GOLDBERG SEGALLA

SPRING 2024

Labor Law Update

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Attorney Advertising

Goldberg Segalla *Labor Law Update*

SPRING 2024

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.

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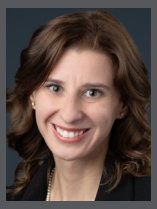

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EDITOR'S NOTE

The plaintiff's bar continues its attempts to expand the application of the Labor Law, whether it is with regard to the gravity-related standard, covered workers, or enumerated activities. In 2023, we saw these efforts increase to new and more novel fact patterns. Our own James Specyal, Esq. handled the Court of Appeals case of *Stoneham v. Joseph Barsuk, Inc.,*[1] which sets a key determining factor in refusing to expand the enumerated activities to which the Labor Law applies.

The plaintiff, a diesel technician, was repairing a faulty brake system on a commercial trailer when the trailer fell onto him. The trailer needed new brake lines, and installing them required lifting the trailer. Rather than using jacks, ramps, or a vehicle lift, the plaintiff used a front loader with a bucket attachment to lift the trailer approximately 5.5 feet off the ground, then engaged the front loader's brakes to keep it from moving. While the plaintiff was working under the trailer, it rolled out of the bucket and landed on the plaintiff, causing catastrophic injuries. The Trial Court and Appellate Division found the plaintiff was not engaged in an enumerated activity and, specifically, that he was not working on a "structure" under the Labor Law when the accident occurred. Since the Appellate Division came to a split decision, they granted leave to the Court of Appeals for a determination.

The Court of Appeals affirmed the lower court's dismissal of the claim, finding that Labor Law § 240(1) was not intended to cover ordinary vehicle repair. The court stated that, although the case involved a horrific incident causing grievous injuries, the plaintiff was engaged in ordinary vehicle repair and not a protected activity which, under the Labor Law, applies to workers employed in erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure. The court ruled the trailer cannot be found to be a structure under the Labor Law even though the previous definition of "structure" is expansive. They noted that, although they previously held the application of Labor Law is not restricted to actual construction sites, this was not the type of work that would allow the Labor Law to apply to off-site accidents.

A dissenting opinion by Justice Cannataro states that the Court of Appeals had previously interpreted Labor Law § 240(1) as covering cases where a plaintiff's injuries were "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential," quoting *Runner v. New York Stock Exchange*. The dissenting judge believed the plaintiff's work encompassed the work contemplated in *Runner*.

Justice Cannataro's application of *Runner* was faulty in that the first key determining factor in a Labor Law case is whether the plaintiff was performing "covered work" as expressly enumerated in the statute. The dissenting justice also stated that the majority had not provided any authority for its novel view that the legislature did not intend "ordinary vehicle repair" to qualify as a protected activity. This position is dubious, considering the statute sets forth a list of enumerated activities intended to be covered by the Labor Law, rather than listing activities not covered.

The Court of Appeals in this matter truly made the correct decision. Just how far could they allow the Labor Law to expand? Indeed, as part of their decision they noted that this expansion would subject vehicle owners to liability if a mechanic worked on their car, a situation which is far afield from "extraordinary protections" for a gravity-related construction accident.

Congratulations, James. Great job!

Please note Goldberg Segalla has a number of construction 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 it more useful, please do not hesitate to contact us.

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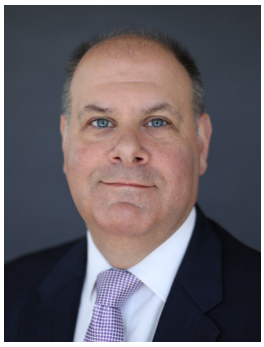
Kelly A. McGee



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1 2023 N.Y. Lexis 2025 (December 19, 2023)

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

STONEHAM V. JOSEPH BARSUK, INC.

2023 NY Lexis 2025
December 19, 2023

The plaintiff, a diesel technician, was lying beneath a lifted trailer working on a faulty airbrake system when the trailer fell on him, causing catastrophic injuries. The Court of Appeals affirmed the lower court's dismissal of Labor Law claims stating that Labor Law § 240(1) was not intended to cover ordinary vehicle repair. The court stated that although the case involved a horrific incident that caused the plaintiff's grievous injuries, the plaintiff was engaged in ordinary vehicle repair and not a protected activity under the Labor Law, which applies to workers employed in erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure. The Fourth Department properly found that the vehicle repair work at issue was not a protected activity within the meaning of the statute. However, the Fourth Department dissenting judge opined that "under the unique circumstances of this case" they were unable to conclude that the plaintiff was not engaged in a protected activity as a matter of law. The plaintiff was a certified diesel technician who had experience working on heavy construction equipment including dump trucks, loaders, dozers and trailers. While the Court of Appeals affirmed, finding that the plaintiff was engaged in ordinary vehicle repair which is not a protected activity under Labor Law § 240, the dissent by J. Cannataro states that the Court of Appeals had previously interpreted Labor Law § 240 as covering cases where a plaintiff's injuries were "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential," quoting *Runner v. New York Stock Exchange*. The dissenting judge believed that the plaintiff's work encompasses the work contemplated in *Runner*. He also stated that the majority has not provided any authority for its novel view that the legislature did not intend "ordinary vehicle repair" to qualify as a protected activity.

PRACTICE NOTE: A critical first step in analyzing a Labor Law claim is determining whether a plaintiff was "so employed" as proscribed by the statute. The plaintiff must have been engaged in erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure. Dissenting Judge Cannataro discusses a *Runner* analysis, which would apply had the plaintiff been engaged in covered work.

TOPICS: *Labor Law, Slip and fall, Premises defect, Actual notice, Constructive notice*

POWELL V. CITY OF NEW YORK

218 A.D. 3d 1
July 13, 2023

The plaintiff sustained personal injuries while excavating a roadbed to make trenches to lay conduits while installing telecommunication cable under the street. The crew was covering the trenches at the end of the workday when a backhoe pushed a steel plate onto the plaintiff's right foot, crushing it. The defendant, City of New York, was sued as the owner of the roadbed and moved for summary judgment, arguing that it had no notice of a hazardous condition as required by New York City's pothole law. In opposition, the plaintiff argued that the pothole law does not apply because injuries resulted from a construction accident and not a trip and fall on a defective roadway. This court reversed the Supreme Court, New York County decision that dismissed the plaintiff's complaint. The court agreed with the plaintiff's position that the injury was not proximately caused by a hazardous roadbed defect, rather from an unsafe work condition during construction. A dissenting opinion by J. Webber states that he would have affirmed the lower court's decision granting the defendant summary judgment because the City of New York demonstrated as a matter of law that there was no nexus between it and the plaintiff's work. The plaintiff was employed by a non-party that contracted with Verizon, who provided tools, equipment and was present at the worksite. The City of New York was not present on the worksite. Further, the city had no contract for, or awareness of or involvement in, the work that Verizon was performing at the time of the plaintiff's injury. Further, the city had no notice of any alleged hazardous condition at the worksite. The city established that Verizon did not have a valid work permit for the work that it was performing when the plaintiff was injured.

PRACTICE NOTE: The manner in which a plaintiff's accident occurred is a critical issue in determining whether Labor Law applies and whether actual or constructive notice is a consideration.

TOPICS: *Contractual indemnification, Conditional summary judgment, Sole proximate cause*

MCKINNEY V. EMPIRE STATE DEVELOPMENT CORP.

217 A.D. 3d 574
July 22, 2023

The general contractor of a project on which the plaintiff was injured established entitlement to conditional summary judgment on its contractual indemnification claim against the plaintiff's employer, a roofing company. The indemnification provision was triggered because the plaintiff was injured during the performance of his work for the roofing company. Conditional summary judgment is appropriate when the record establishes that the general contractor's negligence, if any, was not the sole proximate cause of the accident, and the extent of the indemnification would depend on whether any negligence by the general contractor was found to have contributed to the accident.

PRACTICE NOTE: In a case where there can be no fault found against an owner or a general contractor and there is an enforceable indemnification clause, a motion for conditional summary judgment should be considered.

TOPICS: *Labor Law § 240, Gravity-related risk, Height differential*

RIVAS V. SEWARD PARK HOUS. CORP.

219 A.D. 3d 59
August 24, 2023

The plaintiff was injured from the cave-in of a below grade excavation. The lower court's decision denying summary judgment pursuant to Labor Law § 240 was reversed. The First Department found that the housing development and excavation company failed to provide the plaintiff with adequate protection from a reasonably preventable, gravity-related accident and that they were liable under Labor Law § 240(1). The court looked to the single decisive question of whether the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential. The plaintiff was performing an excavation of a building's underground water pipe in a 6.5-foot deep earthen trench. The cave-in of the trench presented an elevation-related hazard within the meaning of Labor Law § 240.

PRACTICE NOTE: Courts will look to whether a plaintiff's gravity-related accident could have been prevented by a proper safety device to determine Labor Law § 240 liability.

TOPICS: *Labor Law, Medical malpractice, Joinder of claims, Consolidation*

LICONA-RUBIO V. NEW YORK CITY HEALTH AND HOSPITAL CORP.

219 A.D. 3d 1225
September 26, 2023

The plaintiff commenced a lawsuit in Kings County alleging several construction-related violations including Labor Law §§ 200, 240 and 241(6) and common-law negligence in connection with a workplace accident causing personal injuries. Following the accident, the plaintiff was taken to a NYCHHC facility for treatment. He commenced a second action in Supreme Court, New York County against the hospital, alleging medical malpractice in connection with his post-accident treatment. The court found that, although the Labor Law action and the medical malpractice action involved a common question of fact, the medical malpractice action involved numerous additional allegations of professional negligence and injuries that are irrelevant to the Labor Law action and there are no common defendants. The First Department reversed the lower court decision, which granted the motion to consolidate. The First Department found that the issues and applicable legal principles presented in the plaintiff's Labor Law action and the medical malpractice action are so dissimilar that joinder or consolidation would not be beneficial and would likely result in jury confusion.

PRACTICE NOTE: Although two cases may have common questions of fact, Labor Law actions and medical malpractice actions should be tried separately due to differing questions of law.

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

YOUSUF V. HORACE PLAZA, LLC

219 A.D. 3d 1185
September 7, 2023

The First Department affirmed the decision of the Supreme Court, New York County which granted the defendant summary judgment. The plaintiff fell from a ladder while replacing two ceiling tiles in the Dunkin' Donuts store where he was employed as a manager. The plaintiff presented evidence that the tiles were damaged by recurring leaks in the roof of the building, which was owned and managed by the defendants. The plaintiff asserts causes of action against the defendants pursuant to Labor Law §§ 200, 240(1) and 241(6) and common-law negligence. The court stated that the Labor Law applies to only a narrow class of protected workers engaged in the construction or demolition of buildings in areas in which construction, excavation or demolition work is being performed. Since no construction, excavation or demolition was ongoing at the time of the plaintiff's accident, that statute does not protect him.

PRACTICE NOTE: A critical first step in analyzing a Labor Law claim is determining whether a plaintiff was "so employed" as proscribed by the statute. The plaintiff must have been engaged in erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure**.**

TOPICS: *Labor Law § 240(1), Scaffold, Fall from a height*

CAFISI V. L&L HOLDING CO., LLC

219 A.D.3d 1215
September 26, 2023

The plaintiff was injured as he was descending from a baker scaffold when the scaffold began to shake, move, or tip over for no apparent reason. When the scaffold began its movements, the plaintiff let go and fell from the scaffold, landing on a pile of metal straps that were slippery, causing him to fall backwards to the floor. The court held that the plaintiff established a prima facie entitlement to summary judgment under Labor Law § 240(1). The defendants argued that the plaintiff was required to show that the scaffold was defective, which the court found was simply not a requirement. The defendants also attempted to introduce evidence from an "accident report" created more than a week after the accident with multiple layers of hearsay within it, which the court also found insufficient to create an issue of fact.

PRACTICE NOTE: This was a classic Labor Law scenario where the defense utilized multiple creative arguments, which proved unavailing. In First Department ladder cases, the court will look to the manner in which the accident occurred; i.e. the ladder "shook, moved, tipped," with no consideration as to the cause of the ladder movement.

TOPICS: *Labor Law § 241(6), Issue of fact, Fall on stairs*

PIEDRA V. 111 W. 57TH PROP. OWNER LLC

219 A.D.3d 1235
September 26, 2023

The Appellate Division upheld the plaintiff's award of summary judgment on his Labor Law § 241(6) cause of action predicated upon Industrial Code § 23-1.7e (2). The plaintiff testified that he slipped on a piece of wood while descending a staircase, and authenticated with photographs showing debris and garbage on the steps where he fell. For the first time on appeal, the defendants raised an argument that the plaintiff did not meet his prima facie burden. The defendants alleged that the plaintiff told his foreman only that he fell, without mentioning wood debris or that he slipped or tripped. Even though they considered it, the Appellate Division found this evidence was insufficient to raise a triable issue of fact because this statement does not detract from the plaintiff's credibility, nor is it an inconsistent statement.

PRACTICE NOTE: In opposing a motion for summary judgment, a defendant must do more than point out potential issues. They must present affirmative facts that controvert the plaintiff's case and remove it from the realm of the Labor Law.

TOPICS: *Labor Law § 240(1), Ramps*

LIU V. WHITESTAR CONSULTING & CONSTR., INC.

219 A.D.3d 1249
September 28, 2023

In this matter, the Appellate Division examined the requirements of deeming a fall from a ramp to be within the scope of Labor Law § 240(1). The plaintiff was caused to fall 20 to 25 feet from a ramp that had been constructed over one of the building's staircases so that workers could move materials. The court noted that the purpose of the ramp, which was to move materials rather than as a substitute for a scaffold or ladder, is irrelevant to the analysis. Although there are a number of factors to consider, the primary factor is whether the ramp covered a significant elevation differential. Here, the height differential from the top to the bottom of the ramp was between 20 and 25 feet and, as a result, it was deemed significant. Summary judgment was awarded to the plaintiff.

PRACTICE NOTE: When defending a ramp case, you need to examine the size, shape and configuration of the ramp to determine if it falls within the scope of the Labor Law as a safety device. Case law holds smaller ramps with a height differential of 6 to 10 inches will not be deemed to have a significant height differential. However, the court will also look at whether the ramp had safety rails or guards.

TOPICS: *Enumerated activity, Repairs, Alteration*

CASTANEDA V. AMSTERCO 67, LLC

220 A.D.3d 406
October 3, 2023

In this matter, the Appellate Division had to determine whether the plaintiff's work fell under an enumerated activity proscribed by the Labor Law. The plaintiff was retained to perform "pest control activities," which included using a ladder to attach pigeon netting to anchors drilled into the façade of the building, and setting spikes on the building's ledges and windowsills. In other locations on the façade, the plaintiff had to repair netting that had been damaged. Initially, the court noted this was not an "alteration" under the statute, as the installation work did not constitute a significant physical change to the configuration or composition of the building or structure. With regard to the repairs, the court found the work did not constitute a "repair" under the Labor Law in that he was not repairing a part of the building or structure. The plaintiff's Labor Law §§ 240(1) and 241(6) claims were dismissed. However, the court found issues of fact as to the defendant's negligence and did not dismiss the case in its entirety.

PRACTICE NOTE: There is a difference between whether an activity constitutes routine maintenance under the Labor Law and whether the activity is not an enumerated activity. The analysis under each of the enumerated activities has a specific definition under the case law and close scrutiny should be made as to what the plaintiff was doing when the accident occurred.

TOPICS: *Labor Law § 241(6), Labor Law § 200, Industrial Code § 23-1.7(e)(1), Industrial Code § 23-1.7(e)(2)*

COON V. WFP TOWER B CO., L.P.

220 AD.3d 407
October 3, 2023

While pushing a cart, the plaintiff was injured when he fell into an uncovered hole. There were differing versions of the accident details. Under one version, he fell into the hole because he could not see it due to debris. In the second version, he could not see it because he was pushing a cart. All parties moved for summary judgment on Labor Law §§ 241(6) and 200 as well as common-law negligence. The Appellate Division denied summary judgment to all parties. With respect to Labor Law § 241(6), at issue were NY Industrial Code §§ 23-1.7(e)(1) and 23-1.7(e)(2). Although the court did not discuss it in depth, they held there was an issue of fact as to whether the area where the accident occurred could be deemed a "passageway" under Industrial Code § 23-1.7(e)(1). Further, since there was evidence to contradict the claim that the plaintiff fell into the hole due to debris, the court declined to award summary judgment under Industrial code § 23-1.7(e)(2). Lastly, issues of fact existed as to how long the hole existed and when the area was last inspected by the defendants, so the court found issues of fact on Labor Law § 200 and common-law negligence.

PRACTICE NOTE: Where issues of fact exist, the court is going to decline to award summary judgment to any party.

TOPICS: *Labor Law § 200, Direction and control, Defect on the property*

CARVER V. ARTILES

220 A.D.3d 441
October 5, 2023

After the plaintiff fell from a ladder while performing outdoor painting, the defendant moved to dismiss the plaintiff's Labor Law § 200 claim, alleging they did not supervise, direct or control his work. In opposition, the plaintiff introduced an expert affidavit which affirmed that the patio the plaintiff had placed his ladder upon had a 1.8% slope and was a defect that created an imbalance, causing the plaintiff to fall from the A-frame ladder he was working upon. The plaintiff also submitted his own affidavit, which alleged the defendants were responsible for creating the alleged defect. However, the affidavit differed from the plaintiff's testimony. The Appellate Division found the two affidavits were sufficient to raise an issue of fact as to whether the defendant created a defect that caused the accident. Further, the discrepancy between the plaintiff's affidavit and his testimony was an issue of credibility for a jury to determine.

PRACTICE NOTE: Under Labor Law § 200, liability can be imposed in two ways. Where the accident arises out of a defect on the land, a plaintiff must show the defendant created the condition or had notice of the condition with a duty to remedy it. Where the accident arises out of the means and methods of the work, the plaintiff must show the defendant controlled, directed or supervised the work. To secure summary judgment on this section, a defendant must show they are not liable under either of the above analyses.

TOPICS: *Labor Law § 240(1), Scaffold, Lack of guardrails, Defendant's burden to defeat summary judgment*

VELASQUEZ V. 94 E. 208 ST. PARTNERS, LLC

220 A.D.3d 472
October 10, 2023

The plaintiff established that the defendant violated Labor Law § 240(1) and that the violation was the proximate cause of his injuries with his uncontroverted affidavit demonstrating that the scaffold supplied

lacked guardrails and that no other protective devices were provided to protect him from falling. In opposition, the defendants argued that the motion was premature, but failed to show what other discovery was necessary or what additional discovery could have been expected to reveal.

PRACTICE NOTE: An uncontroverted affidavit in support of a motion for summary judgment that the owner/general contractor failed to provide adequate safety devices that would have protected the plaintiff from falling may be sufficient to establish entitlement to summary judgment prior to the close of discovery when the defendant fails to show what other discovery was needed or what additional discovery could have been expected to reveal.

TOPICS: *Homeowner's exemption*

NAVA V. FRANKLIN

220 A.D.3d 486
October 12, 2023

The plaintiff sustained injuries while working at a construction site where the defendants were constructing a two-family home. The court found that the Labor Law claims were properly dismissed, as the defendants fell within the homeowner's exemption in the Labor Law statutes, which exempt "owners of one- and two-family dwellings who contract for but do not direct or control the work" from liability. The defendants made a prima facie showing of their entitlement to the exemption by demonstrating that they intended to reside in one of the units and, therefore, that the property was not to be used solely for commercial purposes, and that they did not direct or control the plaintiff's work.

PRACTICE NOTE: To establish entitlement to the one- and two-family homeowner's exemption, the defendant must establish that the property is not to be used solely for commercial purposes and that the owners do not direct and control the work.

TOPICS: *Labor Law § 240(1), Hearsay evidence*

GARCIA V. 122-130 E. 23RD ST. LLC

220 A.D.3d 463
October 10, 2023

The plaintiff, an employee of a sheetrocking/taping contractor, was performing taping work on a ceiling at a work site. In preparation for the work, he was directed to retrieve scaffold parts to assemble the scaffold. The plaintiff asserted that the parts were mismatched, did not fit one another, and the scaffold could not be erected properly to create a safe work surface. The plaintiff claims that he complained of the defective scaffold, was told to work with what he had, and was not provided with any other safety equipment. The scaffold collapsed while the plaintiff was working, causing him to fall to the ground. The lower court denied the plaintiff's summary judgment motion on Labor Law § 240(1), finding that he failed to make a prima facie showing of entitlement to summary judgment. The First Department disagreed, recognizing that testimony establishing that a safety device collapses is sufficient for a prima facie showing on liability. In opposition to the motion, the defendants submitted affidavits from a principal of the plaintiff's employer and an investigator stating that the plaintiff's supervisor, Mr. Sabato, instructed the plaintiff not to use the scaffold, and he was to wait 10 minutes for delivery of compatible scaffold pieces. However, the plaintiff refused to wait, which resulted in the accident. The court found this evidence insufficient, reasoning that the defendants did not include an admissible affidavit of Mr. Sabato, who was the only defense witness with firsthand knowledge of the discussion with the plaintiff. In support of their decision, the First Department cited to the well-established principle that hearsay statements may be offered in opposition to a motion for summary judgment; however, they cannot defeat summary judgment where it is the only evidence upon which the opposition is predicated. Conversely, inadmissible hearsay statements may be considered in opposition to a motion for summary judgment where offered in conjunction with admissible evidence in support of the same argument.

PRACTICE NOTE: Hearsay evidence cannot defeat a motion for summary judgment where it is the only evidence upon which the opposition to summary judgment is predicated.

TOPICS: *Labor Law § 240(1), Unidentified falling objects*

HARSANYI V. EXTELL 4110 LLC

220 A.D.3d 528
October 19, 2023

The First Department found that the plaintiff was entitled to summary judgment pursuant to Labor Law § 240(1) when he was struck by a falling object even though the plaintiff could not identify the object that struck him or its origin. At the time of the accident, the plaintiff was working on an outrigging platform underneath workers who were stripping wood on the floors above him. The plaintiff submitted photographs showing a large hole in the safety netting that serves as overhead protection. This evidence was sufficient to establish a prima facie violation of Labor Law § 240(1). The court noted that a prima facie case in a Labor Law § 240(1) action involving falling objects is not dependent on whether the plaintiff observed the object that hit him. In addition, the plaintiff is not required to show the exact circumstances under which the object fell, where a lack of a protective device proximately caused the injuries.

PRACTICE NOTE: Where a plaintiff's testimony establishes that a falling object struck him and photographic evidence shows insufficient overhead protection, this is sufficient to establish a violation of Labor Law § 240(1).

TOPICS: *Labor Law § 240(1), Sole proximate cause, Hearsay evidence, Contractual indemnification*

O'SHEA V. PROCIDA CONSTR. CORP.

220 A.D.3D 622
October 31, 2023

The plaintiff's testimony and photographic evidence, which demonstrated that he slipped on mud and grime on the third rung of a jobsite ladder, fell and was injured as he attempted to descend from the upper floors, was sufficient to establish prima facie entitlement to partial summary judgment on his Labor Law § 240(1) claim. In opposition, the defendants attempted to raise an issue of fact by submitting a C3 Workers' Compensation form stating that the accident occurred while he was climbing down a ladder and lost his balance on an uneven

surface. The court found that the C3 form lacked probative value and failed to raise an issue as to whether the alleged misstep was the sole proximate cause of the injury, as there was no affidavit or deposition testimony submitted from the C3 preparer or similar attestation from a records custodian authenticating the statement taken from the plaintiff. The court referenced the long-standing principle that hearsay standing alone is insufficient to defeat summary judgment. While the defendants argued that deposition testimony from the defendant's general manager stating another ladder was available to use, the court found the testimony insufficient to raise a question of fact as the defendants failed to submit evidence that the plaintiff knew another ladder was available and had been instructed to use that ladder as opposed to the one he chose.

PRACTICE NOTE: The plaintiff's testimony that he slipped on the third rung of a ladder along with photographic evidence establishes prima facie entitlement to summary judgment pursuant to Labor Law § 240(1). Hearsay evidence cannot defeat a motion for summary judgment where it is the only evidence upon which the opposition to summary judgment is predicated.

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

FLORES V. EXOTIC DESIGN & WIRE LLC

221 A.D.3d 428
November 9, 2023

The plaintiff established a prima facie violation of Labor Law § 240(1) by showing that he was directed to stand on a plywood sheet covering a bathtub while framing a window three feet off the floor, causing him to fall. The court found that this plywood was the functional equivalent of an elevated platform or scaffold. The defendant argued that the fall from three feet rendered the statute inapplicable. The court found this argument unavailing and ruled that the defendant failed to rebut the plaintiff's prima facie showing of a violation of Labor Law § 240(1).

PRACTICE NOTE: An elevated work surface consisting of plywood laid over a bathtub three feet off the ground is the functional equivalent of a scaffold and is a sufficient height differential to trigger the protections of Labor Law § 240(1).

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

KELITZ V. LIGHT TOWER FIBER N.Y. INC.

2023 N.Y. App. Div. Lexis 5548
November 9, 2023

The plaintiff, an electrician, was pulling ropes through conduits between manholes in order to connect them as a part of larger project to install a fiber optic network through a 20-manhole structure, with the ultimate goal of installing the cables into a new communications room in a school building. When the accident occurred, the plaintiff was working in a manhole, crouched directly underneath the manhole opening, and pushing a snake (fiberglass rod) into conduit running parallel to the manhole wall when a vacuum fell from ground level into the manhole and struck the plaintiff on the head. The First Department modified the lower court's order and granted the plaintiff's motion for summary judgment pursuant to Labor Law § 240(1), finding that the plaintiff established that he was engaged in an "alteration" as defined in the Labor Law. In arriving at this conclusion, the court looked at multiple facts. First, this was a multi-worker project involving the installation of fiber optic cables through 20 manholes where none previously existed. Secondly, the cables would ultimately be installed in a school, which would require drilling holes through the foundation and pulling wire through canals in the ceiling to reach a new communication room. The court also found the fact that the vacuum fell from ground level did not remove this case from the ambit of Labor Law § 240(1) as the plaintiff was working below ground level.

PRACTICE NOTE: The task of pulling ropes through conduits, when part of a larger project involving the installation of new fiber optic cables that would ultimately require drilling through a building foundation and installing a new fiber optic network, qualifies as an "alteration" and is a protected activity under the Labor Law. An object falling from ground level on a worker who is working below ground level falls within the purview of Labor Law § 240(1).

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

GAMEZ V. SANDY CLARKSON LLC

221 A.D.3d 453
November 14, 2023

The plaintiff was injured after he tripped on an uncovered gap at the bottom of a staircase located between the stairs and a landing. He was carrying a bucket of cement in one hand and a 4-foot level in the other at the time of the accident. There were other staircases on site and available for the plaintiff's use. The plaintiff testified that he was unable to grab the handrail because his right hand was holding the bucket of cement. The Appellate Division upheld the Supreme Court's denial of the plaintiff's motion for summary judgment based upon Labor Law § 240(1) because there were other means of access to the worksite, which created an issue of fact as to whether the staircase constituted a safety device under Labor Law § 240(1). The Appellate Division further held that the Supreme Court properly declined to dismiss the defendants' affirmative defense of comparative negligence because the plaintiff admitted that he voluntarily occupied both hands while descending the staircase, and because there was evidence that a hoist may have been available to transport the material.

PRACTICE NOTE: A staircase may not constitute a safety device under Labor Law § 240(1) where there are other means of access to the worksite.

TOPICS: *Labor Law § 240(1), Indemnification, Contribution, Insurance procurement, Summary judgment*

AGURTO V. ONE BOERUM DEV. PARTNERS LLC

198 N.Y.3d 66
November 14, 2023

The plaintiff commenced an action after a fall from the top of scaffolding materials stacked on the back of a flatbed truck approximately 18 feet off the ground. As the plaintiff walked over the materials, he tripped over a board and fell to the sidewalk. Despite wearing a safety harness, he was unable to tie off to the back of the truck. The court held that the fact that the fall was precipitated by a trip on a board

does not remove the accident from the scope of Labor Law § 240(1) as a fall from a height without proper safety devices. The court also examined the applicability of the Labor Law to a defendant that was denominated as a construction manager. The court held that, despite being called a construction manager, the manager functioned as a general contractor whose contractual scope of work included "installation, maintenance, and removal of [a] sidewalk bridge in all areas as required" and, thus, the manager was subject to the Labor Law. Additionally, the court dismissed cross-claims against one of the defendants where there was no evidence that this defendant was obligated to indemnify or procure insurance for the other defendants, and where there was no evidence that this defendant actually supervised or contributed to the plaintiff's accident. Further, the court denied one defendant's motion for summary judgment against a co-defendant because the defendant did not supervise the plaintiff or contribute to the accident. Without supervision or contribution to the accident, there could be no finding of active negligence to support a claim for common-law indemnification and contribution. The motion for summary judgment for contractual indemnification was denied because the indemnification agreement contained a negligence trigger, and there was no determination of negligence up to that point.

PRACTICE NOTE: A construction manager who performs the duties of a general contractor whose scope of work falls within that defined by the Labor Law is subject to Labor Law liability. In addition, a claim for common-law indemnification and contribution requires a finding of active negligence against the party against whom the claims are made.

TOPICS: *Labor Law § 240(1), Summary judgment, Scaffold, Industrial Code*

ISSAC V. 135 W. 52ND ST. OWNER LLC

221 A.D.3d 529
November 28, 2023

During trial, the jury answered "No" to whether the defendants violated Labor Law § 240(1), and thus did not reach the issue of proximate causation. The court held that the jury's verdict was against the weight of the evidence, where the scaffold on which the plaintiff was working failed to adequately protect him from a height-related hazard after his core drill jerked and caused the plaintiff to fall backwards. In reaching its decision, the court noted that it did not matter whether the plaintiff's fall was the result of the scaffold tipping or the plaintiff mis-stepping off of its side because, in either instance, inadequate protective devices were the proximate cause of the accident. The court held that liability for failure to provide protective devices would be imposed "without regard to external considerations such as rules and regulations, contracts, or custom and usage." Finally, the court held that Industrial Code is irrelevant for the purposes of Labor Law § 240(1) where the defendant attempted to argue that handrails were not required by the Industrial Code at the height the plaintiff was working.

PRACTICE NOTE: Compliance with rules and regulations such as the Industrial Code, as well as contracts and custom and usage, will not be considered in defense of Labor Law § 240(1) claims where there is a failure to provide safety devices.

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

TISSELIN V. MEMORIAL HOSP. FOR CANCER & ALLIED DISEASES

2023 NY Slip Op 06210
November 30, 2023

The plaintiff was injured while riding in a personnel hoist after a roof access ladder that was mounted on the hoist ceiling partially detached and struck him on the head from a height of 7 to 8 feet. An incident report indicated that the ladder detached when a washer welded to the ladder's rung broke at the weld. The Appellate Division held that the plaintiff established entitlement to summary judgment under Labor Law § 240(1) because he demonstrated that the access ladder required securing for the purposes of the undertaking, and that the hoist, as an enumerated safety device, was inadequate for its purpose of keeping the plaintiff safe while performing an elevation-related activity. In reaching its decision, the court noted testimony that the ladder was an "escape ladder" which

was an essential component of the hoist. The Appellate Division also upheld the lower court's dismissal of the plaintiff's Labor Law § 200 claim because there was no evidence of actual or constructive notice of a dangerous or defective condition, there was no evidence of the creation of the condition, and this section does not apply to parties who are not owners or general contractors. Finally, the Appellate Division denied one of the defendant's motions for summary judgment seeking dismissal of the common-law negligence cause of action where there was evidence that this defendant furnished, installed, and inspected the hoists every 90 days, and said defendant could not demonstrate installation of the hoist without negligence.

PRACTICE NOTE: 1) Liability will attach under Labor Law § 240(1) where a plaintiff can establish that an enumerated safety device is inadequate to keep the plaintiff safe; 2) liability will not attach under Labor Law § 200 where a party is not an owner or general contractor; and 3) there is no liability under Labor Law § 200 where a defendant has no actual or constructive notice of a dangerous or defective condition and the defendant did not create said condition.

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

KNIGHT V. AMMAN & WHITNEY, INC.

2023 NY Slip Op 06215
December 5, 2023

The plaintiff was an employee of the Department of Environmental Protection who was injured while testing the water main valves and gates at a roadway construction project. The plaintiff was injured when the water main gate key he was attempting to turn popped off of an operating nut and knocked him off balance. The plaintiff did not fall, but alleged that he was injured in the exertion required to regain his balance. The defendant engineer testified that the plaintiff was working at street level and argued that the plaintiff's work was not covered by Labor Law § 240(1) because, despite stepping into an excavation, the plaintiff was working at street level. The court held that the contradictory testimony between the plaintiff and the defendant engineer created a triable issue of fact as to whether the plaintiff's work was covered by Labor Law §§ 240 and 241(6) at the time of the accident.

PRACTICE NOTE: There may be an issue of fact sufficient to defeat summary judgment where a plaintiff working in an excavation at street level provides testimony that, although he did not fall, he was knocked off balance while working.

TOPICS: *Labor Law § 240(1), Summary judgment, Slip and fall, Industrial Code § 23-1.7(d)*

ORELLANA V. 386 PARK S. LLC

2023 NY Slip Op 06317
December 7, 2023

The plaintiff alleged that he slipped and fell on debris and a wet/greasy substance in a passageway through which he walked while carrying a concrete bag over his shoulder. The plaintiff argued that this constituted a "foreign substance" within the meaning of Industrial Code § 23-1.7(d). The court denied the plaintiff's motion because he failed to establish that the source of the debris on which he fell was not associated with the work that he or his co-workers were performing at the construction site.

PRACTICE NOTE: To demonstrate prima facie entitlement to summary judgment predicated on a foreign substance under Industrial Code § 23-1.7(d), a plaintiff must show that the source of the debris on which he fell was not associated with the work that he or his coworkers were performing at the site of the accident.

TOPICS: *Actual notice, Equipment defect*

CABRAL V. ROCKEFELLER UNIV.

2023 NY Slip Op 06436
December 14, 2023

The plaintiff was injured when he was struck in the face by a hydraulic piston that was part of a hydraulic arm pulling heavy equipment up the East River. The court reversed the decision granting the plaintiff summary judgment, finding that there was no evidence that the defendants were on notice of a defect in the hydraulic arm and failed to either repair or remove it from service, as well as prior notice concerning the operability of the device at the time of the plaintiff's accident. The court further affirmed the dismissal of the plaintiff's Labor Law § 240(1) claims because his injuries were not caused by the application of the force of gravity.

PRACTICE NOTE: Not every defect in equipment translates to Labor Law liability. Careful investigation into workplace accidents is required to determine whether a mechanical issue was either discoverable or known to defendants prior to an accident.

TOPICS: *Labor Law § 240(1), Scaffold collapse, Comparative negligence*

BIALUCHA V. CITY OF NEW YORK

2023 NY Slip Op 06470
December 19, 2023

The plaintiff was injured when the baker's scaffold upon which he was working collapsed three hours after the plaintiff raised the height of the scaffold. In reversing the trial court and granting the plaintiff's motion for summary judgment, the court noted that the collapse of a scaffold "for no apparent reason" established his prima facie entitlement to judgment on his Labor Law § 240(1) claims, and evidence that the plaintiff failed to properly lock the scaffold pins was at best evidence of comparative negligence, which is not a defense to Labor Law § 240(1) liability.

PRACTICE NOTE: A defense premised upon the plaintiff's own conduct must establish that the plaintiff was the sole proximate cause of his injuries.

TOPICS: *Espinal exceptions, Forces of harm, Third-party beneficiary*

DIAMOND V. TF CORNERSTONE INC.

2023 NY Slip Op. 06473
December 19, 2023

The plaintiff was injured when he slipped on an allegedly defective stair. The court held that evidence that a force of harm was launched by defendants using chemicals

to clean steps and may have exacerbated an existing dangerous condition was sufficient to raise a question of fact with regard to the plaintiff's standard negligence claims. The court reversed the denial of the fire safety and security contractor's summary judgment motion, finding that its general inspection duties did not extend to the condition of the staircase and, even if it did, the negligent inspection did not launch a force of harm or otherwise make the existing condition any less safe. The court further affirmed the dismissal of the plaintiff's Labor Law § 241(6) claims, holding that routine maintenance of a freight elevator does not constitute construction, demolition, excavation or repairs in connection with ongoing construction.

PRACTICE NOTE: It is critical to investigate and establish the precise nature of a given plaintiff's work at the time of an injury, as not all worksite accidents and all workers are subject to Labor Law protections.

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

LOPEZ V. 106 LPA LLC

2023 NY Slip Op 06481
December 19, 2023

The plaintiff was injured when he was struck by a concrete form that fell from where it was leaning against a wall. Although the concrete form was at the same level as the plaintiff, a question of fact was raised in connection with his Labor Law § 240(1) claims as to whether his injuries flowed from the application of the force of gravity, and whether the defendants failed to provide an appropriate safety device. The plaintiff further raised a question of fact on his Labor Law § 241(6) claims to whether the concrete forms were appropriately stockpiled based upon evidence that the same forms were left scattered around the work area by the plaintiff's employer.

PRACTICE NOTE: When defending against Labor Law § 240(1) claims, it is important to attack both elements of prospective liability, including whether the injury was elevation related or based upon forces of gravity.

TOPICS: *Scattered materials, Industrial Code, Generic directives, Transcript errors*

CASTALDO V. F.J. SCIAME CONSTR. CO. INC.

2023 NY Slip Op 06801
December 28, 2023

The plaintiff was injured when he tripped over a hose while pushing a dolly up a ramp. The court affirmed summary judgment in favor of the plaintiff on his Labor Law § 241(6) claims because the evidence established that the ramp was a physically defined area that workers routinely crossed, and that the ramp was blocked by piles of construction material in violation of the Industrial Code. The defendant's attempt to raise a question of fact based upon the plaintiff's testimony concerning the width of the ramp was unavailing, as site drawings and testimony from other witnesses confirmed the accurate width. The court further reiterated that Industrial Code § 23-1.5 is a generic directive and an insufficient predicate for Labor Law § 241(6) liability.

PRACTICE NOTE: Defense counsel must ensure that challenges to the accuracy of the plaintiff's testimony cannot be easily dismissed through corroborating evidence.

TOPICS: *Labor Law § 240(1), Scaffold collapse, Recalcitrant workers, General Obligations Law*

LEMACHE V. ELK MANHASSET LLC

2023 NY Slip Op 06810
December 28, 2023

The plaintiffs were injured when a scaffold collapsed without warning, causing workers – who were not wearing fall-arrest safety devices – to fall 15 feet to the ground. The plaintiffs' motion was granted notwithstanding their failure to utilize safety devices because there was no evidence that they deliberately refused to obey a direct and immediate instruction, and there was further evidence that appropriate tie-off points were not available. The owner's indemnity agreement did not run afoul of the General Obligations Law because it provided that the indemnity obligation was enforceable to the "full extent permitted by law," thereby excluding the owner's negligence from the scope of the obligation.

PRACTICE NOTE: While many scaffolding accidents involve an element of a plaintiff's own negligence, the few defenses available require strict proof of specific elements which must be established in order to prevail against Labor Law § 240(1) claims.

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

MINHOLZ V. COLUMBIA UNIV.

2023 NY Slip Op 06813
December 28, 2023

The plaintiff was injured when a computer server fell on his foot while he was moving a server rack. The First Department upheld the lower court's finding that the plaintiff was not among the class of persons protected by Labor Law §§ 200, 240(1), and 241(6). The court held that, even if the server rack was being moved in anticipation of demolition work, there was no evidence that construction was ongoing at the time of the accident.

PRACTICE NOTE: Not every employee lawfully on a property under construction is necessarily affiliated with the construction work.

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

ERAZO V. ROCKAWAY VIL. HOUS. DEV. FUND CORP.

2023 NY Slip Op 06805
December 28, 2023

The plaintiff was injured by a concrete pumping hose that allegedly fell. The plaintiff alleged that he and a coworker had lifted the hose 3 or 4 feet above the ground before it fell and injured the plaintiff. The First Department held that the sworn statement of the plaintiff's coworker that he was pulling the same hose contradicted the plaintiff and raised an issue of fact as to whether the plaintiff faced the special elevation risks contemplated by Labor Law § 240(1).

PRACTICE NOTE: Liability arises under Labor Law § 240(1) only where the plaintiff's injuries are the direct consequence of an elevation-related risk that they are not properly protected against.

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

CORREA V. 455 OCEAN ASSOC., LLC

218 A.D.3d 435
July 5, 2023

The plaintiff injured his wrist when he dropped a roll of tarpaper he was carrying down an extension ladder to a lower roof level and had to grab the ladder to prevent himself from falling. The Second Department held that the plaintiff established entitlement to summary judgment based on his testimony that, while there was a pulley available to raise and lower items, it required a second person to operate and his foreman instructed him to use the ladder. The court held that the ladder was not an adequate safety device for lowering the roll of tarpaper.

PRACTICE NOTE: Labor Law § 240(1) imposes a non-delegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites on owners and general contractors, along with their agents.

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

GAMEZ V. NEW LINE STRUCTURES & DEV., LLC

218 A.D.3d 446
July 5, 2023

The plaintiff was injured when he was walking on a sixth floor working deck that had pieces of plywood placed on top of it and one of the pieces of plywood allegedly slid out from under him, causing him to fall through a hole it was covering. The plaintiff alleged the plywood had not been nailed down or marked with the word "hole." The Second Department held that, while the plaintiff made a prima facie showing of entitlement to summary judgment, the defendants raised triable issues of fact as to whether the plaintiff was the sole proximate cause of his injuries. The defendants submitted evidence that the plaintiff was a designated safety carpenter who was responsible for making the holes on the deck safe for all workers, there was a strict protocol for nailing down the plywood and marking it as a hole, and that the plaintiff placed the piece of plywood over the hole he fell through. There was also evidence that there were tie-off points and a fall protection system. The court held that credibility questions could not be determined on a motion for summary judgment.

PRACTICE NOTE: A plaintiff's intentional or negligent conduct may be the sole proximate cause of their injuries where adequate safety devices are provided as required by Labor Law § 240(1) but the plaintiff either does not use or misuses them.

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

DYSKIEWICZ V. CITY OF NEW YORK

218 A.D.3d 546
July 12, 2023

The plaintiff alleged he was injured when he slipped and fell down stairs while working at a classroom renovation project. He was carrying a metal doorframe when he slipped on a clear, sticky liquid on the top step. The Second Department held that the Supreme Court had properly granted the defendants summary judgment as to the plaintiff's Labor Law § 241(6) claim predicated on violations of Industrial Code §§ 23-1.7(e) and 23-2.1(b). The court held that these Industrial Code provisions protect workers from tripping hazards and the plaintiff's injuries were the result of a slipping hazard. Further, the accident occurred in a "passageway" and not a "working area" as applicable to Industrial Code § 23-1.7(e). The Second Department also held that the Supreme Court properly found that Industrial Code § 23-2.1(b) was not sufficiently specific to support a Labor Law § 241(6) cause of action. The plaintiff also failed to demonstrate a basis for overturning the jury's verdict as to the remaining claims related to Labor Law § 241(6). The Second Department held that there was a valid line of reasoning which could have led a rational jury to conclude that the defendants did not violate Industrial Code §§ 23-1.7(d) or 23-3.3(e). The evidence at trial was sufficient to allow the jury to find that the liquid was present for a sufficient amount of time to allow someone exercising reasonable care to remedy it. Also, the jury could reasonably have concluded that the plaintiff was removing debris from one location in the school to another and not removing it from the building altogether for disposal as contemplated by Industrial Code § 23-3.3(e).

PRACTICE NOTE: For a court to conclude as a matter of law that a jury verdict is not supported by legally sufficient evidence, it is necessary to first conclude that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury on the basis of the evidence presented at trial.

TOPICS: *Labor Law § 200, Dangerous condition, Means and methods*

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

218 A.D.3d 620
July 12, 2023

The plaintiff was directed to retrieve a pipe from a hardstand, and was injured when he attempted to step down onto a lubricated rebar dowel protruding from the side of the hardstand and slipped. The Second Department held that the defendants' motion for summary judgment was properly denied as they failed to eliminate all triable issues of fact as to whether the rebar dowel and placement of the pipe on the hardstand constituted dangerous conditions, whether the defendants had actual or constructive notice of these conditions, and whether climbing onto and stepping down from the hardstand while retrieving the pipe was an inherent risk of the plaintiff's work.

PRACTICE NOTE: In a Labor Law § 200 claim where a plaintiff alleges that an accident involves both a dangerous condition on the premises and the means and methods of the work, a defendant may only prevail on summary judgment when the evidence exonerates them for all potential concurrent causes of the plaintiff's accident and injury.

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

ESTRELLA V. ZRHLE HOLDINGS, LLC

218 A.D.3d 640
July 19, 2023

The plaintiff was a laborer involved in the removal of damaged carpeting in a property adjacent to the location of his accident. Both properties were under the oversight of the defendant, a general contractor. The

plaintiff was injured when he fell through a temporary plywood floor as he was retrieving a tool from the subject premises. The Second Department held that the defendant's summary judgment motion as to Labor Law § 200 was properly denied as it failed to establish that it did not create or have notice of the allegedly dangerous condition. The court found that the defendant was properly awarded summary judgment as to the Labor Law § 241(6) claim as the Industrial Code provisions the claim was predicated on apply only to demolition work, which the plaintiff was not engaged in at the time. The plaintiff was held to be entitled to summary judgment on his Labor Law § 240(1) claim as he was exposed to an elevation-related risk without any safety device, which was a proximate cause of his injury. There was no evidence that the plaintiff was instructed not to enter the subject premises or that he could obtain the tools he needed to work in the adjacent property from another location.

PRACTICE NOTE: Labor Law § 240(1) protects workers from elevation-related hazards when they are involved in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure even while performing duties ancillary to those acts.

TOPICS: *Labor Law § 240(1), Labor Law § 200, Labor Law § 241(6), Falling object, Supervision, Control, Industrial Code § 23-1.7(a)*

CRUZ V. 451 LEXINGTON REALTY, LLC

218 A.D.3d 733
July 26, 2023

The plaintiff, a laborer, alleges that he sustained injuries when ductwork on the first-floor ceiling became detached and fell approximately 1½ feet onto him. At the time, the plaintiff had removed his protective eyewear, as he was in the designated "safety zone." Both the plaintiff and the defendants moved for summary judgment on Labor Law §§ 240(1), 200, and 241(6). In affirming the dismissal of the plaintiff's Labor Law § 240(1) cause of action, the court agreed that this section was inapplicable as the ductwork, part of the pre-existing structure, was not being actively worked on at the time of the incident and was not an object that required securing and, as such, it was not the kind of risk contemplated by the statute. In affirming the dismissal of the plaintiff's Labor Law § 241(6) claim, the court held that Industrial Code § 23-1.7(a) was inapplicable, as the area where the incident occurred was not "normally exposed to falling material or objects" within the meaning of the code. The dismissal of the plaintiff's Labor Law § 200 claim was also affirmed, as the defendants did not exercise supervision or control over the plaintiff's work.

PRACTICE NOTE: Dismissal of the plaintiff's claims under Labor Law § 240(1) was proper where it was established that the instrumentality that caused the plaintiff's accident did not require securing for the purposes of the work, and the nature/purpose of the work did not pose a significant risk that the object would fall.

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

VALENCIA V. GLINSKI

219 A.D.3d 541
August 2, 2023

The plaintiffs allege they were injured when the scaffolding on which they were standing collapsed. The plaintiffs brought an action against the defendants under Labor Law §§ 240(1), 200 and 241(6). The defendants moved for summary judgment, seeking dismissal of Labor Law § 200 on the grounds that they did not supervise or control the means and methods of the plaintiffs' work. They also sought dismissal of the plaintiffs' Labor Law §§ 240(1) and 241(6) claims under the homeowner's exemption. In affirming the granting of the defendants' motion for summary judgment, the court held that Labor Law § 200 was not applicable, as the defendants did not supervise or control the means and methods of the work performed by the plaintiffs. Further, the court held that since the defendants averred that they purchased the home with the intent to live there full time and not for commercial purposes, the homeowner's exemption to Labor Law §§ 240(1) and 241(6) applied, and the defendants were entitled to judgment on these causes of action.

PRACTICE NOTE: The homeowner's exemption to Labor Law §§ 240(1) and 241(6) applies when the homeowner intends to use the home as a private residence and not exclusively as a commercial property.

TOPICS: *Labor Law § 240(1), Labor Law § 200, Labor Law § 241(6), Hazardous opening, Fall, Hole, Actual notice, Constructive notice, Dangerous condition, Proximate cause*

MUSHKUDIANI V. RACANELLI CONSTR. GROUP, INC.

219 A.D.3d 613
August 9, 2023

The plaintiff was injured when he fell through an improperly covered hole on the 18th floor of a construction site. The plaintiff moved for summary judgment on the issue of liability with respect to Labor Law §§ 200, 240(1) and 241(6). The motion, while initially denied by the lower court, was granted on reargument. On appeal, the court held that the plaintiff established his entitlement to judgment under Labor Law § 240(1), as he was exposed to an elevation-related risk. The plaintiff was also entitled to judgment under Labor Law § 241(6), as the plaintiff established that Industrial Code § 23-1.7(b)(1)(i) requires an opening to be guarded by a "substantial cover." The plaintiff was denied judgment under Labor Law § 200 in that he failed to establish that the defendants either created or had actual or constructive notice that the improper cover posed a danger to the plaintiff.

PRACTICE NOTE: The plaintiff, who fell through an improperly covered hole on a construction site, was entitled to judgment under Labor Law § 240(1), as it was considered an elevation-related risk within the meaning of the statute.

TOPICS: *Labor Law § 200, Common-law negligence, Dangerous condition, Latent defect, Notice*

AGOSTO V. MUSEUM OF MODERN ART

219 A.D.3d 674
August 16, 2023

The plaintiff, an HVAC technician, was using a ladder to replace a CO2 sensor at the defendant's premises when a hot water pipe burst, causing her to fall from the ladder and sustain injuries. The plaintiff moved for summary judgment on Labor Law §§ 200, 240(1) and 241(6). The defendant cross-moved for summary judgment, seeking dismissal of the plaintiff's Labor Law § 200 claim. The lower court denied both motions and the defendant appealed. The Second Depart-

ment held that the lower court properly denied the defendant's motion for summary judgment, as the defendant failed to establish that the alleged deteriorating condition of the pipe was latent and not discoverable.

PRACTICE NOTE: The defendant was not entitled to summary judgment on the plaintiff's Labor Law § 200 claim when it could not establish that it did not have actual or constructive notice of the existence of an alleged discoverable condition.

TOPICS: *Labor Law § 200, Labor Law § 240(1), Control, Supervision, Proximate cause, Ladder, Falling object*

MAISURADZE V. NOWS THE TIME, INC.

219 A.D.3d 722
August 16, 2023

The plaintiff alleges that he sustained injuries on a construction site when a 10-foot metal pipe fell on his head. The defendant moved for summary judgment, seeking dismissal of the plaintiff's Labor Law §§ 200, 240(1) and 241(6) claims. The plaintiff cross-moved for summary judgment on his Labor Law § 240(1) claim. The Supreme Court granted the defendant's motion and denied the plaintiff's motion. The plaintiff appealed. In affirming the holding of the lower court, the Second Department held that the defendant established its entitlement to judgment on the plaintiff's Labor Law § 200 claim by proving that it was neither the general contractor nor an agent, and did not have control over the worksite or the authority to exercise supervision or control over the work performed by the plaintiff. In upholding the dismissal of the plaintiff's Labor Law § 240(1) claim, the court held that the plaintiff – who testified that he did not see the pipe before it hit him – did not know where the pipe came from, did not know whether the pipe was necessary for the work performed, and could not establish that the pipe's fall was proximately caused by a violation of Labor Law § 240(1).

PRACTICE NOTE: A defendant is entitled to summary judgment under Labor Law § 200 when it establishes that it was not a general contractor nor an agent, and did not have control over the worksite or the work the plaintiff performed. Labor Law § 240(1) is not applicable where a plaintiff cannot establish that the falling object was proximately caused by a violation of the statute.

TOPICS: *Labor Law § 240(1), Fall from ladder, Summary judgment, Agency, Assumption of risk*

DEPASS V. MERCER SQUARE, LLC

219 A.D.3d 801
August 23, 2023

The plaintiff was allegedly injured when he fell from a ladder while removing carpeting as part of the demolition portion of a construction project. The plaintiff sued the owner and manager of the building under Labor Law §§ 200, 241(6) and 240(1). The plaintiff filed a motion for summary judgment against the defendants on his liability claims, as well as to dismiss certain affirmative defenses. Labor Law § 240(1) imposes liability on contractors, owners or their agents. "An agency relationship for purposes of § 240(1) arises only when work is delegated to a third party who obtains the authority to supervise and control the job. Where responsibility for the activity surrounding an injury was not delegated to the third party, there is no agency liability under the statute." The Appellate Division upheld the dismissal of the assumption of risk affirmative defense, holding that affirmative defense is generally limited to risks arising out of the voluntary participation in athletic and recreational activities.

PRACTICE NOTE: Plaintiffs have the burden of proving that the alleged agent had the authority to supervise or control the work being performed that led to the alleged injury in order to establish liability under Labor Law § 240(1).

TOPICS: *Labor Law § 240(1), Fall from ladder, Summary judgment, Sole proximate cause*

IANNACCONE V. UNITED NATURAL FOODS, INC.

219 A.D.3d 819
August 23, 2023

The plaintiff was allegedly injured in a fall from a ladder which he set up against a light pole, with the base of the ladder resting on top of "landscaping" rocks. While he was on the ladder, the rocks gave way, causing the ladder to shift and him to fall. The defendants and the plaintiff's employer moved for summary judgment, alleging that there was no liability under Labor Law § 240(1) where the plaintiff was the sole proximate cause of his own injuries. The Appellate Division stated that "a plaintiff may be the sole proximate cause of his own injuries when, acting as a recalcitrant worker, he (1) had adequate safety devices available, (2) knew both that the safety devices were available and that [he] was expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had [he] not made the choice." The Appellate Division ruled in favor of the plaintiff because, although the plaintiff testified that he could have set up the ladder in a driveway, it was not safe for him to do so because that was where trucks drove in to the project.

PRACTICE NOTE: It is difficult to prove a plaintiff was the sole proximate cause of his own injuries. Care must be taken to establish a record supporting each and every element set forth above.

TOPICS: *Covered person, Inspectors*

LAURIA V. LIPPOLIS CONSTRUCTION, INC.

219 A.D.3d 823
August 23, 2023

The plaintiff in this case, employed as an inspector for a village, was injured while conducting an inspection of an excavation on a worksite. The inspector lowered himself into the excavation, and was injured when he tripped and fell after stepping on the ground. He sued the owner and general contractor, alleging violations of Labor Law §§ 200, 241(6) and 240(1). The action was dismissed because the court held he was not in the class of persons subject to the protections of the Labor Law. The court noted that neither the plaintiff nor his employer, the village, had been retained to perform any work on the subject project, and that the plaintiff was allegedly injured while performing a visual inspection after the property had been "fully excavated."

PRACTICE NOTE: Whether inspection work falls within the purview of the Labor Law will be determined on a case-by-case basis, and depends upon the context of the work. In this case, the work had already been completed.

TOPICS: *Routine maintenance, Repairs, Defective condition*

NUSIO V. LEGEND AUTORAMA LTD.

219 A.D.3d 842
August 23, 2023

The plaintiff was retained to perform work on a garage door at the defendant's auto shop. While working on the door, the ladder the plaintiff was using kicked out, causing him to fall and sustain injuries. There was evidence adduced that there was an oil barrel located near where the plaintiff was working that was dripping oil. There was also evidence that as employees of the auto shop changed vehicle oil filters, oil would drip onto the floor. The defendants moved to dismiss the Labor Law claims as well as the common-law negligence claims. The Appellate Division had to examine whether the plaintiff was engaged in an enumerated activity under the Labor Law. The court found issues of fact existed as to whether the plaintiff was engaged in "repair" or routine maintenance under Labor Law §§ 240(1) and 241(6). With regard to common-law negligence, the court found issues of fact existed as to whether a defective condition existed on the premises and caused the plaintiff's accident.

PRACTICE NOTE: Plaintiffs continue to attempt to expand the application of New York Labor Law to instances where it should not apply. The practitioner should be sure to examine what exactly the plaintiff was doing when the accident occurred rather than just assume that Labor Law applies.

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

ELIBOX V. NEHEMIAH SPRING CR.IV MIXED INCOME HOUSE DEV. FUND CO. INC.

219 A.D.3d 906
August 30, 2023

The plaintiff was injured when he was working alone on a scaffold that suddenly collapsed due to missing nails in the scaffold planks, causing the plaintiff and the planks to fall to the ground. The plaintiff's foreman testified that, during his inspection of the scaffold prior to plaintiff's accident, he had confirmed that all planks were properly installed and secured with nails. However, when he inspected the scaffold after plaintiff's accident, he observed that several of the nails securing the overlapping planks had been removed. The plaintiff was denied summary judgment on Labor Law §§ 241(6) and 240(1), which the Appellate Division affirmed as the defendants raised a triable issue of fact as to the sole proximate cause of the plaintiff's accident based on his foreman's testimony.

PRACTICE NOTE: When examining the plaintiff's claim of a scaffold collapse, keep in mind that the plaintiff may have been the proximate cause of their own injuries.

TOPICS: *Labor Law § 240(1), Labor Law § 200, Supervision, Control*

WILSON V. BERGON CONSTR. CORP.

219 A.D.3d 1380
September 13, 2023

The plaintiff was working on an aluminum plank between two five-foot-high scaffolds when the plank shifted, causing the plaintiff to lose his balance and fall into a wall. The plaintiff moved for summary judgment against the owner, lessee and general contractor of the property based on Labor Law §§ 240(1) and 241(6). The defendants cross-moved and were granted summary judgment, dismissing the plaintiff's claims under Labor Law § 200 by asserting that the owner and lessee defendants exercised no supervisory control over the plaintiff's work and that the general contractor had at most, supervisory authority, which was supported by the plaintiff's deposition testimony. The defendants raised a triable issue of fact as to Labor Law § 240(1) by asserting that the plaintiff's accident did not constitute a fall as his feet never left the scaffold. The plaintiff appealed, and the defendants cross-appealed. The Appellate Court affirmed the lower court's decision on Labor Law § 200. However, the court determined that the plaintiff's motion for summary judgment on Labor Law § 240(1) should have been granted, as the defendants failed to submit any evidence other that speculation that, since the plaintiff did not fall, his injuries were not related to the effects of gravity and/or an elevation-related risk.

PRACTICE NOTE: When assessing a plaintiff's claims, keep in mind the breadth of liability under Labor Law § 240(1).

TOPICS: *Engineers, Exception to Labor Law*

FLOOD V. AHERN PAINTING CONSTRS. INC.

219 A.D.3d 1408
September 20, 2023

The plaintiff commenced this action under Labor Law §§ 200, 240(1) and 241(6) to recover damages for personal injuries he allegedly sustained while working as a bridge painter, after he slipped and fell from a bridge cable that was painted and treated in a defective manner. The general contractor commenced a third-party action against the plaintiff's employer, who impled the engineering and consulting firm, GPI. GPI moved for and was granted summary judgment. The court found that, as professional engineers who do not direct or control work outside of their scope, they were exempt from liability for noncompliance under Labor Law § 241(6) pursuant to § 241(9) and, as they did not supervise or control the plaintiff's work, they were not liable under Labor Law §§ 200 or 240(1). Follow-

ing the dismissal of these claims, the plaintiff's employer asserted cross-claims against GPI. These were also summarily dismissed. Finally, the plaintiff's employer impled GPI a second time, at which point GPI moved for sanctions, which were denied. GPI appealed. The Appellate Court affirmed the dismissal of the causes of action against GPI pursuant to Labor Law § 241(9), however, declined to impose sanctions.

PRACTICE NOTE: When analyzing contracts to determine additional parties to implead into a Labor Law matter, be mindful of the exemptions set forth in Labor Law § 241(9).

TOPICS: *Labor Law § 241(6), Industrial Code § 23-1.7(e)(1)*

GARCIA V. 1000 DEAN, LLC

219 A.D.3d 1491
September 27, 2023

The plaintiff was injured when he fell while carrying two pieces of rebar on premises owned by the defendant, 1000 Dean, due to an uncovered hole in the floor. He commenced an action under Labor Law §§ 200, 240(1) and 241(6). At trial, the jury rendered a verdict for the defendant on the cause of action brought under Labor Law § 241(6) predicated on a violation of Industrial Code § 23-1.7(e)(1). The plaintiff then moved to set aside, pursuant to CPLR 4404(a), and was denied. The plaintiff appealed. The Appellate Court affirmed the denial of the plaintiff's motion, contending that a jury could reasonably interpret that the plaintiff was the proximate cause of his own accident, and that the defendants did not violate Industrial Code § 23-1.7(e)(1). This finding was based on the testimony of the general contractor's foreman regarding their common practice to cover holes in the floor with plywood, and that he had walked through the area in which the plaintiff was injured multiple times a day and could not recall any instance in which the holes were uncovered, even though he personally had covered the hole over which the plaintiff tripped following his accident.

PRACTICE NOTE: When evaluating a plaintiff's claims under Labor Law § 241(6), keep in mind that not only must there be a violation of an applicable Industrial Code but that violation must have been the proximate cause of the plaintiff's injuries.

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

WALSH V. KENNY

219 A.D.3D 1555
September 27, 2023

The plaintiff was injured while removing and replacing boards on a backyard deck at a residence owned by the defendant. The defendant moved for summary judgment at the trial level, which was granted. On appeal, the court reversed that decision, holding that there were triable issues of fact pertaining to whether or not the homeowner's exemption applied, which relieves an owner of a one- or two-family dwelling from liability under Labor Law §§ 241(6) and 240(1). Although the defendant demonstrated that the work being performed at his single-family home was directly related to its residential use, the defendant failed to establish that he did not direct or control the plaintiff's work. The plaintiff testified that the defendant owned a business that employed the plaintiff to perform carpentry work on decks, and that the defendant instructed the plaintiff on which boards to remove and replace at the defendant's home. The plaintiff also testified that the defendant provided all of the materials and tools that the plaintiff used for the work at the defendant's home. This testimony raised a question of fact on the issue of control, warranting a denial of the defendant's motion.

PRACTICE NOTE: In order for a defendant to receive the protection of the homeowner's exemption, the defendant must show that (1) the premises consisted of a one- or two-family residence, and (2) the owner did not direct or control the work being performed.

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

PAWELIC V. SIEGEL

220 A.D.3d 883
October 18, 2023

The plaintiff fell while repairing a roof, sustained injuries, and subsequently died. The defendant moved for summary judgment at the trial level, which was granted. On appeal, the court reversed that decision, holding that there were triable issues of fact pertaining to whether or not the homeowner's exemption applied, which relieves an owner of a one- or two-family dwelling from liability under Labor Law § 241(6) and 240 (1). The plaintiff submitted evidence that the defendant had rented the property prior to the accident, and listed the property for sale following the accident. Based on this evidence, the court held that the homeowner's exemption was not intended to insulate owners who use their one- or two-family houses purely for commercial purposes and that renovating a residence for resale or rental plainly qualifies as work being performed for a commercial purpose.

PRACTICE NOTE: Where a property serves both residential and commercial purposes, a determination as to whether the homeowner's exemption applies turns on the nature of the site and the purpose of the work being performed, and must be based on the owner's intentions at the time of the injury.

TOPICS: *Scaffold, Affidavits, Dispositive motions*

MITCHELL V. 148TH ST. JAMAICA CONDOMINIUM

198 N.Y.S.3d 396
November 1, 2023

The plaintiff fell from a scaffold while "working within" a building on a construction site. The complaint asserted causes of action alleging common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6). Before depositions were conducted, the defendants moved for summary judgment on the grounds that they had no supervisory control over the work the plaintiff performed since they only erected scaffolding on the exterior of the building. In response, the plaintiff argued that the motions for summary judgment were premature because discovery was not complete. The court rejected this argument on the grounds that the plaintiff failed to offer any evidentiary basis to suggest that additional discovery may lead to relevant evidence, or that facts essential to opposing the motion were exclusively within the knowledge and control of the defendants.

PRACTICE NOTE: If you are going to move for summary judgment before discovery is complete, make sure to be thorough and submit all evidence in support of your position.

TOPICS: *Labor Law § 241(6), Summary judgment, Industrial Code § 23-1.7(e)(1)*

TOMPKINS V. TURNER CONSTR. CO.

198 N.Y.S.3d 583
November 8, 2023

The plaintiff was working as a carpenter on a construction project when he tripped and fell on a raised or bowed piece of Masonite board while carrying materials along a walkway. Upon completion of discovery, the plaintiff moved for summary judgment, which was granted on appeal. The plaintiff tendered evidence establishing that while performing construction work, he fell over a tripping hazard in a passageway in the form of a raised or bowed piece of Masonite board, and that this unsafe condition was the proximate cause of his injuries. The plaintiff relied on Industrial Code § 23-1.7(e)(1), which provides that all passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping.

PRACTICE NOTE: To succeed on a cause of action alleging a violation of Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the accident

TOPICS: *Labor Law §§ 200 and 241(6), Passageway, Notice of dangerous condition, Industrial Code § 23-1.7(b), Industrial Code § 23-1.7(e)(1) and (2)*

FREYBERG V. ADELPHI UNIV.

221 A.D.3d 658
November 8, 2023

The plaintiff was performing carpentry work at a building owned by the defendant when he struck his foot on plywood that was covering a hole in the floor, causing him to trip and sustain injuries. The defendant moved for summary judgment on the Labor Law §§ 200 and 241(6) causes of action. The defendant was unsuccessful on the Labor Law § 200 cause of action because it failed to establish that it lacked constructive knowledge of the dangerous condition since it did not submit any evidence that the plywood was a latent defect that could not have been discovered upon a reasonable inspection. However, the defendant established its prima facie entitlement to judgment as a matter of law dismissing so much of the Labor Law § 241(6) cause of action as was predicated on a violation of Industrial Code § 23-1.7(b) by demonstrating that the 4-inch hole covered by the plywood was too small for the plaintiff to fall through. With respect to the Labor Law § 241(6) cause of action as was predicated on violations of Industrial Code § 23-1.7(e)(1) and (2), the defendant established the area where the plaintiff alleged that he fell was not a passageway and the plywood upon which the plaintiff alleged he tripped was an integral part of the construction work being performed.

PRACTICE NOTE: If a defendant is going to claim that it lacked notice of a dangerous condition because it was latent, there must be evidence to support this contention. Simply claiming that a dangerous condition was latent, without proof, will not be sufficient to succeed on a dispositive motion.

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

CHAPA V. BAYLES PROPERTY, INC.

221 A.D.3d 855
November 22, 2023

After falling off a ladder, the plaintiff commenced a personal injury action against property owner Bayles and Ressa Management, as well as CS Stucco and Plaster, asserting violations of Labor Law § 240(1). Bayles and Ressa asserted common-law and contractual indemnification against CS Stucco. The Second Department denied summary judgment based on common-law indemnification, holding that Bayles and Ressa failed to demonstrate as a matter of law that CS Stucco either was negligent or actually directed or supervised the work that gave rise to plaintiff's injuries. However, the court granted the movant summary judgment based on contractual indemnification, holding that the finding that the hold harmless agreement at issue was executed after the date of the accident, but was intended to apply retroactively to include the entire duration of the project. In addition, Bayles and Ressa demonstrated that they were free from active negligence in connection with the plaintiff's injuries.

PRACTICE NOTE: Labor Law § 241(1) liability can be shifted to a contractor by a property owner, even where a contract post-dates the work in question, if the movant establishes that the contract was intended to apply retroactively.

TOPICS: *Labor Law § 240(1), Labor Law § 240(2), Labor Law § 241(6)*

HOSSAIN V. CONDOMINIUM BOARD OF GRAND PROFESSIONAL BUILDING

221 A.D. 3d. 981
November 29, 2023

The plaintiff sought recovery for damages for personal injury while performing pointing work on the façade of a building owned by defendant, Condominium Board of Grand Professional Building, and managed by defendant, G. Buddy. A rope scaffold on which the plaintiff was working, and on which the plaintiff was operating alone, swung and hit the building. The plaintiff sought recovery under Labor Law §§ 240, 240(2) and 241(6). The Appellate Division overturned those portions of the plaintiff's motion for summary judgment as against G. Buddy, the property manager. It found that the express terms of the Labor Law apply only to contractors, owners, and their agents. They further found that the plaintiff failed to demonstrate that G. Buddy had the authority to supervise and control the work that brought about the plaintiff's injuries. Instead, it found that G. Buddy had no control over or supervisory responsibilities on the worksite. As to the Condominium Board of Grand Professional Building, the court found that the plaintiff established liability against the Board pursuant to Labor Law § 240(1). They found that the plaintiff's accident occurred while he was working on a rope scaffold that failed to provide proper protection under that provision of the Labor Law. Nevertheless, the court denied the plaintiff's motion for summary judgment under Labor Law § 240(2), as it found that the plaintiff failed to establish that the scaffolding in question was more than 20 feet above the ground, that it lacked properly secured safety railings, and that the failure to provide such protection was the proximate cause of the plaintiff's injuries.

PRACTICE NOTE: A managing agent that does not control or supervise the work which caused a plaintiff's injuries can establish freedom from liability under the Labor Law. With respect to Labor Law § 240(2), a plaintiff must establish that a violation of that section, including the failure to provide proper safety rails, was a proximate cause of the plaintiff's injuries.

TOPICS: *Labor Law § 240(1), Elevation-related injury, Labor Law § 241(6)*

LALIASHVILI V. KADMIA TENTH AVENUE SPE, LLC

221 A.D.3d 988
November 29, 2023

The plaintiff, employed by third-party defendant, All City Glass and Mirror, was injured at a worksite while transporting unsecured glass panels using an A-frame cart when the cart's wheel allegedly "got caught on something," causing the cart to stop and the glass panels to fall. When he attempted to prevent the glass panels from falling, they hit the plaintiff on the head and shattered on him, causing injury. In rejecting the plaintiff's motion for summary judgment under Labor Law § 240(1), the court found that the plaintiff did not demonstrate as a matter of law that at the time the object fell, it was being hoisted or secured, or that the falling object required securing for the purpose of the undertaking. However, the court affirmed the denial of the defendant's motion for summary judgment under Labor Law § 240(1), holding that neither party had eliminated triable issues of fact as to whether the accident was the result of a gravity-related risk. Noting that All City Glass and Mirror employees typically utilized belts to secure glass panels during transport, the court held that triable issues of fact existed as to whether belts securing the glass panels would have been necessary or expected, and whether the plaintiff's accident was caused by the absence of such belts. The court found triable issues of fact under Labor Law § 241(6), holding that neither party established as a matter of law whether the wheels of the plaintiff's A-frame cart were maintained free-running, and whether the cart from which the glass panels fell was caused to stop suddenly due to a wheel that was not maintained in a free-running manner.

PRACTICE NOTE: Plaintiff's claims under Labor Law § 240(1) require demonstration that the plaintiff's injuries were the direct consequence of a failure to secure against an elevation differential. Claims under Labor Law § 241(6), involving free-wheeling construction carts, require a determination as to whether the reason a cart stopped suddenly was that the wheels were not maintained in a free-running manner. Demonstration of sufficient evidence as to free-running wheels is fact specific, and requires the parties to demonstrate that maintenance of the cart was being performed or not performed in a satisfactory manner.

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

RICCOTTONE V. PSEG LONG ISLAND, LLC

221 A.D.3d 1032
November 29, 2023

An employee of non-party Verizon Communications was injured when he dove under a truck in response to an explosion that occurred when employees of the defendant company were hoisting a portion of damaged utility pole. The Appellate Division upheld the lower court's dismissal of the plaintiff's claims under Labor Law § 240(1) based on the plaintiff's acknowledgement that no portion of the utility pole fell where the plaintiff was standing, approximately 150 feet away. The court found that the defendants' cross motion seeking dismissal of Labor Law § 241(6) should have been denied. It noted that if a property owner did not have the authority to supervise or control the means and methods of the work, it cannot be held liable under Labor Law § 241(6). However, the court found that the moving defendants did not produce sufficient evidence of their lack of control or supervision of the work. The court found that the plaintiff failed to establish his entitlement to judgment as a matter of law as to Labor Law § 200 in that he did not eliminate triable issues of fact as to the cause of the accident.

PRACTICE NOTE: A plaintiff must demonstrate that the application of the force of gravity to an object or person caused or contributed to the plaintiff's injuries to establish liability under Labor Law § 240(1). Liability under Labor Law § 241(6) requires a determination that the defendants control or supervise the work in question. A total replacement of a telephone pole severely damaged after a vehicle hit a pole can be the subject of Labor Law § 241(6) unless the defendants were merely replacing components of the pole or items that required replacement during the course of normal wear and tear.

TOPICS: *Amending pleadings, Labor Law § 240(1), De minimis height differential*

CASTILLO V. HAWKE ENTERS., LLC

222 A.D.3d 827
December 20, 2023

The plaintiff was injured in the course of lowering a 195 lb. cylinder from a height of 10 to 11 feet above the ground. The plaintiff's co-worker dropped the cylinder about 4 inches, trapping the plaintiff's hand and crushing his left middle finger. The plaintiff's counsel moved to amend his pleading to interpose a Labor Law § 240(1) claim, asserting that he mistakenly made a Labor Law § 241 claim in his prior pleading. The Appellate Division allowed the amendment to correct the error since the amendment corrected a typographical error, it did not result in prejudice or surprise to the defendants, and was not palpably insufficient or patently devoid of merit. However, the Appellate Division found that the plaintiff's motion for summary judgment on the Labor Law § 240(1) claim was properly denied, finding that the plaintiff had not proven that he sustained the type of elevation-related injury governed by the statute. Specifically, the court found that there were triable issues of fact as to whether the 4-inch height differential was *de minimis* based upon the cylinder having generated enough force in its descent to crush the plaintiff's finger. The court also found that the defendants – who argued that the plaintiff was engaged in routine maintenance (rather than repair) and that he was the sole proximate cause of his injuries – had not met their burden to dismiss the Labor Law § 240(1) claim.

PRACTICE NOTE: To support the defense that the activity is "routine maintenance" and, therefore, not protected under Labor Law § 240(1), evidence should be developed during discovery regarding the system at issue and activities and/or part replacements required to maintain it in the ordinary course.

TOPICS: *Labor Law §§ 240(1) and 241(6), Industrial Code violation*

RIVAS V. PURVIS HOLDINGS, LLC

2023 NY Slip Op 06267
December 6, 2023

The plaintiff was a masonry worker employed by a third-party defendant. He was injured when he fell from a ladder that allegedly moved. The Appellate Division found that the plaintiff demonstrated a prima facie entitlement to judgment on his Labor Law § 240(1) claim, but upheld the denial of the plaintiff's summary judgment motion because the defendants raised a triable issue of fact as to whether the accident resulted from a violation of the statute. The Appellate Division also denied the plaintiff's motion for summary judgment on his Labor Law § 241(6) claim because photographs established that the ladder was properly secured as required by Industrial Code § 23-1.21(b)(4)(ii). In addition, the Appellate Division upheld the lower court's finding that the plaintiff abandoned his reliance upon certain other Industrial Code sections because he failed to address those code sections in opposition to the defendants' motion.

PRACTICE NOTE: In making a summary judgment motion, a defendant should address each of the plaintiff's claims, including each Industrial Code section alleged in the Bill of Particulars. The plaintiff may – inadvertently or intentionally – fail to respond in opposition to the defendant's arguments on each claim. The plaintiff's failure to oppose dismissal of any particular claim may be found to constitute an abandonment of it.

TOPICS: *Statutory agent*

WOODRUFF V. ISLANDWIDE CARPENTRY CONTRS., INC.

222 A.D.3d 920
December 20, 2023

The plaintiff's decedent was an employee of a general contractor that was performing a gut renovation of a townhouse. The defendant was a subcontractor who installed the ceiling, but left it unfinished. The plaintiff had been instructed by the general contractor and owner to spackle a portion of the second floor ceiling that was at or near a stairwell. The plaintiff's decedent stood on a railing to spackle the ceiling, and was injured when he fell down the stairwell to the first floor. The Appellate Division affirmed the dismissal of the Labor Law §§ 240(1) and 241(6) claims against the defendant, finding that it was not a statutory "agent." To be liable under these statutes as an agent of the owner or general contractor, the defendant must be shown to have had authority to supervise and control the work that brought about the injury, irrespective of whether it actually exercised that authority. The defendant showed that it was not on-site when the accident occurred, and that it did not have authority to supervise or control the work of the plaintiff's decedent.

PRACTICE NOTE: To develop evidence bearing on the question of whether a defendant is a statutory "agent," the scope of the defendant's contracted work and its authority should be fully explored during discovery.

TOPICS: *Grave injury, Collateral estoppel, Employer liability, Summary judgment*

PIERCE V. ARCHER DANIELS MIDLAND, CO.

221 A.D.3d 1382
November 30, 2023

The plaintiff's decedent was fatally injured in an industrial grain elevator during the course of his employment. The plaintiff brought suit against Archer Daniels Midland Co. and its subsidiary, ADM Milling. These defendants moved to dismiss the complaint and all cross-claims under CPLR 3211(a)(7), arguing that the claims against them were barred by the exclusivity provisions of the Workers Compensation Law. On a CPLR 3211 motion to dismiss, the court is to liberally construe the complaint allegations, accept the facts alleged as true, give the plaintiff the benefit of every possible inference, and determine whether the facts alleged fit within any cognizable theory. On appeal, the plaintiff argued that the motion should have been denied because discovery was needed to identify which company employed the plaintiff's decedent, given that certain wage records had conflicting identities of the employer. The Appellate Division noted, however, that the plaintiff applied for Workers Compensation benefits naming ADM Milling as the employer, the plaintiff accepted these benefits, and the court took judicial notice of a Workers Compensation Board decision establishing that ADM Milling was the employer. The court found that the Workers Compensation Board's decision was final and binding, and collaterally estopped the plaintiff from challenging that finding in the lawsuit. The court additionally found that since the plaintiff assumed a position in a prior legal proceeding and succeeded, the doctrine of judicial estoppel prevented her from assuming a contrary position in a subsequent proceeding simply because her interests have changed. Although the establishment of ADM Milling as the employer shielded it from liability to the plaintiff, it nevertheless remained subject to common-law indemnity and contribution cross-claims because the injury at issue (death) is a "grave injury" under Workers Compensation Law § 11. The court also found that it was premature for the lower court to dismiss the claims against ADM Milling's parent company, Archer Daniels Midland, on a pre-answer dismissal motion where discovery was needed to ascertain the extent to which it controlled the accident site, the personnel, and the instrumentality of the injury, particularly since it was in exclusive possession of that information.

PRACTICE NOTE: Discovery should be done to see if the plaintiff has taken a contrary position in a prior legal proceeding and/or whether there were final determinations made in a prior proceeding, which may operate to effect an estoppel (judicial estoppel or collateral estoppel) that prevents the plaintiff from taking a contrary position in the pending litigation.

TOPICS: *Labor Law §§ 200 and 241(6), Industrial Code § 23-1.29, Proximate cause*

SCHOONOVER V. DIAZ

222 A.D.3d 1244
December 21, 2023

The plaintiff, a laborer, was injured when struck by a car in the course of guiding a two-person basket lift in the parking lot at a hotel that was under construction. In support of his Labor Law § 241(6) claim, the plaintiff relied on Industrial Code § 23-1.29, which requires barricading or fencing of construction areas in locations where public vehicular traffic may be hazardous to construction workers. The Appellate Division found that this code section is applicable to off-road parking areas. The defendants relied, in part, upon an expert affidavit that the plaintiff was tasked with controlling the area of the basket lift's movement, but the court rejected the affidavit as containing conclusory assertions. The court noted that determining the scope of the Industrial Code presents a question of law, and it found that the Industrial Code section was applicable. Nevertheless, the court said that a violation of a regulation is merely some evidence of negligence and does not necessarily establish an entitlement to summary judgment. The plaintiff was also required to show that the violation was a proximate cause of his injuries, and the court found a question of fact on this issue. In addressing the plaintiff's Labor Law § 200 claim, the court noted the two standards for an owner's or general contractor's liability: 1) a hazardous or defective condition on the premises that the defendants were or should have been aware of and failed to correct, or; 2) where the injury arose from the means and methods of the work over which the defendants exercised supervisory control. The court found that there was sufficient evidence to raise a question of fact on both standards for Labor Law § 200 liability based on the defendants' knowledge of the work, knowledge of vehicular traffic in the parking lot, and evidence of their direction of the work.

PRACTICE NOTE: Even if it appears that an Industrial Code section was violated, a defendant should attempt to develop evidence during discovery that the violation was not a proximate cause of the accident. Although this may not suffice to have the claim dismissed upon a defense motion, it may be sufficient to raise a question of fact to defeat a plaintiff's motion for summary judgment based on that violation.

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

VERDUGO V. FOX BLDG. GROUP, INC.

218 A.D.3d 1179
July 28, 2023

The plaintiff, a carpenter, was wearing a body harness with a 4-foot lanyard attached to the unsecured roof truss that he stood upon. He was injured when a crane cable became entangled with that unsecured roof truss, causing him and the truss to fall 13 to 14 feet to the ground. The defendants moved to dismiss the Labor Law § 240(1) claim, arguing that the plaintiff was the sole proximate cause by connecting his lanyard to the unsecured truss. The Appellate Division observed that "to establish a sole proximate cause defense, a defendant must demonstrate that the plaintiff (1) had adequate safety devices available, (2) knew both that the safety devices were available and that they were expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had they not made that choice." (Citations, internal quotation marks and brackets omitted) Finding questions of fact as to each of the foregoing elements, the Appellate Division reinstated the plaintiff's Labor Law § 240(1) claim and affirmed the denial of the plaintiff's summary judgment motion. However, the Appellate Division found that the plaintiff's Labor Law § 240(1) claim should have been dismissed against the defendant boom truck company because it was not a statutory agent since it was not the owner or general contractor, and it had no control over the plaintiff or the work he was performing.

PRACTICE NOTE: On the sole proximate cause issue, the court noted that an employer's warning to avoid unsafe practices does not constitute a refusal to use available and appropriate equipment. In addition, a plaintiff's decision to use one method to perform the work when a safer method existed merely constitutes comparative fault, and so it is no defense under Labor Law § 240(1). In view of this, in support of a sole proximate cause defense, a defendant will need to develop evidence to clearly show the availability of adequate safety devices and that the plaintiff was directed to use them but failed to do so.

TOPICS: *Labor Law § 240(1), Labor Law § 241(6), Industrial Code § 23-1.7(b)(1)(i), Trenches, Enumerated activity, Industrial Code § 23-1.7(d) and (e)*

ROSS V. NORTHEAST DIVERSIFICATION, INC.

218 A.D.3d 1244
July 28, 2023

The plaintiff, a concrete finisher, had been injured when he allegedly slipped and tripped on a stone and fell into a 2 to 2½ foot wide, 8 to 12 inch deep trench that had been cut into the blacktop to allow the installation of a curb. The Fourth Department found that the plaintiff's Labor Law § 240(1) claim was improperly granted by the lower court because the plaintiff was not engaged in the type of work contemplated by the statute. The plaintiff's work involved only the demolition and restoration of a sidewalk, not the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure as contemplated by the statute. Although the plaintiff argued that the sidewalk work was part of a large construction project, the plaintiff and his employer had no other role in the project and the sidewalk work constituted a separate and distinct phase of the overall project. Further, the court found that the lower court erred in granting the plaintiff's Labor Law § 241(6) claim, citing Industrial Code § 23-1.7(b)(1)(i), which applies to any hazardous opening into which a person may step or fall, provided that it is one of "significant depth and size." The court found that the trench into which the plaintiff fell was of insufficient depth and size to constitute a hazardous opening. Finally, the court determined that with respect to the plaintiff's Labor Law § 241(6) claim under Industrial Code §§ 23-1.7(d) and 1.7(e), there was an issue of fact concerning who was responsible for clearing up the loose stones that allegedly caused the plaintiff to slip and trip, and whether those stones constitute a foreign substance which may cause slippery footing.

PRACTICE NOTE: The demolition and restoration of a sidewalk is not covered under Labor Law § 240(1) as it constitutes a separate and distinct phase of the overall construction project. A trench measuring 2 to 2½ feet wide and 8 to 12 inches deep is insufficient depth and size to constitute a hazardous opening under Industrial Code § 23-1.7(b)(1)(i). Conflicting information regarding who is responsible for the clearing up of loose stones and whether those stones constituted a foreign substance which may cause slippery footing created an issue of fact under Labor Law § 241(6).

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

PRIMOSCH V. PEROXYCHEM, LLC

219 A.D.3d 1151
August 11, 2023

The lower court erred in granting the plaintiff's motion for summary judgment on its Labor Law § 200 claim because the parties' submission demonstrated an issue of fact as to whether the plaintiff's conduct was the intervening superseding cause of his injuries. The plaintiff was alleged to have sustained an electric shock while performing work on a vacuum circuit breaker (VCB) at the defendant's substation. The record established that the defendant failed to de-energize the VCB, but the record further establishes that electricians are supposed to test the wires for high voltage and attach grounds for protection and that the plaintiff would have been expected to do so. With respect to its Labor Law § 240(1) claim, the Fourth Department found that the plaintiff was not engaged in "cleaning" the VCB for the purposes of Labor Law § 240(1). In particular, the defendant's submissions demonstrated that the work was "the type of job" that was performed routinely and recurrently "with relative frequency as part of the ordinary maintenance and care of a commercial property" and the plaintiff's original motion referred to the work as "certain inspection, testing, and maintenance work." Additionally, the risk inherent in the work resulted not from gravity, but from the high voltage of the VCB and, therefore, the work did not implicate the core purpose of Labor Law § 240(1). Finally, the plaintiff's work was not within the coverage of Labor Law § 241(6), which is limited to work performed in the context of construction, demolition, and/or excavation.

PRACTICE NOTE: An issue of fact exists under Labor Law § 200 as to whether the failure of an electrician to test for voltage and attach grounds is an intervening, superseding act. The risk inherent in the cleaning of a VCB is not height-related, rather the risk comes from the high voltage of the VCB and therefore Labor Law § 240(1) does not apply.

TOPICS: *Indemnification*

HOLLER V. DOMINION ENERGY TRANSMISSION, INC.

2023 N.Y. App. Div. 5922
November 17, 2023

While working on a construction project and walking between job assignments, the plaintiff slipped and fell on ice. In his complaint, he asserted causes of action for common-law negligence and violations of Labor Law §§ 200 and 241(6) against the property owner and the general contractor. The general contractor commenced a third-party action, seeking defense and indemnification from the plaintiff's employer. The Fourth Department found that the defendant/third-party plaintiff failed to establish that they were entitled to a conditional order of indemnification as contractual indemnitees because they failed to eliminate all triable issues of fact as to whether the plaintiff's claims arose from the negligent acts or omissions of the third-party defendant. Likewise, because the duty to defend a contractual indemnitee is no broader than the duty to indemnify, the defendant/third-party plaintiff failed to establish that they were entitled to past and future defense and litigation expenses as contractual indemnitees. Finally, the defendants/third-party plaintiffs failed to establish their entitlement to defense costs and a conditional order of indemnification based on their status as additional insured, inasmuch as their rights as additional insured related to the obligation of the third-party defendant's insurance company are separate and apart from those rights that may be asserted against the third-party defendant.

PRACTICE NOTE: The defendant/third-party plaintiff was not entitled to a conditional order of indemnification as contractual indemnitees because they failed to eliminate all triable issues of fact.

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

CALLOWAY V. AMERICAN PARK PLACE, INC.

221 A.D.3d 1473
November 17, 2023

The plaintiff and his coworker were removing original ductwork from a building. The ducts were in long strips, which were first removed from the straps holding them. The plaintiff and his coworker then carried the ducts, while resting them on their shoulders, down their respective ladders. The plaintiff was on his ladder when a duct slipped from his hand, hit a wall, and then hit the plaintiff's ladder, causing the ladder and the plaintiff to fall. The Fourth Department affirmed the lower court's ruling that the plaintiff met his initial burden on the motion of establishing the ladder was "not so placed ... as to give proper protection to him." The burden thus shifted to the defendants to raise a triable issue of fact whether the plaintiff's own conduct, rather than any violation of Labor Law § 240(1), was the sole proximate cause of his accident. The court found that the defendants failed to meet that burden.

PRACTICE NOTE: Defendants must raise a triable issue of fact to challenge whether a plaintiff's own conduct, rather than any violation of Labor Law § 240(1), is the sole proximate cause of the plaintiff's accident.

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

REYES V. EPISCOPAL SENIOR HOUS. GREECE, LLC

221 A.D.3d 1563
November 17, 2023

The plaintiff was employed by the third-party defendants on a demolition and abatement project owned by the defendant. The plaintiff was working alongside his supervisor on a scissor lift to remove a second-story window when, with the metal flashing and caulk having been removed from the window, the supervisor granted the plaintiff permission to use the bathroom and lowered the lift to the ground, after which the window fell and struck the plaintiff in the head. The Fourth Department found that the lower court erred in denying the plaintiff's motion for summary judgment on the issue of liability on the Labor Law § 240(1) claim. It cannot be said that the plaintiff's conduct was the sole proximate cause of the accident when the record established: the plaintiff and the supervisor were working together on the scissor lift to remove the window; the supervisor granted the plaintiff permission to use the bathroom; the supervisor lowered the lift to the ground while leaving the window – which was at that time susceptible to falling – unsecured on the second story of the building. The Fourth Department further found that the lower court erred in granting the third-party defendants' cross-motion for summary judgment dismissing the third-party complaint. Even assuming that the third-party defendant met their initial burden by establishing that the plaintiff did not sustain a grave injury based on an acquired injury to the brain resulting in total disability, the third-party plaintiffs raised a triable issue of fact in that regard inasmuch as they submitted competent medical evidence showing that the plaintiff may suffer from severe dementia that is causally related to the brain injury sustained during the accident, rendering him unemployable.

PRACTICE NOTE: It cannot be said that the plaintiff's conduct was the sole proximate cause of the accident when the record establishes the actions taken prior to the accident created the dangerous condition. The determination of a grave injury can be challenged by the presentation of medical record sufficient to establish a triable issue of fact regarding the level of resulting disability.

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CONSTRUCTION

Labor Law Update: Spring 2024

Tuesday, April 16, 2024
12 PM ET/9 AM PT

Theodore W. Ucinski and Kelly A. McGee

In this webinar, Goldberg Segalla partners Theodore W. Ucinski and Kelly A. McGee will discuss the basics of NY Labor Law §§ 240(1), 241(6), and 200 as well as Court of Appeals and recent Appellate Division cases of interest. It's geared towards anyone who needs to know the fundamentals of Labor Law as well as the advanced practitioner who wants an update on recent decisions.

WHO SHOULD ATTEND:

- Insurance Professionals
- Insurance Brokers
- Construction industry professionals who would like a better understanding of NY Labor Law and its ramifications for their profession

ATTENDEES WILL LEARN:

- The basics of New York Labor Law
- The theory behind the most prominent Court of Appeals cases
- The current state of the law, with a discussion of some of the recent Appellate Division cases

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Goldberg Segalla partner Joseph A. Oliva has been named co-chair of the firm's Construction Litigation and Counsel practice group. A resident of our Manhattan office, Joe's extensive experience includes recording numerous summary judgment victories in New York Labor Law matters, catastrophic personal injury cases, wrongful death cases, and construction defect cases. His practice also includes civil and commercial litigation, insurance coverage analysis, insurance coverage litigation, and contract litigation.

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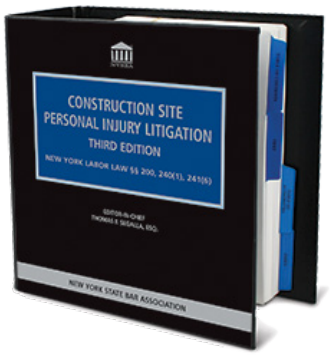

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