC

202 A.D.3d 847
February 9, 2022

The plaintiff was injured while pouring a concrete floor when he tripped and fell over a protruding permanent drainpipe that was covered with a bucket to prevent concrete from entering it. The Second Department held that the defendants were entitled to summary judgment as to the Labor Law § 200 claim by establishing that the allegedly dangerous condition was open and obvious and not inherently dangerous and that they lacked the authority to supervise or control the plaintiff's work. The defendants were also found to be entitled to summary judgment on the Labor Law § 241(6) claim because 12 NYCRR 23-1.7(e)(2) was inapplicable because the drainage pipe that plaintiff fell over was a permanent and integral part of what was being constructed.

PRACTICE NOTE: Where the condition at issue is both "open and obvious" and not "inherently dangerous," a defendant is not liable under either a theory of common law negligence or Labor Law § 200.

TOPICS: *Labor Law § 240(1), Enumerated activity, Common law indemnification*

APONTE V. AIRPORT INDUS. PARK, LLC

202 A.D.3d 895
February 16, 2022

The plaintiff alleged that he fell from a ladder and was injured. The plaintiff's motion for summary judgment was held to be properly denied as to his Labor Law § 240(1) claim because he failed to eliminate triable issues of fact as to whether he was engaged in routine maintenance or the enumerated protected activity of "repairing." The Second Department held that the defendant owner's motion for common law indemnification should have been denied as it failed to establish that the defendant sub-lessee was negligent or actually supervised or directed the work which gave rise to the plaintiff's injury.

PRACTICE NOTE: To prevail on a Labor Law § 240(1) claim, a plaintiff must establish that he was injured during the "erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure." The enumerated activity of "repairing" is distinguished from routine maintenance, which falls outside the scope of Labor Law § 240(1). Routine maintenance is generally where the work involves replacing components that require replacement in the course of normal wear and tear.

TOPICS: *Labor Law § 241(6), Labor Law § 240(1), Enumerated activity, Labor Law § 200, Means and methods, Common law negligence*

HAMM V. REVIEW ASSOC., LLC

202 A.D.3d 934
February 16, 2022

The plaintiff was injured when he was placing a security camera back into its plastic housing and the ladder he was using slipped and he fell. The plaintiff alleged that the ladder given to him by one of the defendants was damaged and caused his fall. The defendants were entitled to summary judgment on the Labor Law § 241(6) claim as the plaintiff failed to plead any industrial code violations. As for the plaintiff's Labor Law § 240(1) claim, the Second Department reversed the lower court and held that neither defendant was entitled to summary judgment as there were issues of fact as to whether the plaintiff was engaged in repairs or routine maintenance at the time of the accident. The defendant owner was entitled to summary judgment on the Labor Law § 200 and common law negligence claims as it had no presence at the property and had no oversight or control over the plaintiff's work. Further, the defendant owner did not create the alleged dangerous condition. The owner did not provide any ladders and had no notice of any defective condition with respect to the subject ladder. The defendant lessee also established that it did not control the means or methods of the plaintiff's work but it failed to establish that it did not have notice of the defective condition of the ladder it provided to the plaintiff.

PRACTICE NOTE: Enumerated activity of "repairing" is distinguished from routine maintenance, which falls outside the scope of Labor Law § 240(1). Routine maintenance is generally where the work involves replacing components that require replacement in the course of normal wear and tear.

TOPICS: *Labor Law § 240(1), Labor Law § 200, Homeowner's exemption*

SOTO V. JUSTON HOCHBERG 2014 IRREVOCABLE TRUST

202 A.D.3d 1122
February 23, 2022

The plaintiff was injured when the elevator he was repairing unexpectedly rapidly descended to the ground floor. The defendants were entitled to summary judgment as to the Labor Law § 200 and common law negligence claims as the evidence established that the accident was caused by an unidentified defect in the elevator that the plaintiff's employer had been hired to repair. The defendants were also entitled to summary judgment as to the Labor Law § 240(1) claim under the homeowner's exemption because they did not direct or control the work being done by the plaintiff at the time of the accident.

PRACTICE NOTE: A defendant property owner is not liable under Labor Law § 200 or common law negligence when the plaintiff is injured by a dangerous condition he was hired to repair. The homeowner's exemption to liability under Labor Law § 240(1) is available to owners of one- and two-family dwellings who contract for but do not direct or control the work.

TOPICS: *Labor Law § 240(1), Labor Law § 200, Labor Law § 241(6)*

TOALONGO V. ALMARWA CTR., INC.

202 A.D.3d 1128
February 23, 2022

The plaintiff was injured when he slipped on ice, water, and debris in a stairwell while trying to support the weight of a steel beam being lowered down to him by coworkers from a scaffold without any safety device. The Second Department held there were issues of fact based on discrepancies in the plaintiff's testimony regarding the causal connection between the beam's unregulated descent and his injury so that neither the plaintiff nor the defendants were entitled to summary judgment on the Labor Law § 240(1) claim. The defendants failed to establish that they did not have notice of the water, ice, and debris so were not entitled to summary judgment on the Labor Law § 200 claim. As for the Labor Law § 240(1) claim, the plaintiff alleged violation of 12 NYCRR 23-1.7(d), which requires employers to keep floors, passageways, walkways, scaffolds, platforms, or other elevated working surfaces free from slippery conditions. The defendants failed to demonstrate that this regulation was inapplicable, not violated, or that the violation was not a proximate cause of the accident.

PRACTICE NOTE: A plaintiff must establish that his or her injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant height differential for liability under Labor Law § 240(1).

TOPICS: *Labor Law § 240(1), Labor Law § 241(6), Homeowner's exemption*

BATES V. PORTER

202 A.D.3d 792
March 9, 2022

The defendants owned property that included a one-family house and two-story barn. The plaintiff was injured when he fell from a ladder while painting the exterior of the defendants' barn. The Second Department upheld the lower court's decision granting the defendants summary judgment based on the homeowner's exemption as the work the plaintiff was performing was directly related to the residential use of the property and they did not control or direct the work.

PRACTICE NOTE: Owners of one- and two-family dwellings who contract for, but do not direct or control the work performed are exempt from liability under Labor Law § 240(1) and Labor Law § 241(6) when the work directly relates to the residential use of the home even if the work also serves a commercial purpose.

TOPICS: *Labor Law § 240(1), Labor Law § 241(6), Safety equipment, Sole proximate cause*

MEJIA V. 69 MAMARONECK RD. CORP.

203 A.D.3d 815
March 9, 2022

The plaintiff was injured when he fell through an open hole in a roof that was cut for the installation of a chimney. The plaintiff had untied his safety harness so that he could reach another portion of the roof to assist a coworker that requested his assistance. The plaintiff could not see the hole because of black ice and a water shield on the roof. The Second Department reversed the lower court decision and held that the plaintiff established that Labor Law § 240(1) was violated because the evidence established

that the plaintiff was exposed to an elevation-related risk of the hole, that the hole was uncovered and unguarded, and that the location of the hole was concealed by ice and a water shield. The absence of protective equipment guarding or covering the hole was a proximate cause of the plaintiff's injuries. The defendants failed to raise an issue of fact as to whether there was a statutory violation or that the plaintiff's own conduct was the sole proximate cause of the accident.

PRACTICE NOTE: Where a plaintiff establishes a violation of the statute and that the violation was a proximate cause of his or her fall, the plaintiff's comparative negligence is not a defense to a Labor Law § 240(1) cause of action.

TOPICS: *Labor Law § 240(1), Labor Law § 241(6), Common law negligence*

SCHUTT V. DYNASTY TRANSP. OF OHIO, INC.

203 A.D.3d 858
March 9, 2022

The plaintiff was injured while unloading elevator components from a 40-foot box truck. The plaintiff slipped and toppled a hydraulic jack he was attempting to move. The plaintiff fell on top of the jack with his foot caught underneath. He noticed oil on his pants and the floor of the truck. The Second Department held that the distributor and trucking defendants were entitled to summary judgment on the common law negligence claims because they did not have notice of the oil condition and the plaintiff's contentions that they created the condition were purely speculative. The trucking defendant was found to not be an agent of the owner defendant, and was thus entitled to summary judgment on the Labor Law claims. The owner and general contractor defendants established that the plaintiff could not recover under Labor Law § 240(1) because the oil was unrelated to any elevation risk. They were not entitled to summary judgment on the Labor Law § 241(6) claim because they failed to show that the floor of the truck was not the type of surface contemplated under 12 NYCRR 23-1.7(d).

PRACTICE NOTE: Liability arises under Law § 240(1) only where the plaintiff's injuries are the direct consequence of an elevation-related risk, not a separate and ordinary tripping or slipping hazard.

TOPICS: *Labor Law § 241(6), Labor Law § 200, Common law negligence*

SOUTHERTON V. CITY OF NEW YORK

203 A.D.3d 977
March 16, 2022

The plaintiff was injured when the saw he was using to cut planks malfunctioned and severed his pinky finger. The defendant city was entitled to summary judgment on the Labor Law § 241(6), Labor Law § 200, and common law negligence claims as it established that it was not the owner, general contractor, or an agent of the owner or general contractor with regard to the plaintiff's work. The defendant city only had general supervisory authority to oversee progress of the work. It did not have authority to exercise supervision and control over the work that lead to the plaintiff's injury.

PRACTICE NOTE: A party is deemed to be an agent of an owner or general contractor under the Labor Law where it has supervisory control and authority over the work being done where a plaintiff is injured. The determinative factor is whether a defendant had the right to exercise control over the work and not whether it actually exercised it.

TOPICS: *Workers' compensation defense, Indemnification, Motion to set aside verdict*

CHIHUAHUA V. BIRCHWOOD ESTATES, LLC

203 A.D.3d 1015
March 23, 2022

The plaintiff was injured when he fell from a makeshift scaffold consisting of a ladder and extension plank while sanding the walls and ceiling at a house under construction. At trial on the indemnification claims, the jury returned a verdict that the drywall subcontractor defendant was not the plaintiff's employer at the time of the accident and thus not entitled to the benefit of the workers' compensation defense. The Second Department held that the jury's determination that the plaintiff was not the drywall subcontractor defendant's employee but that it supervised, directed, and/or controlled the plaintiff's work at the time of the accident was not contrary to the weight of the evidence and was based on a fair interpretation of the evidence.

PRACTICE NOTE: When considering a motion to set aside the verdict pursuant to CPLR § 4404(a), the determination is discretionary in nature and the trial judge must decide whether substantial justice has been done, whether it is likely the verdict was affected, and look to his or her own common sense, experience, and sense of fairness rather than to precedents.

TOPICS: *Labor Law § 240(1), Labor Law § 241(6), Labor Law § 200, Common law negligence, Contractual indemnification*

CHUQUI V. AMNA, LLC

203 A.D.3d 1018
March 23, 2022

The plaintiff was injured when pieces of sheet metal from a cart he was helping to move fell on him after the cart stopped and tipped due to rocks and debris on the floor. The Second Department held that the plaintiff failed to establish a violation of Labor Law § 240(1) as the evidence demonstrated that the accident was not the result of an elevation-related hazard or gravity-related risk so the claim was properly dismissed. The defendants were also entitled to dismissal of the Labor Law § 241(6) claim predicated on an alleged violation of 12 NYCRR 23-2.1(a)(2) because that industrial code, which addresses the safe placement and storage of materials on floors, platforms and scaffolds, was not applicable to the facts of this case. The defendants also established that they did not control the means and methods of the plaintiff's work for the Labor Law § 200 and common law negligence claims, but they did not establish that they lacked notice of the alleged dangerous condition on the floor and so summary judgment on those claims was denied. As they had not established that they were free from negligence, they were not entitled to summary judgment on their contractual indemnification claim against the third-party defendant.

PRACTICE NOTE: A party seeking contractual indemnification pursuant to a contract related to the construction of a building must establish that it was free from negligence and that it may be held solely liable by virtue of statutory or vicarious liability.

TOPICS: *Collateral estoppel, Workers' Compensation*

DENISCO V. 405 LEXINGTON AVE.

203 A.D.3d 1025
March 23, 2022

The plaintiff was injured when he fell from a ladder at a construction site. The Second Department held that the lower court properly

concluded that the plaintiff's action was barred by the collateral estoppel doctrine based on a workers' compensation determination that the accident claimed by the plaintiff did not occur. The Workers' Compensation Board affirmed a decision of an administrative law judge that disallowed the plaintiff's claim based on a finding that the plaintiff's injuries were the result of the plaintiff leaving a moving vehicle and not a work-related incident.

PRACTICE NOTE: The quasi-judicial determinations of administrative agencies are entitled to collateral estoppel effect where the issue a party seeks to preclude in a subsequent civil action is identical to a material issue that was necessarily decided by the administrative tribunal, and where there was a full and fair opportunity to litigate before that tribunal.

TOPICS: *Labor Law § 240(1), CPLR 4404(a), Sole proximate cause*

PETERSEN V. FOREST CITY RATNER COS., LLC

203 A.D.3d 1093
March 23, 2022

The plaintiff, the general contactor's job-site superintendent, was allegedly injured when a temporary barricade fell on top of him, and brought suit against the property owner, lessee, and a subcontractor that removed and replaced the bracing on the temporary side of the barricade. Following trial, the jury returned a defense verdict finding that the plaintiff's actions were the sole proximate cause of his injuries. On appeal, the court held a valid line of reasoning existed to conclude that the plaintiff's act of removing the reinstalled bracing on the barricade was the sole proximate cause of the accident rather than a violation of § 240(1).

PRACTICE NOTE: Well-established sole proximate cause defenses will be affirmed on appeal provided the same are supported by a valid line of reasoning and permissible inferences.

TOPICS: *Labor Law § 240(1), CPLR 2221(d), Questions of fact*

HERAS V. MING SENG & ASSOC., LLC

203 A.D.3d 1146
March 30, 2022

The plaintiff was allegedly injured when a steel beam that he and a coworker were hoisting fell on him. Following discovery, the plaintiff successfully moved for summary judgment on his § 240(1) claims; however, the defendants' subsequent motion to reargue was granted. On appeal, the Second Department concluded that although the plaintiff established his *prima facie* entitlement to judgment, the defendants produced credible evidence revealing a different version of the accident under which they would not be liable, which was sufficient to raise a triable issue of fact and render summary judgment inappropriate.

PRACTICE NOTE: Credibly established alternative versions of accidents can be sufficient to preclude summary judgment even where a plaintiff is able to establish his or her entitlement to judgment as a matter of law.

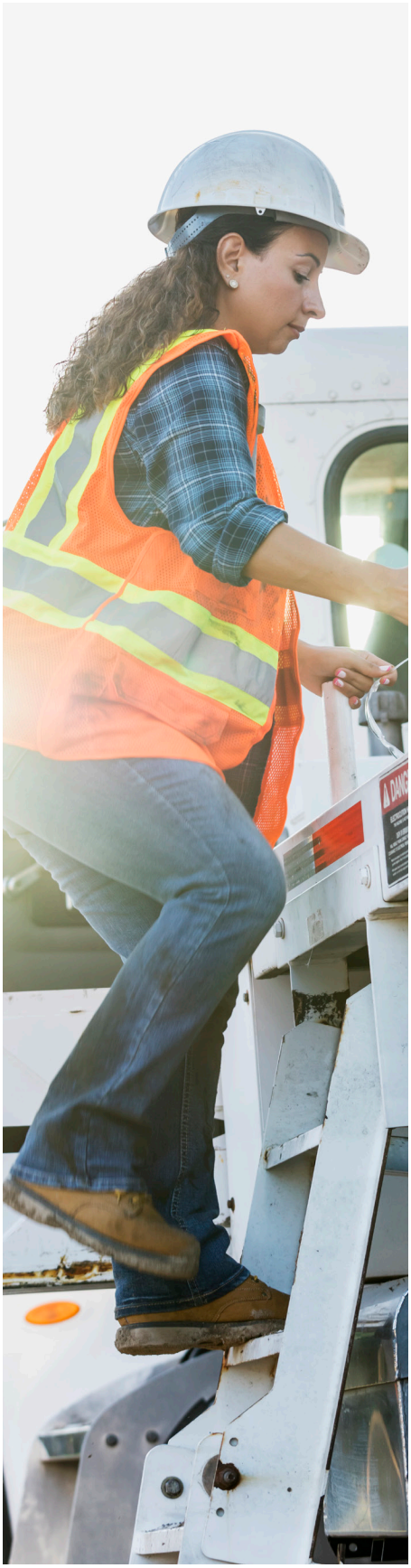
TOPICS: *Labor Law §§ 200, 240(1), 241(6), Industrial code, Ladder, Sole proximate cause, Feigned issues of fact*

SINGH V. 180 VARICK, LLC

203 A.D.3d 1194
March 30, 2022

While descending a six-foot A-frame ladder, the plaintiff allegedly lost his balance on the second-to-last rung, causing him to fall backward and sustain injury. The Second Department affirmed the dismissal of the plaintiff's §§ 200, 240(1) and 241(6) claims finding that the defendants sufficiently established they did not have supervisory authority over the plaintiff's work, that the subject ladder was not defective and no additional safety devices were required as a matter of law, and that the industrial code sections allegedly violated by the defendants were inapplicable to the facts of the case. The Second Department further rejected the plaintiff's effort to raise a triable issue of fact through his affidavit in opposition to the defendants' summary judgment motion, as the latter contradicted his earlier deposition testimony in which he admitted he did not know why he fell and that he lost his balance.

PRACTICE NOTE: It is critical to lock a plaintiff in during his or her deposition to prevent surprise through supplemental testimony provided in opposition to dispositive motions.



TOPICS: *Supervision and control, Triable issues of fact*

LONDONO V. DALEN, LLC

204 A.D.3d 658
April 6, 2022

The defendant's motion for summary judgment was properly denied due to conflicting evidence submitted in support thereof, and the defendant's failure to eliminate all triable issues of fact, including whether the defendant was a general contractor responsible for the plaintiff's injuries under the Labor Law. Because the movant failed to establish its *prima facie* entitlement to judgment as a matter of law, the denial of the motion was proper regardless of the sufficiency of the opposition papers.

PRACTICE NOTE: Defendants must be clear to delineate their specific roles in projects, using contracts and deposition testimony to specify the scope and limitations of their authority, or risk ambiguity concerning their involvement becoming a hurdle to dismissal.

TOPICS: *Labor Law § 240(1), Labor Law § 241(6), Safety lines, Expert affidavits*

LAZO V. NEW YORK STATE THRUWAY AUTH.

204 A.D.3d 774
April 13, 2022

The plaintiff's motion for summary judgment on the issue of liability under § 240(1) should have been granted, as the plaintiff established, *prima facie*, that the safety equipment with which he was provided was insufficient to prevent him from falling. Further, because the defendants' expert affidavits failed to describe the methods used to inspect the plaintiff's safety gear and the condition of the plaintiff's safety gear used on the day of his accident, said affidavits were insufficient to raise a triable issue of fact.

PRACTICE NOTE: Expert submissions must be clear to provide a discussion of the factual basis for an expert's conclusions regarding sufficiency of devices and/or proximate cause.

TOPICS: *Indemnification, Triable issues of fact*

MCNAMARA V. GUSMAR ENTERS., LLC

204 A.D.3d 779
April 13, 2022

The defendants' motions for summary judgment were properly denied as they failed to eliminate triable issues of fact concerning the manner in which the accident occurred, whether adequate safety devices were available at the worksite, whether the absence of adequate devices proximately caused the plaintiff's injuries, and whether the plaintiff's actions were the sole proximate cause of his injuries. Further, the defendants' motion for summary judgment on the issue of contractual liability was properly denied because evidence existed to suggest that the accident did not arise out of the tenant's occupation of the subject space, as the project for which the plaintiff's employer was retained concerned the sprinkler system throughout the building, and not just the space occupied by the movant.

PRACTICE NOTE: Careful attention must be paid when crafting indemnity language to ensure that risk transfers will be effectively applied in the face of a claim.

TOPICS: *One- and two-family dwellings, Direction and control, Alteration, Timeliness of motion*

NUCCI V. COUNTY OF SUFFOLK

204 A.D.3d 817
April 13, 2022

In an action for damages sustained when wind caused the plaintiff's ladder to become unstable while boarding up an abandoned home, the county's motion for summary judgment on the plaintiff's claims under the Labor Law was properly granted as the county established that the subject premises was a one- or two-family dwelling, and that the county, as the owner, contracted for the work but did not direct or control it. The town's cross-motion should have been denied as the act of boarding up the house constituted an "alteration" of the premises under § 240(1) and "construction work" under § 241(6). Finally, the plaintiff's cross-motion was properly denied as untimely, and was not brought on nearly identical grounds to that of the defendants.

PRACTICE NOTE: The authority to select the contractor to perform work, and an entity's presence on the job site during the work, may be sufficient to raise a triable issue of fact as to an entity's status as a contractor within the meaning of the Labor Law.

TOPICS: *Labor Law § 241(6), Industrial code*

LEIGHTON V. CHABER, LLC

204 A.D.3d 903
April 20, 2022

In an action for injuries sustained when the plaintiff was struck in the eye with debris emanating from a grinder tool, the defendants' motion for summary judgment on the plaintiff's § 241(6) claim as predicated upon a violation of 12 NYCRR 23-1.33 was properly granted as that section of the industrial code does not apply to workers on a job site.

PRACTICE NOTE: Careful attention must be paid to a plaintiff's specifically alleged violations of the industrial code as many sections have been held to be either not sufficiently specific to command a particular action, or have been held inapplicable to workers on a site versus pedestrians or passersby.

TOPICS: *Labor Law § 240(1), Deposition testimony*

ORTEGA V. PANTHER SIDING & WINDOWS, INC.

204 A.D.3d 937
April 20, 2022

In an action for damages arising from the plaintiff's fall from the roof of a residential property, the defendant's motion for summary judgment was properly granted as it established it was not the general contractor, owner, or agent on any project in Valley Stream on the date of the plaintiff's accident, and where the plaintiff specifically testified that his accident occurred at a properly located in Valley Stream.

PRACTICE NOTE: It is critical to obtain specific testimony from the plaintiff at deposition with regard to the date, location, and specific mechanism of injury.

TOPICS: *Labor Law, Buildings and structures*

AURIEMMA V. BROOKLYN HOSP. CTR.

204 A.D.3d 969
April 27, 2022

In an action to recover damages for injuries sustained when the plaintiff fell from a truck while unloading mattresses at the defendant's hospital, the hospital's motion for summary judgment was properly granted on the plaintiff's Labor Law claims as it established the plaintiff

was not working on a building or a structure, and therefore, did not fall within the special class of workers for whom Labor Law protections were enacted.

PRACTICE NOTE: Not every fall from a height brings a plaintiff's claims within the scope of the Labor Law, and specific attention must be paid in written discovery and at depositions to identifying the nature of the work performed, as well as the contractual relationships giving rise to a plaintiff's work at a particular location.

TOPICS: *Ladder, Sole proximate cause, Different versions of accidents*

JURSKI V. CITY OF NEW YORK

204 A.D.3d 983
April 27, 2022

In an action to recover for injuries sustained in a fall from an extension ladder, the plaintiff's motion for summary judgment should have been denied as the defendants raised a triable issue of fact by submitting the affidavit of the plaintiff's employer, who averred that the plaintiff admitted, just after the accident, that he lost his balance while descending the ladder and jumped off rather than having fallen.

PRACTICE NOTE: Thorough investigation and interviews of witnesses are critical to establishing potential liability defenses in Labor Law actions.

TOPICS: *Labor Law, Buildings and structures, Actual or constructive notice*

PASTIER V. C.A.C. INDUS., INC.

204 A.D.3d 1029
April 27, 2022

In an action to recover for injuries sustained when an electrician fell through a hole in a grass-covered median on Pelham Parkway, the defendants' motions for summary judgment on the plaintiff's Labor Law claims were properly granted as the plaintiff failed to establish he fell within the special class of workers for whom Labor Law protections were designed. Specifically, the defendants established that the plaintiff's employer was not retained to perform any work pertaining to the reconstruction project involving Pelham Parkway, and further established the defendants neither had actual or constructive notice of the condition, nor created the condition that gave rise to the plaintiff's alleged accident.

PRACTICE NOTE: Not all workers and not all falls at a construction site come within the scope of the Labor Law, and specific attention must be paid in written discovery and at depositions to identifying the nature of the work performed, as well as the contractual relationships giving rise to a plaintiff's work at any given particular location.

TOPICS: *Condominiums, Common elements, Adequate safety devices*

LEWIS V. LESTER'S OF N.Y., INC.

205 A.D.3d 796
May 11, 2022

In an action to recover for injuries sustained when the elbow portion of a pipe dislodged and fell upon the plaintiff, the defendants' motions for summary judgment were properly granted as each established the subject pipe was part of the common elements of the condominium that the individual owners and tenants had no obligation to maintain, and accordingly, they were not owners, contractors, or agents as defined by the Labor Law. The plaintiff's motion against the condominium board was also properly denied as the plaintiff failed to establish that the absence of a particular safety device was a proximate cause of his accident.

PRACTICE NOTE: Careful attention must be paid in discovery to identifying ownership and maintenance obligations for the specific aspects of a building or structure upon which work was being performed at the time of a plaintiff's injury.

TOPICS: *Labor Law § 241(6), 12 NYCRR § 23-1.7(d) and (e), Integral work*

MOYE V. ALPHONSE HOTEL CORP.

205 A.D.3d 907
May 18, 2022

The plaintiff allegedly was injured while working on a demolition project at a hotel. The plaintiff tripped and fell on a pile of debris consisting of electrical wires, sheetrock, and glass. At the time of his accident, the plaintiff was attempting to remove "old and worn" doors that had been piled up in the basement of the worksite. The plaintiff commenced a Labor Law § 241(6) cause of action, and alleged violations of 12 NYCRR § 23-1.7(d) and (e). The trial court granted the defendant's summary judgment motion, and the Appellate Division affirmed, finding that the debris the plaintiff allegedly tripped over was an integral part of the ongoing demolition work performed at the site.

PRACTICE NOTE: There can be no viable cause of action under Labor Law § 241(6) for a trip-and-fall accident where the alleged tripping hazard was an integral part of the ongoing work being performed at the project site.

TOPICS: *Labor Law § 240(1), Labor Law § 241(6), Enumerated activity, Routine maintenance and repair, Issues of fact*

WASHINGTON-TATUM V. CITY OF NEW YORK

205 A.D.3d 976
May 18, 2022

The plaintiff, a New York City Transit Authority employee, was injured while working at the Number 7 subway station in Queens, New York. According to the plaintiff, she was injured when a metal sling fell from the elevated subway tracks and struck her while she was standing on the sidewalk next to a barricade. The plaintiff commenced an action, alleging violations of Labor Law §§ 240(1) and 241(6), and moved for partial summary judgment on liability. The trial court denied the plaintiff's motion, finding that the plaintiff met her burden, but the defendant raised triable issues of fact. The Appellate Division affirmed denial of the plaintiff's motion, but found that the plaintiff failed to meet her initial burden as the movant. As to Labor Law § 240(1), the Appellate Division determined that the plaintiff failed to eliminate triable issues of fact as to whether the plaintiff was engaged in a "repair," which is a protected activity under Labor Law § 240(1), at the time of the accident, or whether she was simply engaged in routine maintenance, which does not fall within the protections of Labor Law § 240(1). As to Labor Law § 241(6), the Appellate Division found that the plaintiff failed to establish she was engaged in construction, excavation, or demolition work at the time of the accident, which is protected under Labor Law § 241(6), or whether she was simply engaged in routine maintenance, which is not a protected activity under the Labor Law.

PRACTICE NOTE: The plaintiff's motion for partial summary judgment on liability must be denied where the plaintiff fails to eliminate triable issues of fact as to the applicability of Labor Law §§ 240(1) and 241(6). Routine maintenance is not a protected activity under either Labor Law § 240(1) or § 241(6).

TOPICS: *Labor Law § 241(6), 12 NYCRR § 23-1.7(e)(2), Evidence, Hearsay*

DEBENEDETTO V. KINGSWOOD PARTNERS, LLC

169 N.Y.S.3d 121
June 1, 2022

The plaintiff, a subcontractor HVAC employee, was injured while installing a water heater at a construction site. At the time of the accident, he allegedly slipped on a piece of a "pencil rod" used to install the ceiling. The incident report prepared by the defendant general contractor's project superintendent provided the following accident description: "when climbing down the ladder, the individual stepped on a piece of pencil rod, rolled his ankle, and fell backwards and hit his head." The accident description provided for the incident report came from one of the plaintiff's coworkers, and not the foreman for the HVAC subcontractor. At trial, the court excluded the incident report, finding the accident description was hearsay. When evaluating the appeal, the Appellate Division concluded that, for a statement to be admissible as a business record for its truth, the coworker must have had personal knowledge of the information and be under a business duty to report it within the regular business conduct. At the trial, the plaintiff failed to establish his coworker had a business duty to provide the information at issue and, therefore, the statement was properly excluded from evidence.

PRACTICE NOTE: Accident descriptions within incident or accident reports may not be admissible at trial unless the party establishes that the accident description was provided by a person who had personal knowledge of the accident, and was under a business duty to report it within his or her regular business conduct.

TOPICS: *Labor Law § 241(6), 12 NYCRR § 23-1.7(d), Issues of fact*

MILLER V. R.L.T. PROPS., LTD.

169 N.Y.S.3d 127
June 1, 2022

The plaintiff alleged he was injured while replacing a compressor on an ice machine in a building operated by the defendant. The plaintiff claimed he slipped and fell on ice in an alleyway on the property near the rear of the building. As a result, the plaintiff commenced an action for common law negligence and alleging violations of Labor Law §§ 200, 240(1) and 241(6), predicated upon 12 NYCRR § 23-1.7(d). Both parties moved for summary judgment, and the trial court granted the defendant's summary judgment motion dismissing the Labor Law § 241(6) claim as was predicated on 12 NYCRR § 23-1.7(d), but denied the remainder of the parties' motions. The Appellate Division reversed, in part, and reinstated the plaintiff's Labor Law § 241(6) claim as predicated on 12 NYCRR § 23-1.7(d), finding that the defendant's own submissions failed to eliminate triable issues of fact as to whether the alleged work fell outside of the activities protected by Labor Law § 241(6).

PRACTICE NOTE: Summary judgment must be denied where the party's own submissions fail to eliminate triable issues of fact concerning the applicability of Labor Law § 241(6) to the alleged work being performed at the time of the accident.

TOPICS: *Labor Law § 240(1), Labor Law § 241(6), Labor Law § 200, Homeowner's exemption*

REINOSO V. HAN MA UM ZEN CTR. OF N.Y.

206 A.D.3d 772
June 8, 2022

The plaintiff was injured when he fell from a ladder while painting the exterior of a detached garage that had been converted into a meditation room, which was owned by the defendant. The ladder the plaintiff was using at the time of the accident was owned by the defendant. The parties moved for summary judgment, and the trial court denied the parties' motions in their entirety. The Appellate Division reversed and partially granted the defendant's summary judgment motion dismissing the causes of action alleging violations of Labor Law §§ 240(1) and 241(6). In dismissing these two causes of action, the Appellate Division found that the defendant established its entitlement to the homeowner's exemption, which exempts owners of one- or two-family dwellings from liability under Labor Law §§ 240(1) and 241(6) where the defendant did not direct or control the work. In review of the evidence, the Appellate Division determined that the defendant established the detached garage/meditation room where the plaintiff was injured was merely an accessory to a one-family dwelling, and the defendant did not direct or control the plaintiff's work. The Appellate Division found that the trial court properly denied the defendant's motion as to Labor Law § 200, however, in that the defendant failed to show that it lacked notice of the allegedly dangerous or defective condition with respect to the ladder.

PRACTICE NOTE: The homeowner's exemption exempting a defendant from liability under either Labor Law § 240(1) or § 241(6) will apply to attachments or accessories of one- or two-family dwellings where it can be established that the defendant did not direct or control the work being performed.

TOPICS: *Labor Law § 240(1), Labor Law § 241(6), Labor Law § 200, Summary judgment*

ALLEN V. ALLEN J. REYEN, INC.

206 A.D.3d 867
June 22, 2022

The plaintiff was injured when he fell from a ladder while performing work at a barn, and he commenced an action alleging violations of Labor Law §§ 200, 240(1) and 241(6). The defendants moved for summary judgment and the trial court denied their motions. The Appellate Division affirmed, finding that a party should be afforded a reasonable opportunity to conduct discovery prior to a determination of a summary judgment motion. In affirming, the Appellate Division noted that the plaintiff was entitled to conduct additional discovery that may result in disclosure of relevant information.

PRACTICE NOTE: Summary judgment may be denied as premature where discovery is not complete and one party maintains exclusive knowledge of information concerning Labor Law claims that is necessary for the other party to oppose the same.

TOPICS: *Labor Law § 200, Labor Law § 240(1), Labor Law § 241(6), Homeowner's exemption, Latent defects, Actual or constructive notice*

RENDON V. CALLAGHAN

206 A.D.3d 945
June 22, 2022

The plaintiff was injured while repairing the roof of a detached garage owned by the defendant when part of the roof collapsed and the plaintiff fell to the ground. The defendant owned two adjoining lots; the defendant's home was on one lot and the garage was located on the adjoining lot. The plaintiff commenced an action alleging violations of Labor Law §§ 200, 240(1) and 241(6). The defendant moved for summary judgment and the trial court granted the defendant's motion dismissing the complaint in its entirety. In affirming dismissal of the Labor Law § 200 cause of action, the Appellate Division

determined that the defendant did not have actual or constructive notice of any structural deficiency in the garage roof, and knowledge of a roof leak did not give the defendant actual or constructive notice of the roof's structural deficiency. The Appellate Division further noted dismissal of Labor Law § 200 was warranted because the defendant established the plaintiff was injured through a dangerous condition the plaintiff had undertaken to fix. The Appellate Division affirmed dismissal of the Labor Law §§ 240(1) and 241(6) causes of action based upon the homeowner's exemption, which exempts owners of one- or two-family dwellings from liability under Labor Law §§ 240(1) and 241(6) where the defendant did not direct or control the work. The fact the garage was on a separate lot adjacent to the lot with defendant's home does not defeat the homeowner's exemption because the garage merely functioned as an extension of the dwelling, and the defendant did not direct or control the work.

PRACTICE NOTE: There can be no violation of Labor Law § 200 where the plaintiff was injured through a dangerous condition the plaintiff had undertaken to fix. Additionally, the homeowner's exemption exempting a defendant from liability under either Labor Law § 240(1) or § 241(6) will apply even if the defendant's dwelling and its attachments or accessories are on separate adjoining lots so long as the defendant does not direct or control the work.

TOPICS: *Labor Law § 240(1), Contractual indemnification*

MOGROVEJO V. HG HOUS. DEV. FUND CO., INC.

170 N.Y.S.3d 628
July 6, 2022

The plaintiff commenced an action for violations of Labor Law § 240(1) against multiple defendants. Based upon a contract, one of the named defendants moved for contractual indemnification and the trial court denied the motion, finding triable issues of fact as to the moving defendant's entitlement to contractual indemnification. In reversing and granting summary judgment on the contractual indemnification claim, the Appellate Division noted that the parties' contract required the indemnitor to indemnify the moving defendant for any acts or omissions by the indemnitor or its employees or sub-subcontractors, which included the plaintiff's employer. In other words, the indemnification provision in the parties' contract was not limited solely to the indemnitor's negligence. The Appellate Division further noted that the moving defendant established it was free from negligence because it did not have authority to supervise or control the plaintiff's work. Instead, the moving defendant's role was limited to general duties to oversee the work as a whole and ensure compliance with safety regulations, which was insufficient to raise a triable issue of fact as to whether the moving defendant could be negligent and, therefore, not entitled to contractual indemnification.

PRACTICE NOTE: If the indemnification provision includes a requirement for the indemnitor to indemnify for a subcontractor's negligence, the indemnitee may be indemnified provided it has been established that the indemnitee is free from negligence.

TOPICS: *Labor Law § 240(1), Statutory agents*

MOGROVEJO V. HG HOUS. DEV. FUND CO., INC.

207 A.D.3d 457
July 6, 2022

The plaintiff, a sub-subcontractor employee, was injured while performing framing work at a construction site. At the time of the accident, the plaintiff stepped onto an unsecured wooden beam, which flipped over and fell out from underneath him, causing him to fall 15 feet to the floor below. The plaintiff commenced a Labor Law § 240(1) cause of action against the project owner, the general contractor, and the subcontractor who the general contractor initially hired to perform the framing work. Prior to commencement of plaintiff's work, the subcontractor who was contractually obligated to perform the framing work subcontracted that work to the plaintiff's employer. The plaintiff moved for summary judgment, and the trial court denied the plaintiff's motion. In reversing the trial court and granting the plaintiff's Labor Law § 240(1) summary judgment motion as to all named defendants, the Appellate Division noted the defendants failed to establish the plaintiff's motion was premature because their claim that additional discovery might yield evidence needed to oppose the motion was speculative. Additionally, the record showed that the defendants had a reasonable opportunity to pursue this discovery, but were not diligent in their pursuit prior to the plaintiff's motion. In reversing and granting summary judgment as to the subcontractor, the Appellate Division noted the subcontractor was liable under Labor Law § 240(1) as a statutory agent of the owner or general contractor because the subcontractor had the authority to supervise and control the particular work the plaintiff was engaged in at the time of his injury.

PRACTICE NOTE: A summary judgment motion will not be deemed premature if the claim concerning additional discovery is speculative, or if the parties have already been given a reasonable opportunity to pursue the additional discovery prior to the filing of the motion. Subcontractors can be held liable under Labor Law § 240(1) as statutory agents of the owner or general contractor where it is shown they had the authority to supervise or control the injury-producing work.

TOPICS: *Labor Law § 240(1), Contractual indemnification*

RODRIGUEZ V. WATERFRONT PLAZA, LLC

207 A.D.3d 489
July 6, 2022

The plaintiff was injured when he was assigned to transport 20-foot-long metal beams from the ground level to the third floor of a partially constructed building. At the time of the accident, the plaintiff had started to back away from a beam that had been positioned vertically before it was going to be lifted to the building's third floor. While stepping backward and away from the vertical metal beam, the plaintiff fell into an unprotected 15-foot-deep opening leading to the building's basement. As the plaintiff was falling into the opening, he was able to grab ahold of the opening's side to prevent his fall to the basement floor below. However, the beam, which was in a vertical and unsecured position, fell and struck plaintiff in the head. The plaintiff commenced a Labor Law § 240(1) cause of action against the project owner and general contractor and moved for summary judgment. The project owner cross-moved for summary judgment on its contractual indemnification against the general contractor. The trial court granted the plaintiff's motion and denied the owner's cross-motion, and the Appellate Division affirmed. The Appellate Division found the plaintiff demonstrated his accident was proximately caused by the failure to provide adequate safety devices to protect against gravity-related hazards posed by the 15-foot-deep opening. The Appellate Division affirmed denial of the owner's cross-motion seeking contractual indemnification based upon the plaintiff's deposition transcript wherein the plaintiff tes-

tified he was being supervised by the project owner on the accident date. Because the owner failed to eliminate triable issues of fact as to whether it was free from negligence, the project owner was not entitled to summary judgment on its contractual indemnification claim.

PRACTICE NOTE: A party will not be entitled to contractual indemnification where it has failed to eliminate triable issues of fact as to whether it was free from negligence.

TOPICS: *Labor Law § 200, Labor Law § 240(1), Labor Law § 241(6), 12 NYCRR § 23-1.29(a), Gravity-related risks*

JOHNSEN V. STATE OF NEW YORK

169 N.Y.S.3d 807
July 13, 2022

The plaintiff was injured while working on a project rehabilitating the Gowanus Expressway in Brooklyn. At the time of the accident, the plaintiff was in a boom lift basket working on the underside of the expressway when a car-carrier tractor-trailer struck her basket, causing the basket to ricochet back and forth and leading to her alleged injuries. The plaintiff commenced causes of action for common law negligence and alleged violations of Labor Law §§ 200, 240(1) and 241(6), predicated on a violation of 12 NYCRR § 23-1.29(a). The Court of Claims granted defendant's motion, but the Appellate Division reversed and reinstated the plaintiff's common law negligence, Labor Law §§ 200 and 240(1) claims, but affirmed as to dismissal of the § 241(6) cause of action. In affirming dismissal of the § 241(6) claim, the Appellate Division determined that the defendant complied with the requirement set forth in 12 NYCRR § 23-1.29(a) in that the work area was fenced or barricaded in such a way as to direct public vehicular traffic away from the area. In reversing and reinstating the plaintiff's Labor Law § 240(1) claim, the Appellate Division noted that the defendant failed to demonstrate *prima facie* entitlement to summary judgment. The Appellate Division further noted that the fact that the plaintiff did not actually fall from the boom lift basket is legally irrelevant so long as the harm directly flowed from the application of the force of gravity to her person. The Appellate Division reversed and reinstated the plaintiff's common law negligence and Labor Law § 200 claims because the defendant failed to show it lacked authority to control the manner in which the work zone traffic control devices were placed so as to render defendant potentially liable for failing to provide a safe worksite.

PRACTICE NOTE: Labor Law § 240(1) applies even if the plaintiff does not actually fall so long as the harm directly flows from the application of the force of gravity upon plaintiff.

TOPICS: *Labor Law § 240(1), Labor Law § 241(6), 12 NYCRR § 23-1.7(d), 12 NYCRR § 23-1.21(b)(4), Gravity-related risks*

ENNIS V. NOBLE CONSTR. GROUP, LLC

207 A.D.3d 703
July 27, 2022

The plaintiff was injured when he attempted to avoid a fall from a ladder while working at a construction site. The plaintiff moved for summary judgment, and the trial court granted the plaintiff's motion as to Labor Law § 241(6) as predicated on alleged violations of 12 NYCRR §§ 23-1.7(d) and 23-1.21(b)(4), but denied the plaintiff's motion as to an alleged violation of Labor Law § 240(1). The Appellate Division reversed in part and granted the plaintiff's motion in its entirety as to alleged violations of Labor Law §§ 240(1) and 241(6). In granting the plaintiff's motion as to § 240(1), the Appellate Division stated that Labor Law § 240(1) may apply where a plaintiff is injured as a result of an attempt to avoid a fall from a ladder. The plaintiff, in his moving papers, established that Labor Law § 240(1) was violated and the violation was a proximate cause of his injuries. In affirming summary judgment as to the plaintiff's Labor Law § 241(6) cause of action, the Appellate Division noted that both 12 NYCRR §§ 23-1.7(d) and 23-1.21(b) applied and were violated. § 23-1.7(d) provides that employers shall not permit any employee to use a floor, platform, or other elevated working surface which is in a slippery condition, and water and any other foreign substance which may cause slippery footing shall be moved, sanded, or covered to provide safe footing. § 23-1.21(b)(4) provides that ladder footings shall be firm, and slippery surfaces shall not be used as ladder footings. In moving for summary judgment, the plaintiff established that the wet concrete floor on which his ladder was placed was in a "slippery condition" within the meaning of § 23-1.7(d), and a "slippery surface" within the meaning of § 23-1.21(b)(4).

PRACTICE NOTE: Labor Law § 240(1) may apply where a plaintiff is injured as a result of an attempt to avoid a fall from a ladder.

TOPICS: *Labor Law § 240(1), Labor Law § 200, Contractual indemnification*

ZONG WANG YANG V. CITY OF NEW YORK

2022 N.Y. APP. DIV. LEXIS 4620
July 27, 2022

The plaintiff was injured at a construction project when he stepped onto aluminum planks that gave way beneath him, causing him to fall through a shaft in the building from the 16th floor to the 15th floor. The plaintiff commenced an action against the project owners and general contractor, alleging common law negligence and violations of Labor Law §§ 200, 240(1) and 241(6). A third-party action was commenced by the general contractor against several sub-subcontractors for the project. The plaintiff moved for summary judgment on his Labor Law § 240(1) claim, the general contractor cross-moved for contractual indemnification against the sub-subcontractors, and the sub-subcontractors cross-moved for dismissal of the third-party common law and contractual indemnification claims. As to the plaintiff's Labor Law § 240(1) summary judgment motion, the Appellate Division reversed and granted the motion, finding that the plaintiff's accident resulted from a failure of the planks to support him, causing him to fall to the floor below. The Appellate Division noted that an instruction given to plaintiff to not work in an area of the worksite cannot constitute the sole proximate cause of his accident and only amounts to comparative negligence, which is not a defense to a Labor Law § 240(1) claim. In affirming denial of the sub-subcontractor's motion seeking dismissal of the general contractor's common law and contractual indemnification claims, the Appellate Division noted that the sub-subcontractor failed to demonstrate it was free from negligence. In affirming the trial court's decision granting the general contractor's contractual indemnification claim against the sub-subcontractor, the Appellate Division found that the indemnification provision did not violate the General Obligations Law because it did not purport to indemnify the general contractor for its own negligence. The Appellate Division further noted that the general contractor was entitled to partial contractual indemnification from the sub-subcontractor for the portion of damages not attributable to the general contractor's negligence.

PRACTICE NOTE: A contractual indemnification provision will be enforceable and a party will be entitled to partial indemnification for the portion of damages not attributable to the party's negligence so long as the indemnification provision either does not purport to indemnify the party for its own negligence or contains a savings clause.

TOPICS: *Labor Law § 240(1), Sole proximate cause, Directed verdict*

DEGRAFF V. COLONTONIO

202 A.D.3d 1297
February 17, 2022

Under the direction and control of the homeowner, the plaintiff was hired to construct a one-story single-family house. At the time of the accident, the plaintiff was attempting to lift and transport materials with a forklift. While attempting to do so, he stood on top of sheets of plywood on the forklift, which gave way under his weight, causing him to fall 12 to 16 feet to the ground and sustain injuries. During a bifurcated jury trial, the plaintiff moved for a directed verdict on his Labor Law § 240(1) cause of action. The trial court denied the motion and the jury ultimately determined that the plaintiff was the sole proximate cause of his injuries. The Appellate Division reversed and found that the directed verdict should have been granted as to a violation of Labor Law § 240(1). In reaching this decision, the Appellate Division noted that the forklift (or lull) was not an adequate safety device for the elevated work being performed by the plaintiff at the time of his fall.

PRACTICE NOTE: Failure to provide an adequate safety device for the elevated work being performed constitutes a violation of Labor Law § 240(1).

TOPICS: *Labor Law § 240(1), Labor Law § 241(6), Labor Law § 200, Negligence, Burden of proof, Hearsay, Intervening act, Homeowner's exemption*

HAWVER V. STEELE

204 A.D.3d 1125
April 7, 2202

The plaintiff alleges he was injured when barn doors fell, striking him on the right shoulder and back, while he was delivering sheetrock to property owned by the defendants. At the time of the incident, a sheetrock contractor was working in the barn. One of the property owners stated that the contractor told him that the barn doors fell upon the plaintiff because one of the contractor's employees knocked into one of the doors. In light of this, the defendants argued that they were entitled to summary judgment because the accident was caused by an intervening act of a third party. The court rejected this, noting that the only evidence the defendants had of the alleged intervening act was based upon hearsay from the sheetrock contractor. Thus, the court ruled that they were not entitled to summary judgment. The court further ruled that the defendants did not prove as a matter of law that the barn is a single-family structure which is exempted from liability under Labor Law § 240(1). The court reasoned that there were questions of fact about whether the barn was intended to be used solely for commercial purposes, which would render the single-family home exemption inapplicable. Lastly, the court determined the plaintiff was not entitled to summary judgment on his § 240 claim because there was a question of fact about whether his accident occurred as a result of an elevation difference.

PRACTICE NOTE: Summary judgment will be denied when the only evidence in support is based upon hearsay. Further, even if a structure can be considered a single-family home, it is not exempted from § 240 liability if it is being used solely for commercial purposes.

TOPICS: *Labor Law § 240, Proximate cause, Fall protection*

WOOD V. BAKER BROS. EXCAVATING

205 A.D.3d 1113
May 5, 28, 2022

In this Labor Law § 240 case, the plaintiff alleges he was not provided adequate fall protection when he was working on a bridge. The alleged failure caused him to slip and fall three feet off the bridge. The plaintiff argued that while there was scaffolding at the worksite, none was available for his use at the time of the accident. One of the defendants provided evidence that the scaffold was portable, thereby rendering it available for the plaintiff's use. Furthermore, the same defendant stated that although he was not present on the worksite at the time of the plaintiff's accident, he was sure there was an extension ladder that the plaintiff could have used. The court denied the plaintiff summary judgment on grounds that there was a dispute of fact about whether adequate fall protection was available for the plaintiff and whether he failed to use the available safety devices. The court also noted that the plaintiff was not entitled to summary judgment because there were questions of fact about the plaintiff's precise job duties on the day of the accident.

PRACTICE NOTE: If there is a dispute of fact about whether or not a plaintiff failed to use proper fall protection that was provided to him or her, he or she is not entitled to summary judgment.

TOPICS: *Labor Law § 240(1), Labor Law § 241(6), Contractual indemnification*

TANKSLEV V. LCO BLDQ. LLC

201 A.D.3d 1323
January 28, 2022

The plaintiff was injured when he fell through a skylight opening in the roof on which he was working in connection with a construction project. The construction manager was entitled to summary judgment dismissing the plaintiff's common law negligence claim, which was based on the construction manager's alleged supervision and control over the plaintiff's work. On the other hand, the construction manager was not entitled to dismissal of the plaintiff's Labor Law § 241(6) claim because there were questions of fact he had the authority to supervise or control the injury-producing work and was therefore a contractor under § 241(6) that could be liable. Similarly, the court concluded that if the construction manager was a contractor, it could be considered an agent of the property owner and, therefore, vicariously liable for a § 241(6). Further, the plaintiff was not entitled to summary judgment against the construction manager on his § 240(1) claim because there were questions of fact as to the construction manager's authority to supervise or control the injury-producing work. On the other hand, the plaintiff was entitled to summary judgment on his § 240(1) claim against the property owner because, although there was a wooden board to protect him from falling through the skylight, it needed to be removed to complete the work, and therefore a different safety device was needed to prevent the plaintiff from falling through the skylight.

PRACTICE NOTE: Here, the court drew a distinction between common law negligence, which requires actual supervision and control of the injury-producing behavior, and § 240(1) and § 241 (6), which only require the authority to supervise and control. Further, even if there is a safety device available to prevent an elevation-related accident, that is not enough to show adequate safety protection was provided if it needs to be removed to complete the work, thereby leaving a plaintiff without fall protection.

TOPICS: *Labor Law § 240(1), Labor Law § 241(6), Labor Law § 200, Industrial code*

MALVESTUTO V. TOWN OF LANCASTER

201 A.D.3d 1339
January 28, 2022

The plaintiff commenced this action seeking damages for injuries sustained while he was working in a trench at a construction site on land owned by the defendant. As he was performing his work, the plaintiff was struck in the leg by the bucket of an excavator situated on the edge of the trench above him. The plaintiff was not entitled to summary judgment on his Labor Law § 240(1) claim because there were questions of fact about whether the plaintiff was injured due to a risk contemplated by the statute or, alternatively, by the usual and ordinary dangers of a construction site. The plaintiff was not entitled to summary judgment on his § 241(6) claim because it was based upon a violation of 12 NYCRR 23-4.2 (k) which the court concluded was not sufficiently specific to sustain a § 241(6) claim. Lastly, the defendant was not entitled to summary judgment on the plaintiff's § 200 claim because there were questions of fact about whether the plaintiff's accident stemmed from a dangerous condition on the premises and whether the defendant had control over the worksite and actual or constructive notice of the dangerous condition.

PRACTICE NOTE: A § 241(6) violation cannot be based upon a violation of a general safety regulation in the industrial code. The industrial code section must provide specific safety standards. Further, there is no liability for a § 240(1) claim if the accident stemmed from ordinary dangers found at a construction site.

TOPICS: *Labor Law § 200, Labor Law § 240, Labor Law § 241(6), Prime contractor*

CLIFTON V. COLLINS

202 A.D.3d 1476
February 4, 2022

The plaintiff commenced this Labor Law and common law negligence action seeking damages for injuries he sustained when he fell down a stairwell while installing cable outlets during a home construction. The prime contractor moved for summary judgment seeking dismissal of the plaintiff's Labor Law §§ 240(1) and 241(6) claims, and the court granted that motion. The court reasoned that while a general contractor can be liable under those two statutes, a prime contractor that exercised no control or supervision over the plaintiff's work and had no authority to enforce safety standards against the plaintiff cannot be held liable for §§ 240(1) and 241(6) violations. The court noted that the general contractor, not the prime contractor, hired the plaintiff's employer. Further, the prime contractor could not be liable for a § 200 violation on a theory that he controlled the method and manner of the plaintiff's work. However, there was a question of fact about whether the prime contractor could be liable under § 200 because there was evidence he had notice of the defect that caused injury and evidence he may have controlled the worksite.

PRACTICE NOTE: A prime contractor that exercised no control or supervision over the plaintiff's work and had no authority to enforce safety standards against plaintiff cannot be held liable for §§ 240(1) and 241(6) violations.

TOPICS: *Labor Law § 240(1), Collateral estoppel*

SZYMKOWIAK V. N.Y. POWER AUTH.

203 A.D.3d 1618
March 11, 2022

The plaintiff commenced this Labor Law and common law negligence action against the defendant seeking damages for injuries he allegedly sustained in two workplace accidents. The court rejected the defendant's argument that it was entitled to summary judgment on the plaintiff's Labor Law § 240(1) claim because the plaintiff was not required to work at an elevation. The plaintiff's deposition created a question of fact about whether he was required to work at an elevation to perform his work. However, the court dismissed the plaintiff's claim related to damages for post-concussion syndrome, although the plaintiff could still recover for headaches and the concussion itself. The court reasoned that, as part of the plaintiff's workers' compensation litigation, the Workers' Compensation Board found that he did not suffer from post-concussion syndrome. Therefore, the plaintiff was collaterally estopped from recovering for post-concussion syndrome. The court noted that administrative agencies such as the Workers' Compensation Board are entitled to collateral estoppel effect where the issue a party seeks to preclude in a subsequent civil action is identical to a material issue that

was necessarily decided by the administrative tribunal and where there was a full and fair opportunity to litigate before that tribunal.

PRACTICE NOTE: A party cannot relitigate an identical issue to one adversely decided against it in prior administrative proceeding, provided the issue was material to the proceeding and expressly decided against the party, presuming that party had a fair and full opportunity to litigate the issue in the administrative proceeding.

TOPICS: *Labor Law § 240(1), Credibility*

HANN V. S&J MORRELL, INC.

207 A.D.3d 1118
July 8, 2022

In this Labor Law § 240(1) case, the plaintiff was a framer employed by a subcontractor on a residential construction project of which defendant was the owner and general contractor. The plaintiff allegedly fell while erecting an elevated exterior deck. The plaintiff was not entitled to summary judgment because the defendant's supervisors testified that they examined the subject deck after the purported accident and discovered that the deck never collapsed, and there was nothing otherwise wrong with the deck. The supervisors also testified that nobody from the plaintiff's employer was present on the day of the fall. Thus, the court determined that whether the accident occurred at all is a credibility determination left for a jury to decide. If the testimony of the defendant's supervisors is correct, then no accident occurred.

PRACTICE NOTE: This case is a straightforward example of the principal that if liability turns on credibility issues between multiple witnesses, then summary judgment will be denied.

TOPICS: *Labor Law § 241(6), Industrial code*

SHELEY V. KINGSFORT BLDRS., INC.

207 A.D.3d 1118
July 8, 2022

In this Labor Law § 241(6) case, the plaintiff allegedly suffered an injury to his eye while using a nail gun on a residential construction project. Although there were safety glasses on the construction site on the day of the injury, the court held that there was a question of fact about whether the defendant instructed the plaintiff to use them, which the court concluded was a requirement of 12 NYCRR § 23-1.8 [a], upon which the plaintiff based his § 241(6) claim. The court further concluded that, although the defendant claimed he previously instructed the plaintiff to use safety glasses on a prior construction project just prior to the one where the plaintiff was allegedly hurt, there was a question of fact about whether the plaintiff was so instructed.

PRACTICE NOTE: Caution is needed when determining what is required to satisfy requirements of the industrial code. Some, such as 12 NYCRR § 23-1.8 [a], require more than providing safety equipment. An instruction to use that equipment is also necessary.

TOPICS: *Labor Law § 240(1), Height differential, Elevation-related risk*

SHANTZ V. BARRY STEEL FABRICATION, INC.

207 A.D.3d 1169
July 8, 2022

In this Labor Law § 240(1) case, the plaintiff was injured when a scissors lift, which he was unloading from a truck bed using an inclined ramp, pinned him between the top of the lift and the upper part of the loading dock's door frame. The court determined that when determining if a plaintiff is entitled to recover under Labor Law § 240 (1), the inquiry does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker. Rather, the single decisive question is whether the plaintiff's injuries were the direct consequence of a failure to provide protection against a risk arising from a physically significant elevation differential. The court further concluded that the defendant failed to establish as a matter of law that plaintiff's injuries were not the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential. Although the elevation difference was only two or three feet, in this case, given the weight of the lift, the difference was enough to refute a contention that it was *de minimus.*

PRACTICE NOTE: Despite of the exact nature of the accident, if it results from an elevation difference, Labor Law § 240(1) may be applicable. Further, even a small elevation difference may be enough to maintain a § 240(1) claim if that difference is enough to cause significant harm.

TOPICS: *Labor Law § 240(1), Proximate cause*

ABDELHAY V. 1105 GROUP PROP. MGT., LLC

207 A.D.3d 1187
July 8, 2022

In this Labor Law § 240(1) case, the plaintiff's injuries occurred when he fell off of an A-frame ladder after he rested his foot on a shelf in order to reach tape being passed to him through an electrical conduit and the shelf collapsed. The court denied summary judgment to the plaintiff and the defendant because there was a question of fact about if an extension ladder that could have prevented the accident was readily available at the worksite and whether the plaintiff knew that he was expected to use the extension ladder but for no good reason chose not to do so. Therefore, the court concluded a reasonable jury could conclude the plaintiff was the sole proximate cause of the accident.

PRACTICE NOTE: If a plaintiff has access to a safety device that could have prevented the accident, knew he or she was expected to use said device, and choose not to use it for no good reason, a defendant cannot be liable under § 240(1).

TOPICS: *Labor Law § 240(1), Sole proximate cause*

FINNOCHI V. LIVE NATION, INC.

204 A.D.3d 1432
April 22, 2022

The plaintiff commenced this action after sustaining injuries while loading rigging equipment onto a truck following a concert. After a non-jury trial, the supreme court dismissed the complaint on the ground that the plaintiff failed to utilize the available safety device (a forklift), and this failure was the sole proximate cause of his injuries. The plaintiff moved post-trial to set aside the verdict pursuant to CPLR 4404 [b], and the supreme court denied the motion. On appeal, the court held that it was an error for the supreme court to deny the plaintiff's post-trial motion because no fair interpretation of the evidence could support the conclusion that the plaintiff's failure to use the forklift was the sole proximate cause of his injuries; more specifically, that the plaintiff chose to forgo using the safety equipment "for no good reason." While the forklift was available and while the plaintiff knew that it was available and knew that he was expected to use it, the plaintiff established that his manager instructed him to load the equip-

ment by hand, and the plaintiff was under no obligation to demand safer methods for loading the boxes. The court also rejected defendant's argument that plaintiff was not performing work under Labor Law § 240 as the plaintiff was a member of the demolition team pertaining to a structure. The court reversed the judgment, granted judgment in favor of the plaintiff on liability for the § 240 claim, and ordered a new trial solely regarding damages.

PRACTICE NOTE: The realities of construction work are relevant to whether a plaintiff disregards a safety device for "no good reason." A worker fearful of losing his or her job may follow orders that ask for less safe conduct. Moreover, even assuming a plaintiff is required to protest and demand safer equipment, the plaintiff's conduct would amount to comparative fault and would not bar recovery under the statute.

TOPICS: *Indemnification, Actual or constructive notice*

LAGARES V CARRIER TERM. SERVS., INC.

204 A.D.3d 1456
April 22, 2022

The plaintiff commenced this action after he slipped and fell from a piece of metal decking atop a steel support beam while repairing a roof. The building was owned by the defendant-third-party plaintiff (Carrier). Defendant-third-party plaintiff Speed Motor was acting as agent of Carrier. The plaintiff was employed by Sahlem Roofing and Siding. Sahlem appealed from an order granting Carrier and Speed Motor's motions for common law indemnification against Sahlem. The court held that Carrier and Speed Motor established that they did not create or have actual or constructive notice of the condition of the metal decking. Moreover, Sahlem exercised actual supervision over the work that caused the injury, and Sahlem failed to raise a triable issue of fact.

PRACTICE NOTE: A party cannot obtain common law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part. Common law indemnification runs against parties who, by virtue of their direction and supervision over the injury-producing work, were at fault in causing the injury.

Index

Thomas F. Segalla

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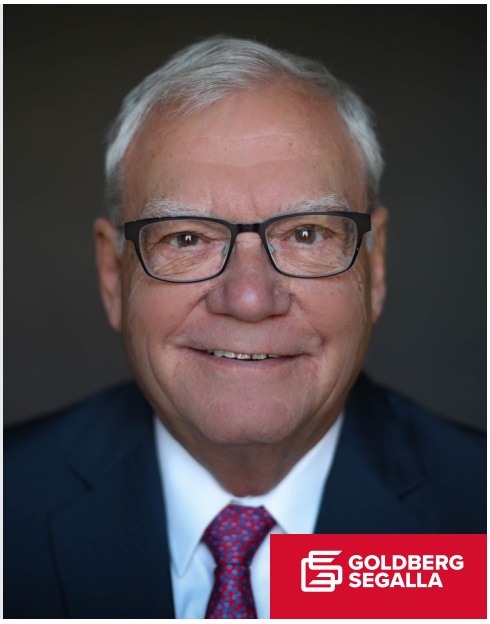
Lifetime Achievement award from the *New York Law Journal*

Over a legal career that spans nearly 50 years, Tom Segalla has amassed many accomplishments, milestones, and innovations. More than 20 years ago, Tom had the idea to put together a publication of Labor Law decisions for firm clients. Working initially on his own, Tom became the first author and editor of what we know as the Labor Law Update. As the successors to just one of Tom's accomplishments, the Editorial Board and Construction Group congratulate Tom Segalla on his Lifetime Achievement Award from the New York Law Journal and thank him for the opportunity to follow in his footsteps as stewards of the Labor Law Update.



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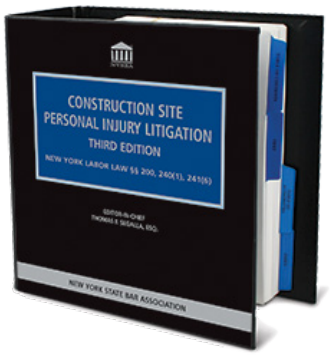

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