
Table of Contents

Construction Accident Litigation; Meanwhile, in the Legislature ... | by Brian J. Shoot

The Short List: The Lead Decisions Concerning Liability Imposed By Sections 200, 240 And 241(6) Of The Labor Law, August 2013 | Brian J. Shoot, Sullivan, Papain, Block, McGrath & Cannavo

CONSTRUCTION ACCIDENT LITIGATION

Meanwhile, in the Legislature …

Brian J. Shoot

Up until now, this column has focused upon emerging trends in the case law concerning construction accident litigation. We now consider a quarter not heard from lately, the State Legislature.

Labor Law sections 240 and 241(6) have not been significantly amended since 1980 (when the Legislature exempted owners of one and two-family dwellings who do not direct or control the work). The untold story is that the business and insurance interests each year lobby for very significant “reforms” of those laws (some would say “deforms”). The bills’ proponents typically argue that New York is alone in imposing “absolute liability” as to work site accidents and that the resultant insurance costs place a unique and undue burden upon New York’s landowners and builders.

We below examine this year’s proposed “reform” and the manner and extent to which New York’s liability rules actually differ from those of other states.

We below conclude that while New York’s rules may generally impose greater liability than some other states in a narrow class of cases (those in which the subject accident was “the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential”), New York also imposes much lesser liability than many other states in the more common circumstance in which the injury does not arise from a

---

1 Brian J. Shoot is a partner with the firm of Sullivan Papain Block McGrath & Cannavo. He is a member of the Office of Court Administration’s Advisory Committee on Civil Practice, the Board of Editors of Warren’s Negligence in the New York Courts (6th ed.), and the American Academy of Appellate Lawyers.

physically significant elevation differential. We also conclude that the national injury data suggests that there is actually method to New York’s “madness,” for the one area in which New York is least tolerant of unsafe work practices and equipment is the precise setting in which the injuries are both the most severe and the most easily preventable.

**The New York Law**

Labor Law § 240 applies to one and only one class of accident: where the plaintiff (or decedent) sustained injury as a result of “a failure to provide adequate protection against a risk arising from a physically significant elevation differential.”\(^3\) In such a case, the owner and general contractors can be held “absolutely liable” irrespective of whether they controlled the work\(^4\) and irrespective of whether the plaintiff was comparatively negligent,\(^5\) but liability will not exist if the worker’s own conduct was the “sole proximate cause of his or her injury.”\(^6\)

Labor Law § 241(6) applies only where a site contractor negligently violated a specific (as opposed to a general) provision of the state construction regulations.\(^7\) In such an instance, the owner and general contractor stand vicariously liable irrespective of whether they controlled and directed the work.\(^8\) However, liability is not “absolute” and the worker’s recovery will be diminished by his or her comparative fault.\(^9\)

\(^{3}\text{Id.}\)


\(^{5}\text{Karcz v. Klewin Building Company, Inc., 85 A.D.3d 1649, 1651 (4th Dep’t 2011).}\)


\(^{7}\text{Nostrom v. A.W. Chesterton Co., 15 N.Y.3d 502 (2010).}\)

\(^{8}\text{Rizzuto v. L.A. Wenger Contracting Co., 91 N.Y.2d 343 (1998).}\)
With the above-noted exceptions, unless the owner and general contractor directed and controlled the details of the work, they cannot be held liable for the site contractors’ negligent performance of the work. Put differently, no matter how horribly the contractors acted and no matter how dangerous their conduct rendered the work site, the owner and general contractor can successfully evade any and all responsibility if, (a) the accident did not fall within the “elevation” scope of Labor Law section 240, and, (b) there was no state regulation that specifically forbid the patently unsafe practice in issue.

The point is perhaps best illustrated by the Court of Appeals’ ruling in *Pavlou v. City of New York*, the “poster child” for New York’s general reticence to impose vicarious responsibility. In *Pavlou*, plaintiff and his co-workers were instructed to move a large steel plate by means of a crane that was affixed to the back of a flatbed truck. There was no doubt that the load exceeded the regulatory maximum. The boom of the crane snapped during the course of the lift, and it crashed down on the plaintiff.

The “defense” was that, in addition to being overloaded, the crane was also cracked, cracked so badly that any load would have resulted in disaster. How could that provide a defense? Well, whether because the regulators felt that it was obvious that one should not use a badly cracked crane or for some other reason, none of the state regulations expressly forbid use of a badly cracked crane. So, if defendants could convince the jury that the boom collapsed because it was cracked (not a problem in the absence of a state regulation that specifically forbid use of badly cracked cranes) and not because it was overloaded (a regulatory violation), defendants would avoid liability.

---


10 8 N.Y.3d 961 (2007), aff’g 21 A.D.3d 74 (1st Dep’t 2005).
And that is precisely what happened. By 3 to 2 vote, the Appellate Division reinstated a defense verdict on the stated ground that “unrefuted expert testimony [that] established that … it was not safe to operate the crane at all and that the crane would have failed upon lifting any load.” The Court of Appeals unanimously affirmed, explaining that the jury could logically find that there was no liability inasmuch as “the crane had a preexisting crack that made it unsafe to operate with any load.”

Thus, while New York’s protections run deep where they actually apply, they are also quite narrow, with the result that the general contractor and owner can completely disclaim responsibility in a wide variety of cases in which any neutral observer would agree that the contractors were negligent and the worker completely blameless in causing the subject accident.

**This Year’s Proposed “Reform”**

For literally decades now, business and insurance interests have argued that New York is out of the “mainstream,” that it imposes too much liability on landowners and general contractors, and that the consequence is “out-of-control” insurance premiums that inhibit construction, and, in consequence, jobs. The proponents of the “reforms” typically argue that the economy would be spurred if the law did not impose “absolute liability” merely because some worker was crushed to death by a falling object or fell from a defective scaffold due to the absence, misplacement, or poor construction of needed safety devices.

This year, A.3104/S.111 would create a new CPLR § 1414 that would add comparative negligence as a viable defense in Labor Law § 240 actions “where safety equipment or devices have been made available, and a person employed or otherwise entitled to the protection of the

---

11 21 A.D.3d at 75.

12 8 N.Y.3d at 962-963.
provisions of such section has failed to follow safety instruction or safe work practices in accordance with training provided, or failed to utilize provided safety equipment or devices, or engaged in a criminal act or was impaired by the use of drugs or alcohol, and such failure, act or impairment is a proximate cause of an injury to such person."

Although much of the argument in support of A.3104/S.111 focuses on the “drugs or alcohol” clause — the fiction being that Labor Law defendants are currently being held responsible in huge numbers of cases in which the worker’s own impairment was a contributing cause of the accident — the key provision is the clause concerning “safe working practices.” That clause would effectively make the comparative negligence defense available in virtually every section 240 case. All the defendant would have to show is that plaintiff acted contrary to some instruction or directive that had been set forth or mentioned in any manual, safety meeting, or hand-out, apparently without limitation as to the passage of time and irrespective of whether the worker was fluent in the language in which the instruction had been conveyed.

The contrast, ironically, would be that the owner and general contractor would themselves remain responsible under Labor Law § 241(6) only where the unsafe practice that caused the accident was violative of a specific provision of the state construction regulations whereas the laborer would be legally responsible not merely for compliance with the regulations but also for adherence to whatever directives the owner and contractors unilaterally decided to include as “training” directives.

Meanwhile, A.379 would amend Labor Law §§ 240 and 241 to additionally exempt “owners of farms” and “owners of multiple dwellings” who “contract for but do not direct or control the work,” this on the stated ground that such individuals “are similar to owners of one

13 The new defense would also apply to actions premised on Labor Law sections 241-a and 241 (subd. 1 through 5), statutes that are rarely involved.
and two-family dwellings.” The irony here is that the owners of individual apartments in multiple dwellings are already entitled to the benefits of the one and two-family dwelling exemptions in those instances in which the apartment owners live in the apartment and do not direct and control the work.14 The proposed amendment would thus effect change only where, (a) the defendant did not use the apartment as his or her residence and instead leased it for profit, or, (b) the defendant owned the entire building or, perhaps, eight, eighty or eight hundred apartments.

A February 8, 2013 Business Council “Legislative Memo” in support of A.3404/S.111 typifies the arguments made in favor of “reform.” The Council there states that the owner and general contractor currently stand “absolutely liable” “if a worker is injured on the job as a result of falling from a height, or being hit with something that falls from a height,” that such is true even “if the worker refused to use safety equipment or was impaired by drugs or alcohol,” and that “[n]o other state recognizes, either by legislation or under the common law, such a cause of action.” The Memo adds that New York’s purportedly unique law affects “not only the construction community but, manufacturers, commercial property owners, as well as private home owners who employ contractors for home improvements” and that it has caused “ever escalating insurance rates.”15

A February 14, 2013 letter jointly written by various Long Island business interests similarly represented that New York law currently “imposes a standard of absolute liability upon contractors and property owners for all “gravity related” injuries,” that New York “is the only


15 The memo does not burden the reader with the information that there is currently an exemption for owners of one and two-family buildings. Nor does it confuse the reader with the information that it currently is a defense that the accident was solely caused by the worker or that the worker was “recalcitrant.”
state which retains this antiquated law from early in the last century” and that the “fairer comparative negligence” rule would do “nothing to impinge upon the workplace safeguards.”

No doubt, some of those statements speak for themselves. But is it true that New York’s liability rules are more solicitous of workers’ safety than those of any other state? The answer is, in part, that other states also have “scaffold laws,” but that New York is indeed amongst the least tolerant when it comes to elevation-related construction accidents. But the rest of the answer is that our laws are actually amongst the worst for the plaintiff-worker for virtually every other kind of construction/demolition accident.

The Statutory Rules In Other Jurisdictions

New York’s “scaffold statute,” Labor Law § 240, is far from the only “scaffold law.” Other states also have statutes that single out scaffolds and like devices as warranting special concern and special liability rules.

Missouri has a statute that applies to “[a]ll scaffolds or structures used in or for the erection, repairing or taking down of any kind of building” and requires that they be “so secured as to insure the safety of persons working thereon, or passing under or about the same, against the falling therein, or the falling of such materials or articles as may be used, placed or deposited thereon.”

Missouri’s high court ruled that the predecessor statute was “very similar” to New York’s scaffold statute. Missouri’s high court ruled that the predecessor statute was “very similar” to New York’s scaffold statute. Missouri’s high court ruled that the predecessor statute was “very similar” to New York’s scaffold statute.

16 V.A.M.S. 292.090 provides:

All scaffolds or structures used in or for the erection, repairing or taking down of any kind of building shall be well and safely supported, and of sufficient width, and so secured as to insure the safety of persons working thereon, or passing under or about the same, against the falling therein, or the falling of such materials or articles as may be used, placed or deposited thereon. All persons engaged in the erection, repairing or taking down of any kind of building shall
York’s statute, that Missouri’s “scaffold law” should therefore be construed similarly, that violation of Missouri’s “scaffold law” should be deemed “negligence per se,” and that the collapse of a scaffold should of itself give rise to “prima facie presumption” of liability.\(^{17}\)

Nebraska also has a statute that requires that, “All scaffolds, hoists, cranes, stays, ladders, supports or other mechanical contrivances used in the erection, repairing, alteration, removal or painting of any house, building, bridge, viaduct or other structure, shall be erected and constructed in a safe, suitable and proper manner.”\(^{18}\) As in Missouri, Nebraska’s high court exercise due caution and care so as to prevent injury or accident to those at work or nearby.

\(^{17}\) *Propulonris v. Goebel Const. Co.*, 213 S.W. 792, 794-795 (Mo. 1919), the State’s high court put it this way:

> Where the statute imposes a duty to provide safety appliances of any kind for protection of persons from injury, the failure of the duty imposed is negligence per se.

> * * *

The state of New York has a statute very similar to the one under consideration here, and it is there held, construing the statute, that the fall of such a scaffold, in the absence of evidence of any other producing cause, points to the omission of the duty enjoined by the statute in its construction and makes out a prima facie case.

> * * *

*The statute under consideration would possess no force or effect if the plaintiff were obliged to point out a specific defect in the scaffold or platform which was furnished him. In that case he would be entitled to recover at common law. If it was not the intention of the Legislature to require absolute safety in the construction of a scaffold of this kind or at least put the burden upon the employer to show that he was without fault in case of an injury from the fall of a scaffold, then the statute would serve no purpose whatever.*

\(^{18}\) Neb. Rev. St. § 48-425 states:

> All scaffolds, hoists, cranes, stays, ladders, supports or other mechanical contrivances used in the erection, repairing, alteration, removal or painting of any
credited New York as the inspiration for the statute, stating that “statutes such as ours appear to have originated in New York.”19 The same court, following the New York rule with respect to “their similar statute,” held “here, if a scaffold gives way with a man who attempts to use it, that would be sufficient to show that it was not constructed in a safe, suitable and proper manner.” 20 Nebraska’s high court more recently observed “As a result of § 48-425, one who erects, constructs, maintains, or supplies scaffolding must see that the scaffolding is erected and constructed in a safe, suitable, and proper manner … Breach of the duty imposed by § 48-425 constitutes negligence per se, not merely evidence of negligence.” 21

Louisiana,22 Oklahoma,23 and Pennsylvania24 also have “scaffold laws” similar to those in Missouri and Nebraska. So does Puerto Rico.25 The Louisiana courts characterize their statute as imposing “strict liability.”26

\begin{verbatim}
house, building, bridge, viaduct or other structure, shall be erected and constructed in a safe, suitable and proper manner. Scaffolding or staging, swung or suspended from an overhead support and more than twenty feet from the ground floor, shall have, where practicable, a safety rail properly bolted, secured and braced, rising at least thirty-four inches above the floor or main portion of such scaffolding or staging, and extending along the entire length of the outside and ends thereof and properly attached thereto, and such scaffolding and staging shall be so fastened as to prevent the same from swaying from the building or structure.
\end{verbatim}

Emphasis added.

19 Johnson v. Weborg, 7 N.W.2d 65, 68 (Neb. 1942).

20 Id. at 70.


22 LSA-R.S. 40:1672 provides:

\begin{verbatim}
§ 1672. Scaffolds, supports, or other mechanical contrivances
All scaffolds, hoist cranes, stays, ladders, supports, or other mechanical contrivances erected by any person for use in the erection, repairing, alteration, removing, or painting of any building, bridge, viaduct, or other structure shall be
\end{verbatim}
constructed, placed, and operated so as to give proper and adequate protection to any person employed or engaged thereon or passing under or by it, and in such a manner as to prevent the falling of any material that may be used or deposited thereon.

Emphasis added.

23 Okl.St.Ann. § 174 states:

All scaffolds, hoists, cranes, stays, ladders, supports, or other mechanical contrivances erected or constructed by any person, firm or corporation in the state, for use in the erection, repairing, alteration, removal, or painting of any house, building, bridge, viaduct, steel tank, standpipe, or other structure, shall be erected and constructed in a safe, suitable, and proper manner, and shall be so erected and constructed, placed and operated as to give proper and adequate protection to life and limb of any person or persons employed or engaged thereon, or passing under or by the same, and in such manner as to prevent the falling of any material that may be used or deposited thereon. Scaffolding or staging swung or suspended from an overhead support more than twenty (20) feet from the ground or floor, shall have, where practicable, a safety rail properly secured and braced, rising at least thirty-four (34) inches above the floor or main portion of such scaffolding or staging and extending along the entire length of the outside and ends thereto and such scaffolding or staging shall be so fastened as to prevent the same from swaying from the building or structure.

Emphasis added.

24 P.S. § 25-2 states in part:

§ 25-2. General safety and health requirements
(a) All establishments shall be so constructed, equipped, arranged, operated, and conducted as to provide reasonable and adequate protection for the life, limb, health, safety, and morals of all persons employed therein.

* * *

(g) All building construction, demolition, and cleaning, including window cleaning, shall be conducted in a manner as to avoid accident hazards to workers or the public. Scaffolds, ladders, material hoists, window cleaning devices, safety belts, and other equipment used in such operations, shall be designed, manufactured, constructed, and erected as to be safe for the purpose intended. All stairs, open-sided floors, platforms, and runways shall be provided with proper railings and toeboards.

Emphasis added.
Ohio also has a special “scaffold law,” but it appears to rely upon fines and the threat of imprisonment to induce compliance with its terms.\(^\text{27}\)

\(^{25}\) 29 L.P.R.A. § 346 states:

§ 346 Scaffold and ladder regulations

All kinds of scaffolds, elevators, hoists, platforms, or ladders, or any other mechanical appliance, whether portable or fixed, placed, or constructed by any person, firm, or corporation in this Commonwealth for the purpose of building, repairing, altering, destroying, or painting any house, building, bridge, viaduct, or any other kind of construction whatever, shall be constructed in a secure, suitable, and convenient manner, and so placed when in operation as to offer proper and adequate protection to the life and limbs of the person or persons working thereon or passing thereunder, and in such manner as to prevent the falling to the ground of any materials or [implements] placed thereon. Every scaffold, platform, or other similar appliance shall be, if possible, at least two feet wide and shall have a safety partition and railing, forming a closed rectangle, which shall be thirty-six (36) inches in height from the floor or surface of said scaffold or platform and shall extend the full length thereof, be solidly constructed and be firm and secure enough to prevent its giving way from the building or construction. The Secretary of Labor and Human Resources or his representatives are hereby authorized to stop any work where the above provisions are being violated, and to require such changes and modifications as he may consider necessary for the protection of the life or limbs of the persons employed in said places, before the work may continue.

Emphasis added.

\(^{26}\) Kempff v. B. E. King & Sons, Inc, 222 So.2d 921, 924 (La. App. 1969) (“The intent of this statute is to impose a strict liability on persons who erect scaffolds to properly construct and maintain these devices so that those who use them will be protected from the hazard presented by their defective conditions”).

\(^{27}\) O.R.C. § 3791.06 states:

No person shall employ or direct another to do or perform labor in erecting, repairing, altering, or painting a house, building, or other structure, and knowingly or negligently furnish, erect, or cause to be furnished for erection for and in the performance of said labor, unsuitable or improper scaffolding, hoists, stays, ladders, or other mechanical contrivances which will not give proper protection to the life and limb of a person so employed or engaged.

Whoever violates this section shall be fined not more than five hundred dollars or imprisoned not more than three months, or both.

If such scaffolding, swung or suspended from an overhead support or supports, is more than twenty feet from the ground floor, it is not deemed to give
Meanwhile, Montana\(^{28}\) and Illinois\(^{29}\) had “scaffold statutes” that were similar to New York’s statute but were eventually “reformed” or repealed as to provide greater tolerance for proper protection to the life and limb of persons employed or engaged on such scaffolding unless, when in use, it has a safety rail rising at least thirty-four inches above the floor or main portion extending along the outside thereof, and properly attached thereto, and is provided with braces strong enough to sustain the weight of a man’s body against it and to prevent such scaffolding from swaying from the building or structure.

Emphasis added.

Violation of the Ohio provision is deemed a basis for a $500 fine or imprisonment, but is apparently not a basis for tort liability. *Curless v. Lathrop Company*, 583 N.E.2d 1367 (Ohio App. 1989).

\(^{28}\) Up until 1995, Montana had a New York-type scaffold law, MCA § 50-77-101, which stated:

All scaffolds erected in this state for use in the erection, repair, alteration, or removal of buildings shall be well and safely supported, of sufficient width, and properly secured so as to ensure the safety of persons working on them or passing under them or by them and to prevent them from falling or to prevent any material that may be used, placed, or deposited on them from falling.

Although ostensibly limited to “scaffolds,” “a ladder [was] considered a scaffold” “under the pre-1995 version of the Act.” *Wilson v. Vukasin*, 922 P.2d 531, 533 (Mont. 1996). Further, the “mandatory nature of the statute” was deemed to “foreclose[] the common-law defenses of assumption of the risk, contributory negligence, and negligence of a fellow servant [citation omitted]” (id).

In 1995, the business interests had their way and the statute was amended, as follows, to make the duty subject to a comparative negligence defense:

(3) Subject to the comparative negligence principles provided in Title 27, chapter 1, part 7, a contractor, subcontractor, or builder who uses or constructs a scaffold on a construction site is liable for damages sustained by any person who uses the scaffold, except a fellow employee or immediate employer, when the damages are caused by negligence of the contractor, subcontractor, or builder in the use or construction of the scaffold.

Yet, interestingly enough, even the “reformed” version of the Montana law provides greater protection in some respects than Labor Law §§ 240 and 241(6) provide here in New York. Here in New York, if a condition that does not cause a gravity-related injury is “merely” violative of OSHA standards, there is no liability, no matter how unsafe the condition may have been. *Nostrom v. A.W. Chesterton Co.*., *supra*, 15 N.Y.3d 502 (2010). By contrast, Montana’s “deformed” statute requires compliance with OSHA standards and even with industry standards.
injury-producing hazards. However, even Montana’s current, weaker statute still requires compliance with industry and OSHA standards.

Thus, excluding Illinois, at least seven states (Missouri, Nebraska, Louisiana, Oklahoma, Pennsylvania, Ohio and Montana) have “Scaffold Laws” and it appears that New York’s statute served as the model for at least a few of those statutes. Yet, this of itself does not mean that such laws are “identical” to New York’s provisions or that such laws are just as solicitous of worker safety. While the words of several of the above-cited statutes are nearly identical to the New York provisions (having been based upon the predecessors of New York’s provisions), one must also consider whether the duty to comply is deemed nondelegable and also whether failure to comply gives rise to “absolute” liability. In this sense, while New York is most certainly not the only state to enact a “scaffold law” to combat the special dangers of elevated-related construction site hazards, it is likely one of the most enthusiastic in imposing tort liability for violations of its statute.

Current MCA § 50-77-101 states in part:

(1) As used in this part, “scaffold” or “scaffolding” means a temporarily elevated platform and its supporting structure that is used on a construction site to support a person, material, or both. The term includes a ladder or other equipment that is the exclusive route of access to the scaffold but does not include any other ladder or other mobile construction equipment.

(2) Employers and employees shall follow safety practices commonly recognized in the construction industry as well as applicable state and federal occupational safety laws.

Emphasis added.

That said, it remains that such is only half, and perhaps less than half, of the total picture. The other side of the coin is that New York is amongst the most reticent of states in imposing common law liability for worksite hazards.

The Common Law Bases For Imposition of Vicarious Liability Recognized Elsewhere But Not Generally In New York

Here, in New York, where the contractors’ negligent means and methods (as opposed to a premises hazard) cause the subject accident, the owner and general contractor do not stand vicariously liable unless they controlled or actively supervised the means and methods which gave rise to the accident. Further, the mere fact that the owner or general contractor exercised general control over the work or over some aspect of the contractor’s work does not suffice if it did not control or direct the conduct that caused the subject accident. Additionally, while vicarious liability can sometimes be imposed under Labor Law § 241(6), that is limited to those

30 Mouta v. Essex Market Development LLC, 103 A.D.3d 505 (1st Dep’t 2013) (“JF demonstrated that it did not supervise and control plaintiff’s work or the area of the work site in which plaintiff’s accident occurred, and therefore cannot be held liable for plaintiff’s injuries under Labor Law § 200 or common-law negligence principles”); Robinson v. County of Nassau, 84 A.D.3d 919, 920 (2nd Dep’t 2011) (“defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff’s accident arose from the means and methods of his work, that the plaintiff’s work was directed and controlled exclusively by his employer, and that they had no authority to exercise supervisory control over his work”).

31 Phillip v. 525 East 80th Street Condominium, 93 A.D.3d 578, 579-580 (1st Dep’t 2012) (where plaintiff “was working at defendant’s building constructing a sidewalk bridge when he fell from atop a load of scaffolding material on a flatbed truck,” plaintiff’s Labor Law § 200 and common-law negligence claims were properly dismissed since defendant’s “general oversight of the timing and quality of the work does not rise to the level of supervision or control”); Piccione v. Sweet Construction Corp., 60 A.D.3d 510, 513 (1st Dep’t 2009) (that employees of the owner and its managing agent “had walked the construction site to monitor compliance with their alteration specifications … constituted the type of general supervision that does not establish liability against an owner”).
circumstances in which the contractor violates a “concrete” (specific) requirements of the State Industrial Code.\textsuperscript{32}

But the rules are very different in those states that adhere to the Restatement (Second) of Torts. To be sure, the general rule nationally, as in New York, is that “the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.”\textsuperscript{33} However, the Restatement provisions adopted as common law in many other states include significant exceptions that frequently have factual application to construction site accidents, so much so that the exceptions virtually swallow the rule.

Section 414 of the Restatement (Second) of Torts, which is the Restatement formulation of the common law “retained control doctrine,”\textsuperscript{34} provides:

One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Comment (a) to the section adds:

If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged therein, under the rules of that part of the law of Agency which deals with the relation of master and servant …

Emphasis added.


\textsuperscript{33} Restatement (Second) of Torts, § 409.

Although the Restatement version of the “retained control doctrine” requires “at least some degree of control over the manner in which the work is done” and not merely “a general right to order the work stopped or resumed,” the rule is, in essence, that the general contractor or other hirer who is in for the proverbial penny is thus in for the pound. Operative control over any aspect of the words translates to legal responsibility for all of the work.

While states differ both in the amount of “control” that is needed to trigger § 414 responsibility and also as to whether it is power or the actual exercise of control that matters, “virtually all of the courts pay lip service to the rule stated in the Restatement (Second) of Torts § 414 …” This includes, for example, Iowa, Montana, and North Dakota. It does not, however, include New York.

Quite apart from liability founded on “control,” the Restatement (Second) of Torts also imposes vicarious liability for the contractor’s negligence where,

(1) the hirer “should recognize” that the work is “likely to create … a peculiar risk of physical harm to others unless special precautions are taken” (Restatement [Second] of Torts, § 416), or

35 Restatement (Second) of Torts, § 414, comment (c).
36 Conger, Lynch and Rentz, Construction Accident Litig., § 4:16.
37 Id. at § 4:15.
40 Madler v. McKenzie County, 467 N.W.2d 709, 711 (N. Dakota 1991).
42 Restatement (Second) of Torts § 416 provides:

§ 416. Work Dangerous in Absence of Special Precautions.
(2) the hirer “knows or has reason to know” that the work “involve[s] an abnormally dangerous activity” that involves “a special danger to others” (Restatement [Second] of Torts, § 427).43

Relatedly, section 413 of the Restatement (Second) of Torts provides that the hirer is also legally responsible irrespective of whether the contractor was negligent where the hirer “should recognize” that the work is likely to create a “peculiar unreasonable risk of physical harm to others unless special precautions are taken,” the hirer “fails to provide in the contract that the contractor shall take such precautions,” and the harm arises from “the absence of such precautions.”44

---

43 Restatement (Second) of Torts § 427 states:

§ 427. Negligence as to Danger Inherent in the Work
One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

44 Restatement (Second) of Torts § 413 provides:

§ 413. Duty to Provide for Taking of Precautions Against Dangers Involved in Work Entrusted to Contractor
One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer
(a) fails to provide in the contract that the contractor shall take such precautions, or
There is, I should note, a split of authority as to whether these “peculiar risk” and “inherently dangerous” provisions apply when the harm is sustained by a site worker rather than a “third person.” Courts in some states, including Wyoming and Minnesota, have ruled that the word “others” (as in “special danger to others”) refers to third persons who are not employed at the site, such as bystanders. However, courts in Alabama, Delaware (but applying Maryland law), Florida, Indiana, Montana, Nebraska, New Hampshire, North Carolina, (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.


46 Jones v. Power Cleaning Contractors, 551 So.2d 996, 998-999 (Ala. 1989) (“As a general rule, a contractor must accept responsibility for the negligent acts of his independent contractor if the independent contractor is engaging in inherently or intrinsically dangerous acts … There is no doubt that the application of PC X-25 [a paint-removing chemical] would fall within the ambit of this definition … and, therefore, that the contractor must assume responsibility for the negligent acts of its independent contractor, Quality”).

47 Chesapeake and Potomac Telephone Co. of Maryland v. Chesapeake Utilities Corp., 436 A.2d 314, 329 (Del. 1981) (“Given the close relationship that [Restatement] § 416 bears to § 427 … we conclude that Maryland … fairly clearly recognizes that a contractor’s employees are within the scope of an employer’s liability for harm resulting from the contractor’s negligence in work either inherently dangerous under § 427 or dangerous in the absence of special precautions within the meaning of § 416 of the Restatement”).


50 Beckman v. Butte-Silver Bow County, 299 Mont. 389, 394, 1 P.3d 348, 351 (Mont. 2000).

51 Parrish v. Omaha Public Power District, 242 Neb. 783, 799-800, 496 N.W.2d 902 (Neb. 1993) (“As expressed in Restatement (Second) of Torts § 416 (1965), if a general contractor hires an independent contractor to perform work which the general contractor ‘should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken,’ the general contractor may be liable for physical harm caused to employees of the subcontractor if the general contractor fails to exercise reasonable care to take such precautions, even though the general contractor has provided, in the contract or otherwise, that the subcontractor be responsible for such precautions”).
Pennsylvania,\textsuperscript{54} South Dakota,\textsuperscript{55} and West Virginia,\textsuperscript{56} amongst others, have applied the provisions in favor of injured site employees. Yet, here in New York, the doctrine is not applied in favor of construction site workers.\textsuperscript{57}

In those states that adhere to the Restatement, the “peculiar risk” and “abnormally dangerous” rules frequently overlap in actual practice inasmuch as the activity that is “abnormally dangerous” is often hazardous because of some “peculiar risk.” Also, while the provisions are not limited to construction/demolition sites, the provisions have special significance to construction site litigation inasmuch as “[c]onstruction job sites have historically

\textsuperscript{52} Elliott v. Public Serv. Co. of New Hampshire, 517 A.2d 1185, 1188 (N.H. 1986) (“…the defendant undertook an inherently dangerous activity, and the plaintiff’s injury was caused by precisely the threat inherent in that activity. We hold, therefore, that an employee of an independent contractor has a cause of action against the principal employer for injuries suffered in the course of performing inherently dangerous work, even if the independent contractor’s negligence caused the injury. A defendant who undertakes an inherently dangerous activity cannot expect immunity from liability when the party to whom he entrusted the dangerous activity fails to prevent the realization of the known threat”).


\textsuperscript{57} Lipka v. United States, 369 F.2d 288, 292-293 (2nd Cir. 1966), cert. den., 387 U.S. 935 (1967) (“This Court has twice held that New York does not allow an independent contractor’s employees to recover from the contractee on the ground that the work contracted for was inherently dangerous”); see also Sanchez v. United Rental Equipment Co., Inc., 246 A.D.2d 524, 525 (2nd Dep’t 1998) (“absent evidence that the hirer committed some affirmative act of negligence, or maintained some control over the work performed by the independent contractors’ employees, an employee of an independent contractor whose negligence caused the accident cannot recover upon the ground that his employer was negligently selected”).
been among the most dangerous places to work."\(^{58}\) By way of example, courts have deemed the following construction activities inherently dangerous: working in trenches,\(^{59}\) crane operation,\(^{60}\) application of a caustic paint remover,\(^{61}\) and aerial application of insecticides.\(^{62}\)

By their terms, the “peculiar risk” and “inherently dangerous” doctrines can impose vicarious liability on the owner or general contractor even when the hirer does not retain control over any aspect of the work, even where the accident does not involve an elevation-related hazard, and even where the subcontractor’s negligent conduct did not entail violation of a specific, regulatory standard. Put differently, each and every one of the many states that have adopted the Restatement provisions as part of their common law and that have deemed them applicable to construction site accidents imposes liability in circumstances in which Labor Law §§ 240 and 241(6) would not.

Finally, while we have Labor Law § 241(6) here in New York, those states that follow the Restatement have the significantly broader provisions of Restatement (Second) of Torts § 424. That section provides:

§ 424. Precautions Required by Statute or Regulation
One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed.

\(^{58}\) John G. Cameron, Jr., Construction Site Safety: Protecting the Worker/Protecting the Owner, 7 No. 1 Journal of the American College of Construction Lawyers 3 (January 2013).

\(^{59}\) Beckman v. Butte-Silver Bow County, supra, 299 Mont. 389, 398-399, 1 P.3d 348, 353 (Mont. 2000).

\(^{60}\) Atlantic Coast Development Corporation v. Napoleon Steel Contractors, Inc., supra, 385 So.2d 676, 679 (Fla. App. 1980).


for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.

Those states which construe “others” to mean persons other than site workers for purposes of the “peculiar harm” and “inherently dangerous” doctrines generally read the same restriction into Restatement § 424. However, the many states that follow the Restatement and that do not so restrict the provisions essentially have their own common law version of Labor Law § 241(6) … except that the common law variant is not limited to any single set of regulations (e.g., Industrial Code Rule 23) and is not even limited to construction work.

**The Proof Of The Pudding: Pavlou Goes To Florida**

We have shown in an analytical fashion that many other states, including from the midwest and south, impose vicarious liability for construction-site accidents in circumstances in which New York does not. But here is the proof of the pudding.

Remember the above-discussed Court of Appeals decision in *Pavlou*, the case in which the defendants escaped liability because there was no state regulation that specifically forbid use of a crane that so badly cracked that it was incapable of bearing any load?

In the Floridian case of *Atlantic Coast Development Corporation v. Napoleon Steel Contractors, Inc.*, a crane was being use to hoist a load of blocks. The blocks fell and crushed a worker, who was killed. Florida did not have a Labor Law § 240 or § 241(6). There was, apparently, no claim that any specific safety regulation had been violated. None of that mattered because Florida regards the operation of a crane as an inherently dangerous activity. The owner and general contractor were therefore vicariously responsible for the accident.

---

63 385 So.2d 676 (Fla. App. 1980).
Unlike in New York.

The Federal Injury Data, And The Wisdom Of New York’s Approach

We have thus far shown that New York is more apt than most other jurisdictions to hold the owner and general contractor liable with respect to elevation-related injuries, but that it is less apt than many other jurisdictions to impose vicarious liability with respect to any other kind of construction site injury.

Query: does that make any sense from a policy perspective? Answer: Strangely enough, yes.

First, gravity-related accidents account for an alarming percentage of the most serious site injuries.

The most recent BLS (U.S. Department of Labor, Bureau of Labor Statistics) injury figures are the 2011 totals, which were released in September 2012. The year 2011 saw 721 construction industry fatalities. Of those, the most common killer by far, accounting for 254 deaths, was “Falls, slips, trips.” Another 123 workers died in consequence of “Contact with objects and equipment,” a category which included accidents in which objects fell on workers.

The BLS analysts found that while the great majority of fatal falls (451 of 541 fatal falls, not limited to construction workers) were falls from a higher level to a lower level, “about one in four (115) occurred after a fall of 10 feet or less.” About 10% of the fatal falls involved falls of six feet or less. And that figure does not include the fatalities which resulted from objects falling on workers.

64 Id. at 679.

65 Id. at 679-680.
Precisely because of the dangers posed by gravity-related hazards, construction remains amongst the most dangerous jobs. Various trades within the construction field -- including roofing and ironwork -- are even more dangerous. The BLS estimates that the average occupational fatality rate for all workers as a whole is approximately 3.5 deaths per 100,000 full-time workers. But that figure shoots up to 26.9 for structural steel workers and 31.8 for roofers. And that’s with the economic downturn in construction.

Second, gravity-related injuries are amongst the most easily preventable. OSHA’s website reports that, “FALLS ARE THE LEADING CAUSE OF DEATH IN CONSTRUCTION.” It adds that “These deaths are preventable” and “All of these can be controlled by compliance with OSHA standards.”

Thus, in singling out gravity-related hazards as the one area in which owners and general contractors are least able to evade responsibility for site safety, New York’s statutes focus on the hazard that gives rise to the largest share of serious and preventable injuries.

“Reform” Or “Deform”?

One of the claims advanced by those who would “reform” Labor Law § 240 is that it is the subcontractors, not the owner or general contractor, who are “in charge.” But the reality is that everything flows downhill.

Owners very understandably want the work done quickly. Many have construction loans that are accruing more and more interest with each passing day. Even those that do not have outstanding loans generally want the work done as quickly as possible, whether because the owner wants the anticipated income to begin rolling in or because he or she just wants to enjoy the new house or other improvement.
That interest in getting the job done quickly typically translates into contractual provisions that provide bonuses for early completion and penalties for failure to meet contractual deadlines. There is, almost inevitably, top-down pressure to work fast. Unfortunately, working quickly and working safely are two very different things.

Back in *Haimes v. New York Tel. Co.*,\(^6\) the Court of Appeals observed that in amending Labor Law § 240 to its present form “the Legislature apparently decided, as it was within its province to do, that over-all compliance with safety standards would be achieved by placing primary and inescapable responsibility on owners and general contractors rather than on their subcontractors who, often occupying an inferior economic position, may more readily shortcut on safety unless those with superior interests compel them to protect themselves.”

Right now, Labor Law § 240 acts as a counterbalance to the inherent need for speed. Although the owner naturally wants the work completed “yesterday,” the statute focuses on the single hazard that gives rise to so many serious injuries and it tells the owner and general contractor that they must not force the contractors to work too quickly.

In this context, would removal of that counterbalance really be a “reform” or a “deform”? Would removal of the counterbalance be likely to reduce or increase the prevalence of elevation-related injuries?

From a different perspective, given that New York is already more tolerant than many other states with respect to all site hazards *other than* elevation-related dangers, do the owners and contractors really have basis to complain that it is “unfair” that the same tolerance does not also extend to gravity-related hazards?

\(^6\) 46 N.Y.2d 132, 137 (1978).
I. Scope Of Labor Law Sections 240 and 241: The Places And Activities To Which They Apply, And The Persons To Whom The Statutes Apply

A. Covered Work

 Joblon v. Solow, 91 N.Y.2d 457, 465, 672 N.Y.S.2d 286, 290 (1998) (“altering” defined as a “significant physical change” to a “building or structure”)


 Prats v. Port Auth. of New York and New Jersey, 100 N.Y.2d 878, 882, 768 N.Y.S.2d 178, 180 (2003) (statutes apply if plaintiff was “a member of a team” that “undertook an enumerated activity” even if plaintiff was not performing covered work the moment that he or she was injured)


 Esposito v. New York City Ind. Dev. Agency, 1 N.Y.3d 526, 528, 770 N.Y.S.2d 682 (2003) (Labor Law sections 240 and 241(6) do not apply if the plaintiff was performing “routine maintenance”)

B. Territorial Limitations

1. Only Within State


2. Maritime Boundary


C. Covered Plaintiffs


*Mordkofsky v. V.C.V. Dev. Corp.*, 76 N.Y.2d 573, 576-577, 561 N.Y.S.2d 892 (1990) (only “employees” are covered)

D. Building or Structure


II. Defendants Subject To Statutory Liability Under Labor Law Sections 240 and 241(6)

A. Owners In General

Sanatass v. Consol. Inv. Company, Inc., 10 N.Y.3d 333, 341-342, 858 N.Y.S.2d 67 (2008) (generally, any owner is an “owner,” irrespective of whether the defendant-owner precipitated, controlled, or even knew of the “construction” work on his or her property)

Morton v. State, 15 N.Y.3d 50, 56, 904 N.Y.S.2d 350 (2010) (but there must be “some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest”)

Guryev v. Tomchinsky, 20 N.Y.3d 194, 957 N.Y.S.2d 677 (2012) (when the condo owner hires contractors to work in the individual unit, the condo owner and not the Board is the “owner” even if the Board approved the work; but the rule is almost certainly different for cooperatives)

B. Lessees

Alfonso v. Pacific Classon Realty, 101 A.D.3d 768, 770, 956 N.Y.S.2d 111, 114-115 (2nd Dep’t 2012) (a lessee who hires the workers, thus fulfilling the role of owner, is an “owner”)

Markey v. C.F.M.M. Owners Corp., 51 A.D.3d 734, 737, 858 N.Y.S.2d 293, 297 (2nd Dep’t 2008) (ditto)


C. Construction Managers, etc.

Walls v. Turner Constr. Co., 4 N.Y.3d 861, 864, 798 N.Y.S.2d 351 (2006) (a rose by any other name, etc.; it’s not the title that matters, it’s the power [or lack thereof] to control the work)
D. Exemption For Certain Owners Of One And Two-Family Dwellings Who Do Not Direct And Control The Work

*Van Amerogen v. Donnini*, 78 N.Y.2d 880, 882-883, 573 N.Y.S.2d 443 (1991) (exemption does not apply to owners who use the premises solely for commercial premises, by, for example, renting out the entire premises)

*Bartoo v. Buell*, 87 N.Y.2d 362, 368, 639 N.Y.S.2d 778, 780 (1996) (but exemption applies if the work “directly relates to the residential use of the home” and such is so even if the “work also serves a commercial purpose”)


III. Key Features Of Labor Law Section 240

A. “Absolute” Liability


B. “Elevation-Relatedness”


*Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 602, 895 N.Y.S.2d 279, 280-281 (2009) (the test simplified: “the single decisive question is whether plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential”)


*Wilinski v. 334 East 92nd Housing Dev. Fund Corp.*, 18 N.Y.3d 1, 9, 935 N.Y.S.2d 551 (2011) (rethinking the so-called “same level” rule and now stating that the statute does not call for “the categorical exclusion of injuries caused by falling objects that, at the time of the accident, were on the same level as the plaintiff”)
IV. Summary Judgment Motions And Standards In Labor Law Section 240 Cases

A. Elevation Device Collapsed


B. No Safety Device Provided


C. Statutes Also Applies To Improper “Placement” Of Adequately Constructed Ladders, Etc.


D. Elevation Device Was “Inadequate”

E.g., *DelRosario v. United Nations Federal Credit Union*, 104 A.D.3d 515, 515, 961 N.Y.S.2d 389, 390 (1st Dep’t 2013); *Jiminez v. RC Church of Epiphany*, 85 A.D.3d 974, 975, 926 N.Y.S.2d 133, 134 (2nd Dep’t 2011)

E. “Immaterial” Factual Disputes Do Not Preclude Grant Of Summary Judgment

E.g., *Lipari v. At Spring, LLC*, 92 A.D.3d 502, 503-504, 938 N.Y.S.2d 303 (1st Dep’t 2012); *Leconte v. 80 East End Owners Corp.*, 80 A.D.3d 669, 670-671, 915 N.Y.S.2d 140 (2nd Dep’t 2011)
F. That Plaintiff Was Sole Witness Does Not Preclude Grant Of Summary Judgment


V. The “Sole Proximate Cause” And “Recalcitrant Worker” Defenses

A. The Defenses Before And During The 1990’s

Haimes v. New York Tel. Co., 46 N.Y.2d 132, 134, 138, 412 N.Y.S.2d 863 (1978) (even though “[t]he exact time of performance and the other details of the work were left entirely to Haimes [decedent], who also supplied all equipment, including the ladder used on the job,” and where decedent was thus to blame for the fact that the “ladder was not being secured against slippage by any mechanical or other means whatsoever,” “the Legislature apparently decided, as it was within its province to do, that over-all compliance with safety standards would be achieved by placing primary and inescapable responsibility on owners and general contractors rather than on their subcontractors …”)

Stolt v. Gen. Foods Corp., 81 N.Y.2d 918, 919-920, 597 N.Y.S.2d 650 (1993) (where the subject ladder “had been broken about a week earlier, and plaintiff had been instructed not to climb it unless someone else was there to secure it for him,” “[t]he mere allegation that plaintiff had disobeyed his supervisor’s instructions when he climbed the broken ladder does not provide a basis for a defense against plaintiff’s Labor Law § 240(1) cause of action”)

Gordon v. E. Ry. Supply, Inc., 81 N.Y.2d 555, 563, 606 N.Y.S.2d 127 (1993) (where defendants’ defense “rest[ed] on their contention that plaintiff was repeatedly instructed to use a scaffold, not a ladder, when sandblasting railroad cars,” “an instruction by an employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not a ‘safety device’ in the sense that plaintiff’s failure to comply with the instruction is equivalent to refusing to use available, safe and appropriate equipment”)

Hagins v. State of New York, 81 N.Y.2d 921, 597 N.Y.S.2d 651 (1993) (“[t]he State’s allegations that claimant had repeatedly been told not to walk across the abutment are not alone sufficient to create a triable issue of fact under the ‘recalcitrant worker’ doctrine …
since that defense is limited to cases in which a worker has been injured as a result of a refusal to use available safety devices provided by the employer or owner”)

**Klein v. City of New York**, 89 N.Y.2d 833, 652 N.Y.S.2d 723 (1996) (where plaintiff was injured while standing on a perfectly fine ladder … because it had been set up and placed improperly … by plaintiff himself, and the Court ruled that “[p]laintiff has established a prima facie case that defendant violated Labor Law § 240(1) by failing to ensure the proper placement of the ladder due to the condition of the floor”)

**B. Blake to Robinson**

**Blake v. Neighborhood Housing Serv. of New York City, Inc.**, 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003) (where the plaintiff-contractor ostensibly failed to lock the clips of his extension ladder; jury could find plaintiff was the “sole proximate cause” of the accident)

**Cahill v. Triborough Bridge and Tunnel Auth.**, 4 N.Y.3d 35, 36, 790 N.Y.S.2d 74 (2004) (the “recalcitrant” worker who was told to use a safety line and “chose to disregard those instructions,” and whose recovery was thus barred)


**Robinson v. East Medical Ctr., LP**, 6 N.Y.3d 550, 553-555, 814 N.Y.S.2d 589 (2006) (the plaintiff who used a 6-foot-ladder knowing that it was too short and that a taller one was “available”; recovery barred)

**C. The Present Tense**

**Gallagher v. The New York Post**, 14 N.Y.3d 83, 88, 896 N.Y.S.2d 732 (2010) (“Liability under § 240(1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident”)

VI. The Standards For Recovery Under Labor Law Section 241(6)


Misicki v. Caradonna, 12 N.Y.3d 511, 882 N.Y.S.2d 375 (2009) (the degree of specificity that is required)


St. Louis v. Town of North Elba, 16 N.Y.3d 411, 416, 923 N.Y.S.2d 391 (2011) (“The Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace … the preferred rule both as a matter of statutory interpretation and as a reinforcement of the objectives of the Industrial Code is to take into consideration the function of a piece of equipment, and not merely the name, when determining the applicability of a regulation”).


VII. Standards Governing Recovery Under Labor Law Section 200

A. Codification Of The Common Law Duty To Provide A Safe Place To Work

Rizzutto v. L.A. Wenger Contracting Co., Inc., 91 N.Y.2d at 352, 670 N.Y.S.2d 816

B. Where Plaintiff Contends That The Subject Accident Was Caused By the Alleged Negligence Of The Contractors

C. Where Plaintiff Contends That The Accident Was Caused By A Premises Defect


D. Where Plaintiff Contends That The Accident Was Caused By Negligence Of The Contractors And A Premises Defect


E. Where Plaintiff Contends That Defendant Provided A Defective Tool And That Such Caused The Accident


F. The Distinction Between Liability Under Labor Law § 200 And Common-Law Liability


VIII. Third-Party Issues

A. Common-Law Indemnification


B. Contractual Indemnification


Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co., 89 N.Y.2d 786, 658 N.Y.S.2d 903 (1997) (impact of General Obligations Law § 5-322.1, which forbids any agreement “purporting to indemnify or hold harmless the promise against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promissee”)


10
NEW YORK “CONSTRUCTION” ACCIDENT LITIGATION:  
THE CURRENT STATE OF THE LABOR LAW

by Brian J. Shoot  
Sullivan Papain Block McGrath & Cannavo P.C.  
August 2013 [case law through August 23, 2013]  

I. APPLICABILITY OF LABOR LAW SECTIONS 240 OR 241(6) TO THE WORK AND/OR THE WORKER IN ISSUE

There are three issues to consider in determining whether the plaintiff-worker was doing the kind of work that entitled him or her to the protections of Labor Law §§ 240(1) and/or 241(6): (1) whether the project in issue (which may sometimes be difficult to define) came within the scope of the statute(s), (2) whether plaintiff’s activity at the time of the injury was sufficiently related to that project to entitle plaintiff to the protection of the statute(s), and, (3) whether the plaintiff was, in the first instance, an “employee” within the meaning of the Labor Law.

Sometimes the second, relatedness issue, addressed in Point IB of this Outline, merges with the third, status-type issue, addressed in Point IC of this Outline.

A last factor, which seldom arises and is considered in Point ID of the Outline, is whether the subject accident fell beyond the territorial scope of the Labor Law, an issue that could arise if the accident occurred in another state, within the federal maritime regime, or on an Indian reservation.

A. The Issue Of Whether The Project In Issue Was The Kind Of Work That Is Covered By Labor Law § 240(1) And/Or Labor Law § 241(6).

Labor Law § 240(1) requires site owners and “contractors” to provide certain listed devices (including “scaffolds,” “ladders,” and “other devices”) and to “cause” those devices to be “so constructed, placed and operated as to give proper protection.” Its sister statute, Labor

1 An Introductory Explanation Concerning This Outline:  In past iterations of this Outline (through July of 2011), the Outline was more or less cumulative. Although I dropped discussions of case law that had become dated or of questionable validity, I retained virtually everything else and then added discussion of the case law that had come down in the interim.

The problem was that while that kind of Outline was useful as a research tool, the Outline became longer and longer, to the point where it was essentially impossible to read and too expensive to reproduce.

This Outline represents a new approach. I have tried to retain enough of the introductory discussions to provide a context, my concern being that the reader might otherwise not get a sense of the general rules and the significance of the most recent rulings. But with that caveat, I generally limit my scope to analysis of the rulings rendered during the course of the last year.

This means that those who are attempting to use this as a research tool should additionally consult prior outlines (but only back to 2011) for discussion of additional case law.
Law § 241(6), ostensibly requires the work site to be so “arranged, operated and conducted” as to provide “reasonable and adequate protection and safety.”

Both statutes are codified in Article 10 of the Labor Law, entitled “Building Construction, Demolition and Repair Work.”

From this, one might reasonably conclude that however broadly or narrowly one construes the terms “construction,” “demolition,” and “repair,” any given project that falls within the scope of one of the statutes will also fall within the scope of the other. One might likewise conclude that any project that does not fall within the ambit of one statute will also not fall within the ambit of the other.

Yet, while those assumptions might be reasonable, they are also flat-out wrong. As the Court of Appeals itself confirmed, the scope of Labor Law § 240(1) is in some respects much broader than that of its sister statute.

Labor Law § 240(1) is self-defining in the sense that the statute itself lists the activities to which it applies. Those activities are “erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.” It has long been the rule that Labor Law § 240(1) applies to “repairing,” “altering,” “painting,” and other listed activities irrespective of whether the covered activity occurs in the context of some larger construction or demolition project. Activities such as “repairing” a malfunctioning commercial freezer, adding a new television cable line (“altering”), and applying bomb blast film to strengthen some lobby windows (also “altering”) are covered activities even if there is no larger project in sight.

Labor Law § 241(6) does not of itself describe the activities to which it applies and thus differs from Labor Law § 240(1) in that respect. However, the term “construction work” is defined in the state regulations enacted under authority of Labor Law § 241(7). The regulatory definition of “construction work” is not far removed from the list of covered activities contained within Labor Law § 240(1). It includes “[a]ll work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures, whether or not such work is performed in proximate relation to a specific building or other structure ….” 12 NYCRR 23-1.4(b)(13).

However, in contrast to the construction of Labor Law § 240, the Court of Appeals ruled a decade ago that Labor Law § 241(6) for the most part applies only to work that occurs within the scope of a construction, demolition, or excavation project. Such remains so today. Why?

---


The best answer I can give is that such is the rule because the Court of Appeals clearly said so. Further, while that may have seemed a dramatic change back in 2002, it is now well settled that Labor Law § 241(6) generally applies only to work that occurs within a construction, demolition or excavation context. 

It is thus quite possible for a given project to be “construction work” within the ambit of Labor Law § 240(1) but not within the scope of Labor Law § 241(6), and this in fact occurs.

Yet, the careful reader has likely noticed that I’ve thus far said that Labor Law § 241(6) “for the most part” or “generally” applies solely to work that occurs within a construction, demolition or excavation project, thus connoting that there are exceptions to the rule. Well, there are exceptions and they vary from activity to activity. For example, there is a line of precedent to the effect that “repairing” qualifies as 241(6) work if it “affected the structural integrity of the building or structure.”

1. The Meaning Of The Terms “Altering” And “Alteration” For Purposes Of Labor Law §§ 240(1) and/or 241(6)

_Custer v. Jordan_, 107 A.D.3d 1555, 1558, 968 N.Y.S.2d 754, 758 (4th Dep’t 2013) (plaintiff’s work of installing siding was a § 240(1) “alteration”).

_Vasquez v. C2 Development Corp.,_ 105 A.D.3d 729, 730, 963 N.Y.S.2d 675, 677 (2nd Dep’t 2013) (where plaintiff “fell from a scaffold which collapsed beneath him” as plaintiff “was removing a fluorescent light fixture and moving it from one area of the ceiling to another,” “[e]ven when the evidence is viewed in the light most favorable to [owner] CS Development, the plaintiff’s work, as described in the plaintiff’s deposition testimony and the affidavit of the

---


8 _Joblon v. Solow, supra_, 91 N.Y.2d at 466.


plaintiff’s employer submitted in opposition to the plaintiff’s motion, constituted ‘altering’ within the meaning of Labor Law § 240(1)).

*Santiago v. Rusciano & Son, Inc.*, 92 A.D.3d 585, 586, 938 N.Y.S.2d 557 (1st Dep’t 2012) (where plaintiff was “boarding up windows to make the subject premises uninhabitable and to protect it from vandalism in anticipation of demolition,” “plaintiff was ‘altering’ the premises within the meaning of Labor Law § 240(1),” and he was also performing work within the ambit of Labor Law § 241(6) since he “was performing work on the premises as it was being prepared for demolition”).

*Bodtman v. Living Manor Love, Inc.*, 105 A.D.3d 434, 434, 963 N.Y.S.2d 35, 36 (1st Dep’t 2013) (where plaintiff was injured while attempting “to drill several holes in the roof of a motel in order to attach a temporary sign,” “the work plaintiff was to perform would have entailed making only a slight change to the building by drilling a few holes in the roof and did not constitute ‘altering’ for the purpose of Labor Law § 240(1)”).

*Amendola v. Rheedlen 125th Street, LLC*, 105 A.D.3d 426, 427, 963 N.Y.S.2d 30, 31 (1st Dep’t 2013) (plaintiff’s “work of hanging window shades at the time of the accident does not constitute ‘altering’ within the meaning of Labor Law § 240(1)” inasmuch as “the shade installation work essentially entailed securing brackets with screws to the ceiling or pan protruding from the wall, and inserting the shades into the bracket”; the work did not “amount to a ‘significant physical change to the configuration or composition of the building or structure’; nor did installation of new window shades constitute a “repair”).

*Zolfaghari v. Hughes Network Systems, LLC*, 99 A.D.3d 1234, 1235, 952 N.Y.S.2d 367 (4th Dep’t 2012) (where plaintiff “fell off a ladder while trying to remove a satellite dish attached to the outside wall of a gas station,” where “plaintiff’s task involved no more than manually unplugging a cord, loosening a small number of bolts by hand and with a wrench, cutting a wire with a hand tool, and lifting the dish apparatus from a bracket and face plate that remained attached to the building,” and where the work “did not require plaintiff to come in physical contact with the building itself, involved no power tools, no drilling of holes, and no feeding of wire through conduits,” the work “did not require that a significant physical change be made to the gas station building” and did not constitute “altering”; “[c]ontrary to plaintiffs’ contention, the work involved in the removal or ‘de-installation’ of a satellite dish system is not the same as that involved in the installation of such a system within the context of Labor Law § 240(1))”.

*Panico v. Advanstar Communications, Inc.*, 92 A.D.3d 656, 657-658, 938 N.Y.S.2d 168, 170 (2nd Dep’t 2012) (where plaintiff “an electrician at the Jacob K. Javits Convention Center, allegedly was injured when he fell from a ladder while hanging a ‘Skanda’ light on a ticket booth that had been erected for a motorcycle show,” defendant established that the work was not “altering” within the scope of Labor Law § 240(1) “by submitting evidence that the work being performed at the time of the accident hanging a ‘Skanda’ light on a ticket booth, involved no ‘significant physical change to the configuration or composition of the … structure”; nor did the work “arise from construction, excavation, or demolition work” within the ambit of Labor Law § 241(6)).
Gunderman v. Sure Connect Cable Installation, Inc., 101 A.D.3d 1214, 1216, 956 N.Y.S.2d 211, 214 (3rd Dep’t 2012) (where plaintiff [who could not remember the accident] was injured while upgrading a residential customer’s cable television service, and where the record did not “contain any meaningful description of the nature or extent of the actual work that [plaintiff] was scheduled to perform,” the Court could not determine on the basis of the materials in the Record “whether the work undertaken by [plaintiff] on the day of his accident constituted an alteration within the meaning of Labor Law § 240(1)”).

2. Renovation, Erection, And Demolition

Garcia v. 225 E. 57th St. Owners, Inc., 96 A.D.3d 88, 91-93, 942 N.Y.S.2d 533 (1st Dep’t 2012) (where plaintiff’s employer was hired to remove wall coverings including mirrored wall panels in a 22-story apartment building, where plaintiff was injured when a mirrored panel he was removing cut his hand, and where plaintiff relied on the demolition safety provisions 23-3.3(b) and (c), plaintiff’s work did not constitute demolition for purposes of Labor Law § 241(6) inasmuch as 12 NYCRR 23-1.4[b][16] defined “demolition work” as “work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment”).

Butler v. Quest Prop. Management V. Corp., 95 A.D.3d 678, 678, 943 N.Y.S.2d 887 (2nd Dep’t 2012) (without providing any factual details as to the nature of plaintiff’s work, “[t]here is no evidence that plaintiff was engaged in construction, excavation or demolition work that would bring his work within the ambit of § 241(6)”).

3. “Cleaning”


Labor Law § 240(1) lists the activities to which it applies. Those activities are “erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.” The Court of Appeals had made clear that the work in issue, especially including “cleaning,” does not have to have been performed as part of a “construction, demolition, or repair project” in order to fall within the ambit of the statute. Broggy v. Rockefeller Group, Inc., 8 N.Y.3d 675, 680, 839 N.Y.S.2d 714, 717 (2007). On the other hand, it had also made clear that the mere fact that the plaintiff was “cleaning” something does not mean that the plaintiff was performing “cleaning” within the ambit of the statute. Connors v. Boorstein, 4 N.Y.2d 172, 173 N.Y.S.2d 288 (1958).

You see, there is cleaning and there is “cleaning.”

Issue: Plaintiff “was injured when he fell from a ladder in a factory while cleaning a product manufactured by his employer.”
The company manufactured a steel “wall module” that had to be cleaned before it was shipped. This required plaintiff to work from a ladder, and he was injured when the ladder broke, causing him to fall.

If the statute applied, defendants, the owners of the site, were surely liable. But did it apply?

The Appellate Division for the Fourth Department split 3 to 2, with the majority answering in the negative.

**Held:** The Court of Appeals unanimously affirmed per a decision by Judge Smith.

The Court confirmed that, (a) “cleaning” “is not limited to cleaning that was ‘part of a construction, demolition, or repair project,’” and, (b) the statute nonetheless does not encompass every act of “cleaning” (18 N.Y.3d at 525-526). In particular, the Court had never “gone as far as plaintiff here asks us to go - to extend the statute to reach a factory employee engaged in cleaning a manufactured product.” “On the contrary, it seems that every case we have decided involving ‘cleaning’ as used in Labor Law § 240(1), with a single exception, has involved cleaning the windows of a building” (18 N.Y.3d at 525).

Because the Court could not find “a single case, in our Court or in the Appellate Division, in which a worker recovered under Labor Law § 240(1) for an injury suffered while cleaning a product in the course of a manufacturing process,” and because “[s]uch injuries can hardly be uncommon,” the Court “infer[red] that it has been generally - and correctly - understood that the statute does not apply to them” (18 N.Y.3d at 526).

**Soto v. J. Crew Inc.**, 95 A.D.3d 721, 721, 945 N.Y.S.2d 255, 255-256 (1st Dep’t 2012) (where plaintiff’s employer “contracted with the J. Crew defendants to provide general daily maintenance services to their store,” and where plaintiff was injured “when he fell off an A-frame ladder while dusting the top of a shelf,” “[t]he dusting of the shelf constituted routine maintenance and was not the type of activity that is protected under the statute”).

---

12 Justice Catterson wrote that he concurred with the result in Soto “because I am constrained by the Court of Appeals’ recent holding in Dahar,” adding that Dahar could not, in his opinion, “be reconciled with extensive recent precedent of the Court or the plain wording of Labor Law § 240(1).” He noted:

The holding in Dahar appears to be a significant sea change in section 240(1) jurisprudence that overrules sub silentio the analysis of Broggy.

* * * * *

... a simple hypothetical demonstrates the mischief attendant to the Dahar holding. Worker “A” is compelled to clean the top of a 50-foot-tall widget. Worker “B” is required to clean the top of a 12-foot-tall window. Both workers are exposed to a gravity related risk of injury and both are “cleaning” for the purposes of section 240(1). Yet, under Dahar, if worker “A” plummets to misfortune whilst cleaning, he or she is not afforded protection of section 240(1).
Quintanilla v. United Talmudical Academy Torah V’yirah, Inc., 38 Misc.3d 1215(A), 2013 N.Y. Slip Op. 50108(U) (Sup. Ct. Kings Co. 2013) (Schmidt, J.) (where plaintiff was part of a team of four workers which was “called in an emergency to remove snow and water from the attic of the roof of a non-residential building which was leaking into an auditorium where a wedding was scheduled to take place within two or three hours,” and where the task itself was the “one-time removal of snow and ice requiring special water extraction equipment,” plaintiff “was engaging in ‘cleaning’ of a non-routine, non-domestic nature at the time of his accident, as opposed to routine maintenance”).

Wowk v. Broadway 280 Park Fee, LLC, 94 A.D.3d 669, 670, 944 N.Y.S.2d 23 (1st Dep’t 2012) (“[e]xterior window washing is a protected activity under Labor Law § 240(1)” and “plaintiff’s act of carrying water for washing the windows was an integral part of cleaning the windows”).

Catania v. St. Rose of Lima School, 40 Misc.3d 1209(A), 2013 N.Y. Slip Op. 51083(U) (Sup. Ct. Kings Co. 2013) (Schmidt, J.) (accepting that plaintiff was not involved in “routine” cleaning of the ventilation duct and that he was instead called in to remove a squirrel, “plaintiff’s work could fall within only the most expansive definition of cleaning, and bears little resemblance to the construction work the hazards of which § 240(1) aims to ameliorate … Nothing in this case suggests that plaintiff was making any physical alterations to the school or that his work was incidental to any undertaking covered by § 240(1”)”.

**Note:** Where the plaintiff was injured while exterior window washing, the plaintiff may, depending on the location and height of the subject building, have a claim under Labor Law § 202 in addition to (or instead of) a claim under Labor Law § 240. Wowk v. Broadway 280 Park Fee, LLC, supra, 94 A.D.3d 669, 670, 944 N.Y.S.2d 23 (1st Dep’t 2012) (although “[p]laintiff identified the specific provision of the Industrial Code (12 NYCRR) that defendant allegedly violated, a prerequisite for a Labor Law § 202 claim, for the first time in opposition to defendant’s motion,” “defendant has shown no prejudice attributable to plaintiff’s omissions, we find that plaintiff should be permitted to proceed with his Labor Law § 202 claim”).

4. Painting

Soodin v. Fragakis, 91 A.D.3d 535, 535, 937 N.Y.S.2d 187, 188 (1st Dep’t 2012) (“[t]he commercial painting and plastering work in which plaintiff was engaged when he fell is covered under Labor Law § 240(1”)”.

Pittman v. S.P. Lenox Realty, LLC, 91 A.D.3d 738, 739, 937 N.Y.S.2d 101, 103 (2nd Dep’t 2012) (where “decedent died after being severely burned when a halogen lamp ignited liquid that he was using to refinish the floors in an apartment,” “defendants failed to establish, prima facie, that the plaintiff was not engaged in a specifically enumerated activity under 12 NYCRR 23-1.4(b)(13)” inasmuch as “[w]e have previously determined that the application of a protective coating to the roof of a building is the ‘functional equivalent’ of painting, which is a specifically enumerated activity under 12 NYCRR 23-1.4(b)(13)”.)
5. The Sometimes Problematic Distinction Between “Repairs” And “Maintenance.”

Labor Law § 240(1) expressly applies not only to “construction” and “demolition” but also to “repairing.” But how does one distinguish “repair” from “maintenance”? Amongst the factors that courts have considered in deciding whether some particular task was “repair” or “maintenance” have been:

1) whether the device or component that was being fixed or replaced was one that was intended to have a limited life span and to require periodic adjustment or replacement (a “Yes” answer suggesting that the work was “routine maintenance”);

2) whether the device or machine that was being “repaired” or “maintained” was actually inoperable (a “Yes” answer suggesting that the work was a “repair” and a “No” answer suggesting the opposite);

3) whether the work was a huge job that required many workers or many hours of labor … or a single-person job completed in a matter of minutes (bigger suggesting “repair”; smaller suggesting “maintenance”);

4) whether the work was a “routine” task that was perhaps performed pursuant to some service contract or whether it was a non-routine job requiring special payment (the first possibility suggesting maintenance); and

5) whether the job was merely one part of an on-going construction project or a discrete activity (obviously, the first possibility of itself suggesting “repair” rather than “maintenance”).

Vasquez v. Cohen Brothers Realty Corporation, 105 A.D.3d 595, 597-598, 963 N.Y.S.2d 626, 629 (1st Dep’t 2013) (where decedent “was employed by the property owner as an engineer” and was injured when he “along with other members of the property’s engineering crew, was replacing ceiling tiles in the drop ceiling of the building’s loading dock” that had “been removed by a plumbing contractor hired to work on the sprinkler heads,” where decedent and a coworker had “used a two-man scissor lift to reach the drop ceiling,” and where the work had also entailed reinstallation of a fluorescent light, the work Vasquez was completing when the accident occurred falls squarely within the protection of Labor Law § 240(1); decedent was “working from an elevated height to repair the ceiling”).

Dos Santos v. Consolidated Edison of New York, Inc., 104 A.D.3d 606, 606-607, 963 N.Y.S.2d 12, 13-14 (1st Dep’t 2013) (where “New York City was beset by a nor’easter that threatened the metropolitan area with heavy rain, strong wind gusts and high tides” and defendant hired plaintiff’s employer “to supplement its effort in responding to vapor conditions and pumping water out of flooded manholes,” and where plaintiff, “a laborer, was injured when he fell into a
steam manhole that was part of defendant’s steam distribution system” while plaintiff was in the course of responding “to a heavy vapor condition,” one “factor to be taken into consideration” in determining whether the work was a covered-by-the-statute “repair” or uncovered-by-the-statute “maintenance” is “whether the work in question was occasioned by an isolated event as opposed to a recurring condition”; here, “[t]he record here demonstrates that the work performed by plaintiff at the time of his injury was far from routine” and “we find that plaintiff was engaged in a repair contemplated by the statute insofar as he was called upon to address a flooding condition that exceeded the capacity of the pumping station”).

**Konaz v. St. John’s Preparatory School**, 105 A.D.3d 912, 913-914, 963 N.Y.S.2d 337, 338-339 (2nd Dep’t 2013) (where “plaintiff, a building mechanic, allegedly was injured when he fell from a ladder while attempting to replace a ballast in a malfunctioning fluorescent light fixture in the school building,” “[t]he task of replacing a ballast in a fluorescent light fixture falls within the category of routine maintenance” constituted “replacement of a worn-out component in a nonconstruction and nonrenovation context, and did not constitute erection, demolition, repairing, altering, painting, cleaning, or pointing of a building within the meaning of Labor Law § 240(1) so as to bring him within the protective ambit of that statute”; nor could there be recovery under Labor Law § 241(6) “since the plaintiff’s work constituted maintenance which was unrelated to construction, excavation, or demolition”).

**Picaro v. New York Convention Cent. Dev. Corp.**, 97 A.D.3d 511, 511-512, 949 N.Y.S.2d 374, 375 (1st Dep’t 2012) (where the plaintiff-electrician “testified that he fixed light fixtures about twice weekly, that ‘nine out of ten times’ the house electricians would change the whole fixture when performing such work, and that he retrieved sockets and bulbs from the building’s storage area in order to perform his work,” and where plaintiff’s “subforeman stated in an affidavit that the high-voltage nature of the lights caused the sockets to deteriorate, requiring them to be replaced on a regular basis, which necessitated keeping a large volume of sockets in stock on the premises,” “plaintiff’s work clearly involved ‘replacing components that require replacement in the course of normal wear and tear’”).

**Gonzalez v. Woodbourne Arboretum, Inc.**, 100 A.D.3d 694, 697, 954 N.Y.S.2d 113, 116 (2nd Dep’t 2012) (where water cannon [which was ten to twelve feet tall and weighed more than a ton] tipped over and fell on decedent just after decedent and other workers had moved it, plaintiff’s Labor Law 240 and 241(6) claims was correctly dismissed inasmuch as, (a) the work in issue involved nothing more than “replacement of a worn-out component in an operable piece of machinery” and was thus “routine maintenance,” and, (b) the accident “did not occur in connection with construction, demolition, or excavation work”).

**Melski v. Fitzpatrick & Weller, Inc.**, 107 A.D.3d 1447, 1448, 967 N.Y.S.2d 304, 304-305 (4th Dep’t 2013) (where defendant “established that decedent’s work involved replacing components that required replacement in the course of normal wear and tear,” it thus established that “decedent was not performing one of the protected activities enumerated in [Labor Law § 240] but, rather, was involved in routine maintenance in a non-construction, non-renovation context” and also that “decedent did not perform his work in the context of construction, demolition or excavation” for purposes of Labor Law § 241(6)).

**B. Prats And The Issue Of Context**


**Background:** Labor Law § 240(1) requires that certain safeguards be taken vis-à-vis “the erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure …” But what about a worker who is not personally doing painting, pointing or erection and who is instead complementing other workers who are engaged in those activities? For that matter, what about the worker who indisputably does Labor Law work (say, a carpenter at a building site), but who was not engaged in any listed activity at the moment of injury?

**Facts:** Plaintiff was an assistant mechanic for a company whose contract "involved cleaning, repairing and rehabilitating air handling units, including supports, anchors and pipings in several buildings." Because "[s]ome of the air handling units measured 20-by-20 feet and were built into the wall," the work required the company "to level floors, lay concrete and rebuild walls to replace large air filtering systems."

Plaintiff typically "assisted a more senior mechanic in changing bearings, motor sheaves and flywheels." But, at the moment he was injured, plaintiff was ascending a ladder in order to hand a wrench to a co-employee who was merely inspecting one of the units. The ladder slid, and plaintiff fell.

**The Issue:** Defendant argued that it was not important or sufficient that the inspection was part of some larger “construction” project. What supposedly mattered was that the work being carried out at the moment of an injury was mere inspection, which was not 240 work. Was defendant correct?

**Held:** The Court, per decision by Judge Rosenblatt, unanimously held that plaintiff was entitled to the statute's protection.

In so holding, the Court ruled that work that is "ancillary" to construction-type work can be covered, and that one must look to the entire context in which the work was performed. The Court put it this way:

At one extreme, a construction worker who, between hammer strokes, pauses to see where to hit the next nail is at that moment ‘inspecting.’ But this is very different from an inspection conducted by someone carrying a clipboard while surveying a possible construction site long before a contractor puts a spade in the ground. Here, AWL employed the plaintiff mechanic substantially to perform work that involved alteration of a building, and, under the facts of this case, he enjoyed the protection of § 240(1) even though he was inspecting, or more precisely, climbing a ladder, at the moment of the accident.
While we have held that job titles are not dispositive (see Joblon, 91 N.Y.2d at 465-466, 672 N.Y.S.2d 286, 695 N.E.2d 237), the facts support the conclusion that plaintiff -- while working as a mechanic -- undertook the kind of work the Legislature intended to protect under § 240(1). Although at the instant of the injury he was inspecting and putting the finishing touches on what he had altered, he had done heavier alteration work on other days at the same job site on the same project. He was a member of a team that undertook an enumerated activity under a construction contract, and it is neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the work. The intent of the statute was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts.

*     *     *

In sum, the question whether a particular inspection falls within § 240(1) must be determined on a case-by-case basis, depending on the context of the work. Here, a confluence of factors brings plaintiff's activity within the statute: his position as a mechanic who routinely undertook an enumerated activity, his employment with a company engaged under a contract to carry out an enumerated activity, and his participation in an enumerated activity during the specific project and at the same site where the injury occurred.

100 N.Y.2d at 881-883, emphasis added.

The Prats Court had little difficulty in ruling that the work as a whole constituted “altering” within the meaning of Labor Law § 240:

… in Panek v. County of Albany (99 N.Y.2d 452 [2003]), we applied the Joblon “altering” analysis to the removal of air handlers from a building before its demolition. The Court concluded that the plaintiff ‘was clearly engaged in a significant physical change to the building when he was injured, thus satisfying the Joblon standard for an alteration’ (Id. at 458, 672 N.Y.S.2d 286, 695 N.E.2d 237). Here, constructing walls and leveling floors are at least as significant as drilling through concrete, the threshold for altering we identified in Joblon. AWL’s project also has much in common with the work carried out in Panek. Applying Joblon and Panek, we are satisfied that AWL’s work involved building alteration, and therefore was not routine maintenance.

100 N.Y.2d at 882, emphasis added.

Aftermath: Post-Prats, the answer as to whether plaintiff was entitled to the protection of Labor Law sections 240 and/or 241 can turn on whether plaintiff was a “member of a team” hired to undertake a listed activity (Coombs v. Izzo Gen. Contr., Inc., 49 A.D.3d 468, 468-469, 858 N.Y.S.2d 3, 3 [1st Dep’t 2008]), whether the work plaintiff was performing was “ancillary to
on-going construction” (Minchala v. Port Authority, 67 A.D.3d 978, 978, 888 N.Y.S.2d 772, 772 [2nd Dep’t 2009]), and whether the work was “part of an easily distinguishable separate phase” (Torkel v. NYU Hospitals Center, 63 A.D.3d 587, 598, 883 N.Y.S.2d 8, 17-18 [1st Dep’t 2009]).


Gallagher v. Resnick, 107 A.D.3d 942, 944, 968 N.Y.S.2d 151, 154 (2nd Dep’t 2013) (where plaintiff’s employer “had been hired to fabricate sills, lintels, and coping stones for the project,” and where “[p]art of that job included going to the work site and climbing to the roof of the building to take measurements in preparation for the fabrication,” “the injured plaintiff was performing a task ancillary to the construction work and was engaged in a ‘covered activity’ within the meaning of Labor Law § 240(1)”).

Scott v. Westmore Fuel Co., Inc., 96 A.D.3d 520, 520, 947 N.Y.S.2d 15 (1st Dep’t 2012) (where plaintiff “was riding on the exterior step of a moving backhoe when he fell and the backhoe ran over his left foot,” “[t]he statutory protection of Labor Law § 241(6) extends to the activity in which plaintiff was engaged at the time of the accident, regardless of whether the backhoe was being brought from storage to the work site for use [citation omitted] or taken away from the work site for storage at the end of the work day [citation omitted]”).

Rast v. Wachs Rome Dev., LLC, 94 A.D.3d 1471, 1472-1473, 943 N.Y.S.2d 323 (4th Dep’t 2012) (where defendant hired plaintiff’s employer as a general contractor to rebuild a strip mall and also hired defendant Scott Quick to repair the roof, where Quick had “started the roof repairs but had left the job site to work on a project in another state,” and where plaintiff “was informed that the roof was leaking and ruining the newly-installed drywall” and “accessed the roof to investigate,” “plaintiff’s conduct in accessing the roof to investigate and attempt to fix the problem was within the scope of his employment”).

Augustyn v. City of New York, 95 A.D.3d 683, 684, 944 N.Y.S.2d 146 (1st Dep’t 2012) (where plaintiff “fell from a sidewalk bridge while engaging in lead paint removal work,” even though plaintiff “was not removing lead paint from a fire escape at the time of the fall, he was walking across the bridge to set up a tent in preparation for lead paint removal work at another fire escape” and this “was part of the overall lead paint removal project”).

2. Work Was Not Sufficiently Related, Or Plaintiff Was Not Part Of “The Team”

Amendola v. Rheiden 125th Street, LLC, supra, 105 A.D.3d 426, 427, 963 N.Y.S.2d 30, 31 (1st Dep’t 2013) (plaintiff’s work of hanging window shades was not of itself covered work and was not “performed in the context of the larger construction project” inasmuch as the other work performed by plaintiff’s employer was performed later and pursuant to a different contract
with a different party, thus making the work in issue “a separate phase easily distinguishable from other parts of the larger construction project”).

_Lavigne v. Glens Falls Cement Co., Inc., supra_, 92 A.D.3d 1182, 1183, 939 N.Y.S.2d 172 (3rd Dep’t 2012) (where plaintiff was assisting in removing and replacing a damaged power cable, where the work itself did not “affect[] the structural integrity of the building or structure or [constitute] an integral part of the construction [or demolition] of a building or structure,” and where the work “was unrelated to any broader renovation or construction project,” “plaintiffs’ Labor Law § 241(6) claim should have been dismissed”).

_Sotomayer v. Metro. Transp. Auth.,_ 92 A.D.3d 862, 863-864, 938 N.Y.S.2d 640 (2nd Dep’t 2012) (plaintiff, “as a materials coordinator was engaged in the requisitioning and gathering of parts used by others in the course of performing maintenance and modification of existing railroad cars, was not engaged in construction, excavation, or demolition work [within the scope of Labor Law § 241[6]”).

C. Application Is Limited To “Employees”; Passersby And “Volunteers” Are Not Covered

1. The General Rule

Even where the plaintiff was doing bona fide construction work, plaintiff cannot claim the benefits of Labor Law sections 240 or 241(6) if plaintiff was a volunteer. _Whelen v. Warwick Valley Civic and Social Club_, 47 N.Y.2d 970, 419 N.Y.S.2d 959 (1979). Nor can people who work in the area, but who are not part of the project and who are merely passersby, claim the benefit of Labor Law sections 240 or 241.13 The same has been said of security guards

13 _Johnson v. Ebidenergy, Inc.,_ 60 A.D.3d 1419, 875 N.Y.S.2d 677, 680-681 (4th Dep’t 2009) (where one of the plaintiffs in the action was employed by a site contractor but actually had no job function at the site and was on-site merely “to pick up paperwork for another job,” that plaintiff [unlike the plaintiff in the other action resolved in the same opinion] “was not within the class of workers protected by the Labor Law because he was ‘not a person’ employed to ‘carry out’ the project” [citing Gibson v. Worthington Div. Of McGrad-Wedson Co., 78 N.Y.2d 1108, 1109, 578 N.Y.S.2d 127 (1991)); Coombs v. Izzo Gen. Contr., Inc., supra, 49 A.D.3d 468, 468-469, 858 N.Y.S.2d 3 (1st Dep’t 2008) (“[a]lthough an individual need not actually be engaged in physical labor to be entitled to coverage under the Labor Law,” plaintiff, a superintendent of a building that was undergoing demolition and construction, was not entitled to the Labor Law’s protection since he “did not perform work integral or necessary to the completion of the construction project, nor was he a member of a team that undertook an enumerated activity under a construction contract”’’ (quoting Prats, supra); Wolfe v. KLR Mechanical, 35 A.D.3d 916, 826 N.Y.S.2d 458, 460 (3rd Dep’t 2006) (plaintiff, who worked at the site, was nonetheless not entitled to protection of Labor Law § 241(6) since there was no claim that plaintiff was involved with the construction project); Jones v. Fried, 21 A.D.3d 1059, 803 N.Y.S.2d 593 (2nd Dep’t 2005) (police officer who fell while traversing work site “was not an ‘employee’ or ‘employed’ at the work site, and thus does not come within the class of persons
and people who pick up the trash, people whose labor benefits the project but who do not supervise and are not involved in any aspect of the construction work.\textsuperscript{14} This is so notwithstanding that section 241(6) \textit{appears} to say differently.\textsuperscript{15}

Yet, if the plaintiff is employed or suffered to do construction work, it is immaterial, in terms of the scope of the statutes, whether the plaintiff is a self-employed contractor or is employed by somebody else, so long as the plaintiff was indeed hired by someone to do the

\begin{quote}

‘employed therein or lawfully frequenting the premises’ who are entitled to the protection afforded by the ‘flat and unvarying duty’ imposed by the Labor Law’); \textit{Sowa v. S.J.N.H. Realty Corp.}, 21 A.D.3d 893, 800 N.Y.S.2d 749 (2nd Dep’t 2005) (the \textit{plaintiff-hairdresser} was not a person “employed” within the meaning of Labor Law §§ 200, 240 and 241(6)); \textit{Morales v. 569 Myrtle Avenue, LLC}, 17 A.D.3d 418, 420, 793 N.Y.S.2d 145, 146 (2nd Dep’t 2005) (where plaintiff was a \textit{passerby} who was struck by a piece of cement while walking on the sidewalk adjacent to a construction site, Supreme Court should have dismissed plaintiff’s claims under Labor Law § 200, 240(1) and 241(6) since “plaintiff is not a member of the class of persons intended to be protected by those provisions of the Labor Law”).

\textsuperscript{14} \textit{Piazza v. Shaw Contract Flooring Serv., Inc.}, 39 A.D.3d 1218, 834 N.Y.S.2d 776 (4th Dep’t 2007) (where plaintiff, \textit{an employee of the Buffalo Municipal Housing Authority}, was sent to \textit{remove trash} from apartments where renovation work was ongoing, “plaintiff’s work in removing trash from the vacant apartment was \textit{not part of} [the] construction” and plaintiff was therefore not entitled to the protection of Labor Law § 241(6); \textit{Spaulding v. S.H.S. Bay Ridge LLC}, 305 A.D.2d 400, 400-401, 759 N.Y.S.2d 179, 180 (2nd Dep’t 2003), \textit{lv. den.}, 100 N.Y.2d 514, 769 N.Y.S.2d 200 (2003) (where plaintiff, who was a \textit{security guard at a construction project} sustained injury when an aluminum extension ladder he was descending “skidded” and caused him to fall, plaintiff was “\textit{not a person entitled to the protection of the Labor Law}” inasmuch as "[he] was neither ‘permitted or suffered to work on a building or structure’ … nor was he performing work necessary and incidental to the erection or repair of a building or structure”).

\textsuperscript{15} Actually, in terms of the actual language used in the two statutes, there is a marked difference in the intended beneficiaries thereof.

Labor Law section 240(1) specifies that it applies to “erection, demolition, repairing, altering”, etc., and then indicates that the contractors and owners must “give proper protection \textit{to a person so employed}.” It is thus clear from the statute itself that the intended beneficiaries are employees.

By contrast, Labor Law § 241(6) commands that the places in which “construction” is performed “provide reasonable and adequate protection and safety \textit{to the persons employed therein or lawfully frequenting such places}.”

One might thus conclude, just from the statutes themselves, that § 240(1) is limited to the site workers and that § 241(6) applies to everyone who has a right to be on-site, including the guy or gal who delivers pizza. However, the Court of Appeals held in \textit{Mordkofsky v. V.C.V. Dev. Corp.}, 76 N.Y.2d 573, 561 N.Y.S.2d 892 (1990) that despite appearances (\textit{i.e.}, the statute’s actual language) Labor Law § 241(6) applies only to people employed as to the project in issue.
work.\textsuperscript{16} Also, there is recent authority, albeit dictum, to the effect that the plaintiff cannot contractually waive his or her rights to bring suit under the Labor Law.\textsuperscript{17}

It is also immaterial if plaintiff’s employer was engaged in a charitable endeavor so long as plaintiff himself or herself was remuneratively employed on the project.\textsuperscript{18}

However, where plaintiff was not hired by anyone to do the work, as would occur if the tenant or owner decided to work on her or his own house, plaintiff would not be a Labor Law worker.\textsuperscript{19}

\textsuperscript{16} \textit{Knauer v. Anderson}, 299 A.D.2d 824, 825, 750 N.Y.S.2d 390, 392 (4th Dep’t 2002) (where the plaintiff-electrician fell from a ladder, it was \textit{immaterial} vis-à-vis the plaintiff’s § 240 claim \textit{whether plaintiff was employed by the third-party defendant or whether he was an independent contractor}; in either case “he was ‘employed’ within the meaning of Labor Law § 240(1)’); see also \textit{Spages v. Gary Null Assoc., Inc.}, 14 A.D.3d 425, 425-426, 788 N.Y.S.2d 355, 356 (1st Dep’t 2005) (the fact that plaintiff contracted to perform the work on the premises did not mean that plaintiff was thereby a “contractor” who was “disqualified from pursuing his Labor Law claims”; “rather, [plaintiff] worked principally as a laborer under a salary contract with Null, which maintained control over all hiring and paid the other workers directly. In view of the nature of his work and employment relation, and his very limited supervisory authority and control over the project, plaintiff was not excludable as a ‘contractor’ from the Labor Law’s protective ambit”).

\textsuperscript{17} \textit{Gunderman v. Sure Connect Cable Installation, Inc.}, supra, 101 A.D.3d 1214, 1218, 956 N.Y.S.2d 211, 214 (3rd Dep’t 2012) (dictum because, as construed by the Court, the contract also did not call for such a waiver).

\textsuperscript{18} \textit{Crapsi v. South Shore Golf Club Holding Co., Inc.}, 19 A.D.3d 1024, 1025-1026, 797 N.Y.S.2d 234, 235-236 (4th Dep’t 2005) (even assuming that “the role of plaintiff’s employer in the erection of the golf dome was only that of consultant or advisor”, and even assuming that plaintiff’s employer “was acting as a volunteer”, plaintiff was nonetheless injured in the scope of his employment for purposes of Labor Law § 240(1); furthermore, “[t]he fact that plaintiff’s employer did not explicitly direct plaintiff to climb to the second tier of the [structure]” and had instead directed plaintiff to perform a task that arguably included that activity did “not negate plaintiff’s status as an employee at the time of the accident”).

\textsuperscript{19} \textit{Turner v. Canale}, 15 A.D.3d 960, 960, 790 N.Y.S.2d 347, 348 (4th Dep’t 2005) (where plaintiff was a tenant who operated a retail bicycle shop on the premises, and where plaintiff was injured during the course of renovations that he was personally performing, plaintiff could not seek recovery under the Labor Law for the simple reason that he had not been “hired” to do any work and was not an “employee”; “Contrary to the contention of plaintiff, the terms of the lease do not establish that he was ‘hired’ by defendants to renovate the property and thus the terms of the lease do not establish that plaintiff was employed by defendants within the meaning of the Labor Law”).
2. Recent Case Law

*Lazri v. Kingston City Consol. Sch. Dist.*, 95 A.D.3d 1642, 1643-1644, 945 N.Y.S.2d 487 (3rd Dep’t 2012) (where it was undisputed that plaintiff’s employer had directed plaintiff and a fellow employee to work on the subject roof on the Sunday in issue, but where the defendant construction manager adduced proof to the effect that the work in issue was supposed to occur on Monday through Friday and that the site was closed as of the subject accident, plaintiff’s motion for summary judgment should have been denied since, [1] “[t]o receive the benefits of Labor Law §§ 240 and 241, a worker must show that ‘he [or she] was both permitted or suffered to work on a building or structure and that he [or she] was hired by someone, be it owner, contractor or their agent,’” and, [2] there was “a question of fact as to whether the job site was closed at the time of plaintiff’s accident”).

*Torres v. Perry Street Development Corp.*, 104 A.D.3d 672, 674, 960 N.Y.S.2d 450, 453 (2nd Dep’t 2013) (where plaintiff testified that he was working “as a ‘helper,’ transporting materials to the masons who were installing new elevator shafts,” but defendants’ field superintendent testified that, on the day of the accident, the plaintiff arrived at the site wearing street clothes looking for the masonry subcontractor “to get paid for a prior job and that the plaintiff was not working at the site”; there was thus an issue of fact as to whether plaintiff was “permitted or suffered to work,” and whether he was an employee entitled to the protections of Labor Law § 240).

*Bolster v. E. Bldg. and Restoration Inc.*, 96 A.D.3d 1123, 1123-1124, 946 N.Y.S.2d 298 (3rd Dep’t 2012) (where plaintiff was a corrections officer who was assigned to work as a “construction escort” whose duties “included escorting defendant’s workers to and from the construction site in the facility, making sure that none of the workers’ tools [which could become potential weapons in the hands of inmates] were left in the facility, and keeping the area otherwise safe from any inmates,” plaintiff’s role was analogous to that of a security guard at a construction site and he was therefore not a “covered person” for purpose of Labor Law § 240(1); interestingly, the defendant “conceded at oral argument that plaintiff was a covered person under [Labor Law § 241(6)]” but the concession was inconsequential inasmuch as the regulations cited by plaintiff were deemed inapplicable).

*Bayo v. 626 Sutter Avenue Associates*, 106 A.D.3d 648, 649, 966 N.Y.S.2d 390, 391-392 (1st Dep’t 2013) (decedent who worked at the site as a night watchman was not entitled to the protections of Labor Law § 241(6); “[a]lthough decedent’s brother-in-law and a former Joy laborer averred in their affidavits they had seen decedent cleaning, removing debris, and securing tools during his shift, which began at 3:30 p.m., the affidavits offer no facts as to what work plaintiff was performing at or near the time he died. Further, the former employee averred that he had stopped working for Joy about a month before the incident”).
D. Territorial Limitations

1. Application Beyond The State’s Borders

Application is by statute limited to accidents that occur within the State, but …

*DaSilva v. C&E Ventures, Inc.*, 83 A.D.3d 551, 554, 922 N.Y.S.2d 32, 35 (1st Dep’t 2011) (where the plaintiffs were allegedly injured from plaintiffs’ exposure to lead during lead paint abatement they performed on the George Washington Bridge, where the injuries occurred in New Jersey and New York, where the defendant Port Authority was a resident in both states, where most plaintiffs were New York residents but two plaintiffs resided in New Jersey, and where New Jersey had no analog to Labor Law § 241(6) and instead flatly provided that “an owner is not responsible for harm which occurs to a contractor’s employee as a result of the very work the contractor was hired to perform,” the Court would apply New York law to the entire case inasmuch as “New York has a paramount interest in ensuring the safety of workers within our state,” at least some of the injuries occurred in New York, and the situation was “far different from one where the injury occurs solely in another state”).

2. Indian Reservations

*John v. Klewin Bldg. Co., Inc.*, 94 A.D.3d 1502, 1503, 943 N.Y.S.2d 812 (4th Dep’t 2012) (where plaintiff fell from a roof at a construction project for the Seneca Niagara Casino, “[w]e reject defendant’s contention on appeal ‘that Labor Law vicarious liability provisions do not apply in this case because plaintiff sustained the injury on an Indian reservation, i.e., that of the Seneca Nation’”).

*Hill v. Seneca Nation of Indians*, 96 A.D.3d 1593, 1594-1595, 947 N.Y.S.2d 272 (4th Dep’t 2012) (New York’s Labor Law, not tribal law, governs accidents within the scope of the Labor Law, and such is so even where, as here, the plaintiff was a Native American).

3. Maritime

*Durando v. City of New York*, 105 A.D.3d 692, 695, 963 N.Y.S.2d 670, 674 (2nd Dep’t 2013) (where plaintiff “was working as a scaffolding installer and remover … on the SS Chemical Pioneer, a ship in dry dock for repairs at the Brooklyn Navy Yard” when he allegedly “fell through an improperly covered opening in the floor, or deck, of one of the ship’s cargo holds” there was “no real dispute that the present action falls within federal maritime jurisdiction” but the causes of action alleging violations of Labor Law §§240(1) and 241(6) were nonetheless “not preempted by general maritime law” inasmuch as “[u]nder the circumstances of the case, the application of Labor Law §§ 240(1) and 241(6), which are local regulations enacted to protect the health and safety of workers in this state, will not unduly interfere with a fundamental characteristic of maritime law or the free flow of maritime commerce”).
**Koat v. Consol. Edison of New York, Inc.**, 98 A.D.3d 474, 475, 949 N.Y.S.2d 699 (2nd Dep’t 2012) (defendants “made a prima facie showing that they were the owners and operators of the same type of barge held by the Court of Appeals in Lee to be a ‘vessel’ within the meaning of the LHWCA, and that the plaintiff’s Labor Law §§ 240(1) and 241(6) claims, insofar as asserted against them, were thus preempted by the federal act”).

**E. Buildings or Structures**

**Dos Santos v. Consolidated Edison of New York, Inc., supra,** 104 A.D.3d 606, 608, 963 N.Y.S.2d 12, 14 (1st Dep’t 2013) (where “New York City was beset by a nor’easter that threatened the metropolitan area with heavy rain, strong wind gusts and high tides” and defendant hired plaintiff’s employer “to supplement its effort in responding to vapor conditions and pumping water out of flooded manholes,” and where plaintiff, “a laborer, was injured when he fell into a steam manhole that was part of defendant’s steam distribution system” while plaintiff was in the course of responding “to a heavy vapor condition,” “[t]he motion court correctly found that the manhole meets the definition of a structure as that term is used in the statute”).

**McCoy v. Abigail Kirsch at Tappan Hill, Inc.,** 99 A.D.3d 13, 14-16, 951 N.Y.S.2d 32 (2nd Dep’t 2012) (where plaintiff was injured while disassembling a 10-foot high chupah which “consisted of metal pipes that were 10 feet long and 3 inches wide,” and where plaintiff was working on “a six-foot high aluminum ladder supplied by his employer, on which two feet allegedly were missing” when the ladder slipped, and plaintiff fell, “the Supreme Court properly held that the chupah at Abigail Kirsch was a ‘structure’ within the intended scope of Labor Law § 240(1)” but this was “not to say that every chupah qualifies as a structure under Labor Law § 240(1)” since “there are wide variations of chupahs, some involving a series of durable interconnected parts, and others being much more simple and merely decorative in nature”).

**Keller v. Kruger,** 39 Misc.3d 720, 732-740, 961 N.Y.S.2d 876, 886-891 (Sup. Ct. Kings Co. 2013) (Battaglia, J.) (where the plaintiffs were road workers who were allegedly injured because defendants purportedly failed to “take adequate measures, including proper placement of attenuator trucks, to prevent vehicles from entering into the area of the roadway that was under construction,” “[d]espite the language in [Labor Law § 241(6)] ‘implying that it is only applicable to work in connection with construction or demolition of buildings, the statute ‘extends to workers involved in, among other things, road construction projects’” there were issues of fact concerning, amongst other matters, whether defendants’ alleged violation of 12 NYCRR § 1.29(a) and (b) was a proximate cause of the accident).
II. APPLICABILITY OF LABOR LAW §§ 240 OR 241(6) TO THE PARTICULAR DEFENDANT

A. “Owners”

1. General Rule

Generally speaking, the owner of the property is an “owner” within the meaning of Labor Law sections 240 and 241 even if the owner exercised no control over the details of the work. *Sanatass v. Consol. Inv. Co., Inc.*, 10 N.Y.3d 333, 340, 858 N.Y.S.2d 67, 72 (2008) (“Relying on its lack of knowledge of plaintiff’s work, undertaken at the behest of the tenant, Consolidated asks us to import a notice requirement into the Labor Law or, conversely, create a lack-of-notice exception to owner liability. But our precedents make clear that so long as a violation of the statute proximately results in injury, the owner’s lack of notice or control over the work is not conclusive—this is precisely what is meant by absolute or strict liability in this context … We have made perfectly plain that even the lack of ‘any ability’ on the owner’s part to ensure compliance with the statute is legally irrelevant”).


2. Recent Case Law

(a) Landowners

*Custer v. Jordan*, supra, 107 A.D.3d 1555, 1557, 968 N.Y.S.2d 754, 757 (4th Dep’t 2013) (although defendant had already agreed to sell the property, he still held title at the time of the accident and “was an ‘owner’ of the property for the purposes of the Labor Law”).

*Henningham v. Highbridge Community Housing Dev. Fund Co.*, 91 A.D.3d 521, 523, 938 N.Y.S.2d 1 (1st Dep’t 2012) (where defendant Kensington merely owned the land but not the building in which plaintiff was injured, Kensington was nonetheless responsible under Labor Law § 240(1) since “the lease between Highbridge and Kensington and the deposition testimony of a Highbridge representative show that Kensington had the right and authority to control the work site”).

*Wicks v. Leemilt’s Petroleum, Inc.*, 103 A.D.3d 793, 795-796, 962 N.Y.S.2d 168 (2nd Dep’t 2013) (where “plaintiff’s employer provided him with a van equipped with an extension ladder and an A-frame ladder,” where plaintiff was purportedly injured while “performing work on an elevated fire extinguishing system at a gasoline station” when he leaned the ladder against the pole on which the fire extinguishing system was located and the pole itself collapsed, and where defendants Getty Petroleum Marking, Inc. and 111 Montauk Highway, LLC, contended that they were not “owners” within the meaning of Labor Law § 240(1), “the evidence they submitted in support of that contention failed to establish that they did not either ‘fulfill[] the role of owner by contracting to have [the] work performed [citation omitted], have the right to control the work being done [citation omitted], or have a sufficient ‘nexus’ to the work
performed, ‘whether by a lease agreement or grant of an easement, or other property interest,’ to support the imposition of Labor Law § 240(1) liability on them [citation omitted”).

Alvarez v. Hudson Valley Realty Corp., 107 A.D.3d 748, 748, 966 N.Y.S.2d 686, 686 (2nd Dep’t 2013) (“defendant demonstrated its prima facie entitlement to judgment as a matter of law dismissing the causes of action asserting violations of Labor Law §§ 240(1) and 241(6) by establishing that it was an abutting property owner with no property interest in the premises upon which the plaintiff was injured, and it neither contracted for nor controlled the construction work on the premises”).

Miller v. Savarino Construction Corporation, 103 A.D.3d 1137, 1138-1139, 959 N.Y.S.2d 318 (4th Dep’t 2013) (defendants successfully established “that nonparty Michigan Street Development, LLC … not 26 Mississippi, owned the building at all times relevant to this matter” and that plaintiff, in essence, sued the wrong party).

(b) Condominiums (and Cooperatives)


Who are the “owners” for purposes of sections 240 and 241(6) of the Labor Law when a proprietary lessee of a cooperative hires a contractor to do work in “his” or “her” apartment? What if the apartment is instead a condominium and the hirer owns it? What if the contractor is instead hired to do work in the building’s common areas?

A divided Court of Appeals recently answered one of those questions and suggested answers to others, in Guryev v. Tomchinsky.

Labor Law “Ownership”

By its terms, Labor Law § 240 applies to “[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work …” So does Labor Law § 241(6). The words “owner” and “ownership” are not defined in the Labor Law itself and are, as one might expect, terms of art.

The long-accepted premise is that the legislature’s intent was to place “‘ultimate responsibility for safety … on the owner and general contractor’”21 and that the ownership provisions should be so construed as to effectuate that intent.22 Interestingly enough, actual ownership of the subject property is neither a necessary nor a sufficient condition of Labor Law ownership.

20 The below discussion of Guryev is adopted from my NYLJ article of January 31, 2013.


Settled law holds that the fee owner can be held responsible for work undertaken by a tenant, and for any breaches of Labor Law sections 240 or 241(6) during the course of that work, irrespective of whether the owner knew of or approved the project. The non-contracting fee owner can be deemed legally responsible even if it owned only the land itself and not the building that was the subject of the work.

Yet, recent Court of Appeals rulings require that there be “‘some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest.’” So, where a village installed a sewer lateral on the defendant’s land and the defendant-owner “did not contract [with the village] to have the sewer lateral installed” and “had no choice but to allow the Village to enter its property pursuant to a right-of-way,” the fee owner was not an “owner” for purposes of the Labor Law.

Just as ownership is not a sufficient basis for responsibility absent the aforementioned “nexus,” nor is actual ownership a necessary condition for Labor Law ownership. Most notably, the tenant will be considered an “owner” if he or she had the right to hire and fire the contractors or had the right to control the work and insist upon proper safety practices. In such an instance, the tenant and the fee owner will both be “owners” for purposes of the Labor Law.

---

23 Sanatass, 10 N.Y.3d at 340 (“our precedents make clear that so long as a violation of the statute proximately results in injury, the owner’s lack of notice or control over the work is not conclusive - this is precisely what is meant by absolute or strict liability in this context”); Gordon, 82 N.Y.2d at 560.


27 Alfonso v. Pacific Classon Realty, LLC, 101 A.D.3d 768, 770, 956 N.Y.S.2d 111 (2nd Dep’t 2012) (“the term owner ‘may also apply to a lessee, where the lessee has the right or authority to control the work site, even if the lessee did not hire the general contractor [citation omitted] … The key question is whether the defendant had the right to insist that proper safety practices were followed’); Markey v. C.F.M.M. Owners Corp., 51 A.D.3d 734, 737, 858 N.Y.S.2d 293 (2nd Dep’t 2008) (“The applicability of Labor Law § 241(6) encompasses lessees who fulfill the role of owner by contracting to have work performed”); Walp v. ACTS Testing Labs, Inc., 28 A.D.3d 1104, 1104-1105, 817 N.Y.S.2d 458 (4th Dep’t 2006) (“[t]he term ‘owner’ as used in those sections is not limited to titleholders, but also encompasses one who ‘has an interest in the property,’ such as a lessee …, who contracted for or otherwise has the right to control the work [citation omitted]’’’); Bush v. Goodyear Tire & Rubber Co., 9 A.D.3d 252, 253, 779 N.Y.S.2d 206 (1st Dep’t 2004), lv. dsmd., 3 N.Y.3d 737, 786 N.Y.S.2d 815 (2004) (“Blockbuster’s status as a tenant does not shield it from liability under sections of the Labor Law pertaining to property owners”).

28 See prior footnote.
Cooperative And Condominium “Ownership”

But who is the “owner” if the work occurs in a cooperative or a condominium? In the case in which the owner or the owner’s board or other representative (e.g., a home owners’ association) hires a contractor to do work in the building’s common areas, there is no controversy and all would agree that the owner and the owner’s board or agent are Labor Law “owners.”

The issue arises when it is the proprietary lessee (in a cooperative) or the unit owner (in a condominium) who hires the contractor to perform work in the hirer’s apartment. The issue becomes especially critical where the hirer, (a) plans to use the apartment as his or her residence, and, (b) does not direct or control the work. In that circumstance, the consequence of the “building parties” not being deemed owners would likely be that no one would be legally responsible for a Labor Law violation inasmuch as the unit owner or lessee would usually qualify for the Labor Law exemption for one and two-family dwellings and suit against the worker’s employer would be barred by the Workers’ Compensation Law.

Regarding cooperatively owned buildings, the Appellate Division for the First Department first said, somewhat off-handedly in a memorandum decision, that the building’s cooperative association and its managing agent were not responsible where a proprietary lessee hired a contractor to work on “her” apartment and neither the cooperative association nor its agent had any knowledge that the work was being done or was to be done. However, the statement bordered on dictum since the work in question (washing the windows in that one apartment) was actually not “construction” anyway. The First Department later asserted the opposite view, i.e., that the cooperative building’s “owners” were “Labor Law” defendants as to work performed in the individual unit.

The Appellate Division for the Second Department subsequently held that the building owner and building manager were statutorily responsible for the safety of covered work undertaken by the proprietary lessee even if the lessee failed to notify them of the work and even if the building owner did not benefit from the work.

---


30 If the hirer did not plan to reside in the apartment, then he or she would be using the apartment solely for commercial purposes and would therefore not fall within the statutory exemption. Van Amerogen, 78 N.Y.2d at 882-883; Nudi v. Schmidt, 63 A.D.3d 1474, 1475, 882 N.Y.S.2d 731 (3rd Dep’t 2009). The exemption would also be forfeited if the hirer directed or controlled the details of the work.


33 Pineda v. 79 Barrow St. Owners Corp., 297 A.D.2d 631, 635-636, 747 N.Y.S.2d 236 (2nd Dep’t 2002) (where “plaintiff was painting the living room of a cooperative apartment,”
In the wake of the Court of Appeals’ still more recent 2008 decision that the owner of an apartment building is responsible for the work undertaken by the tenant irrespective of whether the owner had notice of the work and even if the lease forbid the work, one would think that such rule would also apply where the apartment building was instead a cooperative and that the Second Department’s rulings regarding cooperatively owned buildings therefore remain good law. That, in any event, was the pre-\textit{Guryev} perception.

Yet, it remains that a condominium’s owner’s interests and rights greatly differ from those of a proprietary lessee in many respects. Should that legal distinction make a difference for purposes of Labor Law ownership?

\textbf{Guryev And Condominiums}

In \textit{Guryev}, Gregory and Marina Tomchinsky, the owners of an apartment in a 47-story condominium building, hired a contractor to renovate their apartment. Plaintiff, who was employed by the contractor, was injured, allegedly as a result of a Labor Law § 241(6) violation. The Tomchinskys were required to and did obtain the approval of the condominium’s Board of Managers before undertaking the work.

Plaintiff sued the condominium, its Board, and its managing agent. The key issue was whether those so-called “condominium defendants” were liable as owners in this instance in which they knew of and had approved the work.

By 4 to 2 vote, the Court of Appeals ruled that the “condominium defendants” were not “owners” within the meaning of Labor Law § 241(6).

\textit{DeSabato v. 674 Carroll St. Corp.}, 55 A.D.3d 656, 658-659, 868 N.Y.S.2d 209 (2nd Dep’t 2008) (where plaintiff was injured while renovating an individual apartment in a cooperative building, the building owner was “liable for any violation of Labor Law § 240(1) or § 241(6) that proximately caused injury to the plaintiff, regardless of whether it contracted for or benefitted from the work in Fleischer’s apartment”).


The majority, in a decision penned by Judge Read, reasoned that “the mandatory Alteration Agreement entered into by Mr. Tomchinsky and the Board” “did not vest the Board with authority to ‘determine which contractors to hire, … control the renovation work or … insist that proper safety practices [be] followed [citation omitted]’” (20 N.Y.3d at 200), the *sine quo non* of Labor Law ownership. Further, in contrast to the “cases relied upon by plaintiff and the dissent,” there was no “nexus,” whether by lease or grant of an easement or other property interest, between the worker and the purported owners (*id.*).

The dissent, by Chief Judge Lippman (joined by Judge Ciparick), urged that the majority was elevating form over substance:

> It is obvious that a condominium does in fact retain a propriety interest in its owners’ units every bit as palpable in the unit alteration context as that of a residential cooperative corporation and that there exists no rationale for treating the two kinds of entities differently when it comes to allocating responsibility under the Labor Law. It is to blink at reality to treat condominiums simply as agglomerations of one-family dwellings, as this Court now does. The consequence of such a studied elevation of form over substance is dramatically to reduce the Labor Law’s protective ambit: a construction laborer injured while working in a condominium unit * * *

20 N.Y.3d at 204.

The majority countered that “[l]iability under the Labor Law…turns in every case on sometimes fine distinctions relating to ownership of the premises and control of the injury-producing work” (20 N.Y.3d at 201).

**Guryev And Cooperatives**

As I have noted, the building in *Guryev* was a condominium and the question of who stands responsible as to work done in a cooperative was therefore not before the *Guryev* Court. It is nonetheless of note that both the majority and the dissent *assumed* that the building owner would stand responsible with respect to work done in an individual apartment in a cooperative building.

The majority said that cooperatives are different because “a cooperative corporation owns an entire building, including the apartments where individual tenant-shareholders reside” (20 N.Y.3d at 201-202). The dissenters felt that the majority was “treating the two kinds of entities differently when it comes to allocating responsibility under the Labor Law” and that the majority’s decision to do so “rips a gaping hole in the Labor Law’s protective mantle (20 N.Y.3d at 204, 205) – one that the Legislature will have to mend if the statutory scheme is not to be rendered utterly arbitrary in its application and largely inefficacious in meeting its vaunted objectives” (20 N.Y.3d at 205). But both opinions presumed that the result would have been different if the apartment had been a cooperative rather than a condominium.
Conclusion

In the aftermath of Guryev, the most interesting questions may be those that will be resolved in the workplace and the legislature, not in any court. Inasmuch as the Labor Law’s protections have been effectively nullified with respect to the great majority of “construction” projects that occur within an individual condominium unit, will that ultimately translate to a different (that is, lesser) level of safety once the ramifications of the ruling rendered just last month filter through the industry?

Will insurers charge less for coverage in these instances in which tort liability is highly unlikely to result even where the most dangerous of work hazards cause the most serious of injuries or even death?

Will the legislature act upon the dissenters’ invitation to amend the statutes?

All of this remains to be seen. What we now know for sure is that the manner in which title is held can matter very much indeed if the subject accident occurs during the course of renovation or repair of an individual apartment.

(c) Tenant-“Owners”

Alfonso v. Pacific Classon Realty, LLC, supra, 101 A.D.3d at 770, 956 N.Y.S.2d at 114-115 (2nd Dep’t 2012) (“[a] lessee of real property that hires a contractor and has the right to control the work at the property is considered to be an owner within the meaning of the law” and “the term owner ‘may also apply to a lessee, where the lessee has the right or authority to control the work site, even if the lessee did not hire the general contractor’”; defendant here “failed to establish, prima facie, that it was not an owner or agent within the meaning of the Labor Law”).

(d) Other Alleged “Agents”

Samaroo v. Patmos Fifth Real Estate, Inc., 102 A.D.3d 944, 946, 959 N.Y.S.2d 229 (2nd Dep’t 2013) (“a defendant’s potential liability is based on whether it had the right to exercise control over the work, not whether it actually exercised that right… Once an entity becomes an agent under the Labor Law it cannot escape liability to an injured plaintiff by delegating the work to another entity”).

Russo v. Hudson View Gardens, Inc., 91 A.D.3d 556, 557, 937 N.Y.S.2d 196, 197-198 (1st Dep’t 2012) (where Midboro “did not directly control the method or means of plaintiff’s work, or have actual or constructive notice of an unsafe condition,” but where it was “the managing agent of the premises” where plaintiff was allegedly injured due to the instability of an A-frame ladder, “[t]riable issues of fact exist as to whether Midboro had the authority, pursuant to its agreement with Hudson, to supervise and control plaintiff’s work for the purposes of liability under Labor Law § 240(1) and § 241(6)”).

Esteves-Rivas v. W2001Z/15CPW Realty, LLC, 104 A.D.3d 802, 804-805, 961 N.Y.S.2d 497, 500 (2nd Dep’t 2013) (where plaintiff was injured while installing a car stacker system in a
parking garage, defendant Quick Park, the manager of the parking garage, was entitled to dismissal of all claims inasmuch as it established “conclusively that Quick Park’s employees’ duties at the garage were limited to parking cars and collecting money and that, once Park Plus commenced work on the installation, the work site was under its sole control and it alone was responsible for safety at the site”).

*Lopez v. Dagan*, 98 A.D.3d 436, 437, 949 N.Y.S.2d 671 (1st Dep’t 2012) (the “engineer made a prima facie showing that it did not have the authority to direct, supervise or control the injury-producing work” where “the engineer’s contract with the owners provided that it did not have control over, and was not responsible for, ‘any construction means, methods, procedures, temporary structures or work …’”).

*Mondone v. Lane*, 106 A.D.3d 1062, 1064, 966 N.Y.S.2d 164, 166 (2nd Dep’t 2013) (where plaintiff was injured when “a temporary staircase, installed by the defendant Kevin Bevilacqua, allegedly collapsed,” Supreme Court properly granted that branch of Bevilacqua’s cross motion which was pursuant to CPLR 3211(a)(7) to dismiss the causes of action alleging common-law negligence and violations of Labor Law §§200 and 240(1) insofar as asserted against him inasmuch as “[a] corporation has a separate existence from that of its officers and shareholders, and the complaint is devoid of any allegations sufficient to pierce the corporate veil of True Building Corp. to reach Bevilacqua in his individual capacity”).

B. Owners Of One- And Two-Family Dwellings

1. General Rule

Both statutes exempt “owners of one and two-family dwellings who contract for but do not direct or control the work.” The statutes also exempt architects and engineers who do not direct or control the work.38 There is rarely any difficulty in applying the latter rule. However, the one and two-family exemptions, which were added in 1980, have engendered their own body of case law.

Under the lead case of *Bartoo v. Buell*, 87 N.Y.2d 362, 368, 639 N.Y.S.2d 778, 780 (1996), the exemption applies if the work “directly relates to the residential use of the home” and such is so even if the “work also serves a commercial purpose.” The flip side is that the statute will not apply if the owner used the building solely for commercial purposes, which would include the circumstance in which the premises were fully rented. *Murillo v. Porteus*, 108 A.D.2d 753, __ N.Y.S.2d ___ (2nd Dep’t 2013); *Crossett v. Wing Farm, Inc.*, supra, 79 A.D.3d 1134, 912 N.Y.S.2d 751, 753 (3rd Dep’t 2010) (in *dictum*: “the homeowner exemption … is inapplicable

38 *Velasquez v. Long Island Power Auth.*, 16 Misc.3d 1138(A), 851 N.Y.S.2d 61 (Sup. Ct. Nassau Co. 2007) (Bucaria, J.) (“[i]nsofar as plaintiffs’ claims against defendant, Angelone, purport to rest upon Labor Law §§ 240 and 241, they must be dismissed as a matter of law by reason of the express statutory exemption from liability for ‘professional engineers … [and] architects … who do not direct or control the work for activities other than planning and design’”).
to owners who use their house solely for commercial purposes, including use as rental property”).

Interestingly, if the building had more than two units at the time of the accident but the purpose of the work was to convert the building into an owner-occupied one or two-family dwelling, the owner would come within the scope of the exemption. Stejskal v. Simons, 3 N.Y.3d 628, 782 N.Y.S.2d 397 (2004).

2. Recent Case Law

(a) The Usual Result: No Liability

Mondone v. Lane, supra, 106 A.D.3d 1062, 1063, 966 N.Y.S.2d 164, 166 (2nd Dep’t 2013) (where plaintiff was injured when “a temporary staircase, installed by the defendant Kevin Bevilacqua, allegedly collapsed,” the defendant-homeowners “established, prima facie, that they were exempt from liability under Labor Law §240(1) as owners of a one-family dwelling since they did not direct or control the work being performed but merely displayed typical homeowner interest in the ongoing construction process”).

Lopez v. Dagan, 98 A.D.3d 436, 949 N.Y.S.2d 671 (1st Dep’t 2012) (“[t]he owners made a prima facie showing of their entitlement to judgment as a matter of law under the homeowner’s exemption of Labor Law §240(1) and §241(6)” where it was “undisputed that the sole purpose of the construction work was to convert a multiple dwelling into a one-family dwelling for the owners’ use” and the owners “submitted evidence, including their contract with the general contractor and deposition testimony, showing that they did not direct or control the work at issue”; proof “that the owners hired the contractors and visited the work site regularly failed to raise an issue of fact as to whether they directed or controlled the work”).

Tomecek v. Westchester Additions & Renovations, Inc., 97 A.D.3d 737, 738, 948 N.Y.S.2d 671 (2nd Dep’t 2012) (defendant “demonstrated his entitlement to the homeowner’s exemption by offering proof that he did not supervise, direct, or control the work being performed at his single-family home, but merely displayed typical homeowner interest in the ongoing construction process”).

Ruiz v. Walker, 93 A.D.3d 838, 838-839, 940 N.Y.S.2d 896, 896-897 (2nd Dep’t 2012) (“[s]ince the accident arose from the manner in which the work was performed” and defendant’s involvement “was no more extensive than would be expected of the typical homeowner who hired a contractor to renovate his or her home,” “defendant established, prima facie, her entitlement to the exemption from liability under Labor Law §§240(1) and 241(6) for owners of one- or two-family dwellings who do not direct or control the method and manner of the work”).

Nai Ren Jiang v. Yeh, 95 A.D.3d 970, 971-972, 944 N.Y.S.2d 200 (2nd Dep’t 2012) (where defendants hired plaintiff to perform certain renovations on defendants’ one-family home, where defendants’ proof demonstrated that “[plaintiff] was working on his own, and that Yeh did not instruct Jiang as to how to perform the work,” and where “the statements contained in [plaintiff’s] affidavit appear to have been an attempt to create a feigned issue of fact specifically
designed to avoid the consequences of his earlier deposition testimony,” defendants were entitled to summary judgment).

Chambers v. Tom, 95 A.D.3d 666, 666, 944 N.Y.S.2d 142 (1st Dep’t 2012) (where defendant’s “instructions to plaintiff and his employer were limited to indicating generally where the wood should be installed” and “defendant provided no instructions on how to cut the wood, nor did he provide the circular saw that plaintiff was using at the time of the accident,” “defendant’s involvement in the project did not constitute direction or control over plaintiff’s work”).

Serrano v. Popovic, 91 A.D.3d 626, 627, 936 N.Y.S.2d 254 (2nd Dep’t 2012) (the defendant-owners “made a prima facie showing that the work was performed at a one-family dwelling and that [they] did not direct or control the work”).

(b) Ownership Issues

Westgate v. Broderick, 107 A.D.3d 1389, 1390, 967 N.Y.S.2d 285, 287 (4th Dep’t 2013) (defendants should not have been awarded summary judgment based on the homeowners’ exemption where defendants failed to establish that they actually were owners on the date of the accident; “ownership in the property such that she is entitled to the benefit of the homeowner exemption, the benefit of that ownership would not inure to decedent or his estate based on their relationship as husband and wife”).

Reinoso v. Biordi, 105 A.D.3d 491, 492, 964 N.Y.S.2d 92, 93 (1st Dep’t 2013) (although Frank and Denise Biordi owned the subject one-family house, plaintiff’s § 240 and §241(6) claims against Biordi Construction Corp. (BCC) should not have been dismissed where there was “evidence that BCC, and not Frank Biordi, hired plaintiff’s employer inasmuch as plaintiff’s employer stated that it was hired by BCC and that it was paid by checks bearing BCC’s address” and there was also evidence that “BCC was acting as an agent of the homeowners (the Biordis); “[t]he lack of evidence that BCC directed or controlled work at the site, is not determinative because ‘direct control and supervision is not a prerequisite to incurring liability under section 240. Rather, it is the authority to supervise or co-ordinate the work that is essential”).

(c) Issues Regarding Residential Relatedness

Custer v. Jordan, supra, 107 A.D.3d 1555, 1557-1558, 968 N.Y.S.2d 754, 757-758 (4th Dep’t 2013) (where plaintiff never lived in the subject home, had already agreed to sell it, and was earning interest on the buyer’s payment when the accident occurred, defendant’s commercial interest predominated and he was not entitled to the one- and two-family exemption).

Murillo v. Porteus, 108 A.D.d 753, ___ N.Y.S.2d ___ (2nd Dep’t 2013) (defendant Porteus was properly denied summary judgment; a defendant proceeding on the basis of the exemption “must satisfy two prongs: that the work was conducted at a dwelling that is a residence for only one or two families, and the defendant did not direct or control the work”; here, “there was a triable issue of fact as to whether the appellant intended to use the subject house as rental property”);
additionally, defendant supplied “materials for the job and gave instructions to Rodriguez prior to the accident”).

*Bagley v. Moffett*, 107 A.D.3d 1358, 1359, 969 N.Y.S.2d 184, 186 (3rd Dep’t 2013) (“[a]s the parties seeking the shelter of the statutory exemption, defendants had to establish—as a threshold matter—that the property was not being used solely for commercial purposes at the time of [plaintiff’s] accident”; defendants failed to meet that burden with respect to the one-family house in issue; although “defendants’ affidavits indeed addressed their intended residential use of the property “as a vacation and seasonal home” at the time of its purchase in 2004, those same affidavits were silent as to whether defendants intended—or did in fact continue—to use the property as their residence after they began operating a bed and breakfast at the premises in 2008”).

*Hale v. Meadowood Farms of Cazenovia, LLC*, 104 A.D.3d 1330, 1331-1332, 962 N.Y.S.2d 562, 564-565 (4th Dep’t 2013) (where defendants planned to restore an estate that had once comprised 350 acres, where they used part of the property as a part-time residence and part of it for commercial purposes, where the accident occurred during the reconstruction of a barn, where there was conflicting evidence as to whether it was the defendant-owners or their business that contracted for the work in issue, and where there was also conflicting evidence as to whether the barn would be used for commercial purposes or “solely for historical preservation purposes,” it was for a jury to resolve the factual issues an neither side was entitled to summary judgment).

*Sanchez v. Marticorena*, 103 A.D.3d 1057, 1058-1059, 962 N.Y.S.2d 425, 426-427 (3rd Dep’t 2013) (where decedent fell to his death while working on a roof at defendants’ home, defendants were entitled to the protection of the one- and two-family dwelling exemption since “plaintiff does not dispute that defendants did not control the roof work” and defendants established, (a) that “they purchased the home in 2000 and … resided there since that time,” and, (b) that “[t]he roof work was undertaken after water leaked into the attic where one of the defendants slept, and defendants paid for the roof work with their personal funds”; although it was true that “defendants became certified to operate a family care home under a program with the Office for People with Developmental Disabilities” and that they earned a stipend “from allowing individuals to reside in their home,” “plaintiff has failed to present any facts which would demonstrate that defendants’ receipt of these stipends transformed the residence into a purely commercial enterprise so as to render the homeowner’s exemption inapplicable”).

*Parise v. Green Chimneys Children’s Services, Inc.*, 106 A.D.3d 970, 970, 965 N.Y.S.2d 608, 608-609 (2nd Dep’t 2013) (where the property was owned by “defendant Green Chimneys Children’s Services, Inc. … a self-described ‘integrated campus for emotionally disturbed youths,’” Green Chimneys demonstrated its prima facie entitlement to judgment as a matter of law with respect to, inter alia, its claim that it was entitled to the homeowner’s exemption of Labor Law §§ 240(1) and 241 by establishing that the Founder’s House was a single-family dwelling used solely as a residence for Green Chimneys’ founder and his wife and that “the house served no commercial or business use for Green Chimneys, which received no income from the house, and Green Chimneys did not direct or control the work being performed”).
Van Hoesen v. Dolen, 94 A.D.3d 1264, 1266, 942 N.Y.S.2d 650 (3rd Dep’t 2012) (where defendants decided to construct an indoor horseback riding arena next to their one-family home, and where defendant Eric Dolen, “a principal of defendant Superior Homes, LLC, a supplier of modular and mobile homes” “had the site graded and prepared, arranged for the use of a crane, and entered into an oral agreement with Christopher Clarke, the owner of defendant Interstate … by which Interstate would erect the arena’s frame and roof,” defendants were entitled to dismissal of plaintiff’s 240 and 241(6) claims since, (a) there was “no evidence that the Dolens exerted supervisory control over the method and manner of the arena’s construction,” and, (b) the riding arena “was located on the same property as the Dolens’ single-family home, and both Dolens testified, without contradiction, that it was built solely for the personal use of their family members”).

(d) Not A Dwelling

De Oleo v. Charis Christian Ministries, Inc., 106 A.D.3d 521, 522, 966 N.Y.S.2d 375, 376-377 (1st Dep’t 2013) (defendants failed to show that the subject church “was akin to a one-to two-family dwelling exempting them from liability under § 240(1)”; “Apart from defendants’ pastor’s contradictory affidavit attesting that the church appeared to be the height of a one-story residence, the balance of the evidence established that the building was only utilized as a church”).

C. Statutory Liability Of “Contractors”

1. General Rule

Under the rule laid down in Walls v. Turner Constr. Co., 4 N.Y.3d 861, 864, 798 N.Y.S.2d 351, 354 (2005), the manner in which the parties at the site labeled the defendant (e.g., “general contractor,” “construction manager,” etc.) is not “necessarily determinative.” Rather, the key is the amount of control or authority defendant exercised over the work.

In Walls itself, the Court cited the following factors as indicating that the defendant, although labeled as a mere “construction manager,” exercised sufficient control: “(1) the specific contractual terms creating agency, (2) the absence of a general contractor, (3) Turner’s duty to oversee the construction site and the trade contractors, and (4) the Turner representative’s acknowledgment that Turner had authority to control activities at the work site and to stop any unsafe work practices” (4 N.Y.3d at 864, 798 N.Y.S.2d at 354).

2. Recent Case Law

(a) General Contractors And The Equivalent

Westgate v. Broderick, 107 A.D.3d 1389, 1390-1391, 967 N.Y.S.2d 285, 287 (4th Dep’t 2013) (where plaintiff was injured when a ladder jack scaffold collapsed from under him while he was constructing a house for decedent, “the record establishe[d] that decedent was a contractor within
the meaning of the statute because he ‘had the power to enforce safety standards and choose responsible subcontractors’”).

_Muriqi v. Charmer Ind. Inc._, 96 A.D.3d 535, 536, 947 N.Y.S.2d 26 (1st Dep’t 2012) (summary judgment was properly granted in plaintiff’s favor where plaintiff’s proof demonstrated that defendant “had ‘plenary authority’ over the work” at the site, including the work being performed by plaintiff at the time of the accident,” and where the testimony of defendant’s principal offered in opposition to the motion “was riddled with internal contradictions and failures of memory”).

_Chang Zhang Zou v. 122 Development, LLC_, 103 A.D.3d 519, 519, 959 N.Y.S.2d 666 (1st Dep’t 2013) (without discussion of the facts: “[t]he evidence establishes that Matrix was not a general contractor with supervisory authority and control over plaintiff’s work. Accordingly, it cannot be held liable for plaintiff’s injuries under Labor Law § 240(1) or § 241(6)”).

_Kittlestad v. Losco Group, Inc._, 92 A.D.3d 612, 939 N.Y.S.2d 382 (1st Dep’t 2012) (while defendant Jacobs “contend[ed] that defendant Losco Group was the general contractor,” “that issue cannot be determined conclusively on this record” inasmuch as “Jacob’s contractual obligations with respect to oversight of the work were comprehensive” and “[i]t was required to monitor the individual performance of each trade contractor, coordinate work between the trades, and ‘resolve disputes’”).

_Kosovrasti v. Epic (217) LLC_, 96 A.D.3d 695, 695-696, 948 N.Y.S.2d 260 (1st Dep’t 2012) (although defendant Compound “made a prima facie showing that it could not be held liable as a general contractor under Labor Law § 240(1), § 241(6) or § 200 by demonstrating that it had no authority, contractual or otherwise, to supervise, direct, or control the workers or activities at the work site,” plaintiff and defendant Tribbles “raised a triable issue of fact” by showing that, (a) “[t]he work permits issued after the accident … list[ed] Compound as the general contractor,” and, (b) “Tribble’s vice president testified that, before the work began, she and Compound agreed that Compound would be responsible for obtaining the necessary permits and that Compound was to ‘oversee the coordination’ of the ‘involved trades’ on the project”).

(b) _Construction Managers, Safety Consultants, And The Equivalent_

_Naughton v. City of New York_, 94 A.D.3d 1, 9-10, 940 N.Y.S.2d 21 (1st Dep’t 2012) (where Petrocelli “was delegated plenary authority over the construction work at the site, which included the authority to supervise and control the work performed by its subcontractors,” it was “therefore a statutory agent of the owner or general contractor of the work site liable under the Labor Law”).

_Fraser v. Pace Plumbing Corp._, 93 A.D.3d 616, 114, 115-116 (1st Dep’t 2012) (where “the contract between Pace and the construction manager of the renovation project required Pace to cut, fit, patch and protect its work,” “triable issues of fact remain as to
whether [Pace] is a statutory agent of the construction manager” for purposes of Labor Law §§ 240(1), 241(6) and 200).

**Rodriguez v. Dormitory Authority of the State.** 104 A.D.3d 529, 531, 962 N.Y.S.2d 102, 105 (1st Dep’t 2013) (“We reject Bovis’s argument that it cannot be held liable pursuant to Labor Law § 241(6) because it was a construction manager … Given that Bovis was responsible for planning and coordinating construction activity throughout the project, providing safety supervision of all contractors and subcontractors on the project, and conducting daily safety walkthroughs on the site, an issue of fact exists as to whether it was the functional equivalent of a general contractor so as to hold it liable under § 241(6)).

**Leszczynski v. Town of Neversink.** 107 A.D.3d 1183, 1184-1185, 968 N.Y.S.2d 204, 205-206 (3rd Dep’t 2013) (where plaintiff “was injured when a frozen conglomerate of number two stone, estimated to be the size of a bowling ball and weighing 40 to 80 pounds, fell on his head while he was standing in a trench where he was working installing sewer pipe,” where plaintiff was employed by the GC, and where “[t]he project had been funded by the New York City Department of Environmental Protection, which required that a safety consultant be hired,” “[a]lthough it is not the title that is dispositive, but whether such defendant had sufficient supervision and control over the activity that resulted in the injury”; here, where defendant’s contract “set forth that a representative of defendant would be at the work site daily, make inspections, conduct safety meetings and have authority to require ‘immediate corrective action for imminent danger situations,’” where “[d]efendant’s representative was continuously at the site throughout the project, and he exercised his power on several occasions prior to the accident by stopping work and requiring defendant to take specific precautions or actions,” and where the representative “was present when the accident occurred,” “there was sufficient evidence for [the jury’s] finding that defendant acted as an agent”).

**Rodriguez v. Gilbane/TDX Joint Venture.** 102 A.D.3d 484-484, 958 N.Y.S.2d 130 (1st Dep’t 2013), lv. den., ___ N.Y.3d ___ (2013) (“[t]he IAS court correctly determined that the Gilbane/TDX defendants, as the construction manager, were not liable under the Labor Law for plaintiff’s injuries, as the Gilbane/TDX defendants did not direct, control or supervise plaintiff’s work” and there was “nothing in the record to indicate that the Gilbane/TDX defendants were other than the typical construction manager and therefore not the agent of the Dormitory Authority of New York, the owner of the building being built at the time of injury”).

**Miller v. Savarino Constr. Corp.** 103 A.D.3d 1137, 1139-1140, 959 N.Y.S.2d 318 (4th Dep’t 2013) (where defendant “Savarino Construction was responsible for, inter alia, coordinating the activities and safety programs of the contractors at the project, but had no control over the acts, omissions or safety precautions of the contractors,” the defendant “construction manager” was not liable under Labor Law § 241(6) or § 200 as to accident that arose from the means and methods of the work).

**McLaren v. Turner Construction Company.** 105 A.D.3d 1016, 1017, 963 N.Y.S.2d 386, 387-388 (2nd Dep’t 2013) (“[a]lthough a construction manager is generally not considered a contractor responsible for the safety of the workers at a construction site ... it may nonetheless become responsible if it has been delegated the authority and duties of a general contractor, or if
it functions as an agent of the owner of the premises”); here, however, “**Turner Construction Company ... made a prima facie showing of its entitlement to judgment as a matter of law** by establishing, through the admission of construction documents and agreements and the deposition testimony of the parties, that it **had not been delegated the authority and duties of a general contractor, and did not have supervisory control and authority over the work being done**”).

**Babiack v. Ontario Exteriors, Inc., supra,** 106 A.D.3d 1448, 1449, 964 N.Y.S.2d 828, 830 (4th Dep’t 2013) (where plaintiff was injured when he fell through a skylight opening in the roof while he was installing insulation in the roof rafters of a condominium complex, defendant Ontario Exteriors “established as a matter of law both that it **did not coordinate and supervise the project** ... and that it was **not an agent of the owner** to which the owner delegated the power to supervise and control plaintiff’s work”).

(c) **Contractors**

**Gallagher v. Resnick, supra,** 107 A.D.3d 942, 944-945, 968 N.Y.S.2d 151, 153-154 (2nd Dep’t 2013) (where the **general contractor hired Coffey Contracting** to work on the masonry and **Coffey hired plaintiff’s company** “to fabricate sills, lintels, and coping stones for the project,” “**contrary to Coffey Contracting’s contention,** it is **liable** under Labor Law § 240(1) as a **statutory agent** of the owner or general contractor, since it had the authority to supervise and control the particular work in which the injured plaintiff was engaged at the time of his injury”).

**Tuccillo v. Bovis Lend Lease, Inc.,** 101 A.D.3d 625, 628, 958 N.Y.S.2d 86 (1st Dep’t 2012) (where defendant ADT was hired to “install closed circuit televisions, access controls, an intercom system and a burglar alarm system” and then subcontracted part of that work to plaintiff’s employer, **ADT demonstrated that it “had the authority to supervise and control the work” just by “subcontracting a portion of the installation of the security system to Tuccillo’s employer,** Petrocelli”; “that Petrocelli possessed concomitant or overlapping authority to supervise the wire installation does not negate ADT’s authority to supervise and control the installation of the wires ... [w]hether ADT actually supervised Tuccillo is irrelevant”).

**Betancur v. Lincoln Cent. for the Performing Arts, Inc.,** 101 A.D.3d 429, 956 N.Y.S.2d 7, 8-9 (1st Dep’t 2012) (where defendant JDP’s contract “limited its responsibilities and potential liability to the work it was hired to perform and/or oversee,” and where plaintiff’s work “was performed under a separate contract,” JDP was not a statutory agent for purposes of Labor Law § 240(1)).

**Giovanniello v. E.W. Howell, Co., LLC,** 104 A.D.3d 812, 813, 961 N.Y.S.2d 513, 516 (2nd Dep’t 2013) (where defendant was “**one of several prime contractors** on the subject project,” it “established its prima facie entitlement to judgment as a matter of law ... by demonstrating that it was **not in privity of contract with the injured plaintiff’s employer,** and that it **had not been delegated the authority to oversee and control** the injured plaintiff’s activities”).
(d) Subcontractors

*Britez v. Madison Park Owner, LLC*, 106 A.D.3d 531, 531-532, 966 N.Y.S.2d 7, 8 (1st Dep’t 2013) (where National entered into a subcontract “for the drywall and carpentry work” and then “subcontracted part of its work to Citywide Interiors Contractors, Inc., which in turn subcontracted the taping and spackling work to plaintiff’s employer, Pecci Construction LLC,” National had authority over the work for purposes of Labor Law §§ 240(1) and 241(6)).

*Nascimento v. Bridgehampton Constr. Corp.*, 86 A.D.3d 189, 192-193, 924 N.Y.S.2d 353, 356-357 (1st Dep’t 2011) (“as a subcontractor rather than the general contractor, Bayview may be held liable for plaintiff’s injuries under Labor Law §§ 240(1) and 241(6) only if it had the authority to supervise and control the work giving rise to the obligations imposed by these statutes, which would render it the general contractor’s statutory agent,” but “evidence that a subcontractor delegated the requisite supervision and control to another subcontractor has been cited as forming part of the proof that the first subcontractor formerly possessed that authority, and may justly imposing Labor Law liability on the first subcontractor as a statutory agent of the general contractor”; here, even though defendant Bayview was not hired pursuant to a written contract, “[a] finder of fact could find that when Bayview undertook responsibility for the framing work, and then subcontracted out that work, specifying that the subcontract included the responsibility to supervise the work, it acknowledged that the job it was subcontracting out included supervision of the framing work” inasmuch as such “may permit the factfinder to infer that supervision of the framing work was part of the job Bayview had undertaken and, in turn, delegated to R&L”; “[i]mportantly, once a subcontractor qualifies as a statutory agent, it may not escape liability by the simple expedient of delegating that work to another entity [citation omitted]. If it undertook the supervision of the framing work, Bayview cannot avoid liability under the Labor Law by having further subcontracted the work to Figueiredo”).

*Klewinowski v. City of New York*, 103 A.D.3d 547, 547-548, 959 N.Y.S.2d 493 (1st Dep’t 2013), lv. den., 21 N.Y.3d 855, 967 N.Y.S.2d 688 (2013) (where plaintiff was injured “when an excavating machine knocked into electrical cables and pulled down a light pole which fell on top of him,” and where defendant Welsbach was the “subcontractor that installed the temporary light pole and overhead cables,” Welsbach was not an “owner” for purposes of Labor Law §§ 240(1) or 241(6) where it did not remain on site after its installation of the pole and “had no continuing duty to maintain it”).

*Keenan v. Simon Property Group, Inc.*, 106 A.D.3d 586, 589, 966 N.Y.S.2d 378, 382 (1st Dep’t 2013) (where the GC subcontracted the glass work to Alert Glass, which in turn subcontracted part of that work to plaintiff’s employer, and where Alert was not on site when the accident occurred, plaintiffs’ claims against Alert should have been dismissed since “[t]here was no evidence to support a finding that Alert Glass was delegated “plenary authority” to control and supervise the work site (including plaintiff’s work), that it exercised such broad authority, or that Alert Glass was a statutory agent of the owner or general contractor on the project, and thus subject to vicarious liability under Labor Law §§ 240(1) and 241(6)” inasmuch as “[t]he subcontract between the project’s general contractor and Alert Glass did not state, or even reasonably imply, that the general contractor was delegating its responsibilities for supervising and controlling the work at the project to Alert Glass”).
Vargas v. Peter Scalamandre & Sons, Inc., 105 A.D.3d 454, 455, 963 N.Y.S.2d 73, 75 (1st Dep’t 2013) (“Labor Law § 241(6) does not automatically apply to all subcontractors on a site or in the ‘chain of command’ … Rather, for liability under the statute to attach to a defendant, a plaintiff must show that the defendant exercised control, either over the plaintiff, the specific work area involved or the work that gave rise to the injury”; “Here, while there is evidence connecting defendant concrete supplier Ferrara and concrete contractor Scalamandre to the particular pile of material over which plaintiff fell, there is insufficient evidence connecting bricklayer Rad and concrete contractor Interstate to that pile”).

Mathews v. Bank of America, 107 A.D.3d 495, 496, 968 N.Y.S.2d 15, 17 (1st Dep’t 2013) (defendant JVN “could not be considered a statutory agent for purposes of imposing liability under Labor Law § 240(1)” where there was “no evidence that it had the authority to supervise, direct, or control the air testing and monitoring work that plaintiff, who was employed by EFI, was performing at the time of her injury” and “[t]he subcontract by which EFI hired JVN, for the specific purpose of removing asbestos, provided that JVN ‘shall be under the general direction of EFI’”).

Giovanniello v. E.W. Howell, Co., LLC, supra, 104 A.D.3d 812, 814, 961 N.Y.S.2d 513, 516 (2nd Dep’t 2013) (“liability cannot be assessed against a subcontractor who did not control the work that caused the plaintiff’s injury”).

Anderson v. Vestry Acquisition, LLC, 36 Misc.3d 1235(A), 2012 N.Y. Slip Op. 51607(U) (Sup. Ct. Queens Co. 2012) (McDonald, J.) (defendant-subcontractor could not be held liable under Labor Law § 240 where the proof “unequivocally demonstrates that [it] did not direct, supervise or control the work giving rise to the plaintiff’s injury or have the authority to do so”).

(e) Miscellaneous

Medina v. R.M. Resources, 107 A.D.3d 859, 860-861, 968 N.Y.S.2d 533, 535 (2nd Dep’t 2013) (where the subject retail store was owned by the Costco defendants [“Costco”], where Costco encountered problems with an air compressor manufactured by defendant Ingersoll-Rand Company, where Ingersoll Rand relayed the report to its local distributor, and where the local distributor dispatched plaintiff, an employee, to the scene, “Ingersoll–Rand demonstrated its prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging violations of Labor Law §§ 240(1) and 241(6) insofar as asserted against it by establishing that it was neither an owner, a contractor, nor a statutory agent under those provisions”).

Nenadovic v. P.T. Tenants Corp., 94 A.D.3d 534, 535, 942 N.Y.S.2d 474 (1st Dep’t 2012) (where plaintiff “and his two co-workers, were assigned to work together on a 50-foot suspended scaffold that ultimately broke in two, causing them to sustain injuries,” and where “the evidence demonstrated, inter alia, that the defendant contractors were aware that the scaffold was indicated to have a two-man maximum capacity, that three workers (including plaintiff) were
nonetheless assigned to work together from the scaffold, and that there was no other adequate safety equipment made available to the workers,” “Liberty, as the only licensed rigger of the scaffolds on the job site, was properly found by the court to be a statutory agent for purposes of Labor Law § 240(1), inasmuch as Liberty was the lone licensed authority on the project which, pursuant to applicable regulations, was under an obligation to supervise and control the conduct of the workers that manned the scaffolds”).

_Landon v. Austin_, 100 A.D.3d 1232, 1234, 954 N.Y.S.2d 670, 672 (3rd Dep’t 2012) (where plaintiff fell from the roof that as the focus of the work, and where Duane Austin of Austin Construction “hired and paid plaintiff on the day in question and, further, possessed the authority to both enforce safety standards and supervise or control plaintiff’s work,” there was nonetheless a factual issue as to “which of his two hats” Austin was wearing inasmuch as “plaintiff acknowledged that he had worked for both Austin (individually) and ACI in the past and offered conflicting testimony as to whether he was working for Austin or ACI on the day he was injured”).

_Rivera v. Fairway Equities LLC_, 36 Misc.3d 1236(A), 2012 NY. Slip Op. 51676(U) (Sup. Ct. Kings Co. 2012) (Schmidt, J.) (where defendant delivered the hamper that fell on the plaintiff, but where defendant had no authority over plaintiff and plaintiff failed to prove defendant had “authority or control over the unloading of the sand from the hamper,” plaintiff was not entitled to summary judgment regarding that defendant).39

---

39 My firm represented the plaintiff in _Rivera_.

36
III. LABOR LAW SECTION 240 AND THE ELEVATION-RELATEDNESS PREREQUISITE

Violation of Labor Law § 240(1) mandates imposition of “absolute liability” regardless of negligence. If the statute is breached, liability is imposed upon the general contractor and/or the building owner and his or her “agents” (except for owners of one and two-family dwellings who do not direct the work) irrespective of the defendant's control or lack of control over the work.

But the statute applies only to a narrow class of cases. Although section 240(1) itself contains no such express limitation, the Court of Appeals ruled in *Rocovich v. Consolidated Striegel v. Hillcrest Heights Development Corporation*, 100 N.Y.2d 974, 977, 768 N.Y.S.2d 727, 729 (2003) (“Labor Law § 240(1) imposes absolute liability on owners, contractors and agents for their failure to provide workers with safety devices that properly protect against elevation-related special hazards”); *Gordon v. E. Ry. Supply, Inc.*, supra, 82 N.Y.2d 555, 559, 606 N.Y.S.2d 127, 129 (1993) (“The purpose of the section is to protect workers by placing the ‘ultimate responsibility’ for worksite safety on the owner and general contractor, instead of the workers themselves … Thus, § 240(1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury”); *Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513, 522, 493 N.Y.S.2d 102, 106 (1985) (“… a violation of section 240(1) or the first five subdivisions of section 241 creates absolute liability”); *Vasquez v. Cohen Brothers Realty Corporation*, supra, 105 A.D.3d 595, 597, 963 N.Y.S.2d 626, 629 (1st Dep’t 2013) (Labor Law § 240(1) “imposes strict liability on the owner for a breach of the statutory duty which has proximately caused injury”); *Alonzo v. Safe Harbors of the Hudson Housing Development Fund Company, Inc.*, 104 A.D.3d 446, 449, 961 N.Y.S.2d 91, 95 (1st Dep’t 2013) (“Plaintiff’s Labor Law § 240(1) claim does not depend on a finding that defendants were in control of the work site. All that plaintiff was required to establish was that defendants breached their non-delegable duty to furnish or erect, or cause to be furnished or erected, safety devices in a manner that gave him proper protection from gravity-related risks”).

*Gordon v. Eastern Railway Supply, Inc.*, supra, 82 N.Y.2d 555, 560, 606 N.Y.S.2d 127, 129 (1993) (“Section 240(1) of the Labor Law, like section 241(6), provides that the statutory duty is nondelegable. It does not require that the owner exercise supervision or control over the worksite before liability attaches”); *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 498, 601 N.Y.S.2d 49, 51 (1993) (“It is now well established that the duty imposed by Labor Law Sec. 240(1) is nondelegable and that an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work”); *Vasquez v. C2 Development Corp.*, supra, 105 A.D.3d 729, 730-731, 963 N.Y.S.2d 675, 677 (2nd Dep’t 2013) (where the “accident occurred at a premises leased to Ali by the owner, the defendant C2 Development Corp.,” “contrary to C2 Development’s contention, it is liable for any violation of Labor Law § 240(1) that proximately caused the plaintiff’s injuries, even though the plaintiff was employed by its tenant” [citing *Sanatass v. Consolidated Inv. Co., Inc.*, 10 N.Y.3d 333]).
Edison Company, 78 N.Y.2d 509, 577 N.Y.S.2d 219 (1991) that the statute was impliedly limited to those accidents and injuries that arose from elevation-related hazards.42

By way of example, in Rocovich itself, the allegedly unacceptable danger was that the plaintiff was working near a 12-inch deep trough. The plaintiff, however, was not injured by virtue of the elevation difference; nor did the accident have anything to do with gravity or gravity-related risks. The trough contained hot oil. The plaintiff stepped in it. He was burned. The Court deemed the statute inapplicable since, on those facts, it was “difficult to imagine” how the case could be said to have “entailed an elevation-related risk” (78 N.Y.2d at 514-15, 577 N.Y.S.2d at 222).

For the most part, there are basically two kinds of Labor Law § 240 cases:

1) cases where the plaintiff-worker fell (or was injured in avoiding a fall) in consequence of improper construction, placement or operation of an elevation-safety device (or, alternatively, in consequence of the failure to provide such a device); and,

2) cases where the plaintiff-worker was struck by a falling object (or was injured in avoiding the object) in consequence of improper construction, placement, or operation of an elevation-safety device (or as a result of the failure to provide same).43

However, as is now clear from Runner v. New York Stock Exchange, Inc., 13 N.Y.3d 599, 895 N.Y.S.2d 279 (2009), which is discussed immediately below, the statute may apply even where the plaintiff neither fell nor was at risk of falling and where the plaintiff was neither

42The Court’s rationale was that the Legislature appeared to be concerned solely with the “special hazards” arising from differences in elevation, and that section 240(1) should therefore be limited to those factual contexts. The Rocovich Court explained:

The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is position and the higher level of the materials or load being hoisted or secured. It is because of the special hazards in having to work in these circumstances, we believe, that the Legislature has seen fit to give the worker the exceptional protection that section 240(1) provides. Consistent with this statutory purpose we have applied section 240(1) in circumstances where there are risks related to elevation differentials … In cases such as these, the proper ‘erection’, ‘construction’, ‘placement’ or ‘operation’ of one or more devices of the sort listed in section 240(1) would allegedly have prevented the injury (see also, DeHaen v. Rockwood Sprinkler Co., supra, 258 N.Y. at 354, 179 N.E. 764).

78 N.Y.2d at 514, 577 N.Y.S.2d at 222, emphasis added.

struck by a falling object nor was at risk from a falling object. There is now one “single decisive question”: “whether plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential” (13 N.Y.3d at 603, 895 N.Y.S.2d at 280-281).

A. Runner And The “Single Decisive Question” For Elevation-Relatedness


Must the plaintiff-worker actually fall or be struck by a falling object in order for the subject accident to be deemed a gravity-related accident within the ambit of Labor Law § 240(1)?

What if, (1) the workers have to lower an 800-pound object down a set of four stairs; (2) the employer fails to provide a “hoist” and instead assigns several workers to “essentially act[] as counterweights,” and, (3) plaintiff was thereby pulled “horizontally,” and thus sustained injury? Does the fact that plaintiff moved horizontally rather than vertically take the accident beyond the bounds of the statute?

And is the failure to provide a “hoist” a statutory violation in those circumstances?

The Court of Appeals answered all of those questions in Runner, in the process framing a “single decisive question” to govern elevation-relatedness.

Facts: Writing for a unanimous bench, Chief Judge Lippman summarized the facts as follows:

The trial evidence showed that plaintiff suffered serious and permanent injuries to both of his hands while performing tasks in connection with the installation of an Uninterruptible Power System on defendant New York Stock Exchange’s premises. The manner in which the injuries were sustained is undisputed. Plaintiff and several co-workers had been directed to move a large reel of wire, weighing some 800 pounds, down a set of about four stairs. To prevent the reel from rolling freely down the flight and causing damage, the workers were instructed to tie one end of a ten-foot length of rope to the reel and then to wrap the rope around a metal bar placed horizontally across a door jamb on the same level as the reel. The loose end of the rope was then held by plaintiff and two co-workers while two other co-workers began to push the reel down the stairs. As the reel descended, it pulled plaintiff and his fellow workers, who were essentially acting as counterweights, toward the metal bar. The expedient of wrapping the rope around the bar proved ineffective to regulate the rate of the reel’s descent and plaintiff was drawn horizontally into the bar, injuring his hands as they jammed against it. Experts testified that a pulley or hoist should have been used to move the reel safely down the stairs and that
the jerry-rigged device actually employed had not been adequate to that task.

13 N.Y.3d at 601, 895 N.Y.S.2d at 280, emphasis added.

The case was tried in federal court, and the trial ended with the jury finding that plaintiff’s injuries were not attributable to a gravity-related risk. Plaintiffs afterwards moved to set aside the verdict on the ground that the movement of the reel down the stairs presented a gravity-related hazard as a matter of law. The District Court agreed and the Second Circuit thereafter certified the issue to New York’s Court of Appeals.

**Held:** The Court of Appeals unanimously ruled that the term “falling object case” may apply even when the worker was not struck by a falling object, and that such was so here. The reasoning was as follows:

… we think the dispositive inquiry framed by our cases does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker. Rather, **the single decisive question is whether plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential.**

*     *     *

Defendants contend to the contrary that the accident was not sufficiently elevation-related to fall within § 240(1)’s scope. The occurrence, they note, did not involve the traversal of an elevation differential either by plaintiff or an object that hit him, and they urge that gravity must operate directly upon either the plaintiff or upon an object falling upon the plaintiff if there is to be Labor Law § 240(1) liability.

*     *     *

**Manifestly, the applicability of the statute in a falling object case such as the one before us does not under this essential formulation depend upon whether the object has hit the worker.** The relevant inquiry -- one which may be answered in the affirmative even in situations where the object does not fall on the worker -- is rather whether the harm flows directly from the application of the force of gravity to the object. Here, as the District Court correctly found, the harm to plaintiff was the direct consequence of the application of the force of gravity to the reel. Indeed, the injury to plaintiff was every bit as direct a consequence of the descent of the reel as would have been an injury to a worker positioned in the descending reel’s path. The latter worker would certainly be entitled to recovery under §
240(1) and there appears no sensible basis to deny plaintiff the same legal recourse.

*     *     *

The elevation differential here involved cannot be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent. And, the causal connection between the object’s inadequately regulated descent and plaintiff’s injury was, as noted, unmediated -- or, demonstrably, at least as unmediated as it would have been had plaintiff been situated paradigmatically at the rope’s opposite end. It is in this respect that this case differs from *Toefer v. Long Is. R.R.* (4 N.Y.3d 399 [2005]), upon which defendants rely. There, the injury was the result of a concatenation of circumstances resulting in the “inexplicable” launch of an object -- not a falling object -- in plaintiff’s direction (*Id.* at 408); it was not, as here, the direct consequence of a failure to provide statutorily required protection against a risk plainly arising from a workplace elevation differential.

13 N.Y.3d at 602-605, 895 N.Y.S.2d at 280-282, emphasis added.

**B.  “Falling Worker” Cases**

1. **The “Almost Fell” Cases**

*Lopez-Dones v. 601 West Assoc., LLC*, 98 A.D.3d 476, 949 N.Y.S.2d 165, 168-169 (2nd Dep’t 2012) (where plaintiff was working on a ladder when “an unidentified man pushing a loaded dolly past the ladder caused the dolly to come into contact with the ladder, and the impact caused the ladder to tip,” where the ladder “did not fall to the concrete floor, but, rather, came into contact with a nearby air conditioning duct,” where “plaintiff, who lost her footing, ‘immediately’ reacted to the impact by grabbing onto a metal rod extending from the ceiling,” and where “plaintiff allegedly sustained certain injuries as a result of her attempt to avoid a fall from the ladder,” plaintiff “established, prima facie, that Labor Law § 240(1) was violated and that the violation was a proximate cause of her injuries”).

*Ramirez v. Metropolitan Transportation Authority*, 106 A.D.3d 799, 799-800, 965 N.Y.S.2d 156, 158-159 (2nd Dep’t 2013) (where “plaintiff allegedly was injured while working on elevated subway tracks, when a plank on a catwalk on which he was standing broke” and “plaintiff fell part of the way through the catwalk to his thigh, catching himself with his arm,” “Labor Law § 240 applied to the catwalk at issue, because it was the functional equivalent of scaffolding” and “defendants failed to raise a triable issue of fact as to whether the injured plaintiff’s own [undescribed in the opinion] conduct was the sole proximate cause of his accident”).
Mathews v. Bank of America, supra, 107 A.D.3d 495, 495, 968 N.Y.S.2d 15, 17 (1st Dep’t 2013) (Defendant’s “contention that plaintiff’s accident was not gravity related is unpersuasive, since plaintiff was not required to show that she fell completely off the ladder to the floor so long as the "harm directly flow[ed] from the application of the force of gravity to an object or person”).

2. Alleged De Minimus Falls And “Ordinary Work Hazards”

Soltero v. City of New York, 93 A.D.3d 578, 578, 940 N.Y.S.2d 491, 491-492 (1st Dep’t 2012) (plaintiff fell “from a two foot high ledge in a subway tunnel while she was working as part of a team of New York City Transit Authority employees who were replacing old tracks,” and where the fall occurred because plaintiff was required to work without “safety devices” from a ledge “which had been soaked with water by the Transit Authority to control the dust,” plaintiff was entitled to summary judgment).

McGill v. Qudsi, 91 A.D.3d 1241, 1242-1243, 937 N.Y.S.2d 460, 461 (3rd Dep’t 2012) (where plaintiff was required to descend a ladder while sliding a window along it, and where he thereby fell “approximately 8 to 10 feet,” plaintiff’s fall from a ladder while removing the second-story window of an apartment building is the type of elevation-related risk for which Labor Law § 240(1) was intended to provide protection).

Smith v. Nestle Purina Petcare Company, 105 A.D.3d 1384, 966 N.Y.S.2d 292, 294 (4th Dep’t 2013) (where plaintiff had been “standing on a ladder while vacuuming grain dust off the top of a hose rack” and he then “stepped off the ladder and onto accumulated grain dust and a hose that was hanging off the rack,” plaintiff was entitled to summary judgment. Plaintiff’s § 240 claim should have been dismissed inasmuch as “plaintiff’s injury resulted from a separate hazard wholly unrelated to the danger that brought about the need for the ladder in the first instance—an unnoticed or concealed object on the floor” [citing Nieves v. Five Boro A.C. & Refrig. Corp., 93 N.Y.2d 914, 916, 690 N.Y.S.2d 852 [1999], which had involved basically the same fact pattern]).

Creese v. Long Island Light. Co., 98 A.D.3d 708, 709, 950 N.Y.S.2d 167, 170 (2nd Dep’t 2012) (where a wooden plank had been placed as a “means of ingress and egress” to the subject building, where the top of the plank was “three to four feet higher than the ground below,” where the plank “was not being used in the performance of the injured plaintiff’s work,” and where plaintiff fell from the plank to the ground, the plank “was not being utilized as a ladder, scaffold, hoist, or other safety device for the benefit of the injured plaintiff in his work, and, thus, that the accident [did] not come within the purview of Labor Law § 240(1)”).

Cappabianca v. Skanska USA Bldg. Inc., 99 A.D.3d 139, 146, 950 N.Y.S.2d 35 (1st Dep’t 2012) (where plaintiff was on a pallet “anywhere from 4 to 12 inches high” when a saw malfunctioned and sprayed water “all over,” and where plaintiff’s foot was thus caused to become caught in the 3” to 6” openings between the slots of the pallet, causing him to fall, plaintiff’s “accident could not give rise to liability under that statute because he was at most
12 inches above the floor and was not exposed to an elevation-related risk requiring protective safety equipment”.

**Parker v. 205-209 East 57th St. Assoc., LLC**, 100 A.D.3d 607, 609, 953 N.Y.S.2d 635, 637 (2nd Dep’t 2012) (where “plaintiff, a roofer, was allegedly injured when he fell after stepping through a doorway which was several feet above the level of the lower roof of the building on which he was working,” and where the metal grate that “was usually placed on the other side of the doorway” had been removed “so that the door opened onto an empty space between the doorway and the stairs,” “plaintiff’s injuries did not result from the type of elevation related hazard to which the statute applies”).

3. Falls Through Or Into Holes And Openings

**Mouta v. Essex Market Development LLC**, 106 A.D.3d 549, 550, 966 N.Y.S.2d 13, 15 (1st Dep’t 2013) (where plaintiff “was injured when he stepped on a section of plywood platform that, unbeknownst to him, was being dismantled, and he fell from the fourth floor to the second floor,” plaintiff was entitled to summary judgment since “[t]here [was] no question that plaintiff’s was a ‘gravity-related … fall[ ] from a height,’ and that plaintiff was provided with no safety devices, such as a harness, to prevent the fall”; the defendant’s “conclusory claims that safety devices were available are not sufficient to raise an issue of fact”).

**Babiack v. Ontario Exteriors, Inc., supra**, 106 A.D.3d 1448, 1449, 964 N.Y.S.2d 828, 830 (4th Dep’t 2013) (where plaintiff was injured when he fell through a skylight opening in the roof while he was installing insulation in the roof rafters of a condominium complex, “[p]laintiff’s fall through a skylight opening is the very type of elevation-related accident encompassed by the statute”).

**Durando v. City of New York, supra**, 105 A.D.3d 692, 695, 963 N.Y.S.2d 670, 674 (2nd Dep’t 2013) (where plaintiff “was working as a scaffolding installer and remover … on the SS Chemical Pioneer, a ship in dry dock for repairs at the Brooklyn Navy Yard” when he allegedly “fell through an improperly covered opening in the floor, or deck, of one of the ship’s cargo holds”, “plaintiffs established their prima facie entitlement to judgment as a matter of law by showing that there was a failure to provide a proper safety device to prevent the injured plaintiff from falling through a hole in the deck of the ship’s cargo hold”).

**Dos Santos v. Consolidated Edison of New York, Inc., supra**, 104 A.D.3d 606, 608, 963 N.Y.S.2d 12, 14 (1st Dep’t 2013) (where “New York City was beset by a nor’easter that threatened the metropolitan area with heavy rain, strong wind gusts and high tides” and defendant hired plaintiff’s employer “to supplement its effort in responding to vapor conditions and pumping water out of flooded manholes,” and where plaintiff, “a laborer, was injured when he fell into a steam manhole that was part of defendant’s steam distribution system” while plaintiff was in the course of responding “to a heavy vapor condition,” “the motion court correctly found that plaintiff’s injury resulted from an elevation-related hazard that Labor Law § 240(1) is intended to obviate”).


Clavijo v. Atlas Terminals, LLC, 104 A.D.3d 475, 476, 961 N.Y.S.2d 113, 114 (1st Dep’t 2013) (where plaintiff “was injured in the course of building a mezzanine floor by nailing plywood to beaming when he stepped through tile he believed to be plywood and fell to the concrete floor below,” plaintiff “established his entitlement to summary judgment under Labor Law § 240(1) by showing that Atlas failed to provide any safety devices that would have prevented his fall”).

Alonzo v. Safe Harbors of the Hudson Housing Development Fund Company, Inc., supra, 104 A.D.3d 446, 447, 450, 961 N.Y.S.2d 91, 93, 95 (1st Dep’t 2013) (where the accident occurred when plaintiff “stepped on an eight-by-four-foot section of 3/4-inch-thick plywood, which unexpectedly ‘flipped up,’” thus uncovering an opening through which the plaintiff fell, “10 or 12 feet to the story below,” “the gravity-related risk was a sizeable hole in the floor that had been made specifically to aid in the construction project”; “[w]e have repeatedly held that § 240(1) is violated when workers fall through unprotected floor openings” and plaintiff “established a prima facie violation of the statute by showing that the plywood cover on the hole was an inadequate safety device because it was not secured at the time of the accident”).

Norero v. 99-105 Third Ave. Realty, LLC, 96 A.D.3d 727, 727, 728, 945 N.Y.S.2d 720 (2nd Dep’t 2012) (where plaintiff’s proof established that “while working on the fifth floor of the building, he partially fell into an unprotected opening in the floor that was large enough for his body to have passed through,” “that he was not provided with proper protection under Labor Law § 240(1), that the failure to provide such protection also violated a specific and applicable provision of the Industrial Code (see 12 NYCRR 23-1.7[b][1][i]), and that this failure was the proximate cause of his alleged injuries,” “Supreme Court should have granted the plaintiff’s motion, in effect, for summary judgment on the issue of liability on the causes of action alleging violations of Labor Law §§ 240(1) and 241(6)”).

Peters v. The New Sch., 102 A.D.3d 548, 548, 958 N.Y.S.2d 133 (1st Dep’t 2013) (where plaintiff was injured “when, while removing plywood sheets that were temporarily covering a hole in the floor, a wood beam that was used to support the plywood and upon which plaintiff was standing, cracked and caused him to fall through the hole,” plaintiff established “that defendant failed to provide any safety devices that would have prevented his fall, thereby entitling him to summary judgment”).

Mouta v. Essex Market Dev. LLC, supra, 106 A.D.3d 549, 550, 966 N.Y.S.2d 13 (1st Dep’t 2013) (where plaintiff “stepped on a section of plywood platform that, unbeknownst to him, was being dismantled, and … fell from the fourth floor to the second,” there was “no question that plaintiff was a ‘gravity-related … fall[] from a height’”).

Susko v. 337 Greenwich LLC, 103 A.D.3d 434, 435, 961 N.Y.S.2d 35 (1st Dep’t 2013) (where it was “unrefuted” that “plywood sheeting was placed over the planks on the scaffold and that, in one area, there were two planks missing beneath the plywood,” where there was “overwhelming evidence, physical as well as testimonial, from both interested and non-interested witnesses, that plaintiff fell from the scaffold,” and where defendant argued that the defect was caused by some contractor’s purportedly unforeseeable “theft” of the missing planks, the defendant’s “characterization of the removal of the plans as a ‘theft’ [was] entirely speculative
and, even if true, [did not] convert this foreseeable event into a superceding intervening cause” and “plaintiff established a violation of section 240(1) as a matter of law” “[s]ince preventing a worker from falling is a core objective of the statute”).

Coleman v. Crumb Rubber Mfgs., 92 A.D.3d 1128, 1128, 940 N.Y.S.2d 170 (3rd Dep’t 2012) (where plaintiff fell into a floor hole that was 12 inches by 16 inches such that “[h]is left leg fell in up to his groin, while his body and other leg remained above the hole,” “[t]he existence of a lower level below the floor where plaintiff was working, without more, did not create an elevation-related risk, nor did plaintiff’s ‘mere proximity’ to the opening in the floor give rise to the statutory protections” inasmuch as plaintiff had been “walking across a level, permanent floor - a task which did not warrant the use of the protective devices required by Labor Law § 240(1)”).

Coaxum v. Metcon Constr. Inc., 93 A.D.3d 403, 404, 939 N.Y.S.2d 415 (1st Dep’t 2012) (where another worker pushed plaintiff in the course of a dispute, and where plaintiff then “stepped back into an open hole and fell, breaking his leg,” there was “at best, conflicting evidence concerning [the hole’s] size and whether its depth was sufficient to render it a gravity-related hazard” within the meaning of Labor Law § 240(1) … or a falling hazard as defined by 12 NYCRR 23-1.7(b)(1), thereby stating a claim for violation of Labor Law § 241(6))”.

Carey v. Five Brothers, Inc., 106 A.D.3d 938, 940, 966 N.Y.S.2d 153, 156 (2nd Dep’t 2013) (where plaintiff “fell partially through an open manhole stop a 10-foot-deep precast drainage vault” as he returned to his truck after delivering equipment and supplies to his crew, plaintiff’s injuries “although allegedly the result of a fall, did not arise in the context of the ‘special hazards’ against which the statute is designed to protect, namely, ‘the exceptionally dangerous conditions posed by elevation differentials at work sites’”).

4. Fall From Roofs, Ladders Or Scaffolds, Or From Devices Being Used As Substitutes For Ladders Or Scaffolds

Mayo v. Metropolitan Opera Association, Inc., 108 A.D.3d 422, 969 N.Y.S.2d 39, 41 (1st Dep’t 2013) (where “the Met contracted to have the steel carriage rail for its automated window-washing system … stripped and repainted,” where the rail ran around the roof of the opera house, where plaintiff had to climb a ladder located on the sixth floor of the Opera House and exit onto the roof through a hatch door in the ceiling in order to reach the work, where “[p]laintiff and his witnesses testified that the hatch door was easy to open, but difficult to close, in part because of a broken hinge,” and where “plaintiff fell off the ladder while trying to close the hatch using both hands,” “[t]he record demonstrates that the Met and Lincoln Center failed to provide adequate safety devices to protect plaintiff from the risks associated with gaining access to the Opera House roof and the steel carriage rail, and therefore they are liable for plaintiff’s injuries under Labor Law § 240(1)”)

Nicometi v. Vineyards of Fredonia, LLC, 107 A.D.3d 1537, 1538, 967 N.Y.S.2d 563, 564 (4th Dep’t 2013) (where plaintiff claimed to have fallen “when his stilts slipped on ice while he was
installing insulation at an elevated level, i.e., the ceiling,” “plaintiff’s fall was the result of an elevation-related risk for which Labor Law § 240(1) provides protection”).

DelRosario v. United Nations Federal Credit Union, 104 A.D.3d 515, 515, 961 N.Y.S.2d 389, 390 (1st Dep’t 2013) (where plaintiff, standing on an A-frame ladder, was struck on the left side of his face by a live, energized and exposed electrical wire, pulled away from the wire, thus causing the ladder to wobble and him to fall, plaintiff was entitled to partial summary judgment under Labor Law § 240(1) inasmuch as “the ladder provided to plaintiff was inadequate to the task of preventing his fall when he came into contact with the exposed wire and was a proximate cause of his injury”).

Vasquez v. Cohen Brothers Realty Corporation, supra, 105 A.D.3d 595, 597-598, 963 N.Y.S.2d 626, 629 (1st Dep’t 2013) (where decedent was attempting to push a ceiling tile into a grid while perched on an elevated duct when he lost his balance and fell, and where “defendant failed to provide him with an adequate safety device” and “did not supply the workers with harnesses or safety lines,” “the accident [fell] squarely within the protection of Labor Law § 240[1]”).

Gallagher v. Resnick, supra, 107 A.D.3d 942, 944-945, 968 N.Y.S.2d 151, 153-154 (2nd Dep’t 2013) (where plaintiff “fell from the roof to a terrace approximately 10 to 12 feet below,” he established his entitlement to summary judgment by demonstrating that “no safety devices were present on the site for the work being performed, and that this failure was a proximate cause of the injured plaintiff’s injuries”).

5. Falls Into Trenches


Prior to the decision here in Salazar, there was a great deal of confusion as to when a worker’s fall from ground level into a trench would come within the ambit of Labor Law § 240 and/or 12 NYCRR 23-1.7(b)(1)(i), the latter relating to “hazardous openings.”

Now, in the aftermath of the Court of Appeals’ November 21, 2011 decision in Salazar … the confusion remains unresolved.

Background: There is no doubt that trench-related accidents can come within the ambit of the statute. The Court of Appeals so ruled some fifteen years ago in Covey v. Iroquois Gas Transmission System, 89 N.Y.2d 952, 655 N.Y.S.2d 854 [1997]).

In Covey, the subject accident arose from the construction of a pipeline. Plaintiff was attempting to replace hydraulic fluid in a backhoe when he “attempt[ed] to steady himself by grabbing an improperly secured handrail” that guarded the adjacent trench (89 N.Y.2d at 953). Plaintiff fell from the backhoe “into the 15-foot deep excavation,” a total distance of “approximately 20 feet” (89 N.Y.2d at 953-954). A unanimous Court of Appeals held that the hazard in issue “was the type of elevation-related risk for which Labor Law § 240(1) provides protection” (89 N.Y.2d at 954).
Yet, Covey was an easy case. First and most obviously, a twenty-foot drop is — how can I put this? — a twenty-foot drop. Second, given that there actually was a “safety device” present (the defective railing), the defendants could hardly argue that this was not an instance in which provision of a properly constructed safety device could have averted the accident.

But where does one draw the proverbial line? The four Departments have provided at least three and possibly four different answers.

The First Department has been most prone to deem trench-related falling hazards as “physically significant” for purposes of Labor Law § 240(1). Including Salazar itself, the First Department has twice deemed falls of as little as four feet to come within the statute’s scope.44

The Second Department’s rulings have been arguably consistent with those of the First Department, but the data is insufficient to say whether it too would regard a trench only four to six-feet deep physically significant for purposes of Labor Law § 240(1). The Second Department deemed the alleged hazard elevated for purposes of Labor Law § 240(1) in one case in which the subject trench was eight feet deep and another in which the trench was ten to twelve feet deep.45 It reached the opposite conclusion in one case in which the plaintiff allegedly fell “across and halfway down a trench that was five to six feet deep”46 and in another case that involved “a 1 1/2 to 2 feet-deep trench.”47

The Third Department’s rulings have been more difficult to harmonize. In one case in which the hole itself was “approximately 16 to 20 feet below street level” but plaintiff was on a ledge that was only 5 to 6 feet above the deepest part of the hole when “he felt the ground go out beneath him causing him to fall into the pit,” the Court ruled that “plaintiff’s injury did not result

44 Auriemma v. Biltmore Theatre, LLC, 82 A.D.3d 1, 9, 917 N.Y.S.2d 130 (1st Dep’t 2011) (where plaintiff was “descending approximately four-to-six feet from one elevation at the top of the pit to another elevation at the bottom in order to retrieve his equipment as directed by his foreman”); Salazar v. Novalex Contr. Corp., 72 A.D.3d 418, 421, 897 N.Y.S.2d 423 (1st Dep’t 2010), rev’d, 18 N.Y.3d 134 (2011) (where “the trench “was, according to plaintiff, 4 feet deep and 15 feet long”); see also Bell v. Bengomo Realty, Inc., 36 A.D.3d 479, 480, 829 N.Y.S.2d 42 (1st Dep’t 2007) (where the subject trench had a “six- to seven-foot depth” and the plaintiff’s work “necessitated close proximity to the trench edge”).

45 Ventimiglia v. Thatch, Ripley & Co., LLC, 96 A.D.3d 1043, 1045-1046, 947 N.Y.S.2d 566 (2nd Dep’t 2012) (where “a trench approximately 10 feet wide and 8 feet deep [allegedly] surrounded the work site,” where several planks that had been placed across the trench purportedly “served as the only way into and out of the site,” and where the planks allegedly “opened up” as plaintiff walked across, “causing him to fall into the trench,” defendants were not entitled to dismissal of the plaintiff’s § 240 claim inasmuch as “the planks from which the plaintiff allegedly fell were being utilized in the performance of his work and were, under the circumstances, the functional equivalent of a scaffold meant to prevent the plaintiff from falling into the eight-foot-deep trench”); Alexandre v. City of New York, 300 A.D.2d 263, 263-264, 750 N.Y.S.2d 651 (2nd Dep’t 2002).


from a special elevation-related hazard under Labor Law § 240(1).“\(^{48}\) Yet, the Court deemed plaintiff entitled to summary judgment in another case in which there was a series of terraces and the plaintiff “fell to the terrace below, a distance of approximately four or five feet.”\(^{49}\) There was also “no question” that the statute applied where plaintiff fell into a trench that was “10 to 15 feet deep”\(^{50}\) and no doubt that the statute did not apply where plaintiff “fell into a ditch or trench that was considerably less than three feet deep.”\(^{51}\)

Apart from the depth of the trench and the length of the fall, the Third Department has also looked to the manner in which the plaintiff fell, and more specifically whether plaintiff slid down the side of the trench or whether plaintiff fell straight down. There is some language to the effect that a mere slide does not implicate the statute’s coverage.\(^ {52}\)

Meanwhile, the Fourth Department has a rule all its own. The Fourth Department looks to whether the plaintiff fell from the side of the trench or from a plank or like device that extended over the trench.

In the Fourth Department, “generally a fall from the ground on either side is not covered by the statute …”\(^ {53}\) Where, however, “a plaintiff is working or walking over a plank or similar support suspended over a trench and falls into it, the statute applies.”\(^ {54}\) The depth of the trench appears to be of secondary import. Indeed, in a case in which the accident was evidently of the fall-from-a-plank variety, the Court deemed the statute applicable irrespective of “whether the work area at the location where plaintiff fell was 30 inches below grade, as described by defendant, or 10 feet below grade, as described by plaintiff,” pronouncing that “the extent of the


\(^ {52}\) Cummings v. I. & O. A. Slutsky, Inc., 304 A.D.2d 860, 861, 757 N.Y.S.2d 625 (3rd Dep’t 2003) (“[t]he mere fact that the ramp upon which decedent was walking was on an incline, resulting in his sliding some seven feet to the shoulder of the road, does not bring this case within the ambit of the elevation-related hazards contemplated by Labor Law § 240(1)”); Finkle v. A.J. Eckert Co., Inc., 11 A.D.3d 794, 795, 783 N.Y.S.2d 110 (3rd Dep’t 2004) (“Supreme Court erred in partially granting defendant summary judgment” inasmuch as “the record does not unequivocally establish that plaintiff slid down the slope of an excavation trench such that liability under this particular statutory provision is unwarranted as a matter of law”).


\(^ {54}\) Pitts, 81 A.D.3d at 1476; Wild v. Marrano/Marc Equity Corp., 75 A.D.3d 1099, 1099, 903 N.Y.S.2d 288 (4th Dep’t 2010).
elevation differential or the distance that a worker falls does not necessarily determine the applicability of Labor Law § 240.”

This brings us to Salazar.

Facts: In Salazar, plaintiff, who was “injured while he was spreading freshly poured concrete in the basement of a building that was being renovated,” “fell into an open trench while walking backwards and using a tool to smooth out the concrete” (72 A.D.3d at 424). “He testified that the trench he fell into was approximately four feet deep, two feet wide and between ten and fifteen feet long” (id.).

Appellate Division: The Salazar dissenter deemed Labor Law § 240(1) inapplicable on the stated grounds, (1) that Labor Law § 240(1) “is not implicated if a device of the kind enumerated in the statute would not be used to address the risk posed by the particular difference in elevation that existed” (72 A.D.3d at 431), (2) that there was no violation inasmuch as the existence of the alleged hazard was “integral to the work” (an argument that, according to the majority, had not been urged by the defendant), and, (3) cases from “all three of the other departments of the Appellate Division have held, as a matter of law, that no claim under Labor Law § 240(1) arises from a fall into a trench, ditch or hole of a depth comparable to, or even greater than, that of the trench at issue here” (72 A.D.3d at 432). In so arguing, the dissent did not cite the Court of Appeals’ ruling in Covey or the First Department’s own ruling in Bell. Nor did it cite any of the rulings in Congi, Alexandre, Jenkins, or Bowen. It did, however, cite many decisions in which Labor Law § 240 claims had been dismissed in arguably similar circumstances.

The Appellate Division majority’s answer was not that the cases cited by the dissent had been wrongly decided, but instead that they were distinguishable and that the subject fall had involved an elevation-related risk:

Here, plaintiff’s task required him to traverse a floor that contained an opening of significantly greater width and depth than that encountered in Rocovich. Indeed, in contrast to Rocovich, the bottom of the trench in this case represented a separate level, which, relative to the floor itself, surely constituted a gravity-related hazard covered by section 240, even by the standard articulated by the Court of Appeals in Rocovich (id.).

*   *   *

The dissent asserts that this case is analogous to other cases in which this Court found that Labor Law § 240(1) did not apply. However, those cases are inapposite. In both (Romeo v. Property Owner (USA) LLC, 61 A.D.3d 491, 877 N.Y.S.2d 48 [2009]) and (Geonie v. OD & P N.Y. Ltd., 50 A.D.3d 444, 855 N.Y.S.2d 495 [2008]), the worker stepped into an opening in a raised “computer floor” that was created when one of the floor tiles was removed. In Romeo the opening was a mere two feet by two feet and eighteen inches deep. It can be presumed that the dimensions of the opening in Geonie, although not disclosed in the decision, were

---

similar.

In each of these cases the dimensions of the opening in the floor were not sufficiently significant that the worker could be said to have been working at an elevation. In contrast, the trench that plaintiff fell into here was, according to plaintiff, four feet deep and fifteen feet long.

* * *

Under those circumstances, plaintiff's workplace was certainly elevated for purposes of Labor Law § 240.

In reaching this conclusion, we have considered the other cases from this Department cited by the dissent. However, after careful examination, we have determined that they are distinguishable on their facts. We fail to see how this constitutes a rejection of stare decisis, which we agree with our dissenting colleague is a “principled concept.”

72 A.D.3d at 426, emphasis added.

Was the dissent correct in stating that the trench was too shallow to bring the accident into the realm of Labor Law § 240? And are trenches for some reason different than floor openings?

Does it matter, and some have urged that it should, whether the plaintiff fell into a trench or whether she or he instead slid down the side of a trench?

Should it matter, as it apparently does in the Fourth Department, whether plaintiff fell from the side of the trench or from a plank suspended above the trench.

**Court of Appeals:** Writing for the majority, Judge Pigott reasoned that “Labor Law § 240(1) should be construed with a commonsense approach to the realities of the workplace at issue” (18 N.Y.3d at 140). The plaintiff had testified “that he was directed to pour and spread concrete over the entire basement floor” and “it would be impractical and contrary to the very work at hand to cover the area where the concrete was being spread, particularly since the settling of concrete requires that the work of leveling be done with celerity” (id). The majority thus resolved the Labor Law § 240(1) issue in the space of a paragraph without addressing which, if any, of the Appellate Division’s various formulations of the rule concerning trenches was correct.56

**Moving On**

I think that two conclusions follow from the Court of Appeals’ section 240(1) ruling in Salazar.

First, the so-called “integral part of the work” defense, a defense that the Court of Appeals had earlier deemed applicable to claims premised upon alleged violation of Labor Law §

---

56 The Court of Appeals dissenters charged, in an opinion by Chief Judge Lippman, that it was “not clear from the record that the trench was purposely being filled at the time of the accident,” that the Court was “not in a position to determine conclusively that it was impossible to fill the trench and protect plaintiff from the accident at the same time,” and that the majority failed to view “the facts in the light most favorable to plaintiff” (18 N.Y.3d at 141-143).
241(6), will now be urged as a defense to Labor Law § 240 claims as well. It remains to be seen whether such rule can co-exist with the core principle, long ago announced in *Zimmer v. Chemung County Performing Arts, Inc., supra*, that liability for an elevation-related hazard cannot be “negated” by proof to the effect that “‘no devices have yet been devised to protect workers operating at such heights in dangerous work’” (*Zimmer*, 65 N.Y.2d 513, 524, 493 N.Y.S.2d 102 (1985), *quoting Zimmer*, 102 A.D.2d 993, 995, 477 N.Y.S.2d 873 (3rd Dep’t 1984) (dissenting opinion)).

Second, with the sole exception that the defendants may have a defense in those situations in which the hazard was “integral to the work,” the Appellate Division’s various rulings regarding the statute’s application to trenches are unaltered by *Salazar*. In other words, the rule in any given case still depends in part on where the case is venued.

*Tournabene v. City of New York, ___ Misc.3d ___,* 2013 N.Y. Slip Op. 23220 (Sup. Ct. Kings Co. 2013) (Ash, J.) (where the plaintiff, a utility worker, fell “into an open trench in a roadway at the New South Ferry Terminal Structural Box,” Labor Law § 240 was not violated inasmuch as it was “undisputed that the trench was required to be open to enable Plaintiff and his colleagues to work in it” and plaintiff was “unable to demonstrate what safety devices should have been made available to protect him” given that plaintiff was walking on a flange within the trench and “no safety railings, barricades or fences could have prevented his fall into the trench, as such devices can only be placed outside the trench”).

6. **The Issue Posed By The Collapse Or Failure Of A “Permanent” Floor, Stairway, Or Other Instrumentality**

(a) **The Genesis Of The Permanence Problem**

The Court of Appeals observed back in *Rocovich v. Consol. Edison, supra*, 78 N.Y.2d 509, 514, 577 N.Y.S.2d 219 (1991) that the “exceptional protection” provided by Labor Law § 240(1), protection that includes imposition of absolute liability with respect to work risks within the statute’s scope, is limited to those instances in which the worker is confronted with “special hazards” arising from “a significant risk inherent in the particular task because of the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured.”

The Court more recently pronounced that the “single decisive question” regarding this limitation to elevation-related risks is whether the worker’s injuries “were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential.” *Wilinski v. 334 East 92nd Housing Dev. Fund Corp.*, 18 N.Y.3d 1, 10, 935 N.Y.S.2d 551 (2011), *quoting Runner v. New York Stock Exch., Inc., supra*, 13 N.Y.3d 599, 603, 895 N.Y.S.2d 279 (2009).

---


58 But the Court nonetheless ruled that there was a triable issue whether the open trench was a “hazardous opening” within the meaning of 23-1.7(b)(1) and an “open excavation” within the meaning of 23-4.2(h).
In this context, let us consider the archetypal case of a construction worker who, during the course of the construction of a 63-story office tower, slips and falls while ascending the building’s permanent stairway because, we shall hypothesize, the stairway was allowed to remain in a slippery condition. Does that kind of “slip-and-fall accident” really involve a “physically significant elevation differential”? Does such an accident really arise from a “special hazard” that is deserving of “exceptional protection”?

The obvious answer is No. We can intuitively sense that such an accident is very different than, let us say, a scaffold that collapses while the workers are standing on it. But what, precisely, is the operative distinction? If the courts had had the benefit of the Runner standard prior to 2009, the courts might have simply said that the latter kind of accident was the direct consequence of a failure to protect against a physically significant elevation-related risk whereas the hypothesized slip-and-fall accident is no different than the kind of accident that could befall any tenant or invitee long after the building’s completion. Not having the benefit of the Runner standard, the distinction that the courts instead seized upon was the difference between a temporary appliance specifically provided for the work (the scaffold) and a “permanent” part of the building itself (the stairway).

All four Departments have stated at various times and in various ways that Labor Law § 240(1) may not apply when the subject hazard related to a “permanent” part of the building or structure in issue. The principle dates back to at least 1916, long before the statute’s present incarnation.

Yet, to broadly state that the statute does not apply when the subject hazard relates to a permanent part of the building or structure would misstate the rule. There are circumstances in which the statute clearly applies even though the hazard related to a “permanent” part of the building or structure. There are also other circumstances in which the correct result is anything but clear, especially in light of the most recent case law concerning the permanence issue.

(b) The Work Platform/Passageway Distinction

All four Departments of the Appellate Division have on at least some occasions distinguished the situation in which the “permanent” structure was merely being used as a “passageway” that enabled the worker to get from point A to point B (e.g., the earlier


60 Mizak v. Carborundum Co., 172 App. Div. 627, 629, 159 N.Y.S. 274 (4th Dep’t 1916) ("Section 18 of the Labor Law is not applicable, because the ladder in this case was not being used in the erection, alteration, or repair of any building or structure. The ladder upon which plaintiff here was injured was not an appliance furnished to plaintiff to use in any part of defendant’s premises where he should need a ladder, but was furnished and located permanently as a means for all of defendant’s servants to ascend to the platform and stairs leading to the second floor who should have occasion to do so. In other words, it was a substitute for stairs …").
hypothetical involving a slip-and-fall on the stairway) from the situation in which the permanent structure was being used as a work platform. Where the defective or otherwise unsafe or inadequate roof, stairway, floor, or other permanent part of the structure was being used as a work platform, the Appellate Divisions have often held that the structure effectively served as a scaffold and that the permanent nature of the work surface should therefore not bar the statute’s application.61

Apart from the many decisions stating that the statute can apply when the permanent component served as the functional equivalent of a scaffold, there have been several decisions in which the Courts stated that the statute could apply if the permanent device in issue served as the functional equivalent of a ladder.62

Of course, the curious aspect of the “functional equivalent of a ladder” cases is that the rulings seem to connote that there is some meaningful and potentially dispositive distinction between, (a) a permanently affixed stairway or ladder that is being used as a vertical “passageway,” and, (b) a permanently affixed stairway or ladder that is being used as “the functional equivalent of a ladder.” The more cynical (or realistic?) view may be that the “functional equivalent of a ladder” cases are really holdings in search of a rationale. These are cases in which the facts suggest that the worker was subject to the kind of significant, elevation-related risk that the Legislature intended to address and in which adherence to the court-made distinction regarding “permanent” constructs would frustrate that intent.63

(c) The “Sole Means Of Access” And “Foreseeability”

Factors

Even where the area in issue was a permanent part of the building or structure that was being used as a passageway rather than as a work platform or as “the functional equivalent of a ladder,” there is authority for application of the statute. But it is here that we enter the realm of controversy.

There is a line of First Department decisions, stretching from 1996 to 2012, to the effect that the statute applies even where the area in issue was “permanent” and even where it was used as a passageway if it was the sole means of access to and from the plaintiff’s (or decedent’s)


63 There have also been cases in which the same result was achieved in another way: the court ignored that the device that collapsed was permanent in awarding judgment to the plaintiff.
work area. However, there seems to be no authority for that view outside of the First Department.

There is also a “foreseeability rule” in the First and Second Departments, but it seems to exist only in those Departments and it is not clear that it operates in the same manner in the Second Department as it does in the First Department.

In the First Department, a line of cases holds that liability may be imposed under Labor Law § 240(1) even where the defect concerned a permanent part of the structure and even where the defect was not part of the work area provided that the need for protective devices of the kind enumerated in the statute was foreseeable. The most memorable decision was Justice McGuire’s highly detailed analysis on behalf of a unanimous appellate panel in *Jones v. 414 Equities LLC*, 57 A.D.3d 65, 866 N.Y.S.2d 165 (1st Dep’t 2008). The First Department has followed *Jones* several times since. The Court has also ruled, (1) that foreseeability of the permanent fixture’s collapse need be proven only where the area of the accident was not part of the work area itself, and, (2) that proof of the foreseeability of the collapse of the structure is required only where the structure was a permanent fixture.

The Second Department has also ruled that the statute can apply to the collapse of a permanent part of the structure where there was a foreseeable need for safety devices of the kind enumerated in the statute. However, while the “functional equivalent of a scaffold” cases suggest that proof of foreseeability is required only when the area in issue was not being used as the functional equivalent of a scaffold, this is less clear than it is in the First Department.

---


67 *Ortega v. City of New York*, 95 A.D.3d 125, 940 N.Y.S.2d 636, 639-640 (1st Dep’t 2012) (decided by 3 to 2 vote, with the two concurring judges stating that it was, in their view, unnecessary to reach the issue).

(d) This Past Year’s “Permanence” Decisions

Restrepo v. Yonkers Racing Corporation, Inc., 105 A.D.3d 540, 540, 964 N.Y.S.2d 17, 18 (1st Dep’t 2013) (where plaintiff “was injured when an access door in the floor of the soffit, or attic, where he was working opened downward, causing him to fall approximately 12 to 13 feet to the floor below,” and where plaintiff “was unaware of the door and did not see the door because it was covered by plastic,” it was foreseeable as a matter of law that the defect could lead to injury for purposes of the rule set forth in Jones v. 414 Equities LLC, 57 A.D.3d 65, 80, 866 N.Y.S.2d 165 (1st Dep’t 2008) and this was “especially so where plaintiff was unaware of the door, and therefore could not take any steps to avoid it”; “plaintiff was entitled to summary judgment on his Labor Law § 240(1) claim”).

Burton v. CW Equities, LLC, 97 A.D.3d 462, 462, 950 N.Y.S.2d 1 (1st Dep’t 2012) (where plaintiff fell from a concrete walkway that lacked any guard rail and extended over an approximately 15-foot-deep vaulted area below grade level, “the fact that the concrete walkway from which plaintiff John Burton fell was a permanent structure does not remove it from the coverage of Labor Law § 240(1)” and plaintiff was entitled to summary judgment).

Stallone v. Plaza Constr. Corp., supra, 95 A.D.3d 633, 633-634, 944 N.Y.S.2d 130 (1st Dep’t 2012) (where plaintiff “was injured when, in the course of descending a fixed 14-foot ladder linking upper and lower platforms on a large crane, his foot slipped on a metal rung and he fell 13 feet to the next platform below,” where “[t]he permanently affixed ladder plaintiff used was the only means by which he could reach his elevated work site and, as such, was a device within the meaning of § 240(1),” plaintiff was “entitled to partial summary judgment since the ladder ‘proved inadequate to shield [plaintiff] from harm directly flowing from the application of the force of gravity to an object or person,’ and his injuries were at least partially attributable to defendants’ failure to take mandated safety measures to protect him from elevation-related risks”).

Gambale v. 400 Fifth Realty, LLC, 101 A.D.3d 943, 957 N.Y.S.2d 234 (2nd Dep’t 2012) (where the plaintiff-ironworkers were injured “when the floor, which then consisted of plywood decking, collapsed underneath them as they were standing on it,” “plaintiffs met their prima facie burden of establishing that the defendants’ violation of Labor Law § 240(1) was a proximate cause of their accident” and “defendants failed to raise a triable issue of fact as to whether the plaintiffs’ [undescribed] actions were the sole proximate cause of their accident”).

Ervin v. Consol. Edison of New York, 93 A.D.3d 485, 940 N.Y.S.2d 223 (1st Dep’t 2012) (where plaintiff was injured “when a temporary structure that he was descending to gain access to grade level from the top of a concrete wall, approximately three feet high, gave way causing him to fall,” it was “irrelevant whether the structure constituted a staircase, ramp, or passageway since it was a safety device that failed to afford him proper protection from a gravity-related risk” and plaintiff was “entitled to judgment as a matter of law on his claim pursuant to Labor Law § 240(1)”).

Godoy v. Neighborhood Partnership Housing Development Fund Company, Inc., 104 A.D.3d 646, 647, 961 N.Y.S.2d 220, 221-222 (2nd Dep’t 2013) (where the ground floor collapsed
beneath the plaintiff-demolition worker as she was picking up demolition debris, causing her to fall to the basement, “plaintiff demonstrated, prima facie, her entitlement to judgment as a matter of law on the issue of liability pursuant to Labor Law § 240(1) by submitting evidence that the floor where her accident occurred was unstable and that she was not provided with any safety devices despite the potential elevation risks involved” but “the third-party defendant raised a triable issue of fact” by submitting proof “that the area where the plaintiff fell had been cordoned off because the floor was unstable” and that the witness “had specifically told the plaintiff several times not to enter the restricted area,” the last such time being “30 minutes before the accident”; although plaintiff denied those claims it was the jury’s task to decide the facts of the case).

*Quintanilla v. United Talmudical Academy Torah V’yirah, Inc.*, 38 Misc.3d 1215(A), 2013 N.Y. Slip Op. 50108(U) (Sup. Ct. Kings Co. 2013) (Schmidt, J.) (where defendant’s maintenance manager “told plaintiff and the other workers that they could not walk off the walkway because he knew the surface on either side of the walkway was not sturdy enough to stand on, was not safe, and that walking off the walkway presented a falling hazard,” it was plain that the risk of injury arising from the permanent floor was foreseeable, but there was nonetheless an issue as to whether plaintiff understood the instructions in issue and, if so, whether plaintiff was the sole cause of the subject accident).


Where the plaintiff-laborer had to stand on the narrow ledge of a six-foot high dumpster in order to rearrange debris from an apartment renovation project, where he slipped off and fell to the sidewalk below, and where he claimed that he should have been provided a ladder, did the action come within the ambit of Labor Law § 240(1)?

The Second Department had previously ruled that such “dumpster accidents” were not sufficiently “elevation-related” to come within the scope of the statute. It here ruled that it was “constrained” to follow that precedent.

**Held:** A unanimous Court ruled in an opinion by Judge Pigott that the accident *might* come within the ambit of Labor Law § 240(1).

Defendants urged that the Court had previously ruled that falling off the back end of a flatbed truck is not a 240 accident (*Toefer v. LIRR*, 4 N.Y.3d 399, 795 N.Y.S.2d 511 [2005]) and that the situation here was purportedly analogous.

However, the Court deemed the two fact patterns distinguishable, as follows:

A worker may reasonably be expected to protect himself by exercising due care in stepping down from a flatbed truck. However, the present case, with the facts considered in the light most favorable to the non-moving party, is distinguishable from *Toefer*. Ortiz’s particular task of rearranging the demolition debris and placing additional debris in the dumpster, as he describes it, required him to stand at the top of the dumpster, six feet above the ground, with at least one foot perched on an eight-inch ledge.
Moreover, defendants failed to adduce any evidence demonstrating that being in a precarious position such as this was not necessary to the task. Nor do defendants demonstrate that no safety device of the kind enumerated in section 240(1) would have prevented his fall.

18 N.Y.3d at 339, 937 N.Y.S.2d at 159.

Yet, while defendants had failed to demonstrate an entitlement to summary judgment, plaintiff had also failed to establish as a matter of law, (1) that it was necessary for him to stand on the ledge in order to do his job, and, (2) that a § 240 safety device could have prevented his fall. The Court said:

However, we agree with defendants that Ortiz’s cross motion for summary judgment was properly denied. To recover under section 240(1), Ortiz must establish that he stood on or near the ledge at the top of the dumpster because it was necessary to do so in order to carry out the task he had been given (see Broggy v. Rockefeller Group, Inc., 8 N.Y.3d 675, 681, 839 N.Y.S.2d 714, 870 N.E.2d 1144 [2007]). Ortiz failed to adduce evidence, through testimony or other means, to establish what he asserted in his affidavit - that he was required to stand on or near the ledge. While that assertion is enough, in the context of this case and without contradictory-evidence from defendants, for plaintiff to ward off summary judgment it is not sufficient by itself for plaintiff to win summary judgment.

Moreover, to prevail on summary judgment, plaintiff must establish that there is a safety device of the kind enumerated in section 240(1) that could have prevented his fall, because “liability is contingent upon … the failure to use, or the inadequacy of” such a device (Narducci v. Manhasset Bay Assoc., 96 N.Y.2d 259, 267, 727 N.Y.S.2d 37, 750 N.E.2d 1085 [2001]). Because this too is a triable issue of fact, plaintiff is not entitled to summary judgment.

18 N.Y.3d at 339-340, 937 N.Y.S.2d at 159.

8. The Elevation-Related Prerequisite: Other Fact Patterns And Issues

Fernandez v. Abalene Oil Co., 91 A.D.3d 906, 908-909, 938 N.Y.S.2d 119 (2nd Dep’t 2012), lv. den., 19 N.Y.3d 809, 951 N.Y.S.2d 467 (2012) (where the decedent-worker fell to his death as a result of a Labor Law § 240(1) violation, and where the accident was witnessed by another worker who was decedent’s brother and who was also placed in danger of injury by the decedent’s fall, the surviving brother could nonetheless not assert a “zone of danger” claim

69 Some of the questioning at oral argument (available on the Court’s website) related to the alleged feasibility of using a ladder.
for psychiatric injury under Labor Law § 240(1); “To apply the ‘zone-of-injury’ rule to a cause
of action alleging a violation of Labor Law § 240(1) ‘would, in effect, extend the owner’s
nondelegable duty to a person who was not injured by the particular hazard the statute was
designed to guard against’” [quoting Del Vecchio v. State of New York, 246 A.D.2d 498, 500,
667 N.Y.S.2d 401 (2nd Dep’t 1998)].

Rich v. 125 West 31st St. Assoc., LLC, 92 A.D.3d 433, 434, 938 N.Y.S.2d 20, 21-22 (1st Dep’t
2012) (where plaintiff was injured while working at a construction site when one of the four
hoists that “had been installed to carry personnel and equipment necessary to erect a 58-story
building … began to function erratically … [and] free fell into the sub-basement, coming to
rest on the springs on the bottom of the hoist way,” plaintiff was entitled to summary
judgment since “[t]he unrefuted evidence establishes that the hoist came to a stop only when it
reached the emergency cushion springs located in the sub-basement, an event which does not
constitute normal and safe operation of the hoist” and “[t]he hoist mechanism proved inadequate
to shield plaintiff from the harm directly flowing from the application of the force of gravity”;
further, it was no defense that “the hoist’s safety mechanism engaged, and prevented plaintiff
and his coworkers from suffering more serious injuries”; finally, “neither a lack of certainty as to
exactly what preceded the accident nor the fact that plaintiff did not point to a specific defect in
the hoist creates an issue of fact”).

Phillip v. 525 E. 80th St. Condominium, 93 A.D.3d 578, 578-579, 940 N.Y.S.2d 631, 632 (1st
Dep’t 2012) (where plaintiff “was working at defendant’s building constructing a sidewalk
bridge when he fell from atop a load of scaffolding material on a flatbed truck,” where plaintiff
“was standing on top of the scaffolding material, about nine feet above the platform,
handing the material to his coworkers who were on top of the sidewalk bridge,” where it was
uncontroverted that although plaintiff was provided with a safety harness, there was no location
on the truck where the harness could be secured,” and where “such manner of work was the only
way to unload the materials,” plaintiff was entitled to summary judgment on his Labor Law §
240 claim).

2012) (by 4 to 1 vote: where plaintiff, the driver of a cement-mixing truck, was compelled to
climb across the truck’s rear fender in order to access the vehicle’s ladder, where the bumper
“was approximately three feet off the ground,” and where the back of plaintiff’s shirt “became
caught in the mixer’s rotating hatch handle, causing him to be propelled upward and over to
the other side of the truck,” “plaintiff was not exposed to an elevation-related risk and his
injury did not directly flow from the application of gravity’s force”).

70 My firm and I represented the plaintiffs-appellants in the case.

71 My firm and I represented the plaintiff-respondent in the case.
C. “Falling Object” Cases


Back in Misseritti v. Mark IV Constr. Co., 86 N.Y.2d 487, 634 N.Y.S.2d 35 (1995), the plaintiff was injured when a completed firewall that allegedly should have been braced collapsed on him. The Court unanimously ruled in a relatively brief opinion, which, by the way, was written by Judge Ciparick, that it could not be said “that the collapse of a completed firewall” was “the type of elevation-related accident” that Labor Law § 240(1) was “intended to guard against” (86 N.Y.2d at 491, 634 N.Y.S.2d at 38).

Three years later, in a case in which the hook holding a steel plate became undone and the plate fell on plaintiff’s foot, the Court of Appeals ruled in a short memorandum opinion that Labor Law § 240(1) did not apply because “the steel plate was resting on the ground or hovering slightly above the ground” and “was not elevated above the work site.” Melo v. Consol. Edison Company, 92 N.Y.2d 909, 911, 680 N.Y.S.2d 47, 48-49 (1998).

In the wake of Misseritti and Melo, the conventional wisdom was that Labor Law § 240(1) did not apply to a so-called “falling object” case if the base of the object that fell and struck plaintiff was at the same level as the plaintiff. See, e.g. Whitehead v. City of New York, 79 A.D.3d 858, 913 N.Y.S.2d 697, 699-700 (2nd Dep’t 2010); Kaminski v. 53rd St. and Madison Tower Dev., LLC, 70 A.D.3d 530, 895 N.Y.S.2d 76, 77 (1st Dep’t 2010); Garcia v. Edgewater Dev. Company, 61 A.D.3d 924, 878 N.Y.S.2d 134 (2nd Dep’t 2009); Spiegler v. Gerken Bldg. Corporation, 57 A.D.3d 514, 516, 868 N.Y.S.2d 712, 714 (2nd Dep’t 2008); Cruz v. Neil Hospitality, LLC, 50 A.D.3d 619, 855 N.Y.S.2d 219, 220 (2nd Dep’t 2008); Mikcova v. Alps Mech., Inc., 34 A.D.3d 769, 825 N.Y.S.2d 130, 131 (2nd Dep’t 2006); Peay v. New York City Sch. Constr. Auth., 35 A.D.3d 566, 827 N.Y.S.2d 189, 192 (2nd Dep’t 2006).

Here, the Court of Appeals, in another opinion penned by Judge Ciparick, said that the rule was more “nuanced” than that … and that so-called “same level” cases can fall within the statute’s scope.

Facts: Plaintiff and other workers were demolishing brick walls at a vacant warehouse. By virtue of the demolition thus far, there were two pipes – each four inches in diameter, each rising to a height of ten feet – that were unsecured.

“Earlier that morning, plaintiff voiced concerns to his supervisor that leaving the pipes standing during demolition of the surrounding walls could be dangerous. Nevertheless, no safety measures were taken to secure the pipes. Shortly thereafter, debris from a nearby wall that was being demolished hit the pipes, causing them to topple over” (Op., p. 3).

Plaintiff asserted claims under Labor Law §§ 240 and 241(6). With respect to the former, defendants argued that the pipes were at the “same level” as plaintiff and that Labor Law § 240(1) was therefore not implicated.

Held: Regarding the Labor Law § 240 claim, the Court reasoned that the scope of Labor Law § 240 had “evolved” in the almost two decades since Misseritti, that the statute’s “core purpose” was now “to provide workers with adequate protection from reasonably preventable, gravity-related accidents.”
The Court ruled that *Misseritti* did not call for the “categorical exclusion of injuries caused by falling object that … were on the same level as the plaintiff” and that the elevation differential in the case was “physically significant.” However, the remaining question, which could not be answered on the existent record, was whether protective devices could have in fact been used to secure the pipes. This, the Court said, was an issue of fact.

The gist was as follows:

Our jurisprudence defining the category of injuries that warrant the special protection of Labor Law § 240(1) has evolved over the last two decades, centering around a core premise: that a defendant’s failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability.

*     *     *

We do not agree that *Misseritti* calls for the categorical exclusion of injuries caused by falling objects that, at the time of the accident, were on the same level as the plaintiff. *Misseritti* did not turn on the fact that plaintiff and the base of the wall that collapsed on him were at the same level.

*     *     *

Applying *Runner* to the instant case, we hold that plaintiff is not precluded from recovery under section 240(1) simply because he and the pipes that struck him were on the same level. The pipes, which were metal and four inches in diameter, stood at approximately 10 feet and toppled over to fall at least four feet before striking plaintiff, who is 5’6” tall. That height differential cannot be described as de minimis given the “amount of force [the pipes] were able to generate” (id. at 605) over their descent. Thus, plaintiff suffered harm that “flow[ed] directly from the application of the force of gravity to the [pipes]” (id. at 604; see also *Rocovich*, 78 NY2d at 514). However, though the risk here “ar[ose] from a physically significant elevation differential,” (Runner, 13 NY3d at 604) it remains to be seen whether plaintiffs’ injury was “the direct consequence of [defendants’] failure to provide adequate protection against [that] risk” (id.).

In this regard, this case is distinguishable from *Misseritti* in a significant way: while, in *Misseritti*, the kinds of protective devices section 240(1) prescribes were shown to be inapplicable to the circumstances of the decedent’s injury, here, neither party has met its burden with respect to that issue. Plaintiff asserts, but does not demonstrate, that protective devices such as blocks or ropes could have
been used to secure the pipes and prevent the accident. Defendants assert, but fail to demonstrate, that no protective devices were called for.

Moreover, there is an important distinction between the facts of this case and other cases where summary judgment has been granted in defendants’ favor. Here, the pipes that caused plaintiff’s injuries were not slated for demolition at the time of the accident. This stands in contrast to cases where the objects that injured the plaintiffs were themselves the target of demolition when they fell (see e.g. Brink, 259 AD2d at 265). In those instances, imposing liability for failure to provide protective devices to prevent the walls or objects from falling, when their fall was the goal of the work, would be illogical.

* * *

We conclude, therefore, that while there is a potential “causal connection between the object[s’] inadequately regulated descent and plaintiff’s injury,” (Runner, 13 NY3d at 605), neither party is entitled to summary judgment on plaintiff’s Labor Law § 240(1) claim.

18 N.Y.3d at 7, 9, 11, emphasis added.

Dissent: The Wilinski Court’s § 240 ruling was rendered by 4 to 3 vote. The dissenters, per opinion by Judge Pigott, decried the departure from Misseritti and Melo and from the Appellate Divisions’ “reasonable interpretation” of those rulings. The dissenters felt that the majority’s ruling would inject “confusion and uncertainty” into an area of law that was formerly well settled.

Rodriguez v. DRLD Development Corp., ___ A.D.3d ___, ___ N.Y.S.2d ___, 2013 WL 3984594 (1st Dep’t 2013) (where plaintiff “was assigned to tape and polish installed sheetrock walls on the first floor of a construction project” and “tripped on a metal cable, dislodging a pile of sheetrock boards, which stood approximately eight feet high and were leaning against a wall” and where she “attempted to stop boards from falling with her hands and head, but she could not support their weight, and suffered injuries,” “Supreme Court correctly held that section 240(1) applies to this case even though the sheetrock that fell upon plaintiff was located on the same first-floor level as plaintiff” [citing Wilinski, 18 N.Y.3d 1]” and “was not being hoisted or secured”).

Rodriguez v. D & S Builders, LLC, 98 A.D.3d 957, 959-959, 951 N.Y.S.2d 54 (2nd Dep’t 2012) (“D-Best established their prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiffs’ decedent was not exposed to an elevation-related hazard inasmuch as, at the time the decedent was struck by a bundle of forms, the forms were not being hoisted or secured, and the decedent was working on a flatbed truck at the same level as the bundle of forms”).

61
2. Objects Dropped While Being Hoisted Or Lifted

*Gabrus v. New York City Housing Authority*, 105 A.D.3d 699, 699-700, 963 N.Y.S.2d 161, 162-163 (2nd Dep’t 2013) (where a “drag line for a load of roofing material which was being lifted to the top of the building by means of a hoist became stuck as a load of material was nearing the top of the building,” and where “the load of material broke apart and fell [on plaintiff]” when he went to free the drag line, while a plaintiff seeking to recover under Labor Law § 240(1) “must show that, at the time the object fell, it was ‘being hoisted or secured’ … or ‘required securing for the purposes of the undertaking [internal citations omitted],’” plaintiff established his prima facie entitlement to judgment as a matter of law under Labor Law § 240(1) by demonstrating that the load of material hoisted to the top of the six-story building was inadequately secured, and that the load fell on him, causing his injuries”).

*Miles v. Great Lakes Cheese of New York, Inc.*, 103 A.D.3d 1165, 1166-1167, 958 N.Y.S.2d 847 (4th Dep’t 2013) (where plaintiff and a coworker were in the process of raising [two scaffold] planks from the lowest level on the scaffolding, which was approximately 3 1/2 feet above the ground, to a higher level approximately 20 inches above the lowest level,” where the “coworker balanced himself between the scaffold frame and one of the outriggers,” and where the “coworker … lost his balance, let go of the planks, and dropped them onto plaintiff’s head,” “plaintiff “established as a matter of law that he was exposed to ‘hazards … related to the effects of gravity where protective devices are called for … because of … a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured” and further established that “Labor Law § 240(1) was violated because the safety device at issue in this case, i.e., the scaffold frame, was not ‘so constructed, placed and operated as to give proper protection’ to plaintiff, inasmuch as it was inadequate to protect him from the foreseeable risk that his coworker might drop the planks onto him”).

*Pritchard v. Tully Const. Co., Inc.*, 82 A.D.3d 730, 730-731, 918 N.Y.S.2d 154 (2nd Dep’t 2011) (where plaintiff’s co-workers “were attempting to attach [a] motor, which weighed 300 to 350 pounds, to the end of a 20-foot high pipe,” where the injured plaintiff “had been stationed by his supervisor approximately two to three feet beneath the motor, in order to bolt the bottom of the motor to the pipe,” and where “the motor was not secured by a hoist or other safety device” and the “plaintiffs coworkers were attempting to lift it and position it using only their hands,” “plaintiff was engaged in work within the ambit of the statute [Labor Law § 240(1)] because it subjected him to the risk of harm directly flowing from the application of the force of gravity to an object”).

*DiPalma v. State of New York*, 90 A.D.3d 1659, 1660, 936 N.Y.S.2d 464, 465-466 (4th Dep’t 2011) (where plaintiff was injured “when a large ‘skid box’ containing concrete debris slid off of a forklift and struck him,” and where defendant argued “that Labor Law § 240(1) is inapplicable because there was no significant height differential between the skid box and the platform onto which it fell,” the Court, citing *Wilinski, infra* and *Runner*, ruled otherwise; “[t]he ‘core premise’ of our Labor Law § 240(1) jurisprudence is ‘that a defendant’s failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability … [and] the single decisive question is whether plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a
physically significant elevation differential’’; here, “the experts who testified on behalf of both parties agreed that the failure to use a protective device to secure the skid box to the forklift was improper” and, given “the weight of the skid box and its contents,” the fact that it fell “only one or two feet before it struck claimant” did not make the elevation differential “de minimus”.

*Dedndreaj v. ABC Carpet & Home*, 93 A.D.3d 487, 488, 940 N.Y.S.2d 62 (1st Dep’t 2012) (plaintiff “established his prima facie entitlement to summary judgment by showing that defendants’ failure to provide an adequate safety device proximately caused a pipe that was in the process of being hoisted to fall and strike him”).

*Rivera v. Fairway Equities LLC, supra*, 36 Misc.3d 1236(A), 2012 NY. Slip Op. 51676(U) (Sup. Ct. Kings Co. 2012) (Schmidt, J.) (courts “have not set a bright-line distinction between a differential to which section 240(1) applies and differential that is de minimis and not covered,” but “this court finds that, in light of the heavy weight of the sand-filled hamper, the obvious force it generated in the three to four foot fall from the forks of the forklift, and the absence of any brace or other Labor Law § 240 device securing the harmer to the forklift, plaintiff has demonstrated, as a matter of law, that Labor Law § 240(1) was violated”).

*Maraj v. Aurora Assoc., L.P.*, 38 Misc.3d 282, 953 N.Y.S.2d 482 (Sup. Ct. Queens Co. 2012) (Elliott, J.) (where “plaintiff and his coworkers were hoisting a 1,500 to 2,000-pound elevator sheave to move it from the top of the landing of the first flight to the top of the landing of the second flight of stairs,” where “plaintiff’s hands remained on the sheave to keep it steady as it was being hoisted up; that the sheave had been hoisted up about 24 inches when it hit the right stairway wall,” and where the sheave ultimately “came back down to the landing, went ‘vigorously to the left’ and pinned plaintiff’s finger to the left wall of the stairway,” “defendant’s contention that the work did not encompass the protections of the statute because there was no ‘appreciable height differential’ between plaintiff and the sheave is without merit”).

3. Ladders, Scaffolds Or Hoists That Fell On The Worker

*Torres v. Perry Street Development Corp., supra*, 104 A.D.3d 672, 675, 960 N.Y.S.2d 450, 454 (2nd Dep’t 2013) (where plaintiff claimed that “he was walking past a 20-foot extension ladder which a worker from another trade was using to scrape the ceiling, when the ladder suddenly fell, and he was struck by both the falling ladder and the worker who had been standing on it,” “[c]ontrary to the defendants’ contentions, the injury did not result ‘from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first place’”; “the hazard presented here is of the type contemplated in Labor Law § 240(1)”).

*Agresti v. Silverstein Properties, Inc.*, 104 A.D.3d 409, 409, 959 N.Y.S.2d 915, 915 (1st Dep’t 2013) (plaintiff was entitled to partial summary judgment “when an improvised scaffold being

---

72 My firm represented the plaintiff in *Rivera*. 63
used by two workers between two and five feet above plaintiff’s head collapsed causing a wooden plank to fall and strike plaintiff in the head”).

Wade v. Bovis Lend Lease LMB, Inc., 102 A.D.3d 476, 476, 958 N.Y.S.2d 344 (1st Dep’t 2013) (where plaintiff “was a passenger in a temporary personnel lift … at a construction site when the lift became stuck,” where he and others “were directed to exit the hoist through an exit in the top,” and where plaintiff was thereupon “struck by a piece of guide rail that … had broken off and fell over 200 feet to where it struck plaintiff,” plaintiff was entitled to summary judgment on his Labor Law § 240 claim inasmuch as “[t]he enumerated safety device, the hoist, failed and was a proximate cause of plaintiff’s injury” and “[in] addition, the guide rail was an object that required securing for the purposes of operating the hoist”).

4. Objects That Fell Due To Floor Holes Or Poorly Constructed Devices

Marrero v. 2075 Holding Co. LLC, 106 A.D.3d 408, 409, 964 N.Y.S.2d 144, 146 (1st Dep’t 2013) (where plaintiff testified that “he was walking across plywood planks covering fresh concrete” when “[t]he plywood planks buckled and shifted,” and where that caused “an A-frame cart containing sheetrock and two 500-pound steel beams” to tip over and land on plaintiff’s left calf and ankle, “[w]hile the record did not specify the height, the uncontroverted evidence shows that the steel beams fell a short distance from the top of the A-frame cart to plaintiff’s leg”; “[g]iven the beams’ total weight of 1,000 pounds and the force they were able to generate during their descent, the height differential was not de minimis” and Labor Law § 240(1) applied).

Mercado v. Caithness Long Island LLC, 104 A.D.3d 576, 577, 961 N.Y.S.2d 424, 426 (1st Dep’t 2013) (where plaintiff “was struck on the head by a pipe that fell from a height of approximately 85 to 120 feet as a result of a gap in a toeboard installed along a grated walkway near the top of a generator in the power plant,” and where it was “undisputed that there was no netting to prevent objects from falling on workers,” plaintiff “established that his injuries were caused, at least in part, by the absence of proper protection required by [Labor Law § 240]”; “contrary to defendants’ contention, plaintiff is not required to show exactly how the pipe fell, since, under any of the proffered theories, the lack of protective devices was the proximate cause of his injuries”; nor was “plaintiff required to show that the pipe was being hoisted or secured when it fell, since that is not a precondition to liability pursuant to Labor Law § 240(1)”).

5. Objects That Were Dropped Inadvertently, Or Which Broke Off And Fell

Banscher v. Actus Lend Lease, LLC, 103 A.D.3d 823, 824, 960 N.Y.S.2d 183, 185 (2nd Dep’t 2013) (where the plaintiff-roofer was allegedly injured while installing shingles on a pitched roof, when a water jug that belonged to another worker rolled down the roof and hit him, causing him to fall off the roof, “defendants established, prima facie, that the water jug ‘was not
a material being hoisted or a load that required securing for the purposes of the undertaking at the time it fell”).

**Moncayo v. Curtis Partition Corporation**, 106 A.D.3d 963, 964, 965 N.Y.S.2d 593, 594-595 (2nd Dep’t 2013) (where site worker “Michael McNerny, had been working on the third floor, using a power saw to cut out a piece of sheetrock from the ceiling to facilitate the installation of a grill for the air conditioning system,” where a small piece of sheetrock slipped from his hand and bounced off a window sill, and where it thereafter struck plaintiff while plaintiff was standing on the ground outside the school that was under construction, Supreme Court properly dismissed plaintiff’s Labor Law § 240(1) claim since “a plaintiff must show that, at the time the object fell, it was ‘being hoisted or secured … or required securing for the purposes of the undertaking’” and must also “show that the object fell ‘because of the absence or inadequacy of a safety device of the kind enumerated in the statute’”).

**Maldonado v. AMMM Properties Company**, 107 A.D.3d 954, 954, 968 N.Y.S.2d 163, 165 (2nd Dep’t 2013) (where plaintiff and a co-employee were attempting to demolish a wall that included a glass pane, and where “plaintiff was holding the glass pane while a coworker attempted to dislodge it from the metal frame by the use of pliers, when the glass pane cracked and fell, causing the plaintiff to sustain injuries,” Labor Law § 240(1) was inapplicable inasmuch as a plaintiff seeking recovery under the statute “must show that, at the time the object fell, it was being hoisted or secured or ‘required securing for the purposes of the undertaking’” and also must “show that the object fell ‘because of the absence or inadequacy of a safety device of the kind enumerated in the statute’”).

**Mendez v. Jackson Dev. Group, Ltd.**, 99 A.D.3d 677, 678-679, 951 N.Y.S.2d 736 (2nd Dep’t 2012) (where plaintiff and a co-worker “jointly lifted a glass window pane in order to install it in a window frame,” where plaintiff was standing on a ladder at the time, and where “[t]he glass window pane split in half and the pieces struck the plaintiff, causing injuries,” the plaintiff’s 240 claim should have been dismissed since “the evidence submitted by the appellants showed ‘the absence of a causal nexus between the worker’s injury and a lack or failure of a device prescribed by section 240(1)’”).

6. **“Falling Objects” That Did Not Actually Fall**

**Mohamed v. City of Watervliet**, 106 A.D.3d 1244, 1246, 965 N.Y.S.2d 637, 640 (3rd Dep’t 2013) (where plaintiff and his co-workers “were installing a T-connection to an existing water main so that a new fire hydrant could be connected,” where plaintiff was standing in a trench and the T-connection was attached to the bucket of a backhoe, where the bucket was being lowered into the trench, and where the bucket had remained suspended approximately 3 1/2 feet above plaintiff when it “then descended precipitously into the trench and crushed plaintiff,” Labor Law § 240(1) did not apply since “the evidence submitted by plaintiffs, if accepted as true, would establish that ‘the backhoe bucket crushed plaintiff [] … not because of gravity, but because of its mechanical operation by an allegedly negligent co-worker’”).
**Garcia v. DPA Wallace Ave. I, LLC**, 101 A.D.3d 415, 416, 955 N.Y.S.2d 320, 321 (1st Dep’t 2012) (where plaintiff, “an elevator mechanic, was in an elevator pit … when the ‘selector tape,’ a thin strip of metal, broke and ‘snapped’ upwards, cutting his hand,” Labor Law § 240 was inapplicable inasmuch as “[t]he object upon which the force of gravity was applied, the weight in the overhead room, was not material being hoisted or a load that required securing for the purpose of carrying out plaintiff’s undertaking” and the cases cited by plaintiff were “distinguishable in that the objects upon which the gravitational force applied were being hoisted as part of the injured plaintiffs’ work”).

7. **Objects That Were Thrown**

**Henningham v. Highbridge Community Housing Dev. Fund Corp., supra**, 91 A.D.3d 521, 938 N.Y.S.2d 1 (1st Dep’t 2012) (where plaintiff and his co-workers “were dropping construction debris, such as broken cinder blocks, from the roof of a six- or seven-story building into a hard plastic chute in front of the building,” where plaintiff unclogged the chute by poking the debris, and where “plaintiff was struck on the back of the head by a cinder block” “[s]hortly after telling his co-workers that the chute was clear,” Labor Law § 240(1) applied inasmuch as “[falling object’ liability under Labor Law § 240(1) is not limited to cases in which the falling object is in the process of being hoisted or secured,” citing **Quattrocchi**).

8. **Accidents That Were Not Elevation-Related**

**Oakes v. Wal-Mart Real Estate Business Trust**, 99 A.D.3d 31, 34-40, 948 N.Y.S.2d 748 (3rd Dep’t 2012) (where plaintiff “was responsible for reading the numbered tags on pieces of structural steel and, after comparing them to the blueprint, directing the sequence for the placement of the steel components into the building structure,” and where a forklift driven by a co-worker sunk into a soft spot on the ground causing its right tire to sink, which in turn caused an unsecured bar joist to shift, which caused a truss to fall on the plaintiff, it was “not enough that a plaintiff’s injury flowed directly from the application of the force of gravity to an object or person, even where a device specified by the statute might have prevented the accident” where “notwithstanding the substantial weight of the truss and the significant force generated as it fell due to the force of gravity … there was no elevation differential present here, let alone a ‘physically significant elevation differential’” inasmuch as “[t]he truss and plaintiff were both at ground level, and they were either approximately the same height or plaintiff was slightly taller than the truss”).

**Ghany v. BC Tile Contrs., Inc.**, 95 A.D.3d 768, 768-769, 945 N.Y.S.2d 657 (1st Dep’t 2012) (where the plaintiff-mason allegedly was injured “when he tripped over a small stone while carrying a stone weighing approximately 100 pounds across an open, grassy area,” thus causing the stone he was carrying to fall and strike his knee and wrist, “[t]he motion court properly dismissed the Labor Law § 240(1) cause of action” inasmuch as “the impetus for the heavy stone’s fall was plaintiff’s tripping on ground level, rather than the direct consequence of gravity”).
**Grygo v. 1116 Kings Highway Realty, LLC**, 96 A.D.3d 1002, 1003, 947 N.Y.S.2d 586 (2nd Dep’t 2012) (where plaintiff was allegedly injured “when a cart holding sheetrock, which was at a worksite located in a large open space, toppled and fell over, causing the cart and sheetrock to strike him in the right leg,” plaintiff’s injuries “resulted from a general hazard encountered at a construction site and were not ‘the direct consequence of a failure to provide’ an adequate device of the sort enumerated in Labor Law § 240(1),” thus rendering Labor Law § 240 inapplicable).

**Winters v. Main LLC**, 96 A.D.3d 428, 428-429, 947 N.Y.S.2d 418 (1st Dep’t 2012) (where plaintiff “lost his footing on a scaffold platform, causing a pipe he had been handed to slip downward in his hands,” where he then felt “a sharp pain in his back” “when he reached forward to grab the pipe,” and where “the scaffold did not shake or move, and there was no debris on the platform,” “plaintiff’s injuries were caused not by a failure to provide adequate protection against an elevation-related risk but by an accident arising from a routine workplace risk”).

**Jackson v. Heitman Funds/191 Colonie LLC**, 37 Misc.3d 1211(A), 2012 WL 5187650 (Sup. Ct. Albany Co. 2012) (Lynch, J.) (the court in a “falling object” case should consider “the weight of the falling object and the amount of force it was capable of generating ‘even over the course of a relatively short descent’ [quoting Runner]”); here, where a “roll carrier” that “was elevated eighteen inches off the ground” struck plaintiff, “plaintiff’s injury [did] not arise from a ‘physically significant elevation differential’”).

**Mapp v. NYC Housing Dev. Corp.**, 38 Misc.3d 1215(A), 2012 N.Y. Slip Op. (Sup. Ct. Kings Co. 2012) (Schmidt, J.) (where plaintiff and other workers were on the building’s roof, “putting the weights on a horizontal bar which had been constructed approximately six feet above the floor of the roof to counterbalance the weight of the suspended scaffold when the workers and their equipment were on it, and where “the entire scaffold support” first swayed and then collapsed completely, striking plaintiff’s knee, plaintiff “has not demonstrated that the accident occurred as the result of anything more than ‘the usual and ordinary dangers of a construction site and not the extraordinary elevation risks envisioned by Labor Law § 240(1)’”).

9. **Permanence**

**Flossos v. Waterside Redevelopment Company, L.P.**, 108 A.D.3d 647, ___ N.Y.S.2d ___ (2nd Dep’t 2013) (where the plaintiff-painter “leaned a closed 4-foot A-frame ladder against a closet door” and “did not lock the horizontal bars of the ladder,” and where “[a] piece of ceiling fell down on the plaintiff, propelling him and the ladder to the floor,” “[i]nsofar as the ceiling was a part of the permanent structure of the building, it was not a falling object that was ‘being hoisted or secured’”)).
10. Factual Issues

Kropp v. Town of Shandaken, 91 A.D.3d 1087, 1087-1089, 937 N.Y.S.2d 345, 350-351 (3rd Dep’t 2012) (where “plaintiff was working at the bottom of a trench that was between four and eight feet deep, connecting lengths of pipe that were being lowered into the trench by an excavator operated by plaintiff’s supervisor,” where “plaintiff was struck by an iron pipe measuring 18 inches in diameter and 18 feet long, and that fittings had been attached to one end of the pipe to permit it to be connected with a narrower pipe, resulting in a total weight of approximately 1,500 pounds,” and where the parties agreed “that the pipe dropped as it was being moved [but] … disagree[d] as to how far it dropped, why this occurred, and whether the hoisting equipment was adequate to meet the requirements of the task and Labor Law § 240(1),” neither side should have been granted summary judgment; while the statute would be implicated “even if, as defendant contends, [the pipe] did not fall until near the end of its descent and dropped only one foot before it struck plaintiff” inasmuch as “such an elevation differential ‘cannot be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating,” “the conflicting expert opinions as to the adequacy of the hoisting equipment and the divergent testimony as to whether safety clips were present on the hooks, and whether the accident occurred because these hooks came loose, because the pipe slipped in its slings or because plaintiff altered its balance by pushing on it, pose issues of fact as to whether the absence or inadequacy of a safety device proximately caused plaintiff’s injuries”).

11. The Foreseeability Controversy

Ortega v. City of New York, supra, 95 A.D.3d 125, 126, 128, 940 N.Y.S.2d 636, 637-638, 639 (1st Dep’t 2012) (by 3 to 2 vote: “We hold that a plaintiff is not required to demonstrate that the injury was foreseeable, except in the context of a collapse of a permanent structure … In other words, when a worker is performing one of the inherently dangerous activities covered by Labor Law § 240(1), some injury is foreseeable from the failure of a contractor or owner to provide the worker with proper safety devices … Thus, a plaintiff merely has to demonstrate that he or she was injured when an elevation-related safety device failed to perform its function to support and secure him from injury”).

Fabrizi v. 1095 Ave. of the Americas, L.L.C., 98 A.D.3d 864, 864-865, 951 N.Y.S.2d 480 (1st Dep’t 2012) (by 3 to 2 vote: where plaintiff was struck by a falling pipe, and where pipe had been “attached to another piece of pipe by a compression coupling at the ceiling,” the case fell within Labor Law § 240 but there was “an issue of fact as to whether defendants failed to provide a protective device” or whether, as defendants claimed, “in light of the Kindorf support system and compression coupling that attached the conduit to the ceiling, no protective devices were called for.”

Justice Román, who concurred in part and dissented in part, urged that “the pertinent and indeed dispositive inquiry is whether it was reasonably foreseeable at the outset that the task assigned to a worker exposed him/her to a gravity-related hazard, so that he/she should have been provided with one or more of the safety devices required by the statute,” but acknowledged that “whether foreseeability is an element in any Labor Law § 240(1) analysis remains a point of contention in our very own department.”)
McLean v. 405 Webster Ave. Assoc., 98 A.D.3d 1090, 1095-1096, 951 N.Y.S.2d 185, 190-191 (2nd Dep’t 2012) (where plaintiff “was installing microduct … in a dumbwaiter shaft of a building owned by the defendant” when “he was hit by the counterweight for the dumbwaiter,” “Supreme Court properly awarded the moving defendants summary judgment dismissing the cause of action alleging a violation of Labor Law § 240(1)” because, (1) “it was not the nature of the work that caused an object to fall on the plaintiff” and it was instead “the defective condition of the ropes in the shaft,” and, (2) “[w]here a falling object is not a foreseeable risk inherent in the work, no protective device pursuant to Labor Law § 240(1) is required”).

D. “Falling Worker” And “Falling Object”

Saber v. 69th Tenants Corp., 107 A.D.3d 873, 875, 968 N.Y.S.2d 103, 106-107 (2nd Dep’t 2013) (where plaintiff was standing on an A-frame ladder when an overhead mirror suddenly came loose and pressed against him, where “it was not until the mirror came into contact with the marble walls of the shower stall and shattered that he lost his balance and fell backwards off the ladder,” and where “the ladder [that then] wobbled, and the wobbling motion contributed to his fall, the ladder itself did not fall because the space in which he was working was too small,” the jury could reasonably conclude that defendants violated Labor Law § 240(1), but that the violation was not a proximate cause of the plaintiff’s injuries; “[a] fair interpretation of the evidence supported the jury’s determination that the plaintiff’s accident was not proximately caused by an improperly placed or maintained ladder but, instead, by the unanticipated dislodging of the mirror”).

Saber v. 69th Tenants Corp., supra, 107 A.D.3d at 876, 968 N.Y.S.2d at 107 (2nd Dep’t 2013) (where plaintiff was standing on an A-frame ladder when an overhead mirror suddenly came loose and pressed against him, where that caused the plaintiff to fall, and where the jury returned a defendant’s verdict, “the trial court erred in failing to charge the jury in connection with Labor Law § 240(1) as it applies to falling objects, such as the mirror in this case. ‘[L]iability may be imposed where an object or material that fell, causing injury, was ‘a load that required securing for the purposes of the undertaking at the time it fell’”).

Naughton v. City of New York, supra, 94 A.D.3d 1, 6-8, 940 N.Y.S.2d 21 (1st Dep’t 2012) (where plaintiff was assigned to unload a flatbed truck, where he had to stand about “10-11 feet above the flatbed surface and 15-16 feet above the ground” to do so, where he asked for but was denied a ladder, and where he fell when a bundle hit him and knocked him to the street, “[t]he motion court should have granted summary judgment to plaintiff” on his Labor Law § 240(1) claim” inasmuch as the general contractor stood liable “for failing to provide a ladder to prevent plaintiff’s fall” and was “independently liable under § 240(1) for failing to provide a secure method of hoisting the bundles”; in other words, this was “a falling worker” and a “falling object” case; there was “no merit to defendants’ contention that plaintiff’s accident is outside the scope of § 240(1) because it resulted from a usual and ordinary danger of a construction site”; “[p]laintiff’s fall from a height of 15-16 feet above the ground constitutes precisely the type of elevation-related risk envisioned by the statute”).
Charney v. Lechase Constr., 90 A.D.3d 1477, 1478, 935 N.Y.S.2d 392, 394-395 (4th Dep’t 2011) (where the plaintiff-ironworker “and a co-worker were assigned to cut a portion of a steel beam, place a cable around the beam, attach the cable to a crane and cut the remaining portion of the beam,” where plaintiff “was lowered to the stage of the Center, approximately four feet above the ground, where he retrieved additional hose for his cutting torch and waited for the crane to be repositioned,” where the structural steel canopy collapsed and plaintiff “ran to the edge of the stage, and … was injured when he jumped into a pile of debris,” defendants were correct in positing that “plaintiff ‘was working on a large and stable surface only four feet from the ground' [at the time of the accident, this] [and such was …] not a situation that [called] for the use of a device like those listed in section 240(1) to prevent a worker from falling.” BUT the collapse of the canopy could constitute a statutory violation and the record did not “establish as a matter of law whether the cause of the collapse was the failure to use appropriate safety devices to secure the partially cut beam … or whether the cause was unrelated to such failure”).

Bruce v. Actus Lend Lease, 101 A.D.3d 1701, 1702, 959 N.Y.S.2d 574 (4th Dep’t 2012) (where plaintiff alleged that a roof truss that he “was securing to a building under construction broke apart, striking him and knocking him off a ladder,” “plaintiff was not injured based on the ‘falling object’ theory of recovery,” especially since it was “undisputed that the truss was rising when it struck plaintiff,” but there was “an issue of fact … with respect to the ‘falling worker’ theory of recovery” inasmuch as there were questions “‘concerning the adequacy of the protection afforded to plaintiff, both in terms of the [safety devices] provided to him and the absence of other safety devices … [, and] whether the conduct of plaintiff was the sole proximate cause of his injuries’”).

See also cases collected at IV.D. of this outline.
IV. STANDARDS GOVERNING MOTIONS FOR SUMMARY JUDGMENT UNDER LABOR LAW § 240

A. Device Collapsed Or No Safety Devices Provided

Gallagher v. Resnick, supra, 107 A.D.3d 942, 944-945, 968 N.Y.S.2d 151, 153-154 (2nd Dep’t 2013) (where plaintiff “fell from the roof to a terrace approximately 10 to 12 feet below,” he established his entitlement to summary judgment by demonstrating that “no safety devices were present on the site for the work being performed, and that this failure was a proximate cause of the injured plaintiff’s injuries”).

Westgate v. Broderick, supra, 107 A.D.3d 1389, 1390-1391, 967 N.Y.S.2d 285, 287 (4th Dep’t 2013) (where plaintiff was injured when a ladder jack scaffold collapsed from under him, “[p]laintiff’s fall was within the class of those protected by Labor Law § 240(1)” and plaintiff was entitled to summary judgment).

Mouta v. Essex Market Dev. LLC, supra, 106 A.D.3d 549, 550, 966 N.Y.S.2d 13 (1st Dep’t 2013) (where plaintiff “stepped on a section of plywood platform that, unbeknownst to him, was being dismantled, and … fell from the fourth floor to the second” and where plaintiff “was provided with no safety devices, such as a harness, to prevent the fall,” defendant’s “conclusory claims that safety devices were available [were] not sufficient to raise an issue of fact”).

Vasquez v. C2 Development Corp., supra, 105 A.D.3d 729, 730, 963 N.Y.S.2d 675, 677 (2nd Dep’t 2013) (“plaintiff made a prima facie showing of entitlement to judgment as a matter of law on the issue of liability on his Labor Law § 240(1) cause of action … by submitting his deposition testimony, which demonstrated that the board of the scaffold on which he was standing collapsed, causing him to fall and sustain injuries”).

Durango v. City of New York, supra, 105 A.D.3d 692, 695, 963 N.Y.S.2d 670, 674 (2nd Dep’t 2013) (where plaintiff “was working as a scaffolding installer and remover … on the SS Chemical Pioneer, a ship in dry dock for repairs at the Brooklyn Navy Yard” when he allegedly “fell through an improperly covered opening in the floor, or deck, of one of the ship’s cargo holds”, “plaintiffs established their prima facie entitlement to judgment as a matter of law by showing that there was a failure to provide a proper safety device to prevent the injured plaintiff from falling through a hole in the deck of the ship’s cargo hold”).

Coates v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints, 104 A.D.3d 896, 897, 962 N.Y.S.2d 321, 323 (2nd Dep’t 2013) (where plaintiff “was sent to the work site to inspect a newly constructed retaining wall,” where he was unable to reach portions of the wall from the ground and therefore “scaled the wall in order to check the rest of the capstones,” and where he thus “lost his footing and fell to the sidewalk below,” “Supreme Court properly concluded, based upon the evidence adduced at trial, that the plaintiff was entitled to judgment as a matter of law on the issue of liability” inasmuch as “plaintiff’s unrefuted evidence also demonstrated that he would not have performed his job adequately if he had only checked a portion of the capstones on the wall” and “no rational jury could have found that, in
the conceded absence of any safety devices, the plaintiff could have performed the task assigned to him without scaling the wall”).

**Mercado v. Caithness Long Island LLC, supra**, 104 A.D.3d 576, 577, 961 N.Y.S.2d 424, 426 (1st Dep’t 2013) (where plaintiff “was struck on the head by a pipe that fell from a height of approximately 85 to 120 feet as a result of a gap in a toeboard installed along a grated walkway near the top of a generator in the power plant,” and where it was “undisputed that there was no netting to prevent objects from falling on workers,” plaintiff “established that his injuries were caused, at least in part, by the absence of proper protection required by [Labor Law § 240]”; “contrary to defendants’ contention, plaintiff is not required to show exactly how the pipe fell, since, under any of the proffered theories, the lack of protective devices was the proximate cause of his injuries”; nor was “plaintiff required to show that the pipe was being hoisted or secured when it fell, since that is not a precondition to liability pursuant to Labor Law § 240(1)).

**Chase v. Arnell Constr. Corp.,** 98 A.D.3d 553, 949 N.Y.S.2d 464, 465 (2nd Dep’t 2012) (where “the floor, which consisted of sheet metal decking, collapsed underneath the injured plaintiff as he was walking on it,” “plaintiffs met their prima facie burden of establishing that the defendants’ violation of Labor Law § 240(1) was a proximate cause of the injured plaintiff’s accident”).

**Gambale v. 400 Fifth Realty, LLC, supra,** 101 A.D.3d 943, 943, 957 N.Y.S.2d 234 (2nd Dep’t 2012) (where the plaintiff—ironworkers were injured “when the floor, which then consisted of plywood decking, collapsed underneath them as they were standing on it,” “plaintiffs met their prima facie burden of establishing that the defendants’ violation of Labor Law § 240(1) was a proximate cause of their accident” and “defendants failed to raise a triable issue of fact as to whether the plaintiffs’ [undescribed] actions were the sole proximate cause of their accident”).

**Chabla v. 72 Greenpoint LLC,** 101 A.D.3d 928, 928, 957 N.Y.S.2d 226, 227 (2nd Dep’t 2012) (where plaintiff “was descending a two-story high scaffold using the metal cross-pieces of the scaffolding’s frame” when “a piece of platform planking that extended approximately eight inches beyond the scaffolding’s frame” “broke, causing him to fall [some 15] feet to the ground,” such established a statutory violation and “defendants failed to raise a triable issue of fact as to whether the plaintiff’s actions were the sole proximate cause of his injuries”).

**Williams v. Town of Pittstown,** 100 A.D.3d 1250, 1251-1252, 955 N.Y.S.2d 234 (3rd Dep’t 2012) (where defendant hired the self-employed plaintiff, a hydraulics specialist, to repair defendant’s Gradall, where plaintiff borrowed two workers and some equipment to assist him in putting the 6,000 pound counterweight back on the Gradall, and where the counterweight fell and landed on plaintiff’s foot [requiring a below-the-knee amputation of his leg] as it was being lifted into place via forklift, Supreme Court erred in denying plaintiff’s motion for summary judgment inasmuch as “[p]laintiff submitted proof that defendant did not provide any pulleys, hoists, braces or ropes that would be appropriate safety devices to secure a heavy object, such as the counterweight, while it was being lifted”).
**Dwyer v. Cent. Park Studios, Inc.**, 98 A.D.3d 882, 882-883, 951 N.Y.S.2d 16 (1st Dep’t 2012) (where “plaintiff was standing on a ladder, unassisted, attempting to install a large piece of sheetrock” when “the ladder collapsed” and “the sheetrock slab fell on top of him,” where the third-party defendant “produced a ladder in excellent condition that was purportedly used by plaintiff on the day of the accident,” but where “the ladder’s manufacturer, in an affidavit, stated that, based on markings on the ladder, it was manufactured several years after plaintiff’s accident,” “[t]he court should have granted plaintiff’s cross motion for partial summary judgment on the issue of liability under Labor Law § 240(1)” because “plaintiff’s injuries were proximately caused, at least in part, by the failure to provide proper protection as required by the statute” and plaintiff was “not required to show that the ladder was defective in some manner”).

**Ervin v. Consol. Edison of New York, supra.** 93 A.D.3d 485, 485-486, 940 N.Y.S.2d 223 (1st Dep’t 2012) (where plaintiff was injured “when a temporary structure that he was descending to gain access to grade level from the top of a concrete wall, approximately three feet high, gave way causing him to fall,” it was “irrelevant whether the structure constituted a staircase, ramp, or passageway since it was a safety device that failed to afford him proper protection from a gravity-related risk” and plaintiff was “entitled to judgment as a matter of law on his claim pursuant to Labor Law § 240(1)”).

**Soltero v. City of New York, supra.** 93 A.D.3d 578, 578, 940 N.Y.S.2d 491, 491-492 (1st Dep’t 2012) (plaintiff fell “from a two foot high ledge in a subway tunnel while she was working as part of a team of New York City Transit Authority employees who were replacing old tracks,” and where the fall occurred because plaintiff was required to work without “safety devices” from a ledge “which had been soaked with water” by the Transit Authority to control the dust, plaintiff was entitled to summary judgment).

**Aburto v. City of New York.** 94 A.D.3d 640, 640-641, 942 N.Y.S.2d 514 (1st Dep’t 2012) (where “plaintiff’s 50-h testimony and his co-worker’s affidavit showed that a scaffold suddenly collapsed under him while he was attempting to dismantle it at his foreman’s instructions,” and where “[t]here were no harnesses, lanyards, safety lines, or similar safety devices available for use to prevent his fall,” plaintiff’s motion for summary judgment was not premature; “[d]efendants have not shown, or even argued, that other facts essential to justify opposition to the motion might exist but could not be stated without additional discovery”).

**McGill v. Qudsi.** 91 A.D.3d 1241, 1242-1243, 937 N.Y.S.2d 460, 461 (3rd Dep’t 2012) (where plaintiff was required to descend a ladder while sliding a window along it, and where he thereby fell “approximately 8 to 10 feet,” “[s]ince the absence of any protective device was unquestionably a proximate cause of his accident, it is immaterial whether plaintiff’s fall was precipitated by a loss of balance, misstep on the ladder or other carelessness on his part”; further, “plaintiffs were not required to prove what particular safety devices would have prevented the accident”).

**Nechifor v. RH Atlantic-Pacific LLC.** 92 A.D.3d 514, 514, 938 N.Y.S.2d 308 (1st Dep’t 2012) (plaintiff was entitled to summary judgment when, due to the absence of a ladder, he “fell approximately 12 feet as he attempted to descend from the top of a scaffold by climbing down the side frame of the scaffold”; “[e]ven assuming that plaintiff knew that a ladder or other
appropriate safety devices were readily available to him, there is no evidence that plaintiff knew that he was expected to use the safety devices for the assigned task”.

*Nenadovic v. P.T. Tenants Corp., supra*, 94 A.D.3d 534, 534-535, 942 N.Y.S.2d 474 (1st Dep’t 2012) (where plaintiff “and his two co-workers, were assigned to work together on a 50-foot suspended scaffold that ultimately broke in two, causing them to sustain injuries,” and where “the evidence demonstrated, *inter alia*, that the defendant contractors were aware that the scaffold was indicated to have a two-man maximum capacity, that three workers (including plaintiff) were nonetheless assigned to work together from the scaffold, and that there was no other adequate safety equipment made available to the workers,” plaintiff was entitled to summary judgment inasmuch as “[t]here was no evidence to indicate that the resulting injury to plaintiff was exclusively caused by his own willful or intentional acts” and the direction was not premature since additional evidence could at most “inculpate other defendant contractors with negligence”).

*Ching Kuk Yeung v. Ellis*, 38 Misc.3d 1234(A), 2013 N.Y. Slip Op. 50376(U) (Sup. Ct. Kings Co. 2013) (Rivera, J.) (plaintiff was entitled to summary judgment where “he was seriously injured when a *wooden surface he was standing on collapsed* causing him to fall through and strike the floor of the third floor below” and “he was *provided with a hard helmet, and no other safety devices*”; the affidavit of defendants’ engineer was “disregarded” because he “relie[d] on documents that are not included in Ellis’ opposition papers and he offers conclusory opinions that are not properly within the realm of his stated area of expertise”).


*Fanning v. Rockefeller University*, 106 A.D.3d 484, 484-485, 964 N.Y.S.2d 525, 525-526 (1st Dep’t 2013) (plaintiff “established prima facie entitlement to judgment as a matter of law through testimony that when the unsecured ladder on which he was working suddenly moved, he fell, causing him to sustain injury [citations omitted]. He was not required to present further evidence that the ladder was defective”).

*Ross v. 1510 Associates LLC*, 106 A.D.3d 471, 964 N.Y.S.2d 514, 514 (1st Dep’t 2013) (where plaintiff “testified that he was injured when the A-frame ladder he was standing on tipped over after it shifted *because of the unevenness of the floor,*” plaintiff was entitled to summary judgment and “was not required to show that the ladder was defective”; “the record presents no triable issue of fact whether plaintiff’s negligence was the sole proximate cause of the accident, because there is no evidence that plaintiff fell simply because he los his balance”).

*Estrella v. GIT Industries, Inc.*, 105 A.D.3d 555, 555, 963 N.Y.S.2d 110, 111-112 (1st Dep’t 2013) (plaintiff was entitled to partial summary judgment since “the unsecured ladder on which he was working *suddenly moved*”; “Plaintiff was not required to show that the ladder was defective”).
**Nacewicz v. Roman Catholic Church of the Holy Cross**, 105 A.D.3d 402, 402-403, 963 N.Y.S.2d 14, 16 (1st Dep’t 2013) (where plaintiff, a bricklayer’s assistant, was told to ask the substitute foreman a question, and where plaintiff fell from an unsecured ladder while attempting to get close enough to the substitute foreman to be heard, plaintiff was entitled to summary judgment since it was undisputed that “[t]he ladder slid, causing plaintiff to fall to the sidewalk bridge approximately 10 feet below”; it “is well settled that failure to properly secure a ladder to insure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240(1)”).

**Paganini v. Congregation Eretz H’Chaim**, 105 A.D.3d 830, 962 N.Y.S.2d 683, 684 (2nd Dep’t 2013) (“plaintiff established, prima facie, that the defendant violated Labor Law § 240(1) when it provided him with a wet, unsecured ladder lacking rubber feet, and that the violation proximately caused the ladder to shift and the plaintiff to fall to the ground”).

**Santos v. ACA Waste Serv., Inc.**, 103 A.D.3d 788, 789-790, 959 N.Y.S.2d 729 (2nd Dep’t 2013) (where plaintiff alleged that he “was injured at a construction site when he slipped and fell from the top of an improperly placed and secured dumpster,” and where the defendant-subcontractor’s president submitted an affidavit to the effect that the plaintiff’s employer “‘told me the accident happened when one of his employees climbed up onto the dumpster to pull out material that did not belong in that particular dumpster’” and that “‘there was nothing wrong with the dumpster at the time of this accident,’” the affidavit was inadmissible hearsay and defendant thus “failed to make a prima facie showing of entitlement to judgment as a matter of law”).

**Canas v. Harbour at Blue Point Home Owners Assoc., Inc.**, supra, 99 A.D.3d 962, 963-964, 953 N.Y.S.2d 150 (2nd Dep’t 2012) (“plaintiff made a prima facie showing of his entitlement to judgment as a matter of law on the issue of liability under that statute by showing that, although he was provided with a ladder, as required by the statute, the ladder was not secured so as to prevent it and him from falling”; “[s]ince the plaintiff was provided only with an unsecured ladder and no safety devices, the plaintiff cannot be held solely at fault for his injuries”).

**Marquez v. The Trustees of Columbia Univ.**, 95 A.D.3d 588, 588, 943 N.Y.S.2d 750 (1st Dep’t 2012) (where plaintiff “submitted, inter alia, his deposition testimony and his affidavit showing that he was working on an A-frame ladder plastering a ceiling when the ladder became unstable and tipped, causing him to fall to the floor,” plaintiff thus “established his entitlement to judgment as a matter of law”)

**Santiago v. Rusciano & Son, Inc.**, supra, 92 A.D.3d 585, 586, 938 N.Y.S.2d 557 (1st Dep’t 2012) (where “the ladder supplied to plaintiff slipped out from underneath him and did not offer proper protection,” plaintiff was entitled to summary judgment).

**Eustaquio v. 860 Cortlandt Holdings, Inc.**, 95 A.D.3d 548, 548-549, 944 N.Y.S.2d 78 (1st Dep’t 2012) (plaintiff “met his prima facie burden by submitting his deposition testimony and affidavit showing that he fell from a ladder that was not properly secured or equipped with adequate safety devices” and defendant’s evidence was inadmissible inasmuch as the foreman’s
daughter had purportedly translated the statement from Greek to English but the proof “was not accompanied by an attestation from the daughter setting forth her qualifications and the accuracy of the translation”

**Soodin v. Fragakis, supra.** 91 A.D.3d 535, 535-536, 937 N.Y.S.2d 187, 188 (1st Dep’t 2012) (where plaintiff “established that he was supplied with an old, weak, and shaky ladder that lacked rubber footings and was placed on a slippery polyurethane-coated floor, and that the ladder toppled over, causing him to fall,” he “was entitled to partial summary judgment on his Section 240(1) and 241(6) claims”).

C. Device Proved “Inadequate”

**Mayo v. Metropolitan Opera Association, Inc., supra.** 108 A.D.3d 422, 969 N.Y.S.2d 39, 41 (1st Dep’t 2013) (where “the Met contracted to have the steel carriage rail for its automated window-washing system … stripped and repainted,” where the rail ran around the roof of the opera house, where plaintiff had to climb a ladder located on the sixth floor of the Opera House and exit onto the roof through a hatch door in the ceiling in order to reach the work, where “[p]laintiff and his witnesses testified that the hatch door was easy to open, but difficult to close, in part because of a broken hinge,” and where “plaintiff fell off the ladder while trying to close the hatch using both hands,” “[t]he record demonstrates that the Met and Lincoln Center failed to provide adequate safety devices to protect plaintiff from the risks associated with gaining access to the Opera House roof and the steel carriage rail, and therefore they are liable for plaintiff’s injuries under Labor Law § 240(1))”.

**Keenan v. Simon Property Group, Inc., supra.** 106 A.D.3d 586, 588-589, 966 N.Y.S.2d 378, 381-382 (1st Dep’t 2013) (where plaintiff fell from an unopened and therefore unstable A-frame ladder, “[p]laintiff established prima facie entitlement to summary judgment on his Labor Law § 240(1) claim as against defendants RPT and Art/Shaving by his testimony that: (1) the ladder was the only one available; (2) the ladder could not be properly opened into an A-frame stance due to excess debris in his narrowly confined work space; (3) he asked his foreman for another ladder, to no avail; (4) the ladder was unusual in that the step treads contained spikes which unexpectedly caught hold of his shoe as he was descending the improperly leaning ladder; (5) he was caused to fall backwards, from a height of approximately six feet; and (6) his right shoulder was injured when it struck the wooden work-zone barrier as he fell”).

**Olea v. Overlook Towers Corp.,** 106 A.D.3d 431, 431-432, 965 N.Y.S.2d 39, 40-41 (1st Dep’t 2013)73 (where one of the defendants’ principals “testified that a worker would customarily go from a balcony to a motorized scaffold by jumping onto the scaffold and then climbing over its railing,” where that “was the very method plaintiff was trying to employ when he fell,” where the evidence was “inconclusive about whether safety lines were available at the time of the accident, and whether plaintiff had been instructed to use them,” and where another one of the defendants’ principals “admitted that it would have been safer to provide ladders to protect a

73 Disclosure: My firm and I represented the plaintiff-appellant in *Olea*. 

76
worker in going from a balcony to a motorized scaffold,” “the evidence shows that defendants violated Labor Law § 240(1) by failing to provide an adequate safety devices” and plaintiff should have been granted summary judgment).

**Vail v. 1333 Broadway Associates**, 105 A.D.3d 636, 636-637, 963 N.Y.S.2d 647, 648 (1st Dep’t 2013) (where plaintiff “fell after the six-foot baker’s scaffold upon which he was working shifted, despite the fact that he had locked the wheels,” and where it was “undisputed that the scaffold lacked guardrails,” such established plaintiff’s right to summary judgment; “[g]iven that the scaffold was inadequate in the first instance, any failure by plaintiff to hydrate himself could not be the sole proximate cause of his injuries”).

**Corchado v. 5030 Broadway Properties, LLC**, 103 A.D.3d 768, 769, 962 N.Y.S.2d 185, 186 (2nd Dep’t 2013) (“plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1) by submitting evidence which demonstrated that he fell from the ladder when it “kicked out” from underneath him, and that the failure to provide him with an adequate safety device proximately caused his injuries”).

**DelRosario v. United Nations Federal Credit Union, supra**, 104 A.D.3d 515, 515, 961 N.Y.S.2d 389, 390 (1st Dep’t 2013) (where plaintiff, standing on an A-frame ladder, was struck on the left side of his face by a live, energized and exposed electrical wire, pulled away from the wire, thus causing the ladder to wobble and him to fall, plaintiff was entitled to partial summary judgment under Labor Law § 240(1) inasmuch as “the ladder provided to plaintiff was inadequate to the task of preventing his fall when he came into contact with the exposed wire and was a proximate cause of his injury”).

**Fernandez v. BBD Developers, LLC**, 103 A.D.3d 554, 555-556, 960 N.Y.S.2d 380, 381-382 (1st Dep’t 2013) (where plaintiff was given a safety belt and rope but “[n]o one measured the rope to ensure it was shorter than the distance to the ground [which was 14 feet],” plaintiff met his burden in seeking summary judgment “with evidence that he fell through the open roof while in the course of demolishing the building and that the safety device he was given—a safety belt with a rope which may have been as long as 30 feet—failed to prevent his fall”; although defendants argued “that the safety belt and rope were not defective” and “that plaintiff’s failure to tie the rope to a length that would have prevented him from hitting the floor below was the sole proximate cause of his injuries,” “a plaintiff cannot be the sole proximate cause of his or her injuries where uncontroverted evidence shows that the plaintiff followed his or her supervisor’s instructions and did not, on his or her own initiative, take a foolhardy risk which resulted in injury” and defendants did not “refute plaintiff’s testimony that he had worked for Casino for only three months and had not been provided with instruction on how to use a safety belt and rope” and also did not present “evidence demonstrating that plaintiff was instructed to measure or shorten the rope”).

**Agresti v. Silverstein Properties, Inc., supra**, 104 A.D.3d 409, 409, 959 N.Y.S.2d 915, 915 (1st Dep’t 2013) (partial summary judgment in favor of plaintiff on his Labor Law § 240(1) claim was proper since an enumerated safety device, namely, the makeshift scaffold, proved inadequate to shied plaintiff from “the harm flow[ing] directly from the application of the force
of gravity”; “the lack of certainty as to exactly what preceded the accident or the fact that plaintiff failed to point to a specific defect in the scaffold does not require denial of the motion”.

Cuentas v. Sephora USA, Inc., 102 A.D.3d 504, 504-505, 958 N.Y.S.2d 352 (1st Dep’t 2013) (where plaintiff’s testimony established “that the ladder he was using was both unsteady as he was ascending it and too short to enable him to reach the window he was cleaning,” defendants could not defend on the ground “that plaintiff was negligent because he was on top of the ladder”; where, as here, “plaintiff has established that no adequate safety device was provided” the case is “distinguishable from those cases in which an adequate ladder was provided and there are issues of fact as to whether the accident occurred solely because of the plaintiff’s loss of balance while using the ladder”).

Carchhipulla v. 6661 Broadway Partners, LLC, 95 A.D.3d 573, 573, 945 N.Y.S.2d 4 (1st Dep’t 2012) (“[p]laintiff established his prima facie entitlement to summary judgment by showing that defendant’s failure to provide an adequate safety device enumerated in Labor Law § 240(1) proximately caused him to fall off a ladder, injuring him [citation omitted]. Plaintiff was not required to present evidence of a specific structural effect in the ladder”).

Vetrano v. J. Kokolakis Constr., Inc., 100 A.D.3d 984, 985-986, 954 N.Y.S.2d 646 (2nd Dep’t 2012) (where plaintiff “fell approximately 12 to 13 feet from a steel beam while working as an ironworker,” and where plaintiff’s proof established that he had worn a safety harness but that there was an approximately 20-foot span [from which he fell] where safety lines were unavailable, plaintiff should have been granted summary judgment; “the injured plaintiff’s unsigned but certified deposition transcript was admissible since, in submitting the transcript in support of his own motion, the plaintiff, in effect, adopted it as accurate … [t]he deposition transcript of Bernard Mulligan, Kokolakis’s superintendent, was also admissible since, although unsigned, it was certified and Kokolakis did not challenge its accuracy in its opposing papers”).

Stallone v. Plaza Constr. Corp., supra, 95 A.D.3d 633, 633-634, 944 N.Y.S.2d 130, 132 (1st Dep’t 2012) (where plaintiff fell “in the course of descending a fixed 14-foot ladder linking upper and lower platforms on a large crane,” when “his foot slipped on a metal rung and he fell 13 feet to the next platform below,” “[p]laintiff was entitled to partial summary judgment since the ladder ‘proved inadequate to shield [plaintiff] from harm directly flowing from the application of the force of gravity to an object or person,’ and his injuries were at least partially attributable to defendants’ failure to take mandated safety measures to protect him from elevation-related risks”).

Rich v. 125 West 31st St. Assoc., LLC, supra, 92 A.D.3d 433, 434, 938 N.Y.S.2d 20, 21-22 (1st Dep’t 2012) (where plaintiff was injured while working at a construction site when one of the four hoists that “had been installed to carry personnel and equipment necessary to erect a 58-story building … began to function erratically … [and] free fell into the sub-basement, coming to rest on the springs on the bottom of the hoist way,” plaintiff was entitled to summary judgment since “[t]he unrefuted evidence establishes that the hoist came to a stop only when it reached the emergency cushion springs located in the sub-basement, an event which does not constitute normal and safe operation of the hoist” and “[t]he hoist mechanism proved
inadequate to shield plaintiff from the harm directly flowing from the application of the force of gravity”; further, it was no defense that “the hoist’s safety mechanism engaged, and prevented plaintiff and his coworkers from suffering more serious injuries”; finally, “neither a lack of certainty as to exactly what preceded the accident nor the fact that plaintiff did not point to a specific defect in the hoist creates an issue of fact”).

D. Elevation Device That Is Struck By Falling Object And Then Falls

_Lizama v. 1801 Univ. Assoc., LLC_, 100 A.D.3d 497, 498, 954 N.Y.S.2d 58, 58-59 (1st Dep’t 2012) (where plaintiff was sanding while standing on an A-frame ladder when “the ladder suddenly shifted, a ‘crack’ was heard and the ladder collapsed, causing him to fall to the floor,” and where the ladder “was the lone piece of safety equipment available to plaintiff” for use in sanding the upper part of the walls, plaintiff’s foreman was not at work on the day of the accident and no definitive instructions were given to plaintiff on how to perform the sanding work,” “plaintiff established his entitlement to judgment as a matter of law on the issue of liability on his claim under Labor Law § 240(1)” inasmuch as “defendants did not show that another safety device was available, but went unused, that plaintiff failed to heed instructions on how to perform his assigned sanding task, or that the cause of plaintiff’s injury was unrelated to the ladder’s shifting and ultimate collapse”).

_Bruce v. Actus Lend Lease_, supra, 101 A.D.3d 1701, 1702, 959 N.Y.S.2d 574 (4th Dep’t 2012) (where plaintiff alleged that a roof truss that he “was securing to a building under construction broke apart, striking him and knocking him off a ladder,” “plaintiff was not injured based on the ‘falling object’ theory of recovery,” especially since it was “undisputed that the truss was rising when it struck plaintiff,” but there was “an issue of fact … with respect to the ‘falling worker’ theory of recovery” inasmuch as there were questions “‘concerning the adequacy of the protection afforded to plaintiff, both in terms of the [safety devices] provided to him and the absence of other safety devices … [, and] whether the conduct of plaintiff was the sole proximate cause of his injuries’”).

_Rzymski v. Metro. Tower Life Ins. Co.,_ 94 A.D.3d 629, 629, 942 N.Y.S.2d 530 (1st Dep’t 2012) (where plaintiff “was installing one end of a steel pipe that weighed approximately 250 pounds, and was 20 feet long and 4 inches wide, into a clevis hanger when the other side of the pipe that had previously been installed, came loose, causing the pipe to strike him in the head and knock him off the ladder on which he was standing,” “the motion court correctly granted plaintiff’s motion for partial summary judgment on his cause of action pursuant to Labor Law § 240(1)” inasmuch as plaintiff “established his entitlement to judgment as a matter of law by demonstrating that his claims encompass both a falling object and a fall from an elevation due to inadequate safety devices”).

_Taylor v. One Bryant Park, LLC_, 94 A.D.3d 415, 415-416, 941 N.Y.S.2d 142, 143 (1st Dep’t 2012) (where plaintiff “was injured when the A-frame ladder he was ascending fell over,” where the incident was apparently caused when a stack of metal studs slid against the ladder and caused it to fall, “plaintiff established a violation of Labor Law § 240(1)”); further that
defendant offered unsigned and unauthenticated reports that said the accident occurred differently was “neither credible, nor admissible”).

**Kim v. State St. Hospitality, LLC**, 94 A.D.3d 708, 709, 941 N.Y.S.2d 269, 271-272 (2nd Dep’t 2012) (“plaintiff made a prima facie showing of entitlement to judgment as a matter of law on the Labor Law § 240(1) cause of action by establishing that he fell from an unsecured ladder on which he was standing when a piece of masonry falling from the wall hit the ladder”).

**Saldivar v. Lawrence Dev. Realty, LLC**, 95 A.D.3d 1101, 1102-1103, 945 N.Y.S.2d 269, 271-272 (2nd Dep’t 2012) (where plaintiff “was standing on a makeshift scaffold consisting of two-inch by six-inch wooden plans running from the step immediately below the highest step of one A-frame ladder to the corresponding step on another A-frame ladder positioned approximately six feet away,” and where a piece of the facade plaintiff was saving swung down, “striking the makeshift scaffold, and causing it to collapse and the injured plaintiff to fall to the ground,” “the Supreme Court properly granted the plaintiffs’ motion for summary judgment on the issue of liability” because “[t]he collapse of the makeshift scaffold when it was struck by the facade establishes that the makeshift scaffold failed to afford the injured plaintiff proper protection for the work being performed, and that this failure was a proximate cause of his injuries”).

**Portillo v. Mark**, 37 Misc.3d 135(A), 2012 N.Y. Slip Op. 52118(U) (App. Term, 1st Dep’t 2012) (“[a]lthough plaintiff demonstrated a prima facie entitlement to summary judgment on his Labor Law § 240(1) claim via evidence tending to show that he was injured when the open, unsecured A-frame ladder on which he was standing fell when it was hit by falling debris,” defendant raised a triable issue by adducing eyewitness testimony that plaintiff leaned “a closed A-frame ladder against a wall and climb[ed] to the ‘very top’ of the ladder ‘in its folded position,”’ in the process ignoring a “coworker’s warning not to stand on top of the folded ladder”).

E. Other Unsafe-As-A-Matter-Of-Law Conditions

**Susko v. 337 Greenwich LLC, supra**, 103 A.D.3d 434, 435, 961 N.Y.S.2d 35 (1st Dep’t 2013) (where it was “unrefuted” that “plywood sheeting was placed over the planks on the scaffold and that, in one area, there were two planks missing beneath the plywood,” where there was “overwhelming evidence, physical as well as testimonial, from both interested and non-interested witnesses, that plaintiff fell from the scaffold,” and where defendant argued that the defect was caused by some contractor’s purportedly unforeseeable “theft” of the missing planks, the defendant’s “characterization of the removal of the plans as a ‘theft’ [was] entirely speculative and, even if true, [did not] convert this foreseeable event into a superceding intervening cause” and “plaintiff established a violation of section 240(1) as a matter of law” “since preventing a worker from falling is a core objective of the statute,” the lone entry, by a physician’s assistant at St. Vincent’s Hospital, quoting plaintiff as “I twisted my ankle coming off the truck,” was, of itself, not sufficient to raise an issue of fact).

**Wade v. Bovis Lend Lease LMB, Inc., supra**, 102 A.D.3d 476, 476, 958 N.Y.S.2d 344 (1st Dep’t 2013) (where plaintiff “was a passenger in a temporary personnel lift … at a construction
site when the lift became stuck,” where he and others “were directed to exit the hoist through an exit in the top,” and where plaintiff was thereupon “struck by a piece of guide rail that … had broken off and fell over 200 feet to where it struck plaintiff,” plaintiff was entitled to summary judgment on his Labor Law § 240 claim inasmuch as “[t]he enumerated safety device, the hoist, failed and was a proximate cause of plaintiff’s injury” and “[in] addition, the guide rail was an object that required securing for the purposes of operating the hoist”).

Wicks v. Leemilt’s Petroleum, Inc., supra, 103 A.D.3d 793, 794-795, 962 N.Y.S.2d 168 (2nd Dep’t 2013) (where “plaintiff’s employer provided him with a van equipped with an extension ladder and an A-frame ladder,” where plaintiff was purportedly injured while “performing work on an elevated fire extinguishing system at a gasoline station” when he leaned the ladder against the pole on which the fire extinguishing system was located and the pole itself collapsed, and where plaintiff conceded that “a scissors lift could have been attached to the van” and that he “did not bring it to the work site because he had received no training in its operation,” “the plaintiff established, prima facie, his entitlement to judgment as a matter of law on the issue of liability on his cause of action alleging a violation of Labor Law § 240(1) by submitting evidence that the defendants failed to ensure the proper placement of the extension ladder and that such failure was a proximate cause of his injuries”).

Tzic v. Kasampas, 93 A.D.3d 438, 439, 940 N.Y.S.2d 218 (1st Dep’t 2012) (where plaintiff “fell 15 feet from an opening in a ‘sidewalk shed,”’ where plaintiff’s expert testified that it was improper to use the fire escape as the anchorage for plaintiff’s harness and “that a proper personal fall system was lacking,” and where “the owners did not come forward with evidence contesting plaintiff’s expert’s assertion,” the failure to provide “an adequate safety device” was a § 240 violation and the “testimony that certain other safety devices were provided is irrelevant”).

Henningham v. Highbridge Community Housing Development Fund Corporation, supra, 91 A.D.3d 521, 521-522, 938 N.Y.S.2d 1 (1st Dep’t 2012) (where plaintiff and his co-workers “were dropping construction debris, such as broken cinder blocks, from the roof of a six- or seven-story building into a hard plastic chute in front of the building,” where plaintiff unclogged the chute by poking the debris, and where “plaintiff was struck on the back of the head by a cinder block” “[s]hortly after telling his co-workers that the chute was clear,” even accepting the co-worker’s affidavit claim “that plaintiff had placed his head and upper body inside the chute,” plaintiff was nonetheless entitled to summary judgment; “[i]f the debris chute had been functioning properly, it would not have become clogged, plaintiff would not have been sent to unclog it, and he would not have been injured”).

F. Material Issues Of Fact Precluding Summary Judgment

Rodriguez v. DRLD Development Corp., supra, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2013 WL 3984594 (1st Dep’t 2013) (where plaintiff “was assigned to tape and polish installed sheetrock walls on the first floor of a construction project” and “tripped on a metal cable, dislodging a pile of sheetrock boards, which stood approximately eight feet high and were leaning against a wall” and where she “attempted to stop boards from falling with her hands and head, but she could not support their weight, and suffered injuries,” Labor Law § 240 applied but “plaintiff
was not entitled to summary judgment on her § 240(1) claim” since “it cannot be determined, on the extant record, whether plaintiff’s injuries were proximately caused by the lack of a safety device of the kind required by Labor Law § 240(1”).

Bellreng v. Sicoli & Massaro, Inc., 108 A.D.3d 1027, ___ N.Y.S.2d ___ (4th Dep’t 2013) (where plaintiff “unhooked his safety harness from the steel lifeline that had been placed on the roof” and then “fell through the deteriorated gypsum roofing deck onto a scaffold that had been erected inside the building to prevent debris from falling into the pool,” and where plaintiff said that he disconnected because “he was moving to a new work area, and he could not reach that new work area while connected to the lifeline,” there were nonetheless “triable issues of fact whether he had a good reason for disconnecting from the lifeline or whether his own actions in disconnecting from the lifeline were the sole proximate cause of his fall” inasmuch as there was “abundant evidence in the record demonstrating that he was not permitted to stand on the roof deck” and proof “that raised material issues of fact whether he was instructed to remain secured to a lifeline at all times”; however, defendants “did not meet their initial burdens with respect to the section 240(1) cause of action because they failed to establish that plaintiff’s actions were the sole proximate cause of the accident, i.e., that he knew or should have known that he was expected to use either multiple retractable lanyards or a safety rope in order to reach all areas of the roof”).

Marquez v. 171 Tenants Corp., 106 A.D.3d 422, 423, 963 N.Y.S.2d 868, 868-869 (1st Dep’t 2013) (where plaintiff said that a ladder slipped out from him but “the affidavit of Kleinberg-Levin, who hired plaintiff’s employer and was in his apartment at the time of the accident, state[d] that no ladders were being used on the project on the date of the alleged accident,” there were issues of fact “concerning whether plaintiff’s accident occurred as alleged,” particularly since “defendant submitted medical reports wherein plaintiff was quoted as providing a different description of the accident from that alleged”).

Kunz v. WNYG Housing Development Fund Company Inc., 104 A.D.3d 1337, 1338, 961 N.Y.S.2d 704, 705 (4th Dep’t 2013) (by 4 to 1 vote: where plaintiff “was attempting to attach an outrigger to the scaffold,” and where “[a]s he reached over the side of the scaffold to attach the outrigger, plaintiff fell from the scaffold and landed on the ground some 30 feet below,” “[t]o establish a violation of Labor Law § 240(1), a plaintiff must show not only that he fell at a construction site, but also that he or she did so because of the absence or inadequacy of a safety device” and, because “the scaffold itself and the safety railing and cross braces on it constitute[d] safety devices,” there was “an issue of fact whether the safety devices provided by defendants afforded him proper protection, or whether additional devices were necessary”).

Esteves-Rivas v. W2001Z/15CPW Realty, LLC, supra, 104 A.D.3d 802, 803, 961 N.Y.S.2d 497, 499 (2nd Dep’t 2013) (where “plaintiff testified that he did not feel the ladder shaking or hear any noise from it before he fell, and that the ladder moved only after he had already started falling” he was not entitled to summary judgment inasmuch as “a plaintiff cannot prevail by relying, as the plaintiff does here, solely on the fact that he fell from the ladder”).

Corchado v. 5030 Broadway Props., LLC, supra, 103 A.D.3d 768, 768-769, 962 N.Y.S.2d 185 (2nd Dep’t 2013) (without stating any of the facts that were alleged to provide a defense: where
“plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1) by submitting evidence which demonstrated that he fell from the ladder when it ‘kicked out’ from underneath him, and that the failure to provide him with an adequate safety device proximately caused his injuries,” but where defendants “raised a triable issue of fact as to the manner in which the accident occurred” and “whether the plaintiff’s own actions were the sole proximate cause of the accident,” “Supreme Court properly denied the plaintiff’s motion for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1”).

**Wahab v. Agris & Brenner, LLC**, 102 A.D.3d 672, 673-674, 958 N.Y.S.2d 401 (2nd Dep’t 2013) (where a metal plank of the scaffolding on which plaintiff was standing collapsed, but where plaintiff’s own proof “raised a question of fact as to whether the plaintiff, who possessed a scaffolding license issued by the New York City Department of Buildings, knew before climbing up the scaffold that other workers had begun untying the ropes which secured the planks of the scaffold, yet failed to check whether the planks of the scaffold were secured before climbing up and putting his weight on them,” plaintiff “failed to demonstrate, prima facie, that his failure was not the sole proximate cause of his injuries” and Supreme Court was correct in denying all of the motions and cross-motions for summary judgment as to plaintiff’s 240 claim).

**Rosier v. Stoeckeler**, 101 A.D.3d 1310, 1311-1312, 957 N.Y.S.2d 742 (1st Dep’t 2012) (where plaintiff “submitted an affidavit indicating that his fall occurred when the ladder ‘shifted and began tipping,’” where “defendant countered by producing deposition testimony of Rosier [the plaintiff] in which he testified that he simply lost his balance and that he did not know what caused him to lose his balance,” and where there was “conflicting proof in the record as to whether Rosier fell on the floor of the garage or into the garage pit, and it is not clear from his deposition the role, if any, his handling of a door section had in his fall,” “we agree with Supreme Court that factual issues for trial exist on the Labor Law § 240 cause of action”).

**Noble v. 260-261 Madison Ave., LLC**, 100 A.D.3d 543, 544, 954 N.Y.S.2d 518, 519 (1st Dep’t 2012) (“triable issues exist as to whether, inter alia: (1) the six-foot tall plaintiff was able to stand on the sixth or seventh rung of the 10-step ladder (as he claimed) and still have the necessary headroom to accomplish his work; (2) whether plaintiff actually stood lower down on the ladder in view of the apparent ceiling height constraints, such as might allow him ready hand access to the ladder for support; and (3) whether the admittedly stable ladder required another worker to hold it secure if plaintiff was working from a lower position than claimed, particularly considering that plaintiff admitted he only fell after the ceiling conduit pipe, onto which he purportedly held for support, broke free, resulting his fall” and “triable issues exist whether plaintiff actually stood high enough on the ladder as would warrant securing the ladder beneath him and, further, assuming arguendo, the ladder was so secured, whether it would have prevented his fall once the conduit pipe broke free form its ceiling support system”).

**Nunez v. City of New York**, 100 A.D.3d 724, 724-725, 954 N.Y.S.2d 153, 164-165 (2nd Dep’t 2012) (where plaintiff “testified that the 10-foot A-frame ladder from which he fell was in an open and locked position at the time of the accident, … that it was positioned on an uneven
floor composed of broken concrete and sand or dirt,” and that he “was leaning forward to apply a plastic covering to the wall when the ladder suddenly moved and fell forward with the ladder to the floor,” but where plaintiff “admitted that he himself had placed the ladder, and that he had no problems using it prior to the accident” and where “an incident report and unsworn statements” submitted by plaintiff indicated that “the ladder was in a closed position propped up against the wall,” “plaintiff failed to eliminate triable issues of fact as to whether the ladder provided proper protection, and whether the ladder’s failure to provide proper protection was a proximate cause of the injuries”).

Fabrizi v. 1095 Ave. of the Americas, L.L.C., supra, 98 A.D.3d 864, 864-865, 951 N.Y.S.2d 480 (1st Dep’t 2012) (by 3 to 2 vote: where plaintiff was struck by a falling pipe, and where pipe had been “attached to another piece of pipe by a compression coupling at the ceiling,” the case fell within Labor Law § 240 but there was “an issue of fact as to whether defendants failed to provide a protective device” or whether, as defendants claimed, “in light of the Kindorf support system and compression coupling that attached the conduit to the ceiling, no protective devices were called for”).

Ventimiglia v. Thatch, Ripley & Co., LLC, supra, 96 A.D.3d 1043, 1045-1046, 947 N.Y.S.2d 566 (2nd Dep’t 2012) (where “a trench approximately 10 feet wide and 8 feet deep [allegedly] surrounded the work site,” where several planks that had been placed across the trench purportedly “served as the only way into and out of the site,” and where the planks allegedly “opened up” as plaintiff walked across, “causing him to fall into the trench,” defendants were not entitled to dismissal of the plaintiff’s § 240 claim but neither was plaintiff entitled to summary judgment inasmuch as “defendants raised a triable issue of fact as to whether the trench described by the plaintiff and his coworker actually existed, and whether an accident occurred in the manner alleged by the plaintiff”).

Robinson v. Goldman Sachs Headquarters, LLC, 95 A.D.3d 1096, 1097-1098, 944 N.Y.S.2d 630 (2nd Dep’t 2012) (where plaintiff claimed that the A-frame ladder “kicked out” but “defendants offered an accident report indicating that Robinson had previously stated, within two days after the accident, that he lost his footing or balance and fell off the ladder,” “defendants raised a triable issue of fact as to whether the foot of the ladder simply kicked out and the ladder fell over, as Robinson testified, or whether Robinson’s own carelessness or the manner in which he used the ladder was the sole proximate cause of his fall”).

D’Antonio v. Manhattan Contr. Corp., 93 A.D.3d 443, 444, 939 N.Y.S.2d 433 (1st Dep’t 2012) (where plaintiff was “standing on the third rung of a closed A-frame ladder that was propped up against a wall when he was struck on the head by a conduit pipe that housed wires which

74 The dissenter would have ruled, (1) that “plaintiff’s injuries were the direct consequence of his action in disengaging and removing the devices that secured the conduit pipe in place, to wit, the metal strap or clamp that secured the pipe to the Kindorf support and the pencil box upon which the conduit pipe was also attached,” and, (2) that the case did not fall within Labor Law § 240 due to its marked similarity to Narducci v. Manhasset Bay Assoc., 96 N.Y.S.2d 359 (2001).

The majority deemed the analogy to Narducci “inapt” and the dictum on which the dissent relied dated.

84
partially detached from the wall and swung downward,” summary judgment “was properly denied as there are triable issues of fact which exist regarding whether the conduit pipe constituted a falling object within the meaning of Labor Law § 240(1) and whether the events leading to plaintiff’s injury were due to the absence or inadequacy of a safety device of the type enumerated in the statute [not explained]” and where there was “conflicting evidence as to whether he deliberately jumped, was knocked off by the pipe, or lose his footing when the ladder allegedly ‘shook,’ precluding a determination, as a matter of law, that the ladder constituted an inadequate safety device”).

Rodriguez v. Tribeca 105 LLC, 93 A.D.3d 655, 657, 939 N.Y.S.2d 546 (2nd Dep’t 2012) (without providing any factual detail: where plaintiff Manuel Rodriguez allegedly fell from a ladder, where “[t]he deposition testimony of Manuel’s coworker as to how the accident occurred, which was inconsistent Manuel’s deposition testimony describing how the accident occurred, would support a finding that Manuel’s alleged negligence was the sole proximate cause of his injuries,” plaintiff’s motion for summary judgment should have been denied).

Silva v. FC Beekman Assoc., LLC, 92 A.D.3d 754, 755, 938 N.Y.S.2d 583 (2nd Dep’t 2012) (by 3 to 1 vote: while “plaintiff made a prima facie showing of entitlement to judgment as a matter of law based on his testimony that he fell approximately 14 feet from an elevated scaffold, which was positioned two feet from a wall and was not equipped with railings or surrounded with netting, and that he was not provided with a personal safety device, such as a harness or lifeline,” defendant “raised triable issues of fact” with an affidavit to the effect “that the scaffold was equipped with railings on at least two sides”).

Pitre v. City of New York, 92 A.D.3d 661, 662, 938 N.Y.S.2d 170, 171 (2nd Dep’t 2012) (where jury returned a defense verdict, “the jury could have rationally concluded that a ladder the injured plaintiff was using for the work was adequate and did not slip or that any inadequacy in the ladder was not the proximate cause of the injury” and “Supreme Court properly denied the plaintiffs’ motion pursuant to CPLR 4401 for judgment as a matter of law on the issue of liability on their Labor Law § 240(1) cause of action”).

Decarlo v. Clyde Bergemann US, Inc., 91 A.D.3d 1290, 1290, 937 N.Y.S.2d 646, 647 (4th Dep’t 2012) (where “plaintiff submitted evidence in support of his motion establishing that the ladder was allegedly defective in several respects” but “failed to establish that any of those defects caused him to fall,” “Supreme Court properly denied plaintiff’s motion for partial summary judgment on liability with respect to the Labor Law § 240(1) claim”).

Ellerbe v. Port Auth. of New York and New Jersey, 91 A.D.3d 441, 441-442, 936 N.Y.S.2d 39, 40 (1st Dep’t 2012) (where plaintiff claimed that the ladder “had ‘reared back’ when he attempted to dismount,” but where defendant’s site safety manager “testified that plaintiff told him, immediately after the fall and while plaintiff was still on the ground, that he fell because he ‘lost his footing,’” and where the latter version “was memorialized in a Bovis incident report,” “Supreme Court correctly denied plaintiff’s motion for partial summary judgment” inasmuch as “questions of fact exist making summary judgment inappropriate”).
Fanelli v. J.C. Millbank Constr. Co., Inc., 91 A.D.3d 703, 705, 937 N.Y.S.2d 114, 116-117 (2nd Dep’t 2012) (where plaintiff alleged that construction debris on the floor caused his ladder to wobble and thus caused him to fall, “[t]here were triable issues of fact as to whether those … alleged violations of Labor Law § 240(1) and § 241(6) proximately caused the plaintiff’s injuries”).

Kropp v. Town of Shandaken, 91 A.D.3d 1087, 1088-1090, 937 N.Y.S.2d 345, 350-351 (3rd Dep’t 2012) (where “plaintiff was working at the bottom of a trench that was between four and eight feet deep, connecting lengths of pipe that were being lowered into the trench by an excavator operated by plaintiff’s supervisor,” where “plaintiff was struck by an iron pipe measuring 18 inches in diameter and 18 feet long and … fittings had been attached to one end of the pipe to permit it to be connected with a narrower pipe, resulting in a total weight of approximately 1,500 pounds,” and where the parties agreed “that the pipe dropped as it was being moved [but] … disagree[d] as to how far it dropped, why this occurred, and whether the hoisting equipment was adequate to meet the requirements of the task and Labor Law § 240(1),” neither side should have been granted summary judgment; while the statute would be implicated “even if, as defendant contends, [the pipe] did not fall until near the end of its descent and dropped only one foot before it struck plaintiff” inasmuch as “such an elevation differential ‘cannot be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating,” “the conflicting expert opinions as to the adequacy of the hoisting equipment and the divergent testimony as to whether safety clips were present on the hooks, and whether the accident occurred because these hooks came loose, because the pipe slipped in its slings or because plaintiff altered its balance by pushing on it, pose issues of fact as to whether the absence or inadequacy of a safety device proximately caused plaintiff’s injuries”).

Cardona v. Pfizer, Inc., 38 Misc.3d 1218(A), 2013 N.Y. Slip Op. 50139(U) (Sup. Ct. Kings Co. 2013) (Saitta, J.) (where plaintiff fell from a 22-foot ladder, “Defendants cannot be held to have violated section 240(1) by failing to have someone hold the ladder” where it was undisputed that plaintiff sent the worker who had been holding the ladder away, but there was a triable issue as to whether plaintiff “was provided with a lanyard of sufficient length to enable him to tie off” precluding “granting summary judgment to either Plaintiff or Defendant as to the 240(1) claim”).

G. Immaterial Factual Issues That Did Not Prevent Grant Of Summary Judgment

Fanning v. Rockefeller University, supra, 106 A.D.3d 484, 485, 964 N.Y.S.2d 525, 526 (1st Dep’t 2013) (where unsecured ladder “suddenly moved,” defendants “failed to raise a triable issue of fact by presenting conflicting evidence with regard to whether the A-frame ladder was 6 or 10 feet and whether it was made of wood or fiberglass, since the statute was violated under either description”).

Marrero v. 2075 Holding Co. LLC, supra. 106 A.D.3d 408, 409-410, 964 N.Y.S.2d 144, 146 (1st Dep’t 2013) (where plaintiff testified that “he was walking across plywood planks covering fresh concrete” when “[t]he plywood planks buckled and shifted,” and where that caused “an A-
frame cart containing sheetrock and two 500-pound steel beams” to tip over and land on plaintiff’s left calf and ankle, the “speculations and inconsistent statements” of the foreman “who observed the scene shortly after the accident, but did not witness it” were insufficient to raise a triable issue, especially since “the foreman’s affidavit does not sufficiently challenge the conclusion that the steel beams were not properly secured”; “that the foreman’s affidavit contradicted plaintiff’s testimony about what type of work he was doing at the time of the accident” was of itself insufficient to raise a triable issue inasmuch as defendant’s liability was “unaffected by whether plaintiff was looking for a plank, or cleaning the site, before the steel beams fell on his leg”).

Alonzo v. Safe Harbors of the Hudson Housing Development Fund Company, Inc., supra, 104 A.D.3d 446, 447, 450, 961 N.Y.S.2d 91, 93, 95 (1st Dep’t 2013) (where the accident occurred when plaintiff “stepped on an eight-by-four-foot section of 3/4-inch-thick plywood, which unexpectedly ‘flipped up,’” thus uncovering an opening through which the plaintiff fell, “10 or 12 feet to the story below,” the “testimony that the cover was fastened by nails a short while before the accident is irrelevant” and did not create a triable issue of fact “because liability under § 240(1) is not dependent on a finding that the owner or general contractor had notice of the violation”).

Lipari v. At Spring, LLC, 92 A.D.3d 502, 503-504, 938 N.Y.S.2d 303 (1st Dep’t 2012) (even though there were three different versions of the subject accident, plaintiff was nonetheless entitled to summary judgment since “[a] Labor Law § 240(1) violation proximately caused the accident whether plaintiff’s fall was caused by an unsecured A-frame ladder that slipped [citations omitted] or an unsecured Masonite-covered office ceiling, used as an elevated work platform, that shifted [citations omitted], or whether it happened because plaintiff lost his balance when the unsecured Masonite gave way when he leaned on it as he climbed the unsecured ladder [citations omitted]”).

Phillip v. 525 E. 80th St. Condominium, supra, 93 A.D.3d 578, 578-579, 940 N.Y.S.2d 631, 632 (1st Dep’t 2012) (where plaintiff “was working at defendant’s building constructing a sidewalk bridge when he fell from atop a load of scaffolding material on a flatbed truck,” where plaintiff “was standing on top of the scaffolding material, about nine feet above the platform, handing the material to his coworkers who were on top of the sidewalk bridge,” where it was “uncontroverted that although plaintiff was provided with a safety harness, there was no location on the truck where the harness could be secured,” and where “such manner of work was the only way to unload the materials,” “plaintiff’s inability to recall how he fell is irrelevant, since the evidence establishes that plaintiff fell off the truck and it is undisputed that no safety devices were provided”).

Augustyn v. City of New York, supra, 95 A.D.3d 683, 684-685, 716 N.Y.S.2d 314 (1st Dep’t 2012) (where plaintiff “fell from a sidewalk bridge while engaging in lead paint removal work,” even though “plaintiff could not remember how he fell,” he submitted evidence showing that the could have fallen when the sidewalk bridge partially collapsed under him, through an existing hole, or through a gap between the facade of the building and the bridge. Under any of the proffered theories, plaintiff showed that the absence of protective devices proximately caused his injuries”).
Nascimento v. Bridgehampton Constr. Corp., supra, 86 A.D.3d 189, 191, 924 N.Y.S.2d 353, 355 (1st Dep’t 2011) (where there was a dispute as to “whether plaintiff’s fall was caused by an unsecured extension ladder that slipped or malfunctioned” or whether “it happened because he was required to work on rafters without safety devices protecting him from a fall through the open space to the basement area below,” plaintiff was nonetheless entitled to summary judgment since “the difference between the witnesses’ factual recitations does not create a material issue of fact as to whether Labor Law § 240(1) was violated”).

Krejbich v. Schimenti Constr. Co., Inc., 94 A.D.3d 668, 668, 942 N.Y.S.2d 538 (1st Dep’t 2012) (where “[p]laintiff testified that while he was installing wooden siding to a shed, the A-frame ladder he was standing upon tipped over, causing him to fall to the ground and sustain injury,” and where that “version of events was corroborated by his coworker,” the “conflicting accounts as to the positioning of the ladder after the accident and the color of the ladder that plaintiff was using do not create an issue of fact as to proximate cause” and plaintiff was correctly awarded summary judgment).

Britez v. Madison Park Owner, LLC, 36 Misc.3d 1233(A), 2012 N.Y. Slip Op. 51586(U) (Sup. Ct. New York Co. 2012) (Hagler, J.) (where the wooden platform of the pre-assembled baker’s scaffold moved, causing plaintiff to fall, “although defendants point out that plaintiff initially testified that he fell against the wall, but later changed his mind … these minor inconsistencies do not warrant denial of plaintiff’s motion”).

H. Motion Claimed To Have Been Premature

Norero v. 99-105 Third Ave. Realty, LLC, supra, 96 A.D.3d 727, 728, 945 N.Y.S.2d 720 (2nd Dep’t 2012) (where plaintiff’s proof established that “while working on the fifth floor of the building, he partially fell into an unprotected opening in the floor that was large enough for his body to have passed through,” “that he was not provided with proper protection under Labor Law § 240(1), that the failure to provide such protection also violated a specific and applicable provision of the Industrial Code (see 12 NYCRR 23-1.7[b][1][i]), and that this failure was the proximate cause of his alleged injuries,” defendants failed to show that plaintiff’s motion was premature “as they failed to demonstrate how discovery may reveal or lead to relevant evidence or that ‘facts essential to opposing the motion were exclusively within’ another party’s ‘knowledge and control’”).

Grant v. Steve Mark, Inc., 96 A.D.3d 614, 614, 947 N.Y.S.2d 97 (1st Dep’t 2012) (where plaintiff claimed that the A-frame ladder that she was using during the course of a “gut renovation” tipped over and thus caused her to fall, plaintiff was not entitled to summary judgment inasmuch as “[t]he manner of the happening of the accident [was] within the exclusive knowledge of plaintiff, and the only evidence submitted in support of defendants’ liability [was] plaintiff’s account”; “Defendants should have the opportunity to subject plaintiff’s testimony to cross-examination to explore whether she misused the ladder and was the sole proximate cause of the accident, and to have her credibility determined by a trier of fact”).
I. Plaintiffs’ Motion For Summary Judgment In Cases Involving Unwitnessed Or Witnessed-Only-By-Plaintiff Accidents

*De Oleo v. Charis Christian Ministries, Inc., supra,* 106 A.D.3d 521, 521-522, 966 N.Y.S.2d 375, 376 (1st Dep’t 2013) (the “plaintiff laborer’s lone witness account, given at his deposition, regarding how he fell from the roof of a church owned and/or occupied by defendants while painting a protective sealant on the roof, was consistent and sufficient to establish his prima facie entitlement to partial summary judgment on his § 240(1) claim”; “[d]efendant’s counsel’s unsubstantiated opinion that it would be ‘practically impossible’ for one to fall from the roof, since parapets and/or walls (shown in two photographs) would have stopped the fall, is wholly lacking in probative value” inasmuch as “[t]he two photographs were not authenticated, they depicted only small sections of the roof, there were portions of the roof’s edge that lacked a protective barrier, and no testimony was elicited from plaintiff as to the location on the roof he had fallen from”).

*Ross v. 1510 Associates LLC,* 106 A.D.3d 471, 964 N.Y.S.2d 514, 515 (1st Dep’t 2013) (where plaintiff “testified that he was injured when the A-frame ladder he was standing on tipped over after it shifted because of the unevenness of the floor,” defendants argued “that plaintiff was not entitled to summary judgment because the only evidence as to their liability is his testimony, and they should have the opportunity to cross-examine him and have his credibility determined by a factfinder,” “plaintiff’s testimony was not the only evidence; plaintiff submitted an affidavit by a witness who was present immediately after the accident and observed the uneven condition of the floor in the area in which plaintiff had been working”).

*Marrero v. 2075 Holding Co. LLC, supra,* 106 A.D.3d 408, 409-410, 964 N.Y.S.2d 144, 146 (1st Dep’t 2013) (“we do not agree that [plaintiff’s prior] criminal conviction by itself can raise an issue of fact of credibility when the plaintiff is the sole witness to an accident. As such, defendants fail to present any evidence raising a triable issue of fact relating to the prima facie case or to plaintiff’s credibility”).

*Melchor v. Singh,* 90 A.D.3d 866, 869, 935 N.Y.S.2d 106, 110 (2nd Dep’t 2011) (where “plaintiff testified that … the bottom of the ladder slid back, away from the house and the top of the ladder slid down the side of the house,” and where plaintiff also testified “that the plastic at the top of the ladder ‘wasn’t any good anymore’ and that the feet of the ladder were old and ‘weren’t any good,’” “[t]he fact that the plaintiff may have been the sole witness to the accident does not preclude an award of summary judgment in his favor”).

*Campos v. 68 East 86th Street Owners Corp.,* 40 Misc.3d 1214(A), 2013 N.Y. Slip Op. 51186(U) (Sup. Ct. N.Y. Co. 2013) (Scarpulla, J.) (where plaintiff said that the ladder on which he was standing “suddenly went forward and outward” and that “he did not simply lose his balance and fall off of the ladder,” “[o]nce a plaintiff makes a prima facie showing that the ladder he was using collapsed, there is a presumption that the ladder was an inadequate safety device”; “[t]he fact that the ladder appeared to be in working order prior to the accident is
not sufficient evidence to show that the ladder was free from defects or that plaintiff caused his own accident” and plaintiff was therefore entitled to summary judgment).

J. Defendants’ Motions For Summary Judgment

**Hugo v. Sarantakos**, 108 A.D.3d 744, ___ N.Y.S.2d ___ (2nd Dep’t 2013) (where the plaintiff-contractor fell from the second-highest rung of his own, 24-foot extension ladder, and where “the ladder did not move or slip, and it remained in an upright position after the plaintiff fell off of it,” defendant was entitled to summary judgment inasmuch as “[w]here a plaintiff falls off the ladder because he or she lost his or her balance, and there is no evidence that the ladder from which the plaintiff fell was defective or inadequate, liability pursuant to Labor Law § 240(1) does not attach”).

**Flossos v. Waterside Redevelopment Company, L.P., supra**, 108 A.D.3d 647, ___ N.Y.S.2d ___ (2nd Dep’t 2013) (where the plaintiff-painter “leaned a closed 4-foot A-frame ladder against a closet door” and “did not lock the horizontal bars of the ladder,” and where “[a] piece of ceiling fell down on the plaintiff, propelling him and the ladder to the floor,” defendants were entitled to summary judgment inasmuch as defendants “met their prima facie burden of establishing the absence of a statutory breach, since the plaintiff did not fall as a result of inadequate protection and the object did not fall on the plaintiff due to ‘the absence or inadequacy of a safety device of the kind enumerated in the statute’” and plaintiff “admitted at his deposition that the ladder was appropriate for the job, that he inspected it, and that it was in good working order”).

**Santos v. ACA Waste Services, Inc., supra**, 103 A.D.3d 788, 789, 959 N.Y.S.2d 729, 730-731 (2nd Dep’t 2013) (where defendant moved for summary judgment on the ground that he had been told by a person who may or may not have been a witness that the accident happened differently than claimed by plaintiff, defendant was not entitled to summary judgment and “we need not address the sufficiency of the opposition papers”).

**Gaspar v. Pace Univ.,** 101 A.D.3d 1073, 1073-1074, 957 N.Y.S.2d 393, 394-395 (2nd Dep’t 2012) (defendants were entitled to summary judgment where they “demonstrated that the ladder from which the injured plaintiff fell was not defective or inadequate,” that “the ladder did not otherwise fail to provide protection,” and that “the injured plaintiff fell because he lost his balance”).

**Steinsvaag v. City of New York,** 96 A.D.3d 932, 933, 947 N.Y.S.2d 536 (2nd Dep’t 2012) (where plaintiff “was assisting a coworker in carrying door bucks off a truck and into a construction site,” where “the door buck that the plaintiff and his coworker were carrying struck the plaintiff in his right shoulder,” and where plaintiff attributed “the accident to his coworker having lost his grip on the door buck after slipping on the ramp,” “defendants met their burden of establishing their prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff could not establish that his coworker lost his grip on the door buck because he slipped on a wet ramp without relying on speculative or inadmissible hearsay evidence” and “[t]he affidavit submitted by the plaintiff in opposition to the defendants’ motion, which
contradicted his earlier deposition testimony, raised only a feigned issue of fact”). See also Section V of this outline, discussing the “Sole Proximate Cause” and “Recalcitrant Worker” Defenses.

K. Miscellaneous

Griffin v. Clinton Green South, LLC, supra, 98 A.D.3d 41, 46-47, 948 N.Y.S.2d 8 (1st Dep’t 2012) (trial court was statutorily precluded from directing a verdict in plaintiff’s favor until the close of the defendant’s proof since CPLR § 4401 “authorizes the grant of a motion for a directed verdict only if the opponent of the motion has presented evidence and closes his/her case”).
V. LABOR LAW § 240 DEFENSES

A. The “Sole Proximate Cause” Defense

1. Historical Perspective: The Emergence, Expansion, and Apparent Limitation of the Sole Proximate Cause Defense

Before one can fully appreciate where we now stand with respect to the “sole proximate cause” defense, one must first appreciate that the proverbial pendulum has swung pretty far in both directions in terms of the Court of Appeals’ rulings … and that none of those rulings, from 1978 until now, was ever expressly overruled.

In the first era, which ran from 1978 (Haimes) until the oft-cited 2003 decision in Blake (discussed below), virtually nothing the plaintiff did or failed to do, no matter how negligent or plain stupid, would bar recovery under Labor Law § 240 absent an outright refusal to comply with safety directives. The key Court of Appeals’ decisions were:

*Haimes v. New York Tel. Co.*, 46 N.Y.2d 132, 134, 138, 412 N.Y.S.2d 863 (1978) (even though “[t]he exact time of performance and the other details of the work were left entirely to Haimes [decedent], who also supplied all equipment, including the ladder used on the job,” where decedent was thus to blame for the fact that “the ladder was not being secured against slippage by any mechanical or other means whatsoever,” and where defendant urged that it should not be made an “insurer,” but the Court ruled that “the Legislature apparently decided, as it was within its province to do, that over-all compliance with safety standards would be achieved by placing primary and inescapable responsibility on owners and general contractors rather than on their subcontractors who, often occupying an inferior economic position, may more readily shortcut on safety unless those with superior interests compel them to protect themselves”)

*Hagins v. State of New York*, 81 N.Y.2d 921, 922-923, 597 N.Y.S.2d 651 (1993) (“[t]he State’s allegations that claimant had repeatedly been told not to walk across the abutment are not alone sufficient to create a triable issue of fact under the ‘recalcitrant worker’ doctrine … since that defense is limited to cases in which a worker has been injured as a result of a refusal to use available safety devices provided by the employer or owner”)

*Stolt v. Gen. Foods Corp.*, 81 N.Y.2d 918, 921, 597 N.Y.S.2d 650 (1993) (where the subject ladder “had been broken about a week earlier, and plaintiff had been instructed not to climb it unless someone else was there to secure it for him,” “[t]he mere allegation that plaintiff had disobeyed his supervisor’s instructions when he climbed the broken ladder does not provide a basis for a defense against plaintiff’s Labor Law § 240(1) cause of action”)

*Gordon v. E. Ry. Supply, Inc.*, 82 N.Y.2d 555, 606 N.Y.S.2d 127 (1993) (where defendants’ defense “rest[ed] on their contention that plaintiff was repeatedly instructed to use a scaffold, not a ladder, when sandblasting railroad cars,” but the
Court ruled that “an instruction by an employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not a ‘safety device’ in the sense that plaintiff’s failure to comply with the instruction is equivalent to refusing to use available, safe and appropriate equipment”

*Klein v. City of New York, supra*, 89 N.Y.2d 833, 835, 652 N.Y.S.2d 723 (1996) (where plaintiff was injured while standing on a perfectly fine ladder … because it had been set up and placed improperly … by plaintiff himself, and the Court ruled that “[p]laintiff has established a prima facie case that defendant violated Labor Law § 240(1) by failing to ensure the proper placement of the ladder due to the condition of the floor”)

*Jastrzebski v. North Shore District*, 223 A.D.2d 677, 680, 637 N.Y.S.2d 439 (2nd Dep’t 1996), aff’d on opinion below, 88 N.Y.2d 946, 647 N.Y.S.2d 708 (1996) (where, finally, the defense was deemed viable because the “case involve[d] more than instruction to avoid using unsafe equipment or to avoid engaging in unsafe practices; rather, the plaintiff here refused to use the available, safe, and appropriate equipment”)

In the second era, from the 2003 ruling in *Blake* throughout the rest of that decade, the Court was much more prone to find that plaintiff’s conduct was or could be found by the jury to completely bar recovery under Labor Law § 240. The lead cases of that era were:

*Blake v. Neighborhood Housing Serv. of New York City, Inc.*, 1 N.Y.3d 280, 290-292, 771 N.Y.S.2d 484 (2003) (where the plaintiff-contractor ostensibly failed to lock the clips of his extension ladder, and thus be deemed the “sole proximate cause” of the accident; discussed at length in section V.A.3 of this outline)

*Cahill v. Triborough Bridge and Tunnel Auth.*, 4 N.Y.3d 35, 36, 790 N.Y.S.2d 74 (2004) (the “recalcitrant” worker who was told to use a safety line and “chose to disregard those instructions,” and whose recovery was thus barred)


*Robinson v. East Medical Ctr., LP, supra*, 6 N.Y.3d 550, 553-555, 814 N.Y.S.2d 589 (2006 (the plaintiff who used a 6-foot-ladder knowing that it was too short and that a taller one was “available”)

With the Court’s 2010 ruling in *Gallagher v. The New York Post*, 14 N.Y.3d 83, 896 N.Y.S.2d 732 (2010, the pendulum shifted again, with a new standard that made it more difficult for the defendant to establish a “sole proximate cause” defense, especially in those instances in which the plaintiff-worker’s alleged sin was failure to use a purportedly available safety device.

Yet, for all of these apparent changes of direction, none of the above-cited decisions was ever overruled. At one extreme, *Stolt*, where the plaintiff-worker was deemed entitled to recovery even though the ladder was broken and he had been flat-out told not to use it, has never been overruled. On the other hand, *Robinson*, where the subject ladder was merely too short for
the job and the plaintiff had not been told not to use it, but was nonetheless barred for doing so, has also never been overruled. You see the difficulty?

At any rate, I think that it is useful, for purposes of analysis, to divide the “sole proximate defense” into two possible fact patterns. One fact pattern is the case in which the plaintiff is blamed for the failure to use a purportedly available safety device, or, alternatively, a purportedly available elevation device that was better or safer than the device plaintiff used. This is the fact pattern now governed by *Gallagher*. The second fact pattern is, quite simply, anything and everything else for which the plaintiff can be blamed.

I’ll start with the *Gallagher* fact pattern.

2. Plaintiff’s (Or Decedent’s) Allegedly Negligent Failure To Use A Purportedly Available Safety Or Elevation Device


Plaintiff, an ironworker, fell through an uncovered opening when the blade of a powered saw jammed and he was pushed forward. The asserted defense was that harnesses were purportedly available at the job site and there was purportedly a “standing order” to wear them. But was that enough to enable a jury to conclude that plaintiff was the “sole proximate cause” of his accident?

The Appellate Division split 3 to 2. The majority, per opinion by Justice McGuire, ruled that a factual issue had been presented:

…if adequate safety devices are made available to the worker, but the worker does not use, or misuses, them, there is no liability.

*   *   *

In this matter, we are compelled to disagree with the dissent's conclusion that “there is simply no evidence of record that the plaintiff chose not to use an available safety device.” Jonathan Schreck, plaintiff's employer's assistant project manager, testified at a deposition conducted on January 31, 2006, that: he had weekly meetings with the safety specialist hired to oversee the construction project in question; the ironworkers were required to use certain safety devices, such as lanyards, cables or harnesses, when working near open areas; the devices were used to prevent injury in case a worker fell through an opening or off an elevated surface; the safety devices were available on the job site the day plaintiff was injured; and a standing order was in place that all workers operating around any opening in the floor were to be in a harness and tied off.
55 A.D.3d at 490, 866 N.Y.S.2d at 181, emphasis added.

The dissent, by Justice Catterson, would have ruled that failure to use a supposedly available safety device should not, under the Court of Appeals’ jurisprudence, bar recovery unless there was proof, absent here, that the device was available, that the plaintiff knew that it was available and that he was expected to use it, and that the plaintiff essentially refused to do so “for no good reason” (55 A.D.3d at 492, 866 N.Y.S.2d at 178).

Held: The Court of Appeals unanimously ruled, in an opinion by Judge Pigott, that the Appellate Division dissent had the right of it.

The plaintiff’s failure to use a safety device cannot be deemed the “sole proximate cause” of the accident for Labor Law purposes unless the device was, (1) “readily available,” (2) plaintiff knew that he or she was “expected” to use it, and, (3) plaintiff “for no good reason chose not to do so.”

The gist was as follows:

NYP relies on our decision in Montgomery v. Federal Express Corp. (4 N.Y.3d 805 [2005]). In Montgomery, we held that a worker who injured himself when he jumped from an elevator motor room to a roof, rather than use a “readily available” ladder, was not entitled to recover under Labor Law § 240(1). Similarly, in Robinson v. East Med. Ctr., LP (6 N.Y.3d 550, 553 [2006]), we held that a plumber who lost his balance and injured himself, when he used a six-foot ladder to install pipes at a height of 12 to 13 feet from the floor, could not recover under § 240(1), because he knew that there were eight-foot ladders on the job site and exactly where they could be found. Both cases stand for the same proposition.

Liability under § 240(1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident. In such cases, plaintiff’s own negligence is the sole proximate cause of his injury (see Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 39-40 [2004]).

This is not such a case. There is no evidence in the record that Gallagher knew where to find the safety devices that NYP argues were readily available or that he was expected to use them. Although Schreck testified that appropriate safety devices were available at the project site on the date of the accident, nowhere in his testimony did Schreck state that Gallagher had been told to use such safety devices. Schreck referred to a ‘standing order’ issued to the project foremen, directing workers to ‘have a harness on and be tied off,’ but could not say whether the order had been conveyed to the workers. Moreover, the affidavit of Gallagher's foreman, Nover, who was not deposed, does not support NYP's claim that Gallagher was told about safety devices. Nover stated that Gallagher had not been provided with the requisite safety devices, a proposition that is consistent either with Gallagher's ignorance of the availability of safety devices or with his knowledge thereof. Even viewed in the light most favorable to
NYP (as it must be when we consider plaintiffs’ motion for summary judgment), the evidence does not raise a question of fact that Gallagher knew of the availability of the safety devices and unreasonably chose not to use them.

14 N.Y.3d at 88-89, emphasis added.

The Court further ruled that, even assuming that plaintiff had negligently worked with a hand injury and the weakness of his grip contributed to the occurrence, “such weakness in his hand would at most have contributed towards his loss of balance, and cannot as a matter of law have been the sole proximate cause of his fall from the second floor to the temporary floor.”

Comment: Obviously, since the Court of Appeals’ March 2010 ruling in Gallagher constitutes the latest word from the highest court, any pre-Gallagher rulings by lower courts must be deemed no longer good law to the extent those rulings are inconsistent with Gallagher.

The last Gallagher element, that plaintiff did what she or he did “for no good reason,” used a phrase lifted from the Court’s decision in Cahill v. Triborough Bridge and Tunnel Authority, supra, 4 N.Y.3d 35, 40, 790 N.Y.S.2d 74 (2004). The standard logically implies that if plaintiff had some acceptable reason for departing from instructions, the defense will not lie. It is, as yet, unclear whether that means only that the defense will not apply when the worker acted reasonably or whether there is also room for the hypothetical case in which the worker had a “good reason” but not a good enough reason to render the conduct “reasonable.” In either case, the irony is that a throw-away phrase from perhaps the most anti-worker decision ever penned by the Court of Appeals (at least in recent memory), the ruling in Cahill, was used as a building block for the far more worker-friendly ruling in Gallagher.

(b) Post-Gallagher

In the wake of Gallagher, the sole proximate cause defense has been rejected in cases where defendant failed to prove the safer whatever was readily available, where defendant

75 Clavijo v. Atlas Terminals, LLC, supra, 104 A.D.3d 475, 476, 961 N.Y.S.2d 113, 114 (1st Dep’t 2013 (where plaintiff “was injured in the course of building a mezzanine floor by nailing plywood to beaming when he stepped through tile he believed to be plywood and fell to the concrete floor below,” plaintiff’s employer’s testimony “that safety harnesses were available at the site but that he did not know where they were kept or whether plaintiff knew of their existence,” “failed to raise an issue of fact whether plaintiff was a recalcitrant worker or the sole proximate cause of his accident”); Cuentas v. Sephora USA, Inc., supra, 102 A.D.3d 504, 504-505, 958 N.Y.S.2d 352 (1st Dep’t 2013) (where plaintiff’s testimony established “that the ladder he was using was both unsteady as he was ascending it and too short to enable him to reach the window he was cleaning,” defendants could not defend on the ground “that plaintiff was negligent because he was on top of the ladder”; where, as here, “plaintiff has established that no adequate safety device was provided” the case is “distinguishable from those cases [such as Robinson v. E. Medical Cent., supra] in which an adequate ladder was provided and there are issues of fact as to whether the accident occurred solely because of the plaintiff’s loss of balance while using the ladder”); Lipari v. At Spring, LLC, supra, 92 A.D.3d 502, 503-504, 938 N.Y.S.2d 303 (1st Dep’t 2012) (where plaintiff testified that he “asked his foreman for a Bakers
failed to prove that the plaintiff knew he or she was expected to use it,76 where defendant failed to prove that plaintiff acted unreasonably and did whatever he or she did “for no good reason,”77 Scaffold, but was told that the scaffolds were in use and that he should use an eight foot A-frame ladder, which plaintiff placed against a wall in a close position because that was the only way he could use it to reach the area where the seam was located,” defendants’ submission to the effect that plaintiff’s foreman “did not recall being asked by plaintiff for a scaffold and testified that even if the request had been made, there would not have been enough room to use one” “did not suffice to raise a fact question as to whether plaintiff’s own acts or omissions were the sole cause of the accident”).

76 Custer v. Jordan, supra, 107 A.D.3d 1555, 1558-1559, 968 N.Y.S.2d 754, 758-759 (4th Dep’t 2013) (where defendant argued that plaintiff was the “sole proximate cause” of his accident “inasmuch as he failed to tie off the ladder and scaffolding prior to his fall,” “although plaintiff was a carpenter experienced in the use of that type of scaffolding, defendant failed to submit any evidence that plaintiff knew or should have known to tie off the scaffolding and/or the ladder” and the defendant thus failed to present a prima facie defense); Nacewicz v. Roman Catholic Church of the Holy Cross, supra, 105 A.D.3d 402, 402-403, 963 N.Y.S.2d 14, 16 (1st Dep’t 2013) (where plaintiff, a bricklayer’s assistant, was told to ask the substitute foreman a question, and where plaintiff fell from an unsecured ladder while attempting to get close enough to the substitute foreman to be heard, plaintiff was entitled to summary judgment since it was undisputed that “[t]he ladder slid, causing plaintiff to fall to the sidewalk bridge approximately 10 feet below”; defendant’s various arguments — including “that plaintiff should have checked the ladder” and that “he did not use the fire escape to ascend to the scaffold’s second tier” — did not raise an issue of fact inasmuch as the first would at most constitute comparative negligence and there was no evidence [citing Gallagher v. New York Post] that plaintiff was “ever told the use of the extension ladder was forbidden, or, put differently, that use of the fire escape was not only the ‘standard way,’ but the exclusive way to move between tiers”); Imbriale v. Richter & Ratner Contracting Corp., 103 A.D.3d 478, 479, 960 N.Y.S.2d 9 (1st Dep’t 2013) (where defendants “argued that the decedent’s tool bag, which until recently had been in the decedent’s wife possession, contained suction cups that could have anchored the top of the decedent’s ladder to the glass wall against which the otherwise unsecured ladder had been leaning before it slid and collapsed,” such could not of itself raise a “sole proximate cause” defense where defendants “failed to adduce any evidence that the decedent knew that the suction cups could be used to anchor the top of the ladder to the glass or that he had been directed or knew he was expected to use the suction cups for that purpose”); Kin v. State of New York, 101 A.D.3d 1606, 1607-1608, 956 N.Y.S.2d 731, 733 (4th Dep’t 2012) (where claimant “was using the top half of an extension ladder that lacked rubber feet in an attempt to gain access to a scaffold that had been erected under the bridge” when “the bottom of the ladder slid out from beneath her, causing her to fall approximately 10 feet to the ground,” and where defendant “established that ladders with rubber feet … were available at the work site for claimant’s use” but “submitted no evidence that claimant knew that she was expected to use only those ladders,” Supreme Court “erred in denying claimant’s motion for partial summary judgment on liability under Labor Law § 240(1)’’); Dwyer v. Cent. Park Studios, Inc., supra, 98 A.D.3d 882, 883-884, 951 N.Y.S.2d 16 (1st Dep’t 2012) (where “plaintiff was standing on a ladder, unassisted, attempting to install a large piece of sheetrock” when “the ladder collapsed” and “the sheetrock slab fell on top of
him,” where the third-party defendant “produced a ladder in excellent condition that was purportedly used by plaintiff on the day of the accident,” but where “the ladder’s manufacturer, in an affidavit, stated that, based on markings on the ladder, it was manufactured several years after plaintiff’s accident,” “[t]he testimony of [plaintiff’s employer] principal that, after the accident, plaintiff stated that he lost his balance raises, at most, an issue of comparative negligence, which would not bar recovery under § 240(1); “[e]ven if other ladders were available at the job site, there was no showing that plaintiff was expected, or instructed, to use those ladders and for no good reason chose not to do so”); Augustyn v. City of New York, supra, 95 A.D.3d 683, 685, 716 N.Y.S.2d 341 (1st Dep’t 2012) (where plaintiff “fell from a sidewalk bridge while engaging in lead paint removal work,” defendants failed to raise a triable issue of fact as to whether plaintiff was the sole proximate cause of his injuries because “the evidence does not show that plaintiff was expected to, or instructed to, use a harness while walking along the sidewalk bridge … Rather, plaintiff and the owner of AAAA testified that the harnesses were available for use only on the fire escapes, that workers were not expected to use harnesses while on the sidewalk bridge, and that no rigging existed for the use of harnesses on the bridge”); Nechifor v. RH Atlantic-Pacific LLC, supra, 92 A.D.3d 514, 514, 938 N.Y.S.2d 308 (1st Dep’t 2012) (plaintiff was entitled to summary judgment when, due to the absence of a ladder, he “fell approximately 12 feet as he attempted to descend from the top of a scaffold by climbing down the side frame of the scaffold”; “[e]ven assuming that plaintiff knew that a ladder or other appropriate safety devices were readily available to him, there is no evidence that plaintiff knew that he was expected to use the safety devices for the assigned task”); Torres v. Our Townhouse, LLC, 91 A.D.3d 549, 549, 937 N.Y.S.2d 53, 53-54 (1st Dep’t 2012) (defendants contended that plaintiff had been provided with a ladder and that it was his “own decision to climb down a nearby tree instead of using the ladder” to climb down “from a 12-foot-high sidewalk bridge,” but the record “fail[ed] to support his contention”; “[e]ven if … there might have been a ladder in the chassis under the truck at the work site, no evidence was presented that plaintiff knew where the ladder was or that he knew he was expected to use it and for no good reason chose not to do so”; the order below was therefore reversed to grant plaintiff summary judgment); Ervin v. Consol. Edison of New York, supra, 93 A.D.3d 485, 485-486, 940 N.Y.S.2d 223 (1st Dep’t 2012) (where plaintiff was injured “when a temporary structure that he was descending to gain access to grade level from the top of a concrete wall, approximately three feet high, gave way causing him to fall,” defendant’s unpreserved argument that plaintiff was the sole proximate cause of his accident lacked merit inasmuch as “[d]efendant failed to submit any evidence showing that plaintiff knew or should have known that he was expected to employ some other device”).

77 Ordonez v. G.C. Plumbing Supply Corp., 83 A.D.3d 1021, 1022, 922 N.Y.S.2d 156, 157-158 (2nd Dep’t 2011) (“plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability on his Labor Law § 240(1) cause of action by submitting his deposition testimony and the deposition testimony of a witness, which demonstrated that he fell from an unsecured extension ladder when it slid out from underneath him, and that the failure to secure the ladder proximately caused his injuries”; further, “plaintiff’s failure to use the forklift to complete his task, rather than the ladder, could not have been the sole proximate cause of the accident” inasmuch as “the forklift was not a proper safety device within the meaning of Labor Law § 240(1)”); see also Wicks v. Leemilt’s Petroleum, Inc., supra, 103 A.D.3d 793, 794-795,
where defendant failed to establish some combination of the above,\textsuperscript{78} or where plaintiff’s conduct was not the sole cause of the accident.\textsuperscript{79} 

962 N.Y.S.2d 168 (2nd Dep’t 2013) (where “plaintiff’s employer provided him with a van equipped with an extension ladder and an A-frame ladder,” where plaintiff was purportedly injured while “performing work on an elevated fire extinguishing system at a gasoline station” when he leaned the ladder against the pole on which the fire extinguishing system was located and the pole itself collapsed, and where plaintiff conceded that “a scissors lift could have been attached to the van” and that he “did not bring it to the work site because he had received no training in its operation,” “the plaintiff established, prima facie, his entitlement to judgment as a matter of law on the issue of liability on his cause of action alleging a violation of Labor Law § 240(1) by submitting evidence that the defendants failed to ensure the proper placement of the extension ladder and that such failure was a proximate cause of his injuries”); \textit{Taylor v. One Bryant Park, LLC}, supra, 94 A.D.3d 415, 416, 941 N.Y.S.2d 142, 143 (1st Dep’t 2012) (where plaintiff “was injured when the A-frame ladder he was ascending fell over,” where the incident was apparently caused when a stack of metal studs slid against the ladder and caused it to fall, plaintiff was not the sole proximate cause of the injuries since there was no proof “that plaintiff was aware that the stacked pile of studs was not secured when he placed the ladder near it”).

\textsuperscript{78} \textit{Keenan v. Simon Property Group, Inc.}, supra, 106 A.D.3d 586, 588-589, 966 N.Y.S.2d 378, 381-382 (1st Dep’t 2013) (where plaintiff fell from an unopened and therefore unstable a-frame ladder, but where the ladder could not be opened because of the lack of space and plaintiff had fruitlessly asked for a different ladder, “defendants failed to raise a triable issue of fact. Contrary to defendants’ contention that plaintiff was the sole proximate cause of his accident, the record shows that the ladder was inadequate for the nature of the work performed and the gravity-related risks involved”; “[m]oreover, defendants did not show that another safety device was available, but went unused, that plaintiff failed to heed instructions on how to perform his assigned task of installing vinyl lining, or that the cause of plaintiff’s injury was unrelated to the ladder’s collapse”); \textit{Eustaquio v. 860 Cortlandt Holdings, Inc.}, supra, 95 A.D.3d 548, 548-549, 944 N.Y.S.2d 78 (1st Dep’t 2012) (where plaintiff “met his prima facie burden by submitting his deposition testimony and affidavit showing that he fell from a ladder that was not properly secured or equipped with adequate safety devices,” “[t]he deposition testimony of the president of plaintiff’s employer was insufficient to show that plaintiff was recalcitrant in failing to secure the ladder with a rope before using it, as the president had no personal knowledge of the accident or the condition of the ladder at the time of the accident” and “[i]nsofar as defendants argue that harnesses were available at the job site, the evidence does not show that the workers were expected to, or instructed to, use a harness while ascending or descending a ladder”).

\textsuperscript{79} \textit{Luna v. Zoological Soc’y of Buffalo, Inc.}, 101 A.D.3d 1745, 1745-1746, 958 N.Y.S.2d 807 (4th Dep’t 2012) ([with very little factual detail] “[a]lthough defendant submitted evidence that plaintiff [who fell] was instructed not to work in a particular area and violated those instructions, ‘the nondelegable duty imposed upon the owner and general contractor under Labor Law § 240(1) is not met merely by providing safety instructions or by making other safety devices available, but by furnishing, place and operating such devices so as to give [a worker] proper protection’”; defendant “failed to raise a triable issue of fact whether plaintiff’s ‘own conduct, rather than any violation of Labor Law § 240(1), was the sole proximate cause of the accident’”); \textit{Hernandez v. The Argo Corp.}, 95 A.D.3d 782, 783, 945 N.Y.S.2d 662 (1st Dep’t 2012) (where
The defense was also rejected where the proof supporting the defense was “speculative” or “conclusory” or the so-called direction was nothing more than alleged an “standing order,” where the device that plaintiff failed to use would not have prevented the accident, or where the plaintiff’s alleged “recalcitrance” was really nothing more than “poor judgment.”

“[t]he configuration of the scaffold required workers regularly to travel across an open and unguarded gap of three feet,” and where defendants “focused nearly exclusively on plaintiff’s detaching himself from the rope safety line before jumping across the gap” without rebutting “the evidence that they provided an inadequate safety device in violation of Labor Law § 240(1),” “[g]iven defendants’ statutory violation, plaintiff’s conduct cannot have been the sole proximate cause of the accident”; Britez v. Madison Park Owner, LLC, supra, 36 Misc.3d 1233(A), 2012 N.Y. Slip Op. 51586(U) (Sup. Ct. New York Co. 2012) (Hagler, J.) (where the wooden platform of the pre-assembled baker’s scaffold moved, causing plaintiff to fall, “even if plaintiff failed to lock the wheels of the scaffold and did not descend from the scaffold in order to move it, plaintiff’s actions would not be the sole proximate cause of his injuries”).

80 Fanning v. Rockefeller University, supra, 106 A.D.3d 484, 485, 964 N.Y.S.2d 525, 526 (1st Dep’t 2013) (“Defendants’ argument that plaintiff was the sole proximate cause of his accident because he chose a ladder too short for the work he was performing is speculative and thus, fails to raise an issue of fact”); Peters v. The New Sch., supra, 102 A.D.3d 548, 548, 958 N.Y.S.2d 133 (1st Dep’t 2013) (where plaintiff was injured “when, while removing plywood sheets that were temporarily covering a hole in the floor, a wood beam that was used to support the plywood and upon which plaintiff was standing, cracked and caused him to fall through the hole,” and where the “project superintendent’s [opposing] affidavit was conclusory and nonspecific as to what safety devices were available, where they were kept, and whether plaintiff knew where they were kept,” plaintiff was entitled to summary judgment inasmuch as “[a] general standing order to use safety devices does not raise a question of fact that a plaintiff knew that safety devices were available and unreasonably chose not to use them”).

81 Mata v. Park Here Garage Corp., supra, 71 A.D.3d 423, 424, 896 N.Y.S.2d 57 (1st Dep’t 2010) (where plaintiff was hired to repair an inoperative rolling garage gate permanently affixed to a structure used as a commercial parking facility, where “the work required the removal of a 300-pound tube-and-spring assembly from brackets securing it to the top of the garage entranceway, more than 10 feet above the ground,” where plaintiff “improvised a pulley system consisting of a length of chain draped over an upper rung of his own extension ladder and attached to the assembly,” where one end struck the ground, causing the ladder on which plaintiff was standing to move, and where there was “another ladder -- an A-frame -- at the premises, which plaintiff elected not to use,” the Court ruled, by 4 to 1, that plaintiff’s failure to use the other ladder could not render his conduct the sole proximate cause of the accident inasmuch as defendants did “not explain how an A-frame ladder would have provided adequate protection”; “[t]hat plaintiff’s improvisational use of his own extension ladder might be viewed as inappropriate is not material since a worker’s contributory negligence does not bar recovery under § 240(1)”).

82 Williams v. Town of Pittstown, supra, 100 A.D.3d 1250, 955 N.Y.S.2d 234 (3rd Dep’t 2012) (where defendant hired the self-employed plaintiff, a hydraulics specialist, to repair defendant’s Gradall, where plaintiff borrowed two workers and some equipment to assist him in putting the
Also, where plaintiff followed the method he or she had been taught to use, the decision to do so will at most constitute comparative negligence, which is not a defense for violation of Labor Law § 240.\textsuperscript{83}

The \textit{Gallagher} defense was, however, triable\textsuperscript{84} or established as a matter of law\textsuperscript{85} in other cases.

6,000 pound counterweight back on the Gradall, and where the counterweight fell and landed on plaintiff’s foot as it was being lifted into place via forklift, Supreme Court erred in denying plaintiff’s motion for summary judgment inasmuch as “[p]laintiff submitted proof that defendant did not provide any pulleys, hoists, braces or ropes that would be appropriate safety devices to secure a heavy object, such as the counterweight, while it was being lifted”; “[d]espite plaintiff being responsible for deciding how to move the counterweight, defendant is not relieved of liability because plaintiff chose a method he had been taught and had safely used more than 10 times in the past, such that his decision simply constitutes comparative fault that is not a defense under the statute”; further, “[w]hile defendant’s expert opined that plaintiff should have at least loosely attached the counterweight to the Gradall with four securing bolts before removing the forklift, those bolts were not safety devices but were part of the Gradall” and “[p]laintiff did not refuse to use those bolts … [h]is failure to install them while the forklift was still holding the counterweight was not recalcitrance, but perhaps poor judgment that would be applicable to the unavailable defense of comparative negligence”); \textit{see also} \textit{Miles v. Great Lakes Cheese of New York, Inc.}, \textit{supra}, 103 A.D.3d 1165, 1166-1167, 958 N.Y.S.2d 847 (4th Dep’t 2013) (where “plaintiff and a coworker were in the process of raising [two scaffold] planks from the lowest level on the scaffolding, which was approximately 3 1/2 feet above the ground, to a higher level approximately 20 inches above the lowest level,” where the “coworker balanced himself between the scaffold frame and one of the outriggers,” and where the “coworker … lost his balance, let go of the planks, and dropped them onto plaintiff’s head,” “defendants failed to raise a triable issue of fact either with respect to whether plaintiff’s alleged misuse of the scaffold was the sole proximate cause of his injuries or with respect to whether plaintiff was a recalcitrant worker” inasmuch as “[n]othing in the record suggests that plaintiff refused to use an available and adequate safety device” and plaintiff could not be deemed recalcitrant merely because he failed to comply with an instruction “to stay under the scaffold frame during the process of raising the planks to a higher level”; “[a]n instruction by an employer or owner to avoid ‘unsafe practices is not a ‘safety device’ in the sense that plaintiff’s failure to comply with the instruction is equivalent to refusing to use available, safe and appropriate equipment’”).

\textsuperscript{83} \textit{Williams v. Town of Pittstown, supra}.

\textsuperscript{84} \textit{Probst v. 11 West 42 Realty Investors, LLC}, 106 A.D.3d 711, 712, 965 N.Y.S.2d 513, 515-516 (2nd Dep’t 2013) (the plaintiff-window washer’s proof established that he “was performing commercial window cleaning work which exposed him to an elevation-related risk encompassed by \textit{Labor Law} § 240(1), and that the failure to provide him with a ladder or other safety device of the kind contemplated under the statute was a proximate cause of his accident,” but defendants “the defendants raised a triable issue of fact as to whether the injured plaintiff’s conduct was the sole proximate cause of his accident because he allegedly failed to use a ladder which his employer made readily available to him, and disregarded instructions to use ladders when necessary”; on the other hand, “[i]n view of the issue of fact as to whether the alleged failure to provide the injured plaintiff with access to adequate safety devices was a proximate cause of the
2. The Plaintiff’s (Or Decedent’s) Alleged Negligence In Misusing The Ladder Or Scaffold Or Other Device, Or In Otherwise Knowingly And Unnecessarily Creating The Risk That Caused The Accident, Generally.

(a) The “Sole Proximate Cause” Defense For Violation Of Labor Law Section 240(1) -- The Decision In Blake v. Neighborhood Housing Services of New York City, Inc., supra, 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003).\(^{86}\)

In The Proverbial Nutshell: Depending on how one construes the holding of Blake, the Court of Appeals held either, 1) that there is no liability for an improperly placed or operated scaffold or ladder where, as here, it was plaintiff himself or herself who improperly placed or operated the instrumentality, or, 2) that such is so only when the plaintiff-worker’s error was accident, his deposition testimony that he dripped soapy water onto the surface of the heating convector from which he slipped did not establish, as a matter of law, that his conduct was the sole proximate cause of the accident”); Allan v. DHL Express (USA), Inc., 99 A.D.3d 828, 833-834, 952 N.Y.S.2d 275 (2nd Dep’t 2012) (where plaintiff claimed that he fell because he had not been “provided with a harness, a lanyard, or an anchorage point for a lanyard,” but defendant responded with proof that plaintiff fell while “climbing down the side of the scaffold, instead of using a ladder that had been set up adjacent to the scaffold,” defendant’s proof “raised a triable issue of fact as to whether the plaintiff’s own actions were the sole proximate cause of the accident”).

\(^{85}\) Paz v. City of New York, 85 A.D.3d 519, 519, 925 N.Y.S.2d 453, 454 (1st Dep’t 2011) (defendant was entitled to summary judgment where “the record established that plaintiff knew that he was expected to use a ladder to climb onto the elevated scaffold, untie it, and lower it to the ground” but “for no good reason” instead decided to stand on a concrete ledge); Maloney v. J.W. Pfeil & Co., Inc., 84 A.D.3d 1632, 1633-1644, 924 N.Y.S.2d 586 (3rd Dep’t 2011) (where plaintiff was “standing on the top cap of a six-foot ladder installing sheetrock” when he fell, where “depositions from plaintiff’s supervisor and coworker established that numerous safety devices appropriate for the work that plaintiff was performing at the time of his accident such as eight-foot ladders, baker’s scaffolds, ‘stilts’ and mechanical lifts, were available at the job site in the building,” where “plaintiff admitted knowing that there were other safety devices in other locations in the building better suited for the type of work he was about to perform and that he had routinely used these devices while working on this project” and “acknowledged that the stepladder he was using … was not tall enough for the work he was performing,” and where plaintiff “admitted knowing that it contained a written warning never to stand on the top cap of the ladder when using it,” defendants established prima facie that plaintiff was the sole proximate cause of his accident).

\(^{86}\) Disclosure: I submitted an amicus brief in Blake on behalf of the New York State Trial Lawyers Association.
more in the nature of misuse rather than misplacement of the appliance (or, put somewhat differently, that the defense applies only where the device was properly constructed and placed, but where the plaintiff nonetheless managed to single-handedly cause the accident). As is shown below, the Appellate Division rulings that have come down in the wake of Blake generally follow the second construction although the boundary line between “misuse” and “mere comparative negligence” is not always easy to discern.

Background: Section 240, subd. 1, of the Labor Law, requires that the owners and contractors furnish such “scaffolding, hoists, stays, ladders”, etc. as is necessary for the work, and also requires, as follows, that such devices be so “constructed, placed and operated” as to provide “proper protection” to the workers.

Prior to its ruling in Blake, the Court of Appeals stated time and again that Labor Law section 240(1) imposes "ultimate responsibility" for worksite safety on the owners and contractors, and imposes "absolute liability" for a statutory breach.87

The Court further ruled, back in Haimes v. New York Tel. Co., supra, 46 N.Y.2d 132, 137-138, 412 N.Y.S.2d 863 (1978), that the owner would stand liable even where it was decedent himself -- acting alone -- who had failed to properly place a properly construed ladder.

The Haimes rule was re-affirmed in other cases in which the plaintiff-worker was, in fact, the culprit who had misplaced the ladder or had selected a broken ladder. Klein v. City of New York, supra. 89 N.Y.2d 833, 652 N.Y.S.2d 723 (1996).

Yet, while it was clear that the defendant could not escape responsibility for a statutory violation by arguing that plaintiff himself or herself had caused the statutory violation, there were always some instances -- such as when the plaintiff fell from a ladder not because the ladder was poorly constructed or placed but instead because plaintiff was drunk,88 or when plaintiff fell because he was trying to carry a cup of coffee while climbing the ladder89 -- that recovery was denied on the ground that inadequacy of a listed safety device was not a proximate cause of the accident. In such instances, recovery was denied not because it was plaintiff who selected and/or placed the ladder (or other device), but instead because the accident had nothing to do with poor construction or placement of the device and was instead caused by factor(s) extrinsic to the statute’s guarantee regarding such devices.


Thus, the distinction seemed to be between those cases (like *Haimes, Klein* and *Stolt*) in which plaintiff was injured by a *plaintiff-caused violation* (no defense) and those cases where plaintiff was injured by *factors other than a statutory violation* (e.g., that plaintiff was drunk, or was engaged in horseplay, or was inattentive). But all of that would soon become much more complicated.

**The Facts in Blake:** The plaintiff, who operated his own contracting company and was working alone on the renovation of a two-family house, fell from an extension ladder.

The accident apparently occurred because, when setting the ladder up, plaintiff had neglected to lock the extension clips in place, with the consequence that the ladder began to retract as plaintiff climbed it, thus causing plaintiff to fall. At least there was no other explanation.

At trial, the trial judge denied plaintiff’s motion for a directed verdict and the case went to a jury, which returned a defendant’s verdict. Plaintiff appealed.

**The Parties’ Claims:** Plaintiff argued that, under section 240 of the Labor Law, any plaintiff who falls from a ladder or scaffold automatically prevails as a matter of law.

Defendant argued that the plaintiff does not prevail if the plaintiff’s conduct was the sole proximate cause of his or her injury, and that this was such a case.

**The Ruling:** The Court, per opinion by Judge Rosenblatt, unanimously affirmed the judgment in the defendant’s favor. In so ruling, the Court clearly held that plaintiff’s alleged negligence in failing to lock the extension clips could constitute a defense. Yet, it was unclear whether the Court was, (a) impliedly overruling *Haimes* and was now saying that the defendants could indeed escape liability for a poorly placed ladder or scaffold where it was the plaintiff who negligently placed the device, or, (b) positing that failure to lock a ladder’s extension clips was in some sense different and distinguishable from failing to secure a ladder (*Haimes*) or from placing it on “gunk” (*Klein*). That is, the Court did not say that it was overruling those decisions, but also did not say that it was not doing so and that the prior rulings in the worker’s favor were in some sense distinguishable.

In any event, the *Blake* Court plainly said that a fall from a ladder or scaffold does not of itself create liability, and also that the plaintiff may not recover where the “sole proximate cause” of the accident was plaintiff’s own conduct:

Given the varying meanings of strict (or absolute) liability in these different settings, it is not surprising that the concept has generated a good deal of litigation under Labor Law § 240(1). The terms may have given rise to the mistaken belief that a fall from a scaffold or ladder, in and of itself, results in an award of damages to the injured party. That is not the law, and we have never held or suggested otherwise.

* * *

Plaintiff argues that he is entitled to recover in the face of a record that shows no violation and reveals that he was entirely responsible for his own injuries. There is no basis for this argument. Even when a worker is not “recalcitrant,” we have held that there can be no liability under section 204(1) when there is no violation and the worker’s actions (here, his negligence) are the “sole proximate cause” of the accident. Extending the
statute to impose liability in such a case would be inconsistent with statutory goals since the accident was not caused by the absence of (or defect in) any safety device, or in the way the safety device was placed.

* * *

Contrary to plaintiff’s claim, the Appellate Division has held (both before and after Weininger) that a defendant is not liable under Labor Law § 240(1) where there is no evidence of violation and the proof reveals that the plaintiff’s own negligence was the sole proximate cause of the accident. Under Labor Law § 240(1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff’s injury) to occupy the same ground as a plaintiff’s sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of the injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation. That is what we held in Weininger, a holding the Appellate Division has consistently understood and applied.

* * *

As in Weininger, the record now before us fully supports the jury’s findings that there was no statutory violation and that plaintiff alone, by negligently using the ladder with the extension clips unlocked, was fully responsible for his injury.


(b) The Blake Defense Circa 2013

Over the past couple of years, the Blake defense was rejected where the injured worker was instructed to do whatever it is that the defendants claim plaintiff should not have done, or where plaintiff had no choice in the matter. 90

90 Boyd v. Schiavone Construction Co., Inc., 106 A.D.3d 546, 547-548, 965 N.Y.S.2d 117, 119 (1st Dep’t 2013) (where plaintiff and a co-worker removed the chain and chain binders that had secured the drill rig in order to use the rig for the purposes they were directed to use it, and where the project superintendent claimed that “the chains did not have to be removed but only had to be loosened enough to create a little play,” plaintiff could not be deemed the sole proximate cause of the accident, inasmuch as he “did not unilaterally elect to remove the chains and chain binders” and merely concurred with a “dock builder foreman who had the discretion to make the determination in the field as to the manner in which the drill rig would be moved” and inasmuch as defendants “offered no evidence that workers were instructed to loosen rather than remove the chains when they had to move the drill rig, plumb the mast, or remove or replace the...
hammer”); **Fernandez v. BBD Developers, LLC, supra**, 103 A.D.3d 554, 555-556, 960 N.Y.S.2d 380, 381-382 (1st Dep’t 2013) (where plaintiff was given a safety belt and rope but “[n]o one measured the rope to ensure it was shorter than the distance to the ground [which was 14 feet],” plaintiff met his burden in seeking summary judgment “with evidence that he fell through the open roof while in the course of demolishing the building and that the safety device he was given—a safety belt with a rope which may have been as long as 30 feet—failed to prevent his fall”; although defendants argued “that the safety belt and rope were not defective” and “that plaintiff’s failure to tie the rope to a length that would have prevented him from hitting the floor below was the sole proximate cause of his injuries,” “a plaintiff cannot be the sole proximate cause of his or her injuries where uncontested evidence shows that the plaintiff followed his or her supervisor’s instructions and did not, on his or her own initiative, take a foolhardy risk which resulted in injury” and defendants did not “refute plaintiff’s testimony that he had worked for Casino for only 3 months and had not been provided with instruction on how to use a safety belt and rope” and also did not present “evidence demonstrating that plaintiff was instructed to measure or shorten the rope”); **Harris v. City of New York, 83 A.D.3d 104, 110-111, 923 N.Y.S.2d 2, 7 (1st Dep’t 2011)** (where plaintiff and his co-workers were removing portions of a deck of a bridge, where a one-ton slab failed to separate and plaintiff was directed to use a four-by-four piece of lumber as a lever while the crane slowly lowered the other end of the slab, and where the slab instead descended quickly, causing the four-by-four upon which the plaintiff was perched to shatter and throwing plaintiff to the ground, this was “not a situation where a plaintiff, on his own initiative, took a foolhardy risk which resulted in injury” and plaintiff could not be deemed the sole proximate cause of his accident where “the uncontested evidence shows that the plaintiff’s foreman directed him to stand on top of the piece of wood in order to keep it in place”); **Jara v. New York Racing Assn., Inc., 85 A.D.3d 1121, 1122-1123, 927 N.Y.S.2d 87, 90 (2nd Dep’t 2011)** (where plaintiff fell “approximately eight feet from the top of a partially demolished wall” that had blocked a doorway that he needed to go through, where plaintiff “had specifically been instructed to locate a functioning electrical outlet in the adjacent room,” and where “[t]here was no means by which to move between the rooms other than climbing over the partially demolished wall,” “plaintiff’s conduct was not the sole proximate cause of his injuries”); **Jiminez v. RC Church of Epiphany, 85 A.D.3d 974, 926 N.Y.S.2d 133 (2nd Dep’t 2011)** (where plaintiff’s “allegedly placed a closed A-frame ladder atop a scaffold and leaned the ladder against the wall” because “their supervisors had instructed them [to do so],” where the scaffold then moved away from the wall and caused plaintiff to fall from the ladder even though plaintiffs had locked the wheels of the scaffold, “plaintiffs established their prima facie entitlement to judgment as a matter of law by submitting evidence sufficient to demonstrate that the defendant failed to provide them with an adequate safety device or ensure that such device was properly placed, and that the defendant’s failure was a proximate cause of their injuries”).

91 **Coates v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints, 104 A.D.3d 896, 897, 962 N.Y.S.2d 321, 323 (2nd Dep’t 2013)** (where plaintiff “was sent to the work site to inspect a newly constructed retaining wall,” where he was unable to reach portions of the wall from the ground and therefore “scaled the wall in order to check the rest of the capstones,” and where he thus “lost his footing and fell to the sidewalk below.” “Supreme Court properly concluded, based upon the evidence adduced at trial, that the plaintiff was entitled to
The Blake defense was rejected where the injured worker’s conduct could not be deemed a superseding cause of an accident caused in part by a statutory violation, or more simply where plaintiff’s conduct was not the only substantial factor in causing the injuries.

judgment as a matter of law on the issue of liability” inasmuch as “plaintiff’s unrefuted evidence also demonstrated that he would not have performed his job adequately if he had only checked a portion of the capstones on the wall” and “no rational jury could have found that, in the conceded absence of any safety devices, the plaintiff could have performed the task assigned to him without scaling the wall”); Naughton v. City of New York, supra, 94 A.D.3d 1, 9, 940 N.Y.S.2d 21 (1st Dep’t 2012) (where plaintiff was assigned to unload a flatbed truck, where he had to stand about “10-11 feet above the flatbed surface and 15-16 feet above the ground” to do so, where he asked for but was denied a ladder, and where he fell when a bundle hit him and knocked him to the street, there was “no plausible view of the evidence that plaintiff’s own acts or omissions were the sole proximate cause of the accident”; “[w]hether plaintiff was hit by the swinging bundle or jumped to get out of its way, it cannot be said that plaintiff was the sole proximate cause of his injuries”); Kittlestad v. Losco Group, Inc., supra, 92 A.D.3d 612, 613, 939 N.Y.S.2d 382 (1st Dep’t 2012) (where “plaintiff and his supervisor testified that the only way to reach the pipes that needed to be insulated was to walk across the air handler unit, which included walking over planks covering a two-foot-by-three-foot area of the unit where the duct work was not complete,” “defendants’ argument that plaintiff was either a recalcitrant worker or the sole proximate cause of his own accident are without merit”);

92 Tzic v. Kasampas, supra, 93 A.D.3d 438, 439, 940 N.Y.S.2d 218 (1st Dep’t 2012) (where plaintiff “fell 15 feet from an opening in a ‘sidewalk shed,’” where plaintiff’s expert testified that it was improper to use the fire escape as the anchorage for plaintiff’s harness and “that a proper personal fall system was lacking,” and where “the owners did not come forward with evidence contesting plaintiff’s expert’s assertion,” the failure to provide “an adequate safety device” was a § 240 violation; “[t]he owners’ assertion that plaintiff covered the opening with tarp and then carelessly walked over it is of no moment” since, first, the assertion was “speculative,” and, second, “once the statutory violation has been established as a proximate cause of the accident, plaintiff’s alleged contributory negligence becomes irrelevant”); Dedndreaj v. ABC Carpet & Home, supra, 93 A.D.3d 487, 488, 940 N.Y.S.2d 62 (1st Dep’t 2012) (where plaintiff “established his prima facie entitlement to summary judgment by showing that defendants’ failure to provide an adequate safety device proximately caused a pipe that was in the process of being hoisted to fall and strike him,” “[e]ven assuming that plaintiff disregarded warnings by walking through the passageway and under the pipe, such conduct was not the sole proximate cause of the injury”).

93 Olea v. Overlook Towers Corp., supra, 106 A.D.3d 431, 431-432, 965 N.Y.S.2d 39, 40-41 (1st Dep’t 2013) (where one of the defendants’ principals “testified that a worker would customarily go from a balcony to a motorized scaffold by jumping onto the scaffold and then climbing over its railing,” where that “was the very method plaintiff was trying to employ when he fell,” where the evidence was “inconclusive about whether safety lines were available at the time of the accident, and whether plaintiff had been instructed to use them,” and where another one of the defendants’ principals “admitted that it would have been safer to provide ladders to protect a worker in going from a balcony to a motorized scaffold,” “the evidence shows that
defendants violated Labor Law § 240(1) by failing to provide an adequate safety devices,” “even if plaintiff was negligent in performing the aforementioned acts, or in failing to dismantle a pipe scaffold blocking another means of access to the motorized scaffold, his acts were not the sole proximate cause of his accident”; Disclosure: my firm and I represented the plaintiff-appellant); Vail v. 1333 Broadway Associates, supra, 105 A.D.3d 636, 636-637, 963 N.Y.S.2d 647, 648 (1st Dep’t 2013) (where plaintiff “fell after the six-foot baker’s scaffold upon which he was working shifted, despite the fact that he had locked the wheels,” and where it was “undisputed that the scaffold lacked guardrails,” such established plaintiff’s right to summary judgment; “[g]iven that the scaffold was inadequate in the first instance, any failure by plaintiff to hydrate himself could not be the sole proximate cause of his injuries”); Carchipulla v. 6661 Broadway Partners, LLC, supra, 95 A.D.3d 573, 573-574, 945 N.Y.S.2d 4 (1st Dep’t 2012) (“[c]ontrary to defendant’s unpreserved contention, there is no triable issue of fact about whether plaintiff’s negligence was the sole proximate cause of the accident, given that there is no evidence that he fell because he simply lost his footing [citations omitted]. Rather, plaintiff’s uncontradicted testimony was that the ladder shook and fell while plaintiff was standing on it”); Aburto v. City of New York, 94 A.D.3d 640, 640, 942 N.Y.S.2d 514 (1st Dep’t 2012) (where “plaintiff’s 50-h testimony and his co-worker’s affidavit showed that a scaffold suddenly collapsed under him while he was attempting to dismantle it at his foreman’s instructions,” and where “[t]here were no harnesses, lanyards, safety lines, or similar safety devices available for use to prevent his fall,” neither the superintendent’s claim “that he saw plaintiff ‘violently and forcefully shaking’ one of the rails of the scaffold when dismantling it” nor the superintendent’s claim “that the scaffold was equipped with toe boards and railings” could stave off summary judgment inasmuch as such devices “are insufficient to prevent workers from falling through a collapsing scaffold” and “where, as here, it has been shown that inadequate devices proximately caused plaintiff’s injuries, any negligence on plaintiff’s part does not preclude partial summary judgment in his favor”); Nenadovic v. P.T. Tenants Corp., supra, 94 A.D.3d 534, 535, 942 N.Y.S.2d 474 (1st Dep’t 2012) (where plaintiff “and his two co-workers, were assigned to work together on a 50-foot suspended scaffold that ultimately broke in two, causing them to sustain injuries,” and where “the evidence demonstrated, inter alia, that the defendant contractors were aware that the scaffold was indicated to have a two-man maximum capacity, that three workers (including plaintiff) were nonetheless assigned to work together from the scaffold, and that there was no other adequate safety equipment made available to the workers,” plaintiff was entitled to summary judgment inasmuch as “[t]here was no evidence to indicate that the resulting injury to plaintiff was exclusively caused by his own willful or intentional acts” and the direction was not premature since additional evidence could at most “inculpate other defendant contractors with negligence”); Rast v. Wachs Rome Development, LLC, supra, 94 A.D.3d 1471, 1473, 943 N.Y.S.2d 323 (4th Dep’t 2012) (where defendant hired plaintiff’s employer as a general contractor to rebuild a strip mall and also hired defendant Scott Quick to repair the roof, where Quick had “started the roof repairs but had left the job site to work on a project in another state,” and where plaintiff “was informed that the roof was leaking and ruining the newly-installed drywall” and “accessed the roof to investigate,” and where plaintiff’s “absence of safety devices was a proximate cause of the plaintiff’s injuries,” plaintiff’s conduct was not “the sole proximate cause of his injuries” and plaintiff was entitled to summary judgment).
The Blake defense was rejected where the conduct in issue was mere comparative negligence, although that may be more a conclusion than an explanation.94 It was also rejected where the Court reasoned that an instruction to avoid an unsafe work practice should not constitute a defense for failure to provide adequate safety devices, a rationale not far removed from Gallagher, supra.95

The Blake defense was deemed viable or at least triable where there was proof that the worker needlessly subjected himself or herself to the risk in issue,96 where the worker ventured

94 Karcz v. Klewin Bldg. Co., Inc., 85 A.D.3d 1649, 1651, 926 N.Y.S.2d 227, 229 (4th Dep’t 2011) (where a truss plaintiff “had lifted overhead onto the aerial platform of a scissor lift fell on him,” plaintiff’s conduct in moving “toward the falling truss in an attempt to prevent it from falling” was, at most, comparative negligence, “which is not an available defense under section 240(1)’’); see also De Oleo v. Charis Christian Ministries, Inc., supra, 106 A.D.3d 521, 522, 966 N.Y.S.2d 375, 376 (1st Dep’t 2013) (where plaintiff fell from a roof, defendants failed to raise a triable issue regarding the sole proximate cause defense; “[a]lthough plaintiff testified that he lost his balance at the roof’s edge after painting himself into a corner, he also testified that he was not provided with any safety device to prevent his fall, and defendants have not refuted that testimony”).

95 Vasquez v. Cohen Brothers Realty Corporation, supra, 105 A.D.3d 595, 598, 963 N.Y.S.2d 626, 629 (1st Dep’t 2013) (where decedent was attempting to push a ceiling tile into a grid while perched on an elevated duct when he los his balance and fell, “[w]e reject defendant’s assertion that Vasquez’s decision to leave the lift was the sole proximate cause of his death. Although the building manager, Joseph Tesoriero, stated in his affidavit that months prior to the accident he told Vasquez not to stand on the guardrails of the lift or leave the lift basket while it was elevated, an instruction to avoid an unsafe practice is not a sufficient substitute for providing a worker with a safety device to allow him to complete his work safely”); see also Mercado v. Caithness Long Island LLC, supra, 104 A.D.3d 576, 577, 961 N.Y.S.2d 424, 426-427 (1st Dep’t 2013) (where plaintiff “was struck on the head by a pipe that fell from a height of approximately 85 to 120 feet as a result of a gap in a toeboard installed along a grated walkway near the top of a generator in the power plant,” and where it was “undisputed that there was no netting to prevent objects from falling on workers,” “[t]hat plaintiff was wearing a welding hood but not a hard hat does not raise an issue of fact since ‘[a] hard hat is not the type of safety device enumerated in Labor Law § 240(1) to be constructed, placed and operated, so as to give proper protection from extraordinary elevation-related risks to a construction worker’”).

96 Kunz v. WNYG Housing Development Fund Company Inc., supra, 104 A.D.3d 1337, 1338-1339, 961 N.Y.S.2d 704, 705-706 (4th Dep’t 2013) (by 4 to 1 vote: where plaintiff “was attempting to attach an outrigger to the scaffold,” and where “[a]s he reached over the side of the scaffold to attach the outrigger, plaintiff fell from the scaffold and landed on the ground some 30 feet below,” “[t]he evidence submitted by plaintiff also raises an issue of fact whether he intentionally removed the safety railing and cross braces from the scaffold and whether such conduct by plaintiff was the sole proximate cause of his injuries”; “[a]lthough plaintiff asserts that he could not have attached the outrigger in the manner suggested by defendants, there was evidence to the contrary, including the testimony of a worker at the site who claimed to have seen plaintiff install outriggers in that manner approximately 50 times before the accident”);
into an area in which he or she was allegedly not supposed to be,\textsuperscript{97} where the alleged conduct was akin to a refusal to work safely (i.e., plaintiff was recalcitrant),\textsuperscript{98} or where the plaintiff’s

\textbf{Mendoza v. Velastate Corp.,} 99 A.D.3d 401, 402, 951 N.Y.S.2d 513 (1st Dep’t 2012) (“the record raises issues of fact as to whether plaintiff was the sole proximate cause of his injuries” inasmuch as “the affidavits and depositions in the record give conflicting accounts of whether plaintiff freely chose the equipment he was using for his work when he was injured, used the equipment with his manager’s knowledge and tacit approval, or was directed to use the equipment by his manager”).

\textsuperscript{97} \textit{Bellreng v. Sicoli & Massaro, Inc.}, 108 A.D.3d 1027, ___ N.Y.S.2d ___ (4th Dep’t 2013) (where plaintiff “unhooked his safety harness from the steel lifeline that had been placed on the roof” and then “fell through the deteriorated gypsum roofing deck onto a scaffold that had been erected inside the building to prevent debris from falling into the pool,” and where plaintiff said that he disconnected because “he was moving to a new work area, and he could not reach that new work area while connected to the lifeline,” there were nonetheless “triable issues of fact whether he had a good reason for disconnecting from the lifeline or whether his own actions in disconnecting from the lifeline were the sole proximate cause of his fall” inasmuch as there was “abundant evidence in the record demonstrating that he was not permitted to stand on the roof decking” and proof “that raised material issues of fact whether he was instructed to remain secured to a lifeline at all times”; however, defendants “did not meet their initial burdens with respect to the section 240(1) cause of action because they failed to establish that plaintiff’s actions were the sole proximate cause of the accident, i.e., that he knew or should have known that he was expected to use either multiple retractable lanyards or a safety rope in order to reach all areas of the roof”); \textit{Nicometi v. Vineyards of Fredonia, LLC, supra}, 107 A.D.3d 1537, 1539, 967 N.Y.S.2d 563, 564-565 (4th Dep’t 2013) (by 3 to 2 vote; where plaintiff claimed to have fallen “when his stilts slipped on ice while he was installing insulation at an elevated level, i.e., the ceiling,” “defendants raised a triable issue of fact by introducing evidence that he was directed not to work in the area where the ice was located”); \textit{Godoy v. Neighborhood Partnership Housing Development Fund Company, Inc.}, 104 A.D.3d 646, 647, 961 N.Y.S.2d 220, 221-222 (2nd Dep’t 2013) (where the ground floor collapsed beneath the plaintiff-demolition worker as she was picking up demolition debris, causing her to fall to the basement, “plaintiff demonstrated, prima facie, her entitlement to judgment as a matter of law on the issue of liability pursuant to \textit{Labor Law § 240(1)} by submitting evidence that the floor where her accident occurred was unstable and that she was not provided with any safety devices despite the potential elevation risks involved” but “the third-party defendant raised a triable issue of fact” by submitting proof “that the area where the plaintiff fell had been cordoned off because the floor was unstable” and that the witness “had specifically told the plaintiff several times not to enter the restricted area,” the last such time being “30 minutes before the accident”; although plaintiff denied those claims it was the jury’s task to decide the facts of the case); \textit{John v. Klewin Bldg. Co., Inc.}, 94 A.D.3d 1502, 943 N.Y.S.2d 812 (4th Dep’t 2012) (where plaintiff fell from a roof at a construction project for the Seneca Niagara Casino, and where there were triable issues of fact whether “before the accident and on the date thereof, plaintiff was specifically instructed to work only on the flat roof and not to work on the sloped roof surface from which he fell,” it could not be “determined as a matter of law whether plaintiff’s decision to climb onto the sloped roof surface was the sole proximate cause of his injuries”); \textit{Serrano v. Popovic}, 91 A.D.3d 626,
carelessness was purportedly the only cause of the accident and there purportedly was no statutory breach. 99

936 N.Y.S.2d 254 (2nd Dep’t 2012) (where safety equipment had been removed from the roof of the main house and decedent was instructed to work only on the garage roof, “the decedent’s decision to climb onto the roof of the main house, where there was no safety equipment, was the sole proximate cause of his injuries”).

98 Ramirez v. Willow Ridge Country Club, Inc., 84 A.D.3d 452, 452-453, 922 N.Y.S.2d 343, 344-345 (1st Dep’t 2011) (where there were two very different versions of the subject accident, where defendants’ version was that the accident “occurred while plaintiff was straddling between an A-frame ladder leaning against the deck railing and an extension ladder affixed to the adjacent wall of the building,” where the foreman “testified that he admonished plaintiff to stop” but plaintiff did not stop and ultimately fell, and where the jury found that defendants had violated Labor Law § 240(1), but that the statutory violation was not a substantial factor in causing the accident, it was “[a] fair inference is that the jury determined that a statutory violation existed with respect to the guardrail of the deck, but that it accepted the foreman’s version of the event and found that the violation was not a proximate cause of the accident … and we perceive no ground upon which its verdict should be disturbed”); see also Wahab v. Agris & Brenner, LLC, 102 A.D.3d 672, 673-674, 958 N.Y.S.2d 401 (2nd Dep’t 2013) (where a metal plank of the scaffolding on which plaintiff was standing collapsed, but where plaintiff’s own proof “raised a question of fact as to whether the plaintiff, who possessed a scaffolding license issued by the New York City Department of Buildings, knew before climbing up the scaffold that other workers had begun untying the ropes which secured the planks of the scaffold, yet failed to check whether the planks of the scaffold were secured before climbing up and putting his weight on them” and defendants “also submitted evidence that the plaintiff’s injuries could have been prevented if he had been wearing an available safety harness,” Supreme Court correctly denied defendants’ cross-motion for summary judgment [while also correctly denying plaintiff’s motion for summary judgment] inasmuch as defendants “failed to make a prima facie showing that the plaintiff’s alleged negligence in failing to wear the harness was the sole proximate cause of the accident”); Quintanilla v. United Talmudical Academy Torah V’yirah, Inc., supra, 38 Misc.3d 1215(A), 2013 N.Y. Slip Op. 50108(U) (Sup. Ct. Kings Co. 2013) (Schmidt, J.) (where defendant’s maintenance manager “told plaintiff and the other workers that they could not walk off the walkway because he knew the surface on either side of the walkway was not sturdy enough to stand on, was not safe, and that walking off the walkway presented a falling hazard,” it was plain that the risk of injury arising from the permanent floor was foreseeable, but there was nonetheless an issue as to whether plaintiff understood the instructions in issue and, if so, whether plaintiff was the sole cause of the subject accident).

99 Kerrigan v. TDX Construction Corporation, 108 A.D.3d 468, ___ N.Y.S.2d ___ (1st Dep’t 2013) (where the motion court attributed “each cause [of the subject accident] … to the decedent’s decisions or to his supervision of Erin employees, and dismissed the complaint in its entirety because decedent ‘alone defined the task at hand, chose the methods and means to be used,’ and made the decisions that led to the accident,” plaintiff “failed to overcome defendant’s prima facie evidence that the decedent’s conduct and decisions were the sole proximate cause of the accident [and] plaintiff’s claims under common-law negligence and Labor Law §§ 200,
240(1) and 241(6) must all be dismissed”; Disclosure: My firm and I represented the plaintiff-appellant in Kerrigan); Noble v. 260-261 Madison Avenue, LLC, supra, 100 A.D.3d 543, 544, 954 N.Y.S.2d 518, 519 (1st Dep’t 2012) (“triable issues exist as to whether, inter alia: (1) the six-foot tall plaintiff was able to stand on the sixth or seventh rung of the 10-step ladder (as he claimed) and still have the necessary headroom to accomplish his work; (2) whether plaintiff actually stood lower down on the ladder in view of the apparent ceiling height constraints, such as might allow him ready hand access to the ladder for support; and (3) whether the admittedly stable ladder required another worker to hold it secure if plaintiff was working from a lower position than claimed, particularly considering that plaintiff admitted he only fell after the ceiling conduit pipe, onto which he purportedly held for support, broke free” and “triable issues exist whether plaintiff actually stood high enough on the ladder as would warrant securing the ladder beneath him and, further, assuming arguendo, the ladder was so secured, whether it would have prevented his fall once the conduit pipe broke free from its ceiling support system”); Nunez v. City of New York, 100 A.D.3d 724, 724-725, 954 N.Y.S.2d 153, 164-165 (2nd Dep’t 2012) (where plaintiff “testified that the 10-foot A-frame ladder from which he fell was in an open and locked position at the time of the accident, … that it was positioned on an uneven floor composed of broken concrete and sand or dirt,” and that he “was leaning forward to apply a plastic covering to the wall when the ladder suddenly moved and fell forward with the ladder to the floor,” but where plaintiff “admitted that he himself had placed the ladder, and that he had no problems using it prior to the accident” and where “an incident report and unsworn statements” submitted by plaintiff indicated that “the ladder was in a closed position propped up against the wall,” “plaintiff failed to eliminate triable issues of fact as to whether the ladder provided proper protection, and whether the ladder’s failure to provide proper protection was a proximate cause of the injuries”); Robinson v. Goldman Sachs Headquarters, LLC, 95 A.D.3d 1096, 944 N.Y.S.2d 630 (2nd Dep’t 2012) (where plaintiff claimed that the A-frame ladder “kicked out” but “defendants offered an accident report indicating that Robinson had previously stated, within two days after the accident, that he lost his footing or balance and fell off the ladder,” “defendants raised a triable issue of fact as to whether the foot of the ladder simply kicked out and the ladder fell over, as Robinson testified, or whether Robinson’s own carelessness or the manner in which he used the ladder was the sole proximate cause of his fall”); Napera v. South Hill Business Campus, LLC, 39 Misc.3d 1231(A), 2013 N.Y. Slip Op. 50831(U) (Sup. Ct. Broome Co. 2013) (Lebous, J.) (where plaintiff “knew the ladder was not owned by his employer, but rather was owned and/or used by defendant’s employees” but used it “[b]ecause the ladder was leaning against the wall in the exact location that I needed to access the ceiling,” and where it was “undisputed that plaintiff used the A-frame ladder while it was leaning against the wall in its closed position and did not open the ladder to its full open and locked position,” and where the ladder slipped causing plaintiff to fall, “the court finds as a matter of law that plaintiff misused an otherwise suitable safety device which was the sole proximate cause of the accident” inasmuch as plaintiff’s expert proof did not address or “counter” defendants’ expert’s opinion that the ladder “would have been adequate for the job performed” but for plaintiff’s failure to open and lock it).
B. The “Recalcitrant Worker” Defense

The so-called “recalcitrant worker” defense reached its zenith in 2004, with the Court of Appeals’ decision in Cahill v. Triborough Bridge and Tunnel Authority, 4 N.Y.3d 35, 790 N.Y.S.2d 74 (2004). Up until Cahill, the Appellate Division, perhaps mindful that the alternative rule could virtually divest owners and contractors of any responsibility for construction site safety -- it would, after all, be unusual if a construction worker had never been told to use a safety belt or to secure all ladders etc. -- had consistently held that a refusal to comply with an immediate safety instruction was the sine quo non of the defense. Disregard of a prior directive or warning might make the worker foolish, stupid or negligent, but it did not render the worker “recalcitrant.”

100 See, e.g., Davidson v. Ambrozewicz, 12 A.D.3d 902, 785 N.Y.S.2d 149, 151 (3rd Dep’t 2004) (“The recalcitrant worker doctrine allows a defendant to escape liability under Labor Law § 240(1) when it is shown that the injured worker refused to use the safety devices provided by the employer … However, an ignored instruction to avoid using unsafe equipment is not the equivalent of a refusal to use available safe equipment and such evidence, by itself, does not create an issue of fact sufficient to support a recalcitrant worker defense”); Bissell v. Town of Amherst, 6 A.D.3d 1229, 775 N.Y.S.2d 730, 731 (4th Dep’t 2004) (with no further explanation: “any evidence that plaintiff disobeyed instructions in climbing the ladder ‘does not provide a basis for a defense against plaintiff[s]’ Labor Law § 240(1) [claim]”); Vacca v. Landau Industries, Ltd., 5 A.D.3d 119, 773 N.Y.S.2d 21, 22 (1st Dep’t 2004) (the site superintendent’s statement “that ‘[a]t some time prior to 10/31/98, the exact date of which [he] did not recall,’ he instructed plaintiff to wear a safety harness is far too equivocal to support the recalcitrant worker defense”; “[i]t is well settled in this Department that an immediate instruction is a requirement of the ‘recalcitrant worker’ defense”); DeJara v. 44-14 Newtown Road Apartment Corporation, 307 A.D.2d 948, 949-950, 763 N.Y.S.2d 654, 656 (2nd Dep’t 2003) (“the Supreme Court properly declined to submit a recalcitrant worker defense to the jury, as there was no evidence that the decedent refused to use any additional safety devices provided to him and available at the work site on the day of the accident”); Howe v. Syracuse University, 306 A.D.2d 891, 892, 760 N.Y.S.2d 922, 922-923 (4th Dep’t 2003) (defendants “did not raise an issue of fact whether plaintiff was a recalcitrant worker”; “[t]he recalcitrant worker defense ‘requires a showing that the injured worker refused to use the safety devices that were provided by the owner or employer’ … [and] has no application where, as here, safety devices were merely present elsewhere at the work site”; “[d]efendants failed to submit proof in support of their contention that plaintiff was told to use a specific safety device and refused to do so”); Morrison v. City of New York, 306 A.D.2d 94, 949-950, 769 N.Y.S.2d 654, 656 (1st Dep’t 2003) (where plaintiff fell from a scaffold that “had no guard rails, safety nets or lifelines”, it “[d]id not avail defendants to assert that plaintiff did not use the ladder they provided to go up and down the scaffold, absent evidence that plaintiff disregarded an immediate, specific instruction to use the ladder”); Olszewski v. Park Terrace Gardens, 306 A.D.2d 128, 128-129, 763 N.Y.S.2d 246, 247 (1st Dep’t 2003) (“Defendants’ recalcitrant worker defense, predicated on plaintiff’s failure to secure the harness he had been furnished to the safety line, is unavailing, there being no dispute that the scaffold was defective, and there being no evidence that plaintiff was given an ‘immediate instruction’ to use the harness”); DePalma v. Metropolitan Transportation Authority, 304 A.D.2d 461, 759 N.Y.S.2d 37 (1st Dep’t 2003) (where decedent fell from an I-beam and was
In *Cahill*, the Court unanimously ruled that the recalcitrant worker defense could apply even when, as was indisputably the case here, the instruction with which the “recalcitrant worker” refused/failed to comply had been given weeks earlier:

We decide in this case that, where an employer had made available adequate safety devices and an employee has been instructed to use them, the employee may not recover under Labor Law § 240(1) for injuries caused solely by his violation of those instructions, even though the instructions were given several weeks before the accident occurred.

* * *

The word “recalcitrant” fits plaintiff in this case well. He received specific instructions to use a safety line while climbing, and chose to disregard those instructions. He was not the less recalcitrant because there was a lapse of weeks between the instructions and his disobedience of them.

4 N.Y.3d at 36, 39, 790 N.Y.S.2d at 75, 76, emphasis added.

Yet, more recent decisions seem to require conduct tantamount to a “refusal” to work safely. And the defense will certainly not lie where plaintiff was directed to do whatever she or she is now being blamed for doing.

killed, where there was no safety net at the site, and “the fact that safety harnesses may have been available at the work site is insufficient to allow defendants to escape liability, there was "no evidence that plaintiff's decedent refused to use the safety harness”; “[s]ince there is no evidence that plaintiff refused to use safety equipment and since the activity which occasioned his fall was within that type of work normally done by a member of a rigging crew, the IAS court should have granted plaintiff’s motion [for summary judgment]").

101 *Mazurett v. Rochester City Sch. Dist.*, 88 A.D.3d 1304, 1305, 930 N.Y.S.2d 742, 743-744 (4th Dep’t 2011) (where plaintiff “fell from a collapsing scaffold at a construction site on property owned by defendant,” the Court rejected “defendant’s contention that plaintiff was a recalcitrant worker whose own actions were the sole proximate cause of the accident”; “[a]lthough defendant submitted evidence that plaintiff was instructed to use a more stable scaffold and to use a ladder to ascend the scaffold, defendant failed to submit any evidence that plaintiff refused to use a particular scaffold or ladder that was provided to him”; “[e]ven assuming, arguendo, that plaintiff was negligent, we conclude that his own conduct cannot be deemed the sole proximate cause of the accident inasmuch as plaintiffs established that a statutory violation was a proximate cause of plaintiff’s injuries”); *Landgraff v. 1579 Bronx River Ave., LLC*, 18 A.D.3d 385, 386, 796 N.Y.S.2d 58 (1st Dep’t 2005) (“[t]he recalcitrant worker defense is thus not applicable as it is limited to circumstances where a worker is injured as a result of his/her refusal to use available safety devices”); *Gaffney v. BFP 300 Madison II, LLC*, 18 A.D.3d 403, 403-404, 795 N.Y.S.2d 579, 580 (1st Dep’t 2005) (“[t]he recalcitrant worker defense, predicated on the injured plaintiff’s alleged failure to use a safety harness and
As a practical matter, the “recalcitrant worker” defense is becoming less and less important inasmuch as defendants generally find that the broader, “sole proximate cause” rubric is less limiting and more easily made out.

other protective devices, is unavailing, since there is no evidence that he deliberately refused to use safety devices provided”; citing Hagins, and not Cahill).

102 Dedndreaj v. ABC Carpet & Home, supra, 93 A.D.3d 487, 488, 940 N.Y.S.2d 62 (1st Dep’t 2012) (where plaintiff “established his prima facie entitlement to summary judgment by showing that defendants’ failure to provide an adequate safety device proximately caused a pipe that was in the process of being hoisted to fall and strike him,” defendants could not “rely upon the ‘recalcitrant worker’ defense given that plaintiff was following his superior through the passageway, which was the only means of exiting the room”).
VI. THE NATURE OF, AND PREREQUISITES FOR, IMPOSITION OF LIABILITY PURSUANT TO LABOR LAW § 241(6).

A. The General Rule: Imposition Of Vicarious Liability

Fusca v. A&S Constr., LLC, 84 A.D.3d 1155, 1156-1157, 924 N.Y.S.2d 463, 466 (2nd Dep’t 2011) (“Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon an owner or general contractor to provide reasonable and adequate protection to workers, and a violation of an explicit and concrete provision of the Industrial Code by a participant in the construction project constitutes some evidence of negligence for which the owner or general contractor may be held vicariously liable’ [internal citations omitted] … ‘An owner or general contractor may, of course, raise any valid defense to the imposition of vicarious liability under section 241(6), including contributory and comparative negligence’” [internal citation omitted]); here, where “plaintiff allegedly sustained injuries when he fell from the ground floor to the basement through an unguarded, unfinished stairwell while working in a house under construction,” “neither the plaintiff nor the defendant established their prima facie entitlement to judgment as a matter of law”).

Alonzo v. Safe Harbors of the Hudson Housing Development Fund Company, Inc., supra, 104 A.D.3d 446, 450, 961 N.Y.S.2d 91, 96 (1st Dep’t 2013) (“[l]ike his Labor Law § 240(1) claim, plaintiff’s Labor Law § 241(6) claim is not dependent on the degree of control over his work that defendants exercised [citation omitted]. Rather, it is dependent on the application of a specific Industrial Code provision and a finding that the violation of the provision was a result of negligence”).

Burnett v. City of New York, 104 A.D.3d 437, 438, 961 N.Y.S.2d 81, 82 (1st Dep’t 2013) (“[s]ince an owner’s liability under Labor Law § 241(6) is vicarious, it is irrelevant that defendant, as it contends, had no notice of the hazardous condition”).

B. Limitation To Industrial Code Rule 23


Industrial Code part 12 relates to prevention and/or removal of air contaminants from the workplace.

With Chief Judge Lippman and Judge Read taking no part, the Court unanimously ruled, per decision by Judge Graffeo, that,

[Industrial Code] part 12 does not impose liability on owners and contractors under Labor Law § 241(6), except insofar as it is expressly incorporated into part 23.
The Court reached that conclusion based upon the circumstances that

- Part 23, governing the protection of workers in construction, demolition and excavation operations, expressly states that the rules in part 23 apply to "owners, contractors and their agents obligated by the Labor Law to provide such persons with safe working conditions and safe places to work" (12 NYCRR 23-1.3), whereas part 12 does not expressly say that it so applies;

- Section 23-1.7(g) makes any "unventilated confined area" where dangerous air contaminants may be present subject to the provisions of part 12, a provision that would purportedly make no sense if part 21 were already subject to part 23.

C. Construction Of The Industrial Code Provisions


The Issue: Did the provisions of 12 NYCRR 23-9.4(3), governing “power shovels and backhoes,” also apply to a “front-end loader” that was used to perform the same work as a power shovel or backhoe?

By 4 to 3 vote, the Court answered in the affirmative.

Facts: Plaintiff was injured while “assisting a work crew that was constructing a drainage pipeline by welding together and laying 20-foot sections of snow-making pipe” (16 N.Y.3d at 413, 923 N.Y.S.2d at 392). They used “a hydraulic-operated clamshell bucket attached to the bucket arm of a front-end loader to lift sections of the pipe approximately four feet above the ground and then hold the pipe in place” for the purposes of the work (id.). As plaintiff was hammering the welded seam to remove excess metal, the jaws of the bucket opened and the pipe pinned plaintiff to the ground.

Section 23-9.4 was within the subpart entitled “Power-Operated Equipment.” It provided:

Where power shovels and backhoes are used for material handling, such equipment and the use thereof shall be in accordance with the following provisions …

(e) Attachment of load.

(1) Any load handled by such equipment shall be suspended from the bucket or bucket arm by means of wire rope having a safety factor of four.
Such wire rope shall be connected by means of either a closed shackle or a safety hook capable of holding at least four times the intended load.

Rulings Below: Supreme Court and the Third Department each deemed the provision applicable. The Appellate Division reasoned that the manner in which the machine was used, not its label, was critical.

Majority: The majority ruled in a decision by the Chief Judge that the provision did not “enumerate each piece of heavy equipment that can be operated to suspend materials from its bucket or bucket arm,” but the provision was “clearly drafted to reduce the threat posed by heavy materials falling from buckets by requiring loads to be fastened with sturdy wire, proportionate to the weight of the load” and “[t]he same danger that exists for a worker using a power shovel or backhoe with an unsecured load exists for a worker using a front-end loader with an unsecured load” (16 N.Y.3d at 415-416, 923 N.Y.S.2d at 394). In light of the protective purposes of the Labor Law, the provision should be “sensibly” applied to the facts at hand:

The Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace (see e.g. Allen v. Cloutier Constr. Corp., 44 N.Y.2d at 300, 405 N.Y.S.2d 630, 376 N.E.2d 1276 [“Doubtless this duty (imposed by Labor Law § 241) is onerous; yet, it is one the Legislature quite reasonably deemed necessary by reason of the exceptional dangers inherent in connection with ‘constructing or demolishing buildings or doing any excavating in connection therewith’”]). Accordingly, the preferred rule both as a matter of statutory interpretation and as a reinforcement of the objectives of the Industrial Code is to take into consideration the function of a piece of equipment, and not merely the name, when determining the applicability of a regulation. This approach accounts for those circumstances where a slightly different machine is utilized for the same risky objective that is perhaps more frequently or more efficiently achieved by the machine designated by name in the Code.

Dissent: The dissent, by Judge Smith, charged that the majority’s construction of the provision “can only confuse what until now has been our consistent, if rather complicated, approach to actions brought under Labor Law § 241(6)” (16 N.Y.3d at 416, 923 N.Y.S.2d at 394).

As he saw it, past decisions had held that “the starting point” was “the words of the regulation” and the majority had here decided “that we may disregard the words if doing so will effectuate the regulation’s ‘purpose of protecting construction laborers against hazards in the workplace’” (16 N.Y.3d at 418, 923 N.Y.S.2d at 395). 

103 I suspect the majority would not have agreed that it had quite said that.
“power shovels and backhoes” it should apply only to power shovels and backhoes. 16 N.Y.3d at 418, 923 N.Y.S.2d at 396.

**Hage v. State of New York**, 38 Misc.3d 1214(A), 2013 N.Y. Slip Op. 50102(U) (Ct. of Claims 2013) (Marin, J.) (where claimant “was operating a drill when it ‘became demagnetized … spun around and crushed against his finger,’” and where **12 NYCRR 23-1.10[b][1]** provided that “[e]lectric and pneumatic hand tools shall be disconnected from power sources and the pressure in hose lines shall be released before any adjustments or repairs are made except for the replacement of bits in electric drills,” while the text of the provisions “appears to comprehend a worker intending to shut off the power before making any adjustments or repairs, or moving on to another place,” “the totality of § 23-1.10 implies that everything be shut down at once; i.e., when the power is off, the worker is safe because the tool has stopped operating”; such view was also supported by claimant’s expert’s affidavit); **contrast Kropp v. Town of Shandaken**, 91 A.D.3d 1087, 937 N.Y.S.2d 345, 351-352 (3rd Dep’t 2012) (where “plaintiff was working at the bottom of a trench that was between four and eight feet deep, connecting lengths of pipe that were being lowered into the trench by an excavator operated by plaintiff’s supervisor,” where “plaintiff was struck by an iron pipe measuring 18 inches in diameter and 18 feet long, and that fittings had been attached to one end of the pipe to permit it to be connected with a narrower pipe, resulting in a total weight of approximately 1,500 pounds,” and where the parties agreed “that the pipe dropped as it was being moved [but] … disagree[d] as to how far it dropped, why this occurred, and whether the hoisting equipment was adequate to meet the requirements of the task and Labor Law § 240(1),” **12 NYCRR subpart 23-8** did not apply inasmuch as “cranes and derricks” “are explicitly excluded from the coverage of **12 NYCRR subpart 23-9**” and “[a]n excavator that is functioning in the same manner as a power shovel and is therefore subject to the requirements of **12 NYCRR 23-9.4** cannot simultaneously be considered a crane for purposes of **12 NYCRR subpart 23-8**”).

**D. Pleading (Or Failure To Plead) The Alleged Regulatory Violations**

**Flynn v. 835 6th Avenue Master L.P.**, 107 A.D.3d 614, 969 N.Y.S.2d 13, 14 (1st Dep’t 2013) (“The court properly permitted plaintiff to amend the bill of particulars, since no prejudice accrued from plaintiff’s late invocation of violations of **12 NYCRR 23–1.7(e)(2)** and **23–2.1(a)(1)**, and the claims entailed no new factual allegations or theories of liability”).

**Smith v. Nestle Purina Petcare Company, supra**, 105 A.D.3d 1384, 966 N.Y.S.2d 292, 294 (4th Dep’t 2013) (“Contrary to the contentions of Nestle and Austin, plaintiff may properly rely on that regulation despite the fact that it is raised for the first time in opposition to the motion and cross motion and is not set forth in the complaint or bill of particulars inasmuch as plaintiff’s reliance thereon ‘raises no new factual allegations or theories of liability and results in no discernible prejudice to [Nestle and Austin]’”).

**Ramirez v. Metropolitan Transportation Authority, supra**, 106 A.D.3d 799, 800, 965 N.Y.S.2d 156, 159 (2nd Dep’t 2013) (where “plaintiff allegedly was injured while working on elevated subway tracks, when a plank on a catwalk on which he was standing broke” and “plaintiff fell part of the way through the catwalk to his thigh, catching himself with his arm,” “although the
plaintiff alleged a violation of Industrial Code § 23-1.22(c)(1) for the first time in opposition to the cross motion, this was not fatal to his claim, since no new factual allegations were involved, no new theories of liability were set forth, and no prejudice was caused to the defendants”).

**Creese v. Long Island Light. Co., supra**, 98 A.D.3d 708, 711-712, 950 N.Y.S.2d 167 (2nd Dep’t 2012) (“the Supreme Court did not improvidently exercise its discretion in granting that branch of the plaintiffs’ motion which was, in effect, for leave to amend the bill of particulars to allege a violation of **12 NYCRR 23-1.7(f)** with respect to the cause of action alleging violations of Labor Law § 241(6)”).

**Burton v. CW Equities, LLC**, 97 A.D.3d 462, 462-463, 950 N.Y.S.2d 1 (1st Dep’t 2012) (where plaintiff fell from a concrete walkway that lacked any guard rail and extended over an approximately 15-foot-deep vaulted area below grade level, plaintiff could allege a violation of § 23-1.7(b)(1) in his responsive motion papers even though it had not been pleaded since defendant “claims no prejudice from the late invocation of the provision”).

**Sanders v. St. Vincent Hosp.**, 95 A.D.3d 1195, 1196, 945 N.Y.S.2d 343 (2nd Dep’t 2012) (where “[t]he amendment presented no new factual allegations or new theories of liability, and did not prejudice the hospital,” “[t]he fact that the plaintiff raised his allegation of the specific Industrial Code provision for the first time in opposition to the hospitals’ motion for summary judgment was not fatal to his claim, and was sufficient to raise a triable issue of fact regarding the hospital’s liability pursuant to Labor law § 241(6)”).

**Pitre v. City of New York**, 92 A.D.3d 661, 938 N.Y.S.2d 170, 171 (2nd Dep’t 2012) (where plaintiffs had not alleged any regulatory violations in their bill of particulars, and where “[n]early 10 years elapsed from the time the plaintiffs served their verified bill of particulars until they sought at trial to rely upon the contested Industrial Code sections” and “plaintiffs offered no explanations as to why they had not earlier moved to amend their pleadings,” “the Supreme Court properly granted the defendants’ motions pursuant to CPLR 4401 for judgment as a matter of law dismissing the plaintiffs’ Labor Law § 241(6) cause of action”).

**Scott v. Westmore Fuel Co., Inc., supra**, 96 A.D.3d 520, 521, 947 N.Y.S.2d 15 (1st Dep’t 2012) (Supreme Court “properly denied plaintiff’s request to amend the bill of particulars to allege violation of **12 NYCRR § 23-9.4(h)(5)**, as such request, made after the note of issue was filed, was untimely and prejudicial … the request, made in a footnote in plaintiff’s opposition papers, was procedurally defective, as plaintiff was required to serve a notice of cross motion … In any event, the provision is inapplicable”).

**E. “Integral To The Work” Defense**

**Thomas v. Goldman Sachs Headquarters, LLC**, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2013 WL 4053163 (1st Dep’t 2013) (where “the protective covering had been purposefully installed on the floor as an integral part of the renovation project,” it could not be “construed as accumulated debris or scattered materials” within the meaning of 23-1.7(e)(2)).
Flynn v. 835 6th Avenue Master L.P., 107 A.D.3d 614, 969 N.Y.S.2d 13, 14 (1st Dep’t 2013) (“[p]laintiff’s testimony showed that the rebar that allegedly caused him to fall was in the process of being installed and thus integral to the ongoing work, defeating his claim of a violation of 12 NYCRR 23–1.7(e)(2)”).

Smith v. Nestle Purina Petcare Company, supra, 105 A.D.3d 1384, 966 N.Y.S.2d 292, 295 (4th Dep’t 2013) (where plaintiff had been “standing on a ladder while vacuuming grain dust off the top of a hose rack” and he then “stepped off the ladder and onto accumulated grain dust and a hose that was hanging off the rack,” in the process twisting his ankle and falling, the motion court erred in denying defendants’ motion for summary judgment “to the extent that it is based upon an alleged violation of 12 NYCRR 23-1.7(d);” the grain dust on which plaintiff slipped “was the very condition he was charged with removing’ and thus was an integral part of the task plaintiff was performing”).

Cumberland v. Hines Interests Limited Partnership, 105 A.D.3d 465, 963 N.Y.S.2d 173 (1st Dep’t 2013) (although “plaintiff’s deposition testimony raised an issue of fact as to whether he fell in a ‘passageway’ or an open work area,” “Industrial Code (12 NYCRR) § 23-1.7(d) does not apply because the pipe and pipe fittings over which plaintiff fell were not ‘debris,’ but rather were ‘consistent with’ the work being performed in the room”).

Velasquez v. 795 Columbus LLC, 103 A.D.3d 541, 541-542, 959 N.Y.S.2d 491 (1st Dep’t 2013) (where plaintiff purportedly “slipped and fell on ‘mud, rocks and water’ at a construction site that … consisted of an open excavation,” 12 NYCRR 23-1.7(d), which “protects workers against slipping hazards, [was] an applicable predicate for the Labor Law § 241(6) claim” since plaintiff “was working on a ‘floor’ within the meaning of 12 NYCRR 23-1.7(d)” and “the mud was not part of the floor and not an integral part of plaintiff’s work” and was therefore “a ‘foreign substance’ that caused slippery footing”).

Sanders v. St. Vincent Hosp., supra, 95 A.D.3d 1195, 1196, 945 N.Y.S.2d 343 (2nd Dep’t 2012) (“12 NYCRR 23-1.7(e)(2) is inapplicable where the object ‘over which the [plaintiff] alleges he [or she] tripped was integral to the work being performed [citation omitted]’”).

White v. Vill. of Port Chester, 92 A.D.3d 872, 877-878, 940 N.Y.S.2d 94 (2nd Dep’t 2012) (where plaintiff, “an employee of a nonparty trucking company, picked up steel from the defendant Orange County Ironworks, LLC … and delivered it to the area outside [the site], parking his truck alongside a sidewalk area where freshly poured concrete was covered with a plastic sheet that extended into the roadway,” where plaintiff “stepped onto the edge of the plastic that extended into the road, tripped and fell,” and where he thereafter “pulled back the plastic sheet and saw a brick laying there, and another brick about four feet away” and testified “that the bricks ‘were folded up inside the plastic,’” 12 NYCRR 23-1.7(e)(2) was “a sufficiently specific, positive command” which was “adequately pleaded in the plaintiffs’ bill of particulars” and defendants “failed to establish, prima facie, that 12 NYCRR 23-1.7(e)(2) is inapplicable to the facts of this case” inasmuch as “the speculative deposition testimony of the injured plaintiff regarding the brick’s purpose was insufficient to establish, as a matter of law, that the brick was not debris but, rather, was integral to and ‘consistent with the work being performed’” especially since “the deposition testimony of certain defense witnesses familiar with
the work was that it was not appropriate to use bricks to hold down a plastic sheet over freshly poured concrete and that, as was used in other areas over the sheet, two-by-four or two-by-six pieces of wood were appropriate").

**Zieris v. City of New York**, 93 A.D.3d 479, 479-480, 940 N.Y.S.2d 72 (1st Dep’t 2012) (“[e]ven assuming that the area plaintiff traversed could be deemed a ‘passageway’ within the meaning of Rule 23-1.7(e) … Rule 23-1.7(e) does not apply because the evidence shows that the subject rivet stem [on which plaintiff tripped] constituted an integral part of plaintiff’s work” inasmuch as “all falling parts could not be caught while plaintiff and his coworkers were actively engaged in the removal work”).

**Leon v. SMC Construction Corp.**, 39 Misc.3d 1207(A), 2013 N.Y. Slip Op. 50512(U) (Sup. Ct. N.Y. Co. 2013) (Rakower, J.) (where plaintiff was employed “as a union asbestos abatement worker,” where “[t]he abatement work was scheduled to begin on a Friday afternoon, after all the other trades had left the site for the day,” where “because there were stacked pipes in the room where the work was to be done, Plaintiff and his supervisor decided to lift and carry the air filter over the stack of pipes,” and where plaintiff’s supervisor “slipped on a pipe” causing plaintiff to injure his back, there were factual issues as to defendants’ liability under Labor Law § 241(6) and 12 NYCRR 23-1.7(e)(2) presented issues of fact; in particular, “the parties have failed to demonstrate that the stack of pipes was inherent to the asbestos abatement job that Plaintiff was performing … ‘Indeed, SMC has failed to demonstrate that the stack of pipes had any connection at all with the renovation project’”).

**F. Issue Reached Upon A “Search Of The Record”**

**Velasquez v. 795 Columbus LLC, supra**, 103 A.D.3d 541, 541, 959 N.Y.S.2d 491 (1st Dep’t 2013) (where plaintiff purportedly “slipped and fell on ‘mud, rocks and water’ at a construction site that … consisted of an open excavation,” while plaintiff “did not raise the applicability of 12 NYCRR 23-1.7(d) in his summary judgment motion (although he asserted it in his complaint and verified bill of particulars), … we reach the issue because it is a legal issue that is apparent on the record, and the determination could not have been avoided if the issue had been brought to defendants’ attention on the motion”).

**G. Plaintiff’s Motions For Partial Summary Judgment Under Labor Law § 241(6)**

**Marrero v. 2075 Holding Co. LLC, supra**, 106 A.D.3d 408, 410, 964 N.Y.S.2d 144, 146-147 (1st Dep’t 2013) (where plaintiff testified that “he was walking across plywood planks covering fresh concrete” when “[t]he plywood planks buckled and shifted,” and where that caused “an A-frame cart containing sheetrock and two 500-pound steel beams” to tip over and land on plaintiff’s left calf and ankle, “we hold that the motion court improperly denied plaintiff’s motion for summary judgment based on violations of 12 NYCRR 23-2.1(a)(2)”; the cited section “states that ‘[m]aterial and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor,
platform or scaffold” and plaintiff “made a prima facie showing that this provision applies, by testifying that an A-frame cart containing Sheetrock and two 500–pound beams was on plywood flooring and the plywood collapsed as he was walking on the floor”).

Restrepo v. Yonkers Racing Corporation, Inc., supra, 105 A.D.3d 540, 541, 964 N.Y.S.2d 17, 19 (1st Dep’t 2013) (where plaintiff “was injured when an access door in the floor of the soffit, or attic, where he was working opened downward, causing him to fall approximately 12 to 13 feet to the floor below,” and where plaintiff “was unaware of the door and did not see the door because it was covered by plastic,” there was no triable issue as to whether the access door was sufficiently substantial or adequately fastened in place to guard the hazardous opening and plaintiff was entitled to summary judgment based on a violation of 12 NYCRR 23-1.7(b)(1)(i)).

Thompson v. 1241 PVR, LC, 104 A.D.3d 1298, 961 N.Y.S.2d 689 (4th Dep’t 2013) (where “[p]laintiff fell on ice and snow that had accumulated on the floor of the building where he was framing interior walls,” where it was “undisputed that there were in fact accumulations of ice and snow and that [the GC] was made aware of that fact,” and where defendants “presented no evidence in opposition to demonstrate that the floor was reasonably and adequately safe despite the violation,” the motion court “properly determined as a matter of law that defendants were negligent” in violating 12 NYCRR 23-1.7(d) and it properly rejected defendants’ argument that plaintiff could be deemed contributorily negligent “based on his failure to use tools provided by defendants to remove the ice and snow” or based upon “his failure to take proper precautions while moving too quickly on the slippery surface”; as to the former, “[d]efendants’ duty to remove the ice and snow was nondelegable and, absent any express policy that employees, including plaintiff, were to remove ice and snow, plaintiff cannot be held negligent for his failure to undertake defendants’ nondelegable duty; as to the latter, “defendants presented no evidence in admissible form establishing that plaintiff was moving too quickly on the ice and snow at the time of his accident”).

Del Rosario v. United Nations Federal Credit Union, 104 A.D.3d 515, 515, 961 N.Y.S.2d 389, 390 (1st Dep’t 2013) (where plaintiff, standing on an A-frame ladder, was struck on the left side of his face by a live, energized and exposed electrical wire, pulled away from the wire, thus causing the ladder to wobble and him to fall, plaintiff was entitled to summary judgment based “on violations of 12 NYCRR 23-1.13(b)(3) and (4)” inasmuch as those “code sections are clear and specific in their commands that before work is started, it is to be ascertained whether the work will bring a worker into contact with an electric power circuit, and, if so, that the worker not be permitted to come into contact with the circuit without it being de-energized”).

Alonzo v. Safe Harbors of the Hudson Housing Development Fund Company, Inc., supra, 104 A.D.3d 446, 451, 961 N.Y.S.2d 91, 96 (1st Dep’t 2013) (where the accident occurred when plaintiff “stepped on an eight-by-four-foot section of 3/4-inch-thick plywood, which unexpectedly ‘flipped up,’” thus uncovering an opening through which the plaintiff fell “10 or 12 feet to the story below,” and where the condition was violative of §§ 23-1.7[b][1][i], [ii] and 23-3.3[j][2][i], plaintiff was entitled to summary judgment “because the removal of the covering, which created a significant falling hazard, was unquestionably negligent, and there is no evidence of plaintiff’s complicity in the removal”).
Velasquez v. 795 Columbus LLC, supra, 103 A.D.3d 541, 959 N.Y.S.2d 491 (1st Dep’t 2013) (where plaintiff purportedly “slipped and fell on ‘mud, rocks and water’ at a construction site that … consisted of an open excavation,” and where the mud was a “foreign substance” for the purposes of 12 NYCRR 23-1.7[d], plaintiff was entitled to partial summary judgment since plaintiff testified “that his foreman instructed him to work on the day of the accident, despite the presence of a muddy and wet condition” and “[t]he deposition testimony of Tishman Construction’s general superintendent that there was no hazardous slippery condition” was “conclusory”).

Morris v. Pavarini Const., 98 A.D.3d 841, 842-843, 950 N.Y.S.2d 370 (1st Dep’t 2012) (by 4 to 1 vote: where defendants urged that 12 NYCRR 23-2.2(a) [requiring that forms used on construction sites “be properly braced or tied together so as to maintain position and shape”] should be limited to completed forms, where the Court of Appeals directed the motion court to hold a hearing to determine if it would be “sensibly applied to anything but completed forms,” and where “the testimony of both plaintiff’s and defendants’ experts showed that the regulation could sensibly be applied to forms as they are being constructed, before they are ready to have liquid concrete poured into them,” the regulation should not be limited in scope to completed forms and summary judgment should be granted to plaintiff; the dissenter believed that “[t]he majority attaches undue significance to the experts’ opinions concerning the construction of forms,” stating “[t]hat an expert may opine that forms should be braced during assembly to resist wind loads has no bearing on whether the regulation at issue requires as much”).

Capuano v. Tishman Constr. Corp., supra, 98 A.D.3d 848, 850-851, 950 N.Y.S.2d 517 (1st Dep’t 2012) (where plaintiff “slipped on a piece of discarded sprinkler pipe between 12 to 18 inches long and 1 to 1 1/4 of an inch in diameter, ‘did a split,’ and injured his lower back,” and where plaintiff “testified that the room where the accident occurred was dark, with no exterior windows,” and that “the temporary lighting that had been installed was not working, and … the nearest functioning lights were approximately 20 feet behind him,” defendants’ claims that the testimony was not credible were unavailing and plaintiff was entitled to summary judgment “based upon the alleged violations of 12 NYCRR 23-1.7(e)(2), which provides that working areas shall be kept free from the accumulation of dirt and debris and scattered tools and materials, and 12 NYCRR 23-1.30, which provides that ‘[i]llumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction … but in no case shall such illumination be less than 10 foot candles in any area where persons are required to [do] work’; the two concurring judges added that the plaintiff should not have the burden “to disprove an affirmative defense in order to make a prima facie showing of entitlement to summary judgment”).

Soodin v. Fragakis, 91 A.D.3d 535, 535-536, 937 N.Y.S.2d 187, 188 (1st Dep’t 2012) (where plaintiff “established that he was supplied with an old, weak, and shaky ladder that lacked rubber footings and was placed on a slippery polyurethane-coated floor, and that the ladder toppled over, causing him to fall,” the evidence that “the ladder collapsed or malfunctioned for no apparent reason raises the presumption that the ladder ‘was not good enough to afford proper protection’ under [Labor Law § 240]” and “also establishes noncompliance with Industrial Code
(12 NYCRR) §§ 23-1.21(b)(1), (3)(i)-(ii) and (iv), and 4(ii),” plaintiff was therefore entitled to partial summary judgment).

**Cappabianca v. Skanska USA Building Inc., supra.** 99 A.D.3d 139, 146-147, 950 N.Y.S.2d 55 (1st Dep’t 2012) (where plaintiff was on a pallet “anywhere from 4 to 12 inches high” when a saw malfunctioned and sprayed water “all over,” and where plaintiff’s foot was thus caused to become caught in the 3” to 6” openings between the slots of the pallet, causing him to fall, plaintiff “set[] forth a claim based on section 23-1.7(d) of the Industrial Code, which prohibits owners and employers from letting workers use ‘a floor … scaffold, platform or other elevated working surface which is in a slippery condition’ and requires that water and other ‘foreign substance[s]’ which may cause slippery footing be removed or covered,” and plaintiff also set forth a claim based on “Industrial Code section 23-9.2(a) [which] requires that ‘any structural defect or unsafe condition is [power-operated] equipment shall be corrected by necessary repairs or replacement,’” but plaintiff was “not entitled to summary judgment as to liability on his reinstated Labor Law § 241(6) claim because, as indicated, the City defendants and Skanska have raised triable issues about whether the Industrial Code regulations were violated and, if so, whether the violations caused the accident”).

**Reynosa v. Bovis Lend Lease, LMB, Inc.,** 39 Misc.3d 1224(A), 2013 N.Y. Slip Op. 50725(U) (Sup. Ct. Kings Co. 2013) (Battaglia, J.) (where plaintiff allegedly slipped on ice while working at the WTC construction site, where plaintiff premised his 241(6) claim on defendants’ alleged violation of 12 NYCRR 23-1.7(d), and where the court remarked that “there does not appear to be a consistently-applied standard in the appellate caselaw used in determining whether a plaintiff has made a prima facie showing of entitlement to summary judgment on a Labor Law § 241(6) cause of action,” that “[b]oth the Third and Fourth Departments have determined it to be error to grant summary judgment on a Labor Law § 241(6) cause of action based solely upon a violation of an Industrial Code section,” that “[t]he First Department appears to differ,” and that “[t]he caselaw in the Second Department appears in conflict,” the court ultimately concluded that “[a]t least within the Second Department, which this Court is bound to follow, the caselaw establishes that, under certain facts and circumstances, a plaintiff establishes prima facie entitlement to summary judgment on a Labor Law § 241(6) cause of action based upon a showing that an applicable Industrial Code provision was violated and that such violation was the proximate cause of the accident or injury” and that summary judgment for plaintiff was warranted in this case in which 23-1.7(d) was the predicate section and plaintiff’s own submission “sufficiently establishes prima facie that he was free from comparative negligence … at the least, does not raise an issue of fact as to Plaintiff’s comparative negligence”).

**H. Recent Rulings As To The Applicability Or “Concreteness” Of Particular Regulations**

**1. Provisions Inapplicable, Unavailing, Or Overly General**

**Purcell v. Metlife Inc., supra,** 108 A.D.3d 431, 969 N.Y.S.2d 43, 45-46 (1st Dep’t 2013) (where “plaintiff testified that he slipped on wet plywood while carrying a heavy steel beam,” 12 NYCRR § 23-1.7[e][1] was inapplicable since, (a) there was “no evidence in the record that
plaintiff tripped,” and (b) “plaintiff’s accident did not take place in a ‘passageway’ within the meaning of that provision’ and instead occurred in an open-work area on the eighth-floor roof setback of the work site; 12 NYCRR § 23-1.7(e)(2) was also inapplicable “because the wet plywood on which plaintiff slipped [was] not ‘debris’ or any of the other obstructions listed in that provision”; 12 NYCRR 23-1.11 was “inapplicable, since plaintiff [did not] claim that his accident was caused by defects in the lumber and nail fastenings used in the construction of the plywood”; 12 NYCRR 23-1.22(b)(2) was also inapplicable “since the plywood [was] neither a runway nor a ramp”).

Flynn v. 835 6th Avenue Master L.P., supra, 107 A.D.3d 614, 969 N.Y.S.2d 13, 14 (1st Dep’t 2013) (“[p]laintiff’s testimony showed that the rebar that allegedly caused him to fall was in the process of being installed and thus integral to the ongoing work, defeating his claim of a violation of 12 NYCRR 23–1.7(e)(2); “given plaintiff’s vague and inconsistent testimony concerning the condition of the stacked rebar, his claim that the accident was caused by the rebar being stored in an unstable manner in violation of 12 NYCRR 23–2.1(a)(1) is based on mere speculation”).

Maldonado v. AMMM Properties Company, supra, 107 A.D.3d 954, 954-955, 968 N.Y.S.2d 163, 165 (2nd Dep’t 2013) (where plaintiff and a co-employee were attempting to demolish a wall that included a glass pane, and where “plaintiff was holding the glass pane while a coworker attempted to dislodge it from the metal frame by the use of pliers, when the glass pane cracked and fell, causing the plaintiff to sustain injuries,” “demonstrated that the provisions of 12 NYCRR 23–3.3(b)(3) and (c), relied on by the plaintiff, are inapplicable, as the hazard arose from the plaintiff’s actual performance of the demolition work itself, rather than from structural instability caused by the progress of the demolition”).

Harasim v. Eljin Construction of New York, Inc., 106 A.D.3d 642, 643, 966 N.Y.S.2d 387, 389 (1st Dep’t 2013) (where plaintiff purportedly slipped on a stairway, “Industrial Code (12 NYCRR) § 23–1.7(e)(2), which protects workers from tripping hazards, is inapplicable because the injured plaintiff does not allege that he tripped over ‘dirt and debris,’ ‘scattered tools’ or ‘sharp projections’ in his work area”).

Mohamed v. City of Watervliet, supra, 106 A.D.3d 1244, 1247, 965 N.Y.S.2d 637, 641 (3rd Dep’t 2013) (where plaintiff and his co-workers “were installing a T-connection to an existing water main so that a new fire hydrant could be connected,” where plaintiff was standing in a trench and the T-connection was attached to the bucket of a backhoe, where the bucket was being lowered into the trench, and where the bucket had remained suspended approximately 3 1/2 feet above plaintiff when it “then descended precipitously into the trench and crushed plaintiff,” “because the ‘load’—the T-connection—was not being carried or swung over plaintiff’s head at the time of the accident, the court properly dismissed the claim to the extent that it relied upon 12 NYCRR 23–9.4(h)(5), which provides that, ‘[w]here power shovels and backhoes are used for material handling, ... [c]arrying or swinging suspended loads over areas where persons are working or passing is prohibited’”; additionally, “12 NYCRR 23-4.2(k) [was] not sufficiently specific to support a Labor Law § 241(6) claim”).
Moncayo v. Curtis Partition Corporation, supra, 106 A.D.3d 963, 965, 965 N.Y.S.2d 593, 595 (2nd Dep’t 2013) (where site worker “Michael McNerny, had been working on the third floor, using a power saw to cut out a piece of sheetrock from the ceiling to facilitate the installation of a grill for the air conditioning system,” where a small piece of sheetrock slipped from his hand and bounced off a window sill, and where it thereafter struck plaintiff while plaintiff was standing on the ground outside the school that was under construction, Supreme Court properly rejected the claim predicated upon a violation of 12 NYCRR 23-1.7(a) inasmuch as “[t]hat section requires suitable overhead protection in areas that are ‘normally exposed to falling material or objects’ … [and] defendants established, prima facie, that 12 NYCRR 23-1.7(a)(1) is inapplicable to the facts of this case because the area where the accident occurred was not normally exposed to falling material or objects”).

Ramirez v. Metropolitan Transportation Authority, supra, 106 A.D.3d 799, 801, 965 N.Y.S.2d 156, 159-160 (2nd Dep’t 2013) (where “plaintiff allegedly was injured while working on elevated subway tracks, when a plank on a catwalk on which he was standing broke” and “plaintiff fell part of the way through the catwalk to his thigh, catching himself with his arm,” “the Supreme Court should have granted that branch of the defendants’ cross motion which was for summary judgment dismissing the Labor Law § 241(6) cause of action insofar as predicated on alleged violations of Industrial Code §§ 23-1.7, 23-1.15, 23-1.16, 23-1.17 and 23-3.3” as “those sections of the Industrial Code are not applicable”; “§ 23-1.7(b) applies to hazardous openings, not elevated hazards such as the one in this case”; Industrial Code § 23-1.15 concerns standards for safety railings (see 12 NYCRR 23-1.15). Here, there was no allegation that the railing in this case failed; “§ 23-1.16 concerns safety belts, harnesses, tail lines, and lifelines (see 12 NYCRR 23-1.16) and, since it is undisputed that the plaintiff was not wearing any of these devices at the time when he fell, and that such devices were offered, there was no violation of this provision”; “§ 23-1.17 concerns life nets” and “since the plaintiff did not fall all the way through the catwalk but, rather, fell only a few feet, the lack or failure of a life net could not be a proximate cause of his injury”).

Marrero v. 2075 Holding Co. LLC, supra, 106 A.D.3d 408, 410, 964 N.Y.S.2d 144, 146-147 (1st Dep’t 2013) (where plaintiff testified that “he was walking across plywood planks covering fresh concrete” when “[t]he plywood planks buckled and shifted,” and that caused “an A-frame cart containing sheetrock and two 500-pound steel beams” to tip over and land on plaintiff’s left calf and ankle, “[s]ection 23-1.7(e)(2) is inapplicable because the accident was not caused by materials or tools scattered on the floor” and “[s]ection 23-2.1(a)(1) is inapplicable because there is no allegation that the accident occurred in a passageway, walkway, stairway, or other thoroughfare”).

Francescon v. Gucci America, Inc., 105 A.D.3d 503, 504, 964 N.Y.S.2d 8, 9-10 (1st Dep’t 2013) (where “plaintiff was injured after he stepped off the edge of the work area to the subfloor 12 to 15 inches below,” such was not “‘hazardous opening’ within the meaning of 12 NYCRR 23-1.7(b)”; 12 NYCRR 23-1.7(f) was “also inapplicable” inasmuch as there was “no basis in the record for any claim that the ‘[s]tairways, ramps or runways’ identified in section 23–1.7(f) were required, given plaintiff’s testimony that the subfloor was only approximately 12 to 15 inches below the first floor from which he fell”; plaintiff’s own testimony also established that his
accident “was not connected to any slippery condition within the purview of 12 NYCRR 23-1.7(d)”).

**Vega v. Renaissance 632 Broadway, LLC, supra**, 103 A.D.3d 883, 885, 962 N.Y.S.2d 200, 202-203 (2nd Dep’t 2013) (where plaintiff’s unsecured ladder was struck by a pipe and was thus caused to fall, and where the subject ladder was either 6 feet or 8 feet tall, the provision of 12 NYCRR 23-1.21[e][3] on which plaintiff relied was thus inapplicable; “[t]he provisions of 12 NYCRR 23-3.3(b)(3) and (e) also are inapplicable, as the hazard arose from the plaintiff’s actual performance of the demolition work itself, rather than from ‘structural instability caused by the progress of the demolition’”).

**Rodriguez v. Dormitory Authority of the State, supra**, 104 A.D.3d 529, 530, 962 N.Y.S.2d 102, 104-105 (1st Dep’t 2013) (where plaintiff tripped over “a scaffold clamp that had been left on the floor where plaintiff was walking while carrying boxes,” “Sections 23–2.1(a)(1) and 23–1.7(e)(1) [were] inapplicable, since plaintiff’s testimony established that the accident occurred in an open working area near a passageway, rather than in the passageway itself”; “Section 23–1.7(d) [was] also inapplicable, as the accident was not caused by a foreign substance”).

**Steiger v. LPCiminelli, Inc.,** 104 A.D.3d 1246, 1250, 961 N.Y.S.2d 634, 638 (4th Dep’t 2013) (where plaintiff tripped and fell while exiting a portable toilet that was set back approximately 1 1/2 to 2 feet form the sidewalk curb, 12 NYCRR 23-1.7[e][1] was inapplicable since “[t]he area where the accident occurred was not a ‘passageway’ that defendants were obligated to keep free of obstructions or other conditions that might cause tripping”).

**Crousset v. Chen,** 102 A.D.3d 448, 448, 958 N.Y.S.2d 105 (1st Dep’t 2013) (where there was “no evidence of a slippery floor or that the masonite, which covered the ceramic floor, was a foreign substance that caused a slippery footing,” plaintiff could not make out a viable case under “12 NYCRR 23-1.7[d], 23-1.21[b][3][ii], [iv], [4][ii]; [e][3]”).

**Johnson v. 923 Fifth Ave. Condominium,** 102 A.D.3d 592, 593, 959 N.Y.S.2d 146 (1st Dep’t 2013) (where plaintiff was purportedly injured by virtue of a sidewalk tripping hazard, 12 NYCRR 23-1.7[e][1] was unavailing since “[t]he area of the sidewalk where plaintiff was unloading materials was not a ‘passageway’”; nor was 12 NYCRR 23-1.7[e][2] of any assistance given that “even if the sidewalk may be construed as a floor, platform or similar area where people ‘work or pass,’ plaintiff did not trip over loose or scattered material. He tripped over a piece of plywood that had been purposefully laid over the sidewalk to protect it and that therefore constituted an integral part of the work”).

**Velasquez v. 795 Columbus LLC, supra,** 103 A.D.3d 541, 541, 459 N.Y.S.2d 491 (1st Dep’t 2013) (where plaintiff purportedly “slipped and fell on ‘mud, rocks and water’ at a construction site that … consisted of an open excavation,” “12 NYCRR 23-1.7[e], which protects workers from tripping hazards, [was] inapplicable to the facts of this case”).

**Mouta v. Essex Market Dev. LLC, supra,** 106 A.D.3d 549, 550, 966 N.Y.S.2d 13 (1st Dep’t 2013) (where plaintiff “stepped on a section of plywood platform that, unbeknownst to him, was being dismantled, and … fell from the fourth floor to the second,” “[t]o the extent the Labor Law
§ 241(6) claim is predicated on Industrial Code (12 NYCRR) § 23-1.5 (general responsibilities of employees), § 23-1.8 (personal protective equipment), § 23-1.11 (lumber and nail fastenings), § 23-1.15 (construction of safety railings), § 23-1.16 (safety belts, harnesses, tail lines and lifelines), § 23-1.17 (life nets), § 23-1.24 (work on roofs) and §§ 23-5.3, 5.4, 5.5, 5.6, and 5.7 (various types of scaffolds), it must be dismissed as against all defendants because these provisions either are too generic to support a § 241(6) claim or are simply inapplicable to the facts of this case”).

Gaspar v. Pace Univ., 101 A.D.3d 1073, 1074, 957 N.Y.S.2d 393, 395 (2nd Dep’t 2012) (where plaintiff fell from a ladder, Industrial Code (12 NYCRR) § 23-1.7[e][2] was “inapplicable” inasmuch as “the injured plaintiff did not trip, nor did he cut himself on any hazard that was on the floor”).

Kin v. State of New York, 101 A.D.3d 1606, 1608, 956 N.Y.S.2d 731, 733 (4th Dep’t 2012) (where claimant “was using the top half of an extension ladder that lacked rubber feet in an attempt to gain access to a scaffold that had been erected under the bridge” when “the bottom of the ladder slid out from beneath her, causing her to fall approximately 10 feet to the ground,” defendant could not be held liable for alleged violation of the 12 NYCRR 23-1.21[b][4] requirement concerning the securement of ladders from which work is being performed inasmuch as “claimant was not performing work from a ladder; instead, she was using the ladder to gain access to the scaffold from which she intended to perform the assigned work”).


Landers v. 1345 Leashold LLC, 100 A.D.3d 576, 576-577, 955 N.Y.S.2d 304, 305 (1st Dep’t 2012) (where “plaintiff was allegedly injured when … the door of a freight elevator fell on his head,” plaintiff failed to raise a triable issue as to application of 12 NYCRR 23-1.8[c][1] inasmuch as plaintiff himself testified “that his work site was free of falling object hazards”).

Zastenchik v. Knollwood Country Club, 101 A.D.3d 861, 863, 955 N.Y.S.2d 640, 642 (2nd Dep’t 2012) (12 NYCRR 23-1.7[d], [e][1], and [e][2], the sections cited by plaintiff, were all inapplicable where plaintiff’s foot “became stuck in the mud to the depth of about 10 inches as he was retrieving pipes” but “plaintiff did not slip or trip”).

Garcia v. DPA Wallace Ave. I, LLC, 101 A.D.3d 415, 416, 955 N.Y.S.2d 320, 321 (1st Dep’t 2012) (where plaintiff, “an elevator mechanic, was in an elevator pit … when the ‘selector tape,’ a thin strip of metal, broke and ‘snapped’ upwards, cutting his hand,” liability could not be based upon Industrial Code § 23-1.7[a][1] inasmuch as “plaintiff was not subject to the overhead hazard of falling objects”).

Raffa v. City of New York, 100 A.D.3d 558, 558, 955 N.Y.S.2d 9, 9-10 (1st Dep’t 2012) (where plaintiff “testified that he slipped while going from his car to a trailer and that, during the two days immediately before his accident, he had lodged multiple complaints to the foreman and superintendents about snow and/or ice covering that area,” plaintiff’s Labor Law § 241(6) claim
was properly dismissed inasmuch as “the open, unpaved area where plaintiff was walking when he fell was not ‘a floor, passageway, walkway, scaffold, platform or other elevated working surface’”; “[n]or was the area a floor, platform or similar area where people ‘work or pass’ and no ‘tripping hazard’ is alleged, under 12 NYCRR 23-1.7(e)(2)”).

Parker v. 205-209 E. St. Assoc., LLC, supra, 100 A.D.3d 607, 609, 953 N.Y.S.2d 635, 637 (2nd Dep’t 2012) (where “plaintiff, a roofer, was allegedly injured when he fell after stepping through a doorway which was several feet above the level of the lower roof of the building on which he was working” and where the metal grate that “was usually placed on the other side of the doorway” had been removed “so that the door opened onto an empty space between the doorway and the stairs,” “the height differential between the edge of the doorway and the lower level of the roof” did not constitute “a hazardous opening within the meaning of section 23-1.7[b][1] of the Industrial Code” and “this Court has the authority to search the record and award summary judgment to a nonappealing party with respect to an issue that was the subject of the motion before the Supreme Court”).

Doodnath v. Morgan Contr. Corp., 101 A.D.3d 477, 478, 956 N.Y.S.2d 11, 12-13 (1st Dep’t 2012) (where the plaintiff, a truck driver, “was injured while he was stacking planks and panels from a dismantled sidewalk bridge and placing them in [his employer’s] flatbed truck” and where he “slipped on a wet, dirty plank that had previously been placed on a pile in the truck,” liability could not be predicated on Industrial Code § 23-1.7[d] inasmuch as plaintiff “was not caused to slip due to a slippery work surface, but rather because he placed his right foot onto an allegedly wet and dirty plank that was stacked on top of other planks, 16 inches off the surface of the truck bed”).

Allan v. DHL Express (USA), Inc., supra, 99 A.D.3d 828, 831, 952 N.Y.S.2d 275 (2nd Dep’t 2012) (12 NYCRR 23-1.7 was “not applicable because it does not apply to areas where employees are ‘required to work’”; 12 NYCRR 23-1.7(b)(1) was not applicable “‘as that regulation applies to safety devices for hazardous openings, and not to an elevated hazard’”; 12 NYCRR 23-5.1(h) “has no application under the facts of this case, since the scaffold was not being erected or removed at the time of the plaintiff’s accident”; “12 NYCRR 23-5.1(f) lacks the specificity required to support a cause of action alleging violations of Labor Law § 241(6)”).

Fernandez v. Stockbridge Homes, LLC, 99 A.D.3d 550, 551, 952 N.Y.S.2d 522 (1st Dep’t 2012) (12 NYCRR § 23-1.16, which set standards for the manner in which safety belts, harnesses, and lifelines should be used, does not specify when such devices must be used and, in consequence, “[a]n alleged violation of this section cannot be maintained as a predicate for § 241(6) liability where there is no evidence that a plaintiff has been provided with any of the safety devices enumerated therein”).

Mendez v. Jackson Dev. Group, Ltd., supra, 99 A.D.3d 677, 679, 951 N.Y.S.2d 736 (2nd Dep’t 2012) (where plaintiff and a co-worker “jointly lifted a glass window pane in order to install it in a window frame,” where plaintiff was standing on a ladder at the time, and where “[t]he glass window pane split in half and the pieces struck the plaintiff, causing injuries,” section 12 NYCRR 23-1.7(e), relating to tripping hazards, was inapplicable).
Cappabianca v. Skanska USA Building Inc., supra, 99 A.D.3d 139, 147, 950 N.Y.S.2d 35 (1st Dep’t 2012) (where plaintiff was on a pallet “anywhere from 4 to 12 inches high” when a saw malfunctioned and sprayed water “all over,” where plaintiff’s foot was thus caused to become caught in the 3” to 6” openings between the slots of the pallet, causing him to fall, “[s]ection 23-1.7(b)(1)(i), which requires that ‘hazardous openings’ be guarded to prevent someone from stepping or falling into the, [did] not apply because the 3- to 6-inch openings between the slats of the pallet were not large enough for a person to fit through,” “[s]ection 23-1.7(e)(2), which requires work areas to be kept free of tripping hazards, [was] inapplicable because Cappabianca does not allege that he tripped on an accumulation of dirt or debris,” and [s]ection 23-1.8(c)(2), requiring workers on ‘wet footing’ to be provided with waterproof boots or similar protective footwear, [was] inapplicable because Cappabianca testified that he wore rubber-soled work boots that adequately protected him”).

Rodriguez v. D & S Builders, LLC, 98 A.D.3d 957, 959, 951 N.Y.S.2d 54 (2nd Dep’t 2012) (where decedent was struck by a bundle of forms while he was working on a flatbed truck, defendants “demonstrated, prima facie, that 12 NYCRR 23-2.1(a)(1) does not apply to the facts of this case since the decedent’s accident occurred on a flatbed truck, not a ‘passageway, walkway, stairway or other thoroughfare’ … Additionally, they demonstrated, prima facie, that 12 NYCRR 23-2.1(a)(2) does not apply to the facts of this case since the decedent was not ‘beneath’ the ‘edge’ of a ‘floor,’ platform or scaffold’ at the time of the accident. In opposition, the plaintiffs failed to raise a triable issue of fact”); Tesoro v. BFP 300 Madison II, LLC, 98 A.D.3d 1031, 950 N.Y.S.2d 779 (2nd Dep’t 2012) (where plaintiff twisted his knee while “pushing an A-Frame cart loaded with sheetrock up a ground level loading dock ramp,” and where plaintiff himself testified, “No, there was nothing wrong with the ramp,” 12 NYCRR 23-1.7(f) was inapplicable “since the plaintiff’s accident occurred on a permanent, concrete ramp which was a part of the building” and the provision “in general terms, requires the use of, inter alia, ‘as the means of access to working levels above or below ground’”).

Kosovrasti v. Epic (217) LLC, supra, 96 A.D.3d 695, 696, 948 N.Y.S.2d 260 (1st Dep’t 2012) (23-5.1[b] was “insufficiently specific to constitute a proper predicate since it is a subpart of Industrial Code (12 NYCRR) § 23-5.1, ‘General Provisions for All Scaffolds’”).

Griffin v. Clinton Green South, LLC, supra, 98 A.D.3d 41, 49-50, 948 N.Y.S.2d 8 (1st Dep’t 2012) (where plaintiff was part of a crew assigned to dismantle a scaffold, and where “plaintiff was on the floor, on his hands and knees, stacking pieces of the scaffold as it was dismantled by his coworkers [when] a piece of the scaffold suddenly fell, striking him in the back,” 12 NYCRR 23-1.7[a][1] [requiring overhead protection] was inapplicable because where “the accident occurred was no longer an area normally ‘exposed to falling materials or objects’” and 12 NYCRR 23-1.7[a][2] [requiring that area “exposed to falling material or objects”] did not apply since “this section of the code requires barricades to cordon off areas for the safety of those not required to work within the sectioned-off area”].

Grygo v. 1116 Kings Highway Realty, LLC, supra, 96 A.D.3d 1002, 947 N.Y.S.2d 586 (2nd Dep’t 2012) (where plaintiff was allegedly injured “when a cart holding sheetrock, which was at a worksite located in a large open space, toppled and fell over, causing the cart and sheetrock to strike him in the right leg.” 12 NYCRR 23-2.1[a][1], which requires owners and general
contractors to store “[a]ll building materials … in a safe and orderly manner” so as “not [to] obstruct any passageway, walkway, stairway or other thoroughfare,” was “inapplicable because the accident occurred in an open area of the worksite, but a ‘passageway, walkway, stairway or other thoroughfare’”.

Scott v. Westmore Fuel Company, Inc., supra, 96 A.D.3d 520, 520-521, 947 N.Y.S.2d 15 (1st Dep’t 2012) (“12 NYCRR § 23-9.4(a) is too general to support a Labor Law § 241(6) claim”; likewise, “12 NYCRR § 23-9.2(b)(1) is a mere general safety standard that is insufficiently specific to give rise to a nondelegable duty under the statute”).

Guodace v. AP Wagner, Inc., 96 A.D.3d 1263, 1265, 947 N.Y.S.2d 642 (3rd Dep’t 2012) (where plaintiff contended that the platform of defendant’s forklift truck spontaneously lifted while plaintiff was standing on it, the proof provided no basis for finding a violation of 23-9.2[a] [providing that “[u]pon discovery, any structural defect or unsafe condition in such [power-operated] equipment shall be corrected by necessary repairs or replacement”] inasmuch as “defendant twice called service technicians to address reported problems with the forklift and had no notice of any other defective condition”; nor was there basis for a finding of violation of 23-9.8[c] [providing that lift trucks “shall be capable of being locked at any elevation”] given that “[p]laintiff’s expert did not dispute that there were available methods for locking the lift”).

Winters v. Main LLC, supra, 96 A.D.3d 428, 428-429, 947 N.Y.S.2d 418 (1st Dep’t 2012) (where plaintiff “lost his footing on a scaffold platform, causing a pipe he had been handed to slip downward in his hands,” where he then felt “a sharp pain in his back” “when he reached forward to grab the pipe,” and where “the scaffold did not shake or move, and there was no debris no the platform,” plaintiff’s injuries were not “caused by a failure to comply with any of the Industrial Code (12 NYCRR) provisions he cited in support of his Labor Law § 241(6) claim” “since the scaffold on which he was standing never moved, he never fell, and no hoisting equipment was in use”).

Ghany v. BC Tile Contr., Inc., supra, 95 A.D.3d 768, 769, 945 N.Y.S.2d 657 (1st Dep’t 2012) (where the plaintiff-mason allegedly was injured “when he tripped over a small stone while carrying a stone weighing approximately 100 pounds across an open, grassy area,” thus causing the stone he was carrying to fall and strike his knee and wrist, “12 NYCRR 23-1.7(d) and 12 NYCRR 23-2.1(a)(1), were inapplicable since the accident occurred in an open, grassy area, rather than a ‘passageway’ or ‘walkway’”; “[m]oreover, the small stone on which plaintiff allegedly fell was ‘an unavoidable and inherent result’ of the work being performed at the site”).

Bolster v. Eastern Building and Restoration Inc., supra, 96 A.D.3d 1123, 1124-1125, 946 N.Y.S.2d 298 (3rd Dep’t 2012) (12 NYCRR 23-3.3(c) was inapplicable inasmuch as “[t]he accident was not caused by structural instability that could have been noticed and addressed by further inspections”; 12 NYCRR 23-3.3(h) was inapplicable inasmuch as that regulation did not apply where, as here, the activity was “moving a doorframe from vertical to horizontal - essentially laying it down - on the same floor in the immediate vicinity”).

Garcia v. 225 E. 57th St. Owners, Inc., supra, 96 A.D.3d 88, 88, 942 N.Y.S.2d 533 (1st Dep’t 2012) (where plaintiff’s employer was hired to remove wall coverings including mirrored wall
panels in a 22-story apartment building, where plaintiff was injured when a mirrored panel he was removing cut his hand, and where plaintiff relied on the demolition safety provisions 23-3.3(b) and (c), even ignoring that plaintiff’s work was not demolition work, “the code provisions cited by the plaintiff [were] inapplicable to his claim” inasmuch as “[t]he mirrored panel did not break because it was weakened by the progress of demolition or dismantling, and therefore neither shoring or bracing or continued inspections could have prevented it from breaking and injuring plaintiff”).

**Bannister v. LPCiminelli, Inc.** 93 A.D.3d 1294, 1295-1296, 940 N.Y.S.2d 749, 751 (4th Dep’t 2012) (where plaintiff “slipped on ice and fell while working in an open courtyard at a school renovation project,” liability could not be premised upon violation of 12 NYCRR 23-1.7(d) because that relates to the surface of “a floor, passageway, walkway, scaffold, platform or other elevated working surface” and “does not apply where ‘the accident occurred in an open area and not on a defined walkway, passageway or path [citation omitted]’”).

**Thompson v. BFP 300 Madison II, LLC.** 95 A.D.3d 543, 543-544, 943 N.Y.S.2d 515 (1st Dep’t 2012) (where plaintiff injured his hand while moving a large fan coil box, his Labor Law § 241(6) claim was “properly dismissed” since the Industrial Code “provisions on which plaintiffs relied involved tripping hazards (12 NYCRR 23-1.7[e]), sharp objects (id.), and material piles (12 NYCRR 23-2.1[a])”).

**Ramcharan v. Beach 20th Realty, LLC.** 94 A.D.3d 964, 966, 942 N.Y.S.2d 593 (2nd Dep’t 2012) (12 NYCRR 23-9.8[k] lacked “the specificity required to support a cause of action under Labor Law § 241(6)”).

**Phillip v. 525 E. 80th St. Condominium, supra.** 93 A.D.3d 578, 579, 940 N.Y.S.2d 631, 632 (1st Dep’t 2012) (where plaintiff “was working at defendant’s building constructing a sidewalk bridge when he fell from atop a load of scaffolding material on a flatbed truck,” “[t]he court properly dismissed plaintiff’s Labor Law § 241(6) claim” inasmuch as Industrial Code Rule 23-1.16 “sets forth only the standards for the use of such devices … and is inapplicable where, as here, defendant did not provide plaintiff with any such devices”).

**Rodriguez v. BCRE 230 Riverdale, LLC.** 91 A.D.3d 933, 935, 938 N.Y.S.2d 146, 149 (2nd Dep’t 2012) (where plaintiff “and two coworkers were pushing a dumpster filled with demolition debris through an alley behind the building when one of its wheels became stuck and stopped moving,” and where one of the wheels fell into a hole and plaintiff then tripped on the hole while trying to steady the dumpster, the Supreme Court erred in denying that branch of the cross motion which was for summary judgment dismissing so much of the Labor Law § 241(6) claim as was based upon 12 NYCRR 23-1.7(e)(2) inasmuch as defendant demonstrated “that 12 NYCRR 23-1.7(e)(2) was inapplicable, as the subject defect was not a hazard contemplated by that regulation”).

**Urbano v. Rockefeller Cent. North, Inc.** 91 A.D.3d 549, 549, 937 N.Y.S.2d 194 (1st Dep’t 2012) (where plaintiff “was struck in the shoulder by a piece of masonry that broke apart while he was placing it in a disposal container,” the regulations cited by plaintiff, 12 NYCRR §§ 23-1.7(d) and (3) and 23-3.3, were inapplicable).
Cabrera v. Revere Condominium, 91 A.D.3d 695, 696-697, 937 N.Y.S.2d 98, 101 (2nd Dep’t 2012) (“defendants established, prima facie, that neither 12 NYCRR 23-1.12(c) nor 12 NYCRR 23-9.2(a) was applicable” inasmuch as, (1) the first section “applies only to saws” and the “hand-held power grinder” was not a saw, and, (2) “the hand-held grinder was not ‘heavy machinery’ as regulated by 12 NYCRR 23-9”; further, the fact that the grinder “was being used to cut metal” did not make it “a saw” since, (1) a grinder “lacks the features” of a saw, and, (2) “although the grinder was being used to cut metal, it was not being used to do so by ‘sawing’”).

Hecker v. State of New York, 92 A.D.3d 1261, 1261-1262, 937 N.Y.S.2d 815, 816-817 (4th Dep’t 2012) (by 3 to 2 vote: where claimant slipped as he was shoveling snow, 12 NYCRR 23-1.7(d) did not apply inasmuch as “claimant was not using the area in which he fell as a floor, passageway or walkway at the item of his fall”; the dissenters would not have reached the unpreserved issue and, even if forced to do so, would have ruled differently).

Eversfield v. Brush Hollow Realty, LLC, 91 A.D.3d 814, 816-817, 937 N.Y.S.2d 287, 289-290 (2nd Dep’t 2012) (plaintiff was injured when, as he turned to exit a portable restroom, “the restroom tilted, and he fell out of it”; “[t]he moving defendants made a prima facie showing that 12 NYCRR 23-1.7(e) is inapplicable because the plaintiff did not allege that he tripped on any dirt, debris, or other obstruction or condition which could cause tripping”).

Garcia v. 245 10th Avenue, LLC, 40 Misc.3d 127(A), 2013 N.Y. Slip Op. 51043(U) (App. Term 1st Dep’t 2013 (12 NYCRR 23-1.7 was inapplicable “where the accident occurred in what plaintiff himself described at deposition as a ‘pretty big … open … courtyard area,’ and not a ‘passageway’ or ‘walkway’”).

2. Plaintiff Prevails, Or Triable Issues Found

Rodriguez v. DRLD Development Corp., supra, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2013 WL 3984594 (1st Dep’t 2013) (where plaintiff “was assigned to tape and polish installed sheetrock walls on the first floor of a construction project” and “tripped on a metal cable, dislodging a pile of sheetrock boards, which stood approximately eight feet high and were leaning against a wall” and where she “attempted to stop boards from falling with her hands and head, but she could not support their weight, and suffered injuries,” the motion court “correctly determined that triable issues of fact also exist as to whether defendant violated Industrial Code (12 NYCRR) § 23-1.7(e)(2) and § 23-2.1(a)(1), which are proper predicates for plaintiff’s Labor Law § 241(6) claim”; “As for § 23-1.7(e)(2), issues of fact exist as to whether the cable upon which plaintiff tripped immediately before the sheetrock fell on her was an inherent part of the construction of the building or ‘debris’”; “As for 12 NYCRR 23-2.1(a)(1), although defendant correctly argues that there has been no testimony that the sheetrock boards blocked a passageway, walkway, stairway or thoroughfare, the fact that the sheetrock fell on plaintiff raises an issue of fact as to whether the boards were stored in a ‘safe and orderly manner’”).

Thomas v. Goldman Sachs Headquarters, LLC, supra, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2013 WL 4053163 (1st Dep’t 2013) (although plaintiff’s testimony suggested “that he tripped on
overlapping Masonite placed five or six feet away from a doorway, his testimony also establishes that his foot then slid into a gap in the floor approximately 8 to 10 inches wide and 12 to 18 inches deep directly in front of the doorway” and “[t]he motion court erred when it dismissed plaintiff’s Labor Law § 241(6) claim to the extent it is based on Industrial Code (12 NYCRR) § 23-1.7(e)(1), which states that “[a]ll passageways shall be kept free from … conditions which could cause tripping”).

Bellreng v. Sicoli & Massaro, Inc., supra, 108 A.D.3d 1027, ___ N.Y.S.2d ___ (4th Dep’t 2013) (where plaintiff “unhooked his safety harness from the steel lifeline that had been placed on the roof” and then “fell through the deteriorated gypsum roofing deck onto a scaffold that had been erected inside the building to prevent debris from falling into the pool,” and where plaintiff said that he disconnected because “he was moving to a new work area, and he could not reach that new work area while connected to the lifeline,” “[w]e conclude that 12 NYCRR 23–1.16(b) applies to the facts of this case, even though plaintiff was not actually attached to the lifeline at the time of his fall, inasmuch as plaintiff testified at his deposition that the safety devices provided to him were inadequate for him to complete his work because they did not afford him access to the entire roof”).

Leszczynski v. Town of Neversink, 107 A.D.3d 1183, 1185, 968 N.Y.S.2d 204, 206 (3rd Dep’t 2013) (where plaintiff “was injured when a frozen conglomerate of number two stone, estimated to be the size of a bowling ball and weighing 40 to 80 pounds, fell on his head while he was standing in a trench where he was working installing sewer pipe,” the record “supports the jury’s finding that the Industrial Code provision set forth in 12 NYCRR 23-9.4(h)(5) was violated” inasmuch as plaintiff “was in an 8 to 10-foot trench, while a side dump loader retrieved stones to be dumped near the trench and then moved directly onto the trench by an excavator bucket” and there was proof that “elevated buckets carrying stones were used in an area where plaintiff was working, and he was in danger of being struck by material falling from the load”).

Harasim v. Eljin Construction of New York, Inc., supra, 106 A.D.3d 642, 643, 966 N.Y.S.2d 387, 389 (1st Dep’t 2013) (where plaintiff purportedly slipped on a stairway, “Industrial Code (12 NYCRR) § 23–1.7(d) is applicable because the permanent staircase where plaintiff’s accident occurred was a “passageway” within the meaning of that provision,” but plaintiffs were “not entitled to partial summary judgment as to liability on that claim, as there are triable issues of fact as to whether a slippery condition on the stairway caused plaintiff’s accident”).

Smith v. Nestle Purina Petcare Company, supra, 105 A.D.3d 1384, 966 N.Y.S.2d 292, 294 (4th Dep’t 2013) (where plaintiff had been “standing on a ladder while vacuuming grain dust off the top of a hose rack” and he then “stepped off the ladder and onto accumulated grain dust and a hose that was hanging off the rack,” in the process twisting his ankle and falling, the motion court correctly denied defendants’ motion for summary judgment with respect to plaintiff’s Labor Law § 241(6) cause of action insofar as it is based upon an alleged violation of 12 NYCRR 23-1.7(e)(2); “on this record there is an issue of fact whether the hose constituted a scattered tool that was a tripping hazard within the meaning”).

Mohamed v. City of Watervliet, supra, 106 A.D.3d 1244, 1247, 965 N.Y.S.2d 637, 641 (3rd Dep’t 2013) (where plaintiff and his co-workers “were installing a T-connection to an existing
water main so that a new fire hydrant could be connected,” where plaintiff was standing in a trench and the T-connection was attached to the bucket of a backhoe, where the bucket was being lowered into the trench, and where the bucket had remained suspended approximately 3 1/2 feet above plaintiff when it “then descended precipitously into the trench and crushed plaintiff,” there were “material issues of fact regarding whether the backhoe was handling a load (12 NYCRR 23–9.2[b][2]), ‘at rest’ (12 NYCRR 23–9.2[g]), ‘in use’ (12 NYCRR 23–9.5[e]), and stopped or parked (12 NYCRR 23–9.5[f]) within the meaning of the regulatory provisions”.

Ramirez v. Metropolitan Transportation Authority, supra, 106 A.D.3d 799, 800-801, 965 N.Y.S.2d 156, 159-160 (2nd Dep’t 2013) (where “plaintiff allegedly was injured while working on elevated subway tracks, when a plank on a catwalk on which he was standing broke” and “plaintiff fell part of the way through the catwalk to his thigh, catching himself with his arm,” “the Supreme Court properly determined that the defendants failed to demonstrate the absence of a factual issue as to whether Industrial Code (12 NYCRR) § 23-5.1(c) (‘SCAFFOLD STRUCTURE’) applied to the facts of this case”; also, defendants failed to demonstrate “that the relevant section” of 23-1.22[c][1], “which pertains, inter alia, to a platform used as a working area, was inapplicable to this action”).

Babiack v. Ontario Exteriors, Inc., supra, 106 A.D.3d 1448, 1449-1450, 964 N.Y.S.2d 828, 830 (4th Dep’t 2013) (where plaintiff was injured when he fell through a skylight opening in the roof while he was installing insulation in the roof rafters of a condominium complex, Supreme Court “properly denied that part of Crescent’s cross motion for summary judgment dismissing the Labor Law § 241(6) cause of action against it” inasmuch as plaintiff relied upon 12 NYCRR 23-1.7(b)(1)(i), concerning hazardous openings, and defendant “failed to meet its initial burden of establishing that it did not violate the regulation, that the regulation was not applicable to the facts of this case, or that the violation was not a proximate cause of the accident”).

Restrepo v. Yonkers Racing Corporation, Inc., supra, 105 A.D.3d 540, 541, 964 N.Y.S.2d 17, 19 (1st Dep’t 2013) (where plaintiff “was injured when an access door in the floor of the soffit, or attic, where he was working opened downward, causing him to fall approximately 12 to 13 feet to the floor below,” and where plaintiff “was unaware of the door and did not see the door because it was covered by plastic,” there was no triable issue as to whether the access door was sufficiently substantial or adequately fastened in place to guard the hazardous opening and plaintiff was entitled to summary judgment based on a violation of 12 NYCRR 23-1.7(b)(1)(i)).

Estrella v. GIT Industries, Inc., supra, 105 A.D.3d 555, 555-556, 963 N.Y.S.2d 110, 112 (1st Dep’t 2013) (where the “unsecured ladder on which he was working suddenly moved,” plaintiff raised a triable issue based upon 12 NYCRR 23-1.21(b)(4)(ii); that section “requires all ladders to have firm footings, and is not limited to ladders that are at least 10-feet tall”; since defendant “failed to make an affirmative showing that the ladder complied with the firm-footing requirement, the sufficiency of plaintiff’s opposition is irrelevant”).

Rodriguez v. Dormitory Authority of the State, supra, 104 A.D.3d 529, 530, 962 N.Y.S.2d 102, 104 (1st Dep’t 2013) (where plaintiff tripped over “a scaffold clamp that had been left on the floor where plaintiff was walking while carrying boxes,” the motion court correctly denied
defendants’ motion for summary judgment insofar as plaintiff’s claims were premised on alleged violation of 12 NYCRR 23-1.7(e)(2)).

**Piazza v. CRP/RAR III Parcel, J., LP, supra,** 103 A.D.3d 580, 581, 962 N.Y.S.2d 74, 74 (1st Dep’t 2013) (where plaintiff “testified that he tripped on a piece of excess tarpaulin and fell partially into the elevator shaft, and ... alleged that there were no guardrails or other safety protections around it,” that was “contradicted by his supervisor, who testified that plaintiff told him he tripped and fell after he had stepped off a ladder and had ascended to the floor on which the tarp was located,” there was thus “there are questions of fact concerning whether the accident falls within the ambit of Labor Law § 240(1); whether Labor Law § 241(6) liability may be imposed for a violation of Industrial Code (12 NYCRR) § 23–1.7(b), concerning hazardous openings; and whether Bovis, the general contractor, had actual or constructive notice of the hazardous opening sufficient to impose liability under Labor Law § 200 and common law negligence”).

**Thompson v. 1241 PVR, LC,** 104 A.D.3d 1298, 961 N.Y.S.2d 689 (4th Dep’t 2013) (where “[p]laintiff fell on ice and snow that had accumulated on the floor of the building where he was framing interior walls,” where it was “undisputed that there were in fact accumulations of ice and snow and that [the GC] was made aware of that fact,” and where defendants “presented no evidence in opposition to demonstrate that the floor was reasonably and adequately safe despite the violation,” the motion court “properly determined as a matter of law that defendants were negligent” in violating 12 NYCRR 23-1.7(d) and it properly rejected defendants’ argument that plaintiff could be deemed contributorily negligent “based on his failure to use tools provided by defendants to remove the ice and snow” or based upon “his failure to take proper precautions while moving too quickly on the slippery surface”).

**Burnett v. City of New York,** 104 A.D.3d 437, 438, 961 N.Y.S.2d 81, 82 (1st Dep’t 2013) (where plaintiff, a track worker, was injured while removing temporary wood shoring from beneath newly laid subway track, “[t]he trial court correctly concluded that the rail bed constituted a floor, passageway, or walkway within the meaning of Industrial Code [12 NYCRR] § 23–1.7(d), that a watery slipping hazard was permitted to exist there, making footing unsafe, and that this unsafe condition caused plaintiff to slip and fall”).

**Alonzo v. Safe Harbors of the Hudson Housing Development Fund Company, Inc., supra,** 104 A.D.3d 446, 450-451, 961 N.Y.S.2d 91, 96 (1st Dep’t 2013) (where the accident occurred when plaintiff “stepped on an eight-by-four-foot section of 3/4-inch-thick plywood, which unexpectedly ‘flipped up,’” thus uncovering an opening through which the plaintiff fell “10 or 12 feet to the story below,” “[t]he Code provisions on which plaintiff relies (12 NYCRR 23–1.7[b][1][i], [ii]; 23–3.3[j][2][ii]), are sufficiently specific” to support liability and were in fact violated—the first required that “[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing,” and the second required that “[e]very opening used for the removal of debris or materials ... shall be provided with an enclosure”—defendants were mistaken in contending “that both of these sections are inapplicable because the hole was less than 15 feet deep”).
Torres v. Perry Street Development Corp., supra, 104 A.D.3d 672, 675-676, 960 N.Y.S.2d 450, 454-455 (2nd Dep’t 2013) (where plaintiff claimed that “he was walking past a 20-foot extension ladder which a worker from another trade was using to scrape the ceiling, when the ladder suddenly fell, and he was struck by both the falling ladder and the worker who had been standing on it,” “defendants failed to submit evidence to negate the applicability of 12 NYCRR 23-1.21(b)(4)(iv) as a predicate for this cause of action”; “[c]ontrary to the defendants’ contentions, it is of no consequence that the plaintiff was not on the ladder when he was injured, so long as the violation of the Industrial Code was a proximate cause of his injuries”).

Velasquez v. 795 Columbus LLC, supra, 103 A.D.3d 541, 959 N.Y.S.2d 491 (1st Dep’t 2013) (where plaintiff purportedly “slipped and fell on ‘mud, rocks and water’ at a construction site that … consisted of an open excavation,” and where the mud was a “foreign substance” for the purposes of 12 NYCRR 23-1.7[d], plaintiff was entitled to partial summary judgment since plaintiff testified “that his foreman instructed him to work on the day of the accident, despite the presence of a muddy and wet condition” and “[t]he deposition testimony of Tishman Construction’s general superintendent that there was no hazardous slippery condition” was “conclusory”).

Susko v. 337 Greenwich LLC, supra, 103 A.D.3d 434, 436, 961 N.Y.S.2d 35 (1st Dep’t 2013) (where it was “unrefuted” that “plywood sheeting was placed over the planks on the scaffold and that, in one area, there were two planks missing beneath the plywood,” defendant “failed to establish that the scaffolding planks complied with Industrial Code [12 NYCRR ] § 23-5.1(e), which is a proper predicate for a Labor Law § 241(6) claim”).

McLean v. 405 Webster Ave. Assoc., supra, 98 A.D.3d 1090, 1095, 951 N.Y.S.2d 185, 190-191 (2nd Dep’t 2012) (where plaintiff “was installing microduct … in a dumbwaiter shaft of a building owned by the defendant” when “he was hit by the counterweight for the dumbwaiter,” “triable issues of fact … existed as to liability pursuant to Labor Law § 241(6) with respect to an alleged violation of 12 NYCRR 23-1.8(c), which requires proof that the job was a ‘hard hat’ job”).

Creese v. Long Island Light. Co., supra, 98 A.D.3d 708, 710, 950 N.Y.S.2d 167 (2nd Dep’t 2012) (where a wooden plank had been placed as a “means of ingress and egress” to the subject building, where the top of the plank was “three to four feet higher than the ground below,” where the plank “was not being used in the performance of the injured plaintiff’s work,” and where plaintiff fell from the plank to the ground, “Supreme Court properly denied that branch of the plaintiffs’ motion which was for summary judgment” based upon Labor Law § 241(6) and 22 NYCRR §§ 23-1.7 and 23-1.22(b) inasmuch as “triable issues of fact remain as to whether the elevated plank on which the injured plaintiff was walking at the time of the accident was in a slippery condition and, if so, whether this condition was a proximate cause of the accident … whether the plank was of insufficient width or was insufficiently supported and braced, and, if so, whether such insufficiency was a proximate cause of the accident … and whether the injured plaintiff was provided a safe means of access to the work site and if any failure to do so was a proximate cause of the accident”).
Cappabianca v. Skanska USA Building Inc., supra, 99 A.D.3d 139, 146-147, 950 N.Y.S.2d 55 (1st Dep’t 2012) (where plaintiff was on a pallet “anywhere from 4 to 12 inches high” when a saw malfunctioned and sprayed water “all over,” and where plaintiff’s foot was thus caused to become caught in the 3” to 6” openings between the slots of the pallet, causing him to fall, plaintiff “set[] forth a claim based on section 23-1.7(d) of the Industrial Code, which prohibits owners and employers from letting workers use ‘a floor … scaffold, platform or other elevated working surface which is in a slippery condition’ and requires that water and other ‘foreign substance[s]’ which may cause slippery footing be removed or covered,” and plaintiff also set forth a claim based on “Industrial Code section 23-9.2(a) [which] requires that ‘any structural defect or unsafe condition is [power-operated] equipment shall be corrected by necessary repairs or replacement,’” but plaintiff was “not entitled to summary judgment as to liability on his reinstated Labor Law § 241(6) claim because, as indicated, the City defendants and Skanska have raised triable issues about whether the Industrial Code regulations were violated and, if so, whether the violations caused the accident”).

Morris v. Pavarini Const., 98 A.D.3d 841, 842-843, 950 N.Y.S.2d 370 (1st Dep’t 2012) (by 4 to 1 vote: where defendants urged that 12 NYCRR 23-2.2(a) [requiring that forms used on construction sites “be properly braced or tied together so as to maintain position and shape”] should be limited to completed forms, where the Court of Appeals directed the motion court to hold a hearing to determine if it would be “sensibly applied to anything but completed forms,” and where “the testimony of both plaintiff’s and defendants’ experts showed that the regulation could sensibly be applied to forms as they are being constructed, before they are ready to have liquid concrete poured into them,” the regulation should not be limited in scope to completed forms and summary judgment should be granted to plaintiff; the dissenter believed that “[t]he majority attaches undue significance to the experts’ opinions concerning the construction of forms,” stating “[t]hat an expert may opine that forms should be braced during assembly to resist wind loads has no bearing on whether the regulation at issue requires as much”).

Capuano v. Tishman Constr. Corp., supra, 98 A.D.3d 848, 850-851, 950 N.Y.S.2d 517 (1st Dep’t 2012) (where plaintiff “slipped on a piece of discarded sprinkler pipe between 12 to 18 inches long and 1 to 1 1/4 of an inch in diameter, ‘did a split,’ and injured his lower back,” and where plaintiff “testified that the room where the accident occurred was dark, with no exterior windows,” and that “the temporary lighting that had been installed was not working, and … the nearest functioning lights were approximately 20 feet behind him,” defendants’ claims that the testimony was not credible were unavailing and plaintiff was entitled to summary judgment “based upon the alleged violations of 12 NYCRR 23-1.7(e)(2), which provides that working areas shall be kept free from the accumulation of dirt and debris and scattered tools and materials, and 12 NYCRR 23-1.30, which provides that ‘illuminat sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction … but in no case shall such illumination be less than 10 foot candles in any area where persons are required to [do] work’”; the two concurring judges added that the plaintiff should not have the burden “to disprove an affirmative defense in order to make a prima facie showing of entitlement to summary judgment”).

Dwyer v. Centr. Park Studios, Inc., supra, 98 A.D.3d 882, 884, 951 N.Y.S.2d 16 (1st Dep’t 2012) (where “plaintiff was standing on a ladder, unassisted, attempting to install a large piece of
sheetrock” when “the ladder collapsed” and “the sheetrock slab fell on top of him,” where the third-party defendant “produced a ladder in excellent condition that was purportedly used by plaintiff on the day of the accident,” but where “the ladder’s manufacturer, in an affidavit, stated that, based on markings on the ladder, it was manufactured several years after plaintiff’s accident,” “[i]n view of the conflicting evidence about the condition of the ladder, the court properly denied plaintiff’s motion for summary judgment as to that part of the Labor Law § 241(6) claim predicated on 12 NYCRR 23-1.21(b)(4)(ii) (requiring all ladder footings to be firm)”).

*Once v. Service Ctr. of New York*, 96 A.D.3d 483, 947 N.Y.S.2d 4 (1st Dep’t 2012) (where “jury found that the power saw provided by appellants had no guard, in violation of Industrial Code § 23-1.12(c), and that no other adequate devices were available to plaintiff,” and where there was “no evidence that plaintiff misused the saw, which he had been directed to use,” jury finding that plaintiff was 15% at fault had to be set aside and “upon a search of the record, judgment in favor of plaintiff on the issue of liability is granted”).

*Norero v. 99-105 Third Ave. Realty, LLC*, supra, 96 A.D.3d 727, 945 N.Y.S.2d 720 (2nd Dep’t 2012) (where plaintiff’s proof established that “while working on the fifth floor of the building, he partially fell into an unprotected opening in the floor that was large enough for his body to have passed through,” “that he was not provided with proper protection under Labor Law § 240(1), that the failure to provide such protection also violated a specific and applicable provision of the Industrial Code (see 12 NYCRR 23-1.7[b][1][i]), and that this failure was the proximate cause of his alleged injuries,” “Supreme Court should have granted the plaintiff’s motion, in effect, for summary judgment on the issue of liability on the causes of action alleging violations of Labor Law §§ 240(1) and 241(6)”).

*Scott v. Westmore Fuel Co., Inc.*, supra, 96 A.D.3d 520, 947 N.Y.S.2d 15 (1st Dep’t 2012) (where plaintiff “was riding on the exterior step of a moving backhoe when he fell and the backhoe ran over his left foot,” “we find that plaintiff has a claim under 12 NYCRR § 23-9.5(c), in view of plaintiff’s testimony that he was not licensed or trained to operate a backhoe, and his foreman’s testimony that plaintiff’s responsibilities entailed primarily excavation work”; “[s]uch evidence indicates that plaintiff was not part of the ‘operating crew’ and thus, was not authorized to be on the backhoe while it was in motion or operation”).

*Ghani v. BC Tile Contr., Inc.*, supra, 95 A.D.3d 768, 945 N.Y.S.2d 657 (1st Dep’t 2012) (plaintiff’s claim that defendant BC Tile was a general contractor did not create an issue of fact where such claim “was plainly controverted by his admission at deposition that he did not know which entity was responsible for what work” and where “both defendants testified that B.C. Tile was merely a subcontractor at the site”).

*Oakes v. Wal-Mart Real Estate Business Trust*, supra, 99 A.D.3d 31, 948 N.Y.S.2d 748 (3rd Dep’t 2012) (where plaintiff “was responsible for reading the numbered tags on pieces of structural steel and, after comparing them to the blueprint, directing the sequence for the placement of the steel components into the building structure,” and where a forklift driven by a co-worker sunk into a soft spot on the ground causing its right tire to sink, which in turn caused an unsecured bar joist to shift, which caused a truss to fall on the plaintiff, plaintiff was not
entitled to summary judgment under Labor Law § 241(6), under 12 NYCRR 23-9.8(e), which provides that “[n]o lift or fork truck shall be used on any surface that is so uneven as to make upsetting likely,” since there was “sharply conflicting testimony regarding whether the ground surface was so rough and uneven as to make upsetting of the forklift likely and further questions of fact regarding whether the alleged regulatory violation caused plaintiff’s injuries”).

John v. Klewin Bldg. Co., Inc., supra, 94 A.D.3d 1502, 943 N.Y.S.2d 812 (4th Dep’t 2012) (where plaintiff fell from a roof at a construction project for the Seneca Niagara Casino, Supreme Court “properly denied that part of [defendant’s] cross motion seeking summary judgment dismissing the Labor Law § 241(6) claim, which was based on alleged violations of 12 NYCRR 23-1.7(d) and 23 NYCRR 23-1.24” inasmuch as “plaintiff raised triable issues of fact whether ‘work [was] to be performed’ on the roof surface from which plaintiff fell (see 12 NYCRR 23-1.24[a][1][i]), whether the roof surface had ‘a slope steeper than one in four inches’ (id.), and whether the sloped roof surface was wet and thus failed ‘to provide safe footing’”).

Wowk v. Broadway 280 Park Fee, LLC, supra, 94 A.D.3d 669, 944 N.Y.S.2d 23 (1st Dep’t 2012) (where plaintiff was injured while carrying water up a stairway, “the reference in 12 NYCRR 23-1.7(d) to ‘passageways’ can encompass a permanent staircase, when that staircase is the sole access to the work site”).

Naughton v. City of New York, supra, 94 A.D.3d 1, 940 N.Y.S.2d 21 (1st Dep’t 2012) (although “other courts” had concluded that 12 NYCRR 23-6.1(h) [providing that “[l]oads which have a tendency to swing or turn freely during hoisting shall be controlled by tag lines”] was not sufficiently specific to establish a § 240(6) violation, the First Department had ruled otherwise with respect to “analogous regulations”).

Coaxum v. Metcon Constr., Inc., supra, 93 A.D.3d 403, 939 N.Y.S.2d 415 (1st Dep’t 2012) (where another worker pushed plaintiff in the course of a dispute, and where plaintiff then “stepped back into an open hole and fell, breaking his leg,” there was “at best, conflicting evidence concerning [the hole’s] size and whether its depth was sufficient to render it a gravity-related hazard within the meaning of Labor Law § 240(1) … or a falling hazard as defined by 12 NYCRR 23-1.7(b)(1), thereby stating a claim for violation of Labor Law § 241(6)”).

Rodriguez v. BCRE 230 Riverdale, LLC, supra, 91 A.D.3d 933, 935, 938 N.Y.S.2d 146, 149 (2nd Dep’t 2012) (where plaintiff “and two coworkers were pushing a dumpster filled with demolition debris through an alley behind the building when one of its wheels became stuck and stopped moving,” and where one of the wheels fell into a hole and plaintiff then tripped on the hole while trying to steady the dumpster, defendant failed to demonstrate the absence of a triable issue of fact as to whether the plaintiff tripped in a passageway within the meaning of 12 NYCRR 23-1.7(e)(1)).

Coleman v. Crumb Rubber Mfgs., supra, 92 A.D.3d 1128, 1129-1130, 940 N.Y.S.2d 170 (3rd Dep’t 2012) (where plaintiff fell into a floor hole that was 12 inches by 16 inches such that “[h]is left leg fell in up to his groin, while his body and other leg remained above the hole,” and where plaintiff relied upon 12 NYCRR 23-1.7(b)(1)(i), which requires “[e]very hazardous opening into which a person may step or fall” to be covered or protected by a safety railing, it was not
necessary “that an injured worker actually fall all the way through such an opening to sustain a claim premised on this regulation” and “an opening 14 to 16 inches wide has been found sufficiently large to support such a claim”).

**Soodin v. Fragakis, supra**, 91 A.D.3d 535, 535-536, 937 N.Y.S.2d 187, 188 (1st Dep’t 2012) (where plaintiff “established that he was supplied with an old, weak, and shaky ladder that lacked rubber footings and was placed on a slippery polyurethane-coated floor, and that the ladder toppled over, causing him to fall,” the evidence that “the ladder collapsed or malfunctioned for no apparent reason raises the presumption that the ladder ‘was not good enough to afford proper protection’ under [Labor Law § 240]” and “also establishes noncompliance with Industrial Code (12 NYCRR) §§ 23-1.21(b)(1), (3)(i)-(ii) and (iv), and 4(ii),” plaintiff was therefore entitled to partial summary judgment).

**Buckley v. Triborough Bridge and Tunnel Auth.,** 91 A.D.3d 508, 509, 937 N.Y.S.2d 25, 26 (1st Dep’t 2012) (where plaintiff was injured “when, while retrieving an electrical cord from a basket lift, the loose end of his lanyard became caught and suddenly released,” causing the hook end to hit his eye, (1) “[t]hat portion of Industrial Code (12 NYCRR) section 23-1.8(a), which requires such protective eyewear under circumstances where an employee is engaged in any ‘operation which may endanger the eyes,’ is specific enough to support a Labor Law § 241(6) claim,” and, (2) there was a triable issue as to whether “the activity in which plaintiff was engaged presented a foreseeable risk of eye injury, requiring the furnishing of eye protection”).

**Fritz v. Sports Auth.,** 91 A.D.3d 712, 713, 936 N.Y.S.2d 310, 311 (2nd Dep’t 2012) (defendants “failed to make a prima facie showing showing that the lighting at the job site sufficiently complied with the requirements of 12 NYCRR 23-1.30 or that the operating surface at the job site sufficiently complied with the requirements of 12 NYCRR 23-9.8(e)”).

**Kropp v. Town of Shandaken,** 91 A.D.3d 1087, 1090-1091, 937 N.Y.S.2d 345, 351-352 (3rd Dep’t 2012) (where “plaintiff was working at the bottom of a trench that was between four and eight feet deep, connecting lengths of pipe that were being lowered into the trench by an excavator operated by plaintiff’s supervisor,” where “plaintiff was struck by an iron pipe measuring 18 inches in diameter and 18 feet long, and that fittings had been attached to one end of the pipe to permit it to be connected with a narrower pipe, resulting in a total weight of approximately 1,500 pounds,” and where the parties agreed “that the pipe dropped as it was being moved [but] … disagree[d] as to how far it dropped, why this occurred, and whether the hoisting equipment was adequate to meet the requirements of the task and Labor Law § 240(1),” “the conflicting testimony as to how the accident occurred presents factual issues as to whether, as plaintiffs’ expert alleges, defendant violated 12 NYCRR 23-9.4(h)(5) by ‘[c]arrying or swinging’ the suspended pipe over the area where plaintiff was working”).

**Kittlestad v. Losco Group, Inc., supra,** 92 A.D.3d 612, 613, 939 N.Y.S.2d 382 (1st Dep’t 2012) (where “plaintiff and his supervisor testified that the only way to reach the pipes that needed to be insulated was to walk across the air handler unit, which included walking over planks covering a two-foot-by-three-foot area of the unit where the duct work was not complete,” 12 NYCRR § 23-1.7(b) was “sufficiently specific to support a Labor Law § 241(6) claim, and [was] applicable to the facts of this case”).
**Tournabene v. City of New York, supra**, ___ Misc.3d ___, 2013 N.Y. Slip Op. 23220 (Sup. Ct. Kings Co. 2013) (Ash, J.) (where the plaintiff, a utility worker, fell “into an open trench in a roadway at the New South Ferry Terminal Structural Box,” there were factual issues under Labor Law § 241(6) premised upon 23-1.7[b][1] or 23-4.2[h]).

**Shields v. First Avenue Builders, LLC**, 39 Misc.3d 1223(A), 2013 N.Y. Slip Op. 50707(U) (Sup. Ct. N.Y. Co. 2013) (Madden, J.) (where plaintiff was injured while attempting to clean the swing-tube section of a concrete pump and where plaintiff’s expert claimed that “the grout pump was defectively designed in that the swing tubs had to be cleaned out manually by inserting a hand within the tubes while the machine was still running,” there were factual issues as to whether defendant MC&O had actual notice of an “unsafe condition” within the meaning of 23-9.2(a) and as to whether liability could be imposed pursuant to Labor Law § 241(6); put differently, it was not an absolute defense that the alleged “unsafe condition” was a claimed design defect).

**Figueroa v. HLM Electric Ltd.**, 38 Misc.3d 1230(A), 2013 N.Y. Slip Op. 50348(U) (Sup. Ct. Queens Co. 2013) (McDonald, J.) (where “because the topsoil in that location was sandy and the trench was deeper than the footing of the wall and as the wall had no mortar, the wall suddenly shifted and collapsed into the trench pinning Figueroa [plaintiff] in the trench,” “there was a reasonable view of the evidence that IG violated the industrial code provision, section 23-1.4(b)(13) which requires that buildings and structures in the vicinity of excavation work be properly supported to prevent injuries to persons” and the jury “rationally found that the IG violated Labor Law § 241(6)” and “that violation was a substantial factor of the plaintiff’s accident”).

**Alfano v. LC Main, LLC**, 38 Misc.3d 1233(A), 2013 N.Y. Slip Op. 50373(U) (Sup. Ct. Westchester Co. 2013) (Connolly, J.) (where plaintiff alleged that he slipped on “a dangerous and hazardous slippery snow and ice condition” that defendants allowed to exist in violation of 12 NYCRR § 23-1.7(d), and where defendants argued that the regulation was “inapplicable to the facts of this case since plaintiff’s accident occurred in an open common area of the construction site and not on a passageway or walkway as required to trigger application of this regulation,” the plaintiff’s photographs established that “the area where the accident occurred show a dedicated path through a fenced-in materials staging area of the jobsite leading directly to the portable toilets installed for the workers to use” and defendants’ motion for summary judgment was therefore denied; however, plaintiffs’ motion for summary judgment was also denied since plaintiffs “have not established a violation of the regulation as a matter of law, as an issue of fact exists as to whether a slippery condition caused by ice actually existed in front of the portable toilet on the date of the accident”).
VII. CLAIMS PREMISED UPON LABOR LAW § 200

Labor Law § 200, subd. 1 mandates that all workplaces be so equipped, operated, conducted, etc., as to provide “reasonable and adequate protection” to the persons employed there.\(^\text{104}\)

In contrast to Labor Law sections 240 and 241, Labor Law § 200 applies to all in-state workplaces, not just to “construction” sites or “construction work.”\(^\text{105}\) Also, in contrast to sections 240 and 241(6) of the Labor Law, section 200 has been deemed a codification of common law.\(^\text{106}\) As such, liability can be imposed under Labor Law § 200 only if the party charged with violating it was negligent. This requirement generally means that the defendant cannot be held liable unless it knew or should have known of the condition or work practice in issue and had the ability/authority to correct it.\(^\text{107}\)

104 Section 200, subd. 1, of the Labor Law provides:

“§ 200. General duty to protect the health and safety of employees; enforcement

1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequently such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section.”


107 Cassidy v. Highrise Hoisting & Scaffolding, Inc., 89 A.D.3d 510, 932 N.Y.S.2d 456 (1st Dep’t 2011) (where plaintiff was working from a temporary loading dock that “was a wooden platform measuring 20 feet by 40 feet and was, depending upon the witness, approximately 48 to 60 inches above the ground, about the height of a trailer truck,” where plaintiff leaned against the dock railing as he was waiting for the hoist to come to the loading dock level, and where the railings gave way and plaintiff fell, plaintiff’s common law and Labor Law § 200 claims were properly dismissed since there was “no evidence that defendants were on notice that the rail, which had been detached for a delivery made within 1/2 hour prior to plaintiff’s fall, was improperly re-attached”); Ortiz v. I.B.K. Enterprises, Inc., 85 A.D.3d 1139, 927 N.Y.S.2d 114
For these reasons, application of Labor Law § 200 does not usually entail consideration of “special” or “technical” rules regarding whether the plaintiff is a “Labor Law § 200 plaintiff” or whether the owner is a “Labor Law § 200 defendant.” Rather, the court basically applies the same common-law principles that govern in other contexts. There are, however, some recurring principles and themes that dominate the case law.

First, the owner and general contractor cannot be held responsible for a contractor’s unsafe work practices or defective equipment if the defendant did not actually supervise or control the contractor’s work.108

(2nd Dep’t 2011) (where plaintiff, a truck driver employed by a concrete supplier, was delivering cement to a construction site when he slipped and fell, and where plaintiff sued the cement subcontractor, the defendant-subcontractor was entitled to summary judgment on the common law and § 200 claims since it “demonstrated, prima facie, that it did not create the dangerous condition that caused the plaintiff’s injury, and the plaintiff failed to raise a triable issue of fact in opposition”); White v. Vill. of Port Chester, supra, 84 A.D.3d 946, 922 N.Y.S.2d 534, 537 (2nd Dep’t 2011) (where plaintiff, an employee of a nonparty trucking company, tripped on a construction condition that extended into the street as plaintiff was attempting to deliver steel that would be used for the interior portions of an urban renewal project, and where there was one general contractor for the interior part of the project and a different general contractor that controlled the exterior area where plaintiff was injured, the interior GC was entitled to summary judgment since “it lacked control over the [subject] sidewalk” but there were factual issues regarding the liability of the exterior GC).

108 Estrella v. GIT Industries, Inc., supra, 105 A.D.3d 555, 556, 963 N.Y.S.2d 110, 112 (1st Dep’t 2013) (where plaintiff fell when “the unsecured ladder on which he was working suddenly moved,” “[d]ismissal of the Labor Law § 200 and common-law negligence claims as against Broadway was proper in light of the lack of evidence that Broadway supervised or controlled plaintiff’s work”); Mouta v. Essex Market Development LLC, supra, 106 A.D.3d 549, 550-551, 966 N.Y.S.2d 13, 15 (1st Dep’t 2013) (where plaintiff “was injured when he stepped on a section of plywood platform that, unbeknownst to him, was being dismantled, and he fell from the fourth floor to the second floor,” JF Contracting Corp. (apparently the GC) “demonstrated that it did not supervise and control plaintiff’s work or the area of the work site in which plaintiff’s accident occurred, and therefore cannot be held liable for plaintiff’s injuries under Labor Law § 200 or common-law negligence principles”; “Marangos, plaintiff’s employer, which pursuant to its contract with JF was responsible for site safety, was in charge of all aspects of the work at issue, including safety”); Mouta v. Essex Market Dev. LLC, supra, 106 A.D.3d 549, 550-551, 966 N.Y.S.2d 13 (1st Dep’t 2013) (“JF demonstrated that it did not supervise and control plaintiff’s work or the area of the work site in which plaintiff’s accident occurred, and therefore cannot be held liable for plaintiff’s injuries under Labor Law § 200 or common-law negligence principles”); Doodnath v. Morgan Contracting Corp., 101 A.D.3d 477, 956 N.Y.S.2d 11, 12-13 (1st Dep’t 2012) (where the plaintiff, a truck driver, “was injured while he was stacking planks and panels from a dismantled sidewalk bridge and placing them in [his employer’s] flatbed truck” and where he “slipped on a wet, dirty plank that had previously been placed on a pile in the truck,” the owner and general contractor were entitled to dismissal of the plaintiff’s Labor Law 200 claim inasmuch as plaintiff’s employer “controlled the activity of its workers during the
disassembly of the sidewalk bridge and the stacking of the bridge materials and that plaintiff was
injured as a result of the manner in which he performed his work”); Allan v. DHL Express
(USA), Inc., supra, 99 A.D.3d 828, 952 N.Y.S.2d 275 (2nd Dep’t 2012) (where plaintiff fell
either because he was not provided with a harness, a lanyard, or an anchorage point for a lanyard
or because he was “climbing down the side of the scaffold, instead of using a ladder that had
been set up adjacent to the scaffold,” “DHL established its prima facie entitlement to judgment
as a matter of law dismissing the causes of action alleging violations of Labor Law § 200 and
common-law negligence” by “demonstrat[ing] that it did not have the authority to supervise or
control the manner in which SPS performed its work”); Cappabianca v. Skanska USA Building
Inc., supra, 99 A.D.3d 139, 950 N.Y.S.2d 35 (1st Dep’t 2012) (by 3 to 2 vote, where plaintiff
was on a pallet “anywhere from 4 to 12 inches high,” and where plaintiff slipped on a wet
surface and fell, the evidence established that the water came solely from a defective saw and the
defendant-landowners were not responsible for that work condition; the dissenters pointed to
proof that they believed permitted the inference that water “accumulated on every floor of the
construction site after rain” and that “basic common-law principles … establish that at some
point over time the ‘means and methods,’ or the manner in which work is performed by a
subcontractor over whom an owner or general contractor has no supervisory control may result
in a dangerous premises condition implicating the owner or general contractor”); Ghany v. BC
Tile Contr., Inc., supra, 95 A.D.3d 768, 945 N.Y.S.2d 657 (1st Dep’t 2012) (where the plaintiff-
mason allegedly was injured “when he tripped over a small stone while carrying a stone
weighing approximately 100 pounds across an open, grassy area,” thus causing the stone he was
carrying to fall and strike his knee and wrist, “[t]he common-law negligence and Labor Law §
200 claims were properly dismissed as against the general contractor” inasmuch as there was “no
evidence that this defendant exercised supervision and control over the work or had actual or
constructive notice of the alleged defective condition”); Schwind v. Mel Lany Constr. Mgt.
Corp., 96 A.D.3d 1196, 945 N.Y.S.2d 151 (2nd Dep’t 2012) (where plaintiff tripped on uptaped
masonite on a stairway landing, and where “[t]he masonite that allegedly caused the plaintiff’s
accident was installed by employees of Mel Lany ‘as a result of, and during the course of, the
ongoing work at the construction site,’” the condition in issue did not qualify as a premises
defect and the owner “made a prima facie showing of her entitlement to judgment as a matter of
law dismissing so much of the complaint as alleged a violation of Labor Law § 200 insofar as
asserted against her by demonstrating that she did not have the authority to exercise the degree of
direction and control necessary to impose liability under Labor Law § 200); Lipari v. At Spring,
LLC, 92 A.D.3d 502, 938 N.Y.S.2d 303 (1st Dep’t 2012) (where plaintiff purportedly asked for a
Bakers Scaffold and was instead compelled to use an unsecured ladder, “[a]s there is no evidence
that the owners or the lessee of the property either supervised or controlled plaintiff’s work or
had notice of any alleged dangerous condition at the work site, the Labor Law § 200 and
common-law negligence claims should be dismissed as against them”); Cabrera v. Revere
Condominium, 91 A.D.3d 695, 937 N.Y.S.2d 98, 101 (2nd Dep’t 2012) (where plaintiff was
injured because he was provided the wrong tool for the job, “the defendants established their
prima facie entitlement to judgment as a matter of law by demonstrating that they did not have
the authority to supervise or control the work in which the plaintiff was engaged at the time of
his alleged injury”).
Further, the mere fact that the owner was intermittently present does not mean that the owner had control over the contractor’s work methods.\textsuperscript{109} Nor does the power to stop the work, a power shared by virtually every owner and general contractor, suffice to establish § 200 liability for an unsafe work practice.\textsuperscript{110} Nor does the fact that defendant monitored and coordinated the contractors’ activities.\textsuperscript{111}

\textsuperscript{109} Foley \textit{v. Consol. Edison Co. of New York, Inc.}, 84 A.D.3d 476, 923 N.Y.S.2d 57, 59 (1st Dep’t 2011) (where plaintiff sought “to recover for burn injuries he sustained while excavating a trench in lower Manhattan for his employer Roadway, which was a subcontractor for Con Edison,” the mere fact that “Con Edison inspectors were always on site” was insufficient to demonstrate that Con Ed controlled “the method and means of plaintiff’s work” to such extent as to make it responsible under Labor Law § 200; “most significant to the claims in this action, Roadway furnished its own tools and equipment to complete its work, including the saw which caught on fire, and Con Edison had no control over the equipment used by plaintiff to enable it to avoid or correct the alleged unsafe condition of the saw”).

\textsuperscript{110} Fiorentino \textit{v. Atlas Park LLC}, 95 A.D.3d 424, 944 N.Y.S.2d 60 (1st Dep’t 2012) (“an owner or general contractor will not be liable under Labor Law § 200 for injuries that arise out of the manner or method of work unless it had the authority to supervise or control that work”; further that the owner or its site supervisor “had the authority to stop the work if he observed a subcontractor engaging in an unsafe activity is insufficient to establish the requisite supervision or control”); Harrison \textit{v. State of New York}, 88 A.D.3d 951, 931 N.Y.S.2d 662, 667 (2nd Dep’t 2011) (where “claimant testified at his deposition, as did his coworker, that the workers received their instructions from a contractor’s foreman and that the State’s inspectors primarily monitored the site for quality control,” and where the “State’s engineer in charge confirmed that, although the State had the power to stop work due to safety risks, his primary role, and that of the inspectors, was to ensure that work was performed in accordance with project specifications and to monitor for quality control,” “the State carried its prima facie burden of demonstrating that it lacked sufficient authority to supervise or control the work” in this case in which the unsafe condition was the work method, not any premises condition).

\textsuperscript{111} Bellreng \textit{v. Sicoli & Massaro, Inc.}, supra, 108 A.D.3d 1027, ___ N.Y.S.2d ___ (4th Dep’t 2013) (where plaintiff “unhooked his safety harness from the steel lifeline that had been placed on the roof” and then “fell through the deteriorated gypsum roofing deck onto a scaffold that had been erected inside the building to prevent debris from falling into the pool,” and where plaintiff said that he disconnected because “he was moving to a new work area, and he could not reach that new work area while connected to the lifeline,” and where the GC “at most, engaged in ‘monitoring and oversight of the timing and quality of work[,]’” such was “‘insufficient to raise a triable issue of fact with respect to supervision or control for the purposes of … Labor Law § 200’” in this case in which liability was premised on allegedly dangerous work practices, not an allegedly dangerous premises defect); Miller \textit{v. Savarino Constr. Corp.}, 103 A.D.3d 1137, 1137-1138, 959 N.Y.S.2d 318 (4th Dep’t 2013) (where defendant “Savarino Construction was responsible for, inter alia, coordinating the activities and safety programs of the contractors at the project, but had no control over the acts, omissions or safety precautions of the contractors,” the defendant “construction manager” was not liable under Labor Law § 241(6) or § 200 as to an accident that arose from the means and methods of the work).
That an owner or general contractor exercises general control over the project as a whole -- as all or virtually all general contractors do, and as many owners do -- does not of itself constitute the kind of close supervision that will render such a defendant responsible for the contractor's work methods.\textsuperscript{112} Nor can liability be imposed in the absence of notice\textsuperscript{113} or in the absence of an unsafe condition or practice.\textsuperscript{114} Obviously, the same holds true when the defendant is merely a site contractor.\textsuperscript{115}

\textsuperscript{112} \textit{Alonzo v. Safe Harbors of the Hudson Housing Development Fund Company, Inc., supra}, 104 A.D.3d 446, 449, 961 N.Y.S.2d 91, 94-95 (1st Dep’t 2013) (“[w]here a construction accident arises out of the means and methods of the work, as opposed to a dangerous condition on the site, liability under \textit{Labor Law § 200} or for common law negligence may be imposed where the defendant ‘exercised control or supervision over the work and had actual or constructive notice of the purportedly unsafe condition’ [citation omitted]. However, the mere fact that a general contractor ‘had overall responsibility for the safety of the work done by the subcontractors’ is insufficient to demonstrate that it had the requisite degree of control and that it actually exercised that control’); \textit{Phillip v. 525 E. 80th St. Condominium, supra}, 93 A.D.3d 578, 579-580, 940 N.Y.S.2d 631, 632-633 (1st Dep’t 2012) (where plaintiff “was working at defendant’s building constructing a sidewalk bridge when he fell from atop a load of scaffolding material on a flatbed truck,” plaintiff’s \textit{Labor Law § 200} and common-law negligence claims were properly dismissed since defendant’s “general oversight of the timing and quality of the work does not rise to the level of supervision or control”); \textit{John v. Klewin Bldg. Co., Inc., supra}, 94 A.D.3d 1502, 943 N.Y.S.2d 812 (4th Dep’t 2012) (where plaintiff fell from a roof at a construction project for the Seneca Niagara Casino, “[d]efendant established as a matter of law that it did not have the authority to supervise or control the methods and manner of plaintiff’s work”).

\textsuperscript{113} \textit{Reinoso v. Biordi, supra}, 105 A.D.3d 491, 492, 964 N.Y.S.2d 92, 93-94 (1st Dep’t 2013) (the defendant-owners were entitled to dismissal of the \textit{Labor Law § 200} and common law claims where “they only performed work on the home on weekends, while the tradesmen normally worked Monday through Friday” and plaintiff testified “that he and his fellow employees were the only workers present from the day he started until two days later, when his accident occurred; and that they had assembled the scaffolding from which he fell”; there was thus “no evidence that BCC controlled the method or manner of work nor that BCC could have known about any dangerous condition created by Goros between the day they commenced work, and the day of plaintiff’s accident”); \textit{Garcia v. DPA Wallace Ave. I, LLC, supra}, 101 A.D.3d 415, 955 N.Y.S.2d 320, 321 (1st Dep’t 2012) (where plaintiff, “an elevator mechanic, was in an elevator pit … when the ‘selector tape,’ a thin strip of metal, broke and ‘snapped’ upwards, cutting his hand,” plaintiff’s \textit{Labor Law 200} claim was properly dismissed inasmuch as the owner “did not have the authority to control plaintiff’s work” and did not have “actual notice of the condition that caused plaintiff’s injuries”; “[t]hat DPA Wallace was aware of the elevator’s general unsafe condition is insufficient to establish constructive notice of the particular hazardous condition that caused plaintiff’s injuries”); \textit{Russo v. Hudson View Gardens, Inc., supra}, 91 A.D.3d 556, 937 N.Y.S.2d 196, 198 (1st Dep’t 2012) (where plaintiff “attributed the injury-causing accident to the instability of the ladder he was using,” and plaintiff “further failed to offer evidence that would lead to a conclusion that Midboro should have known of the condition,” there was no basis for liability on the part of Midboro, the managing agent of the premises).
On the other hand, such a defendant can be deemed at fault if the defendant knew or should have known of the unsafe work practice and had “supervisory control” over the activity.\textsuperscript{116}

Second, where the accident is caused by a premises defect, as opposed to a contractor’s unsafe work practice and as opposed to a defect in the contractor’s tools, liability can be imposed irrespective of the defendant’s control over the details of the work.\textsuperscript{117}

\textsuperscript{114} \textit{Winters v. Main LLC, supra}, 96 A.D.3d 428, 947 N.Y.S.2d 418 (1st Dep’t 2012) (where plaintiff “lost his footing on a scaffold platform, causing a pipe he had been handed to slip downward in his hands,” where he then felt “a sharp pain in his back” “when he reached forward to grab the pipe,” and where “the scaffold did not shake or move, and there was no debris on the platform,” defendants were entitled to summary judgment inasmuch as plaintiff’s own testimony “demonstrate[d] that his injuries were not caused by any unsafe condition of the work site, and his and other witnesses’ testimony that hand assembly was the standard method of scaffold construction demonstrates that his injuries were not caused by the way in which he performed his work”).

\textsuperscript{115} \textit{Keenan v. Simon Property Group, Inc., supra}, 106 A.D.3d 586, 589-590, 966 N.Y.S.2d 378, 382 (1st Dep’t 2013) (where the GC subcontracted the glass work to Alert Glass, which in turn subcontracted part of that work to plaintiff’s employer, and where Alert was not on site when the accident occurred, the Labor Law § 200 and common claims against Alert were properly dismissed since Alert “was not an owner, general contractor or statutory agent, and given that it also lacked authority to control the activity which produced the injury”).

\textsuperscript{116} \textit{Gallagher v. Resnick, supra}, 107 A.D.3d 942, 945, 968 N.Y.S.2d 151, 155 (2nd Dep’t 2013) (where plaintiff fell due to the total absence of safety devices on the subject roof, the general contractor “failed to establish its prima facie entitlement to judgment as a matter of law, as there is a triable issue of fact as to whether it had the authority to supervise or control the injured plaintiff’s work”); \textit{Creese v. Long Island Light. Co., supra}, 98 A.D.3d 708, 950 N.Y.S.2d 167 (2nd Dep’t 2012) (where accident was purportedly caused by the use of an unbraced ramp as a means of access and egress, “plaintiffs demonstrated the existence of triable issues of fact as to whether the KEM defendants [construction managers] had supervisory control and authority over the work site, and whether the KEM defendants had actual or constructive notice of the hazardous condition”).

\textsuperscript{117} \textit{Ramirez v. Metropolitan Transportation Authority, supra}, 106 A.D.3d 799, 801-802, 965 N.Y.S.2d 156, 160 (2nd Dep’t 2013) (where “plaintiff allegedly was injured while working on elevated subway tracks, when a plank on a catwalk on which he was standing broke” and “plaintiff fell part of the way through the catwalk to his thigh, catching himself with his arm,” “[w]here, as here, a ‘premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident’; “the plaintiff’s deposition testimony that he had seen rotten, discolored planks on the catwalk and had reported the condition to the defendants’ foreman on three occasions in the two months prior to his accident was sufficient to raise a triable issue of fact as to whether the defendants had actual notice of the dangerous condition. Moreover, photographs of the broken catwalk in the record show cracked, warped, and discolored planks. Thus, the defendants failed to establish, prima facie, that they lacked constructive notice of the alleged defect’’); \textit{Edwards v.}
W.K. Nursing Home Corporation, 107 A.D.3d 639, 969 N.Y.S.2d 18, 19 (1st Dep’t 2013) (where plaintiff was allegedly injured when a coworker who was assisting him in manually lowering heavy cabinetry from the back of a delivery truck, tripped on a defective condition that spanned from the curb to the immediately adjacent sidewalk, lost his grip on the furniture piece, causing plaintiff to absorb the full weight of the cabinet, plaintiff raised triable issues under Labor Law § 200 “whether defendants had constructive notice of the alleged defective condition in front of its premises where deliveries of renovation materials were made”); Smith v. Nestle Purina Petcare Company, supra, 105 A.D.3d 1384, 966 N.Y.S.2d 292, 295 (4th Dep’t 2013) (where plaintiff had been “standing on a ladder while vacuuming grain dust off the top of a hose rack” and he then “stepped off the ladder and onto accumulated grain dust and a hose that was hanging off the rack,” in the process twisting his ankle and falling, plaintiff was not required to show that defendant had supervisory control over the work being performed where, as here, the accident was caused by a defective condition on the premises; defendant “failed to show that it did not create the dangerous condition or that it lacked control over the premises and lacked actual or constructive notice of the dangerous condition”); Raffa v. City of New York, 100 A.D.3d 558, 558, 955 N.Y.S.2d 9, 9-10 (1st Dep’t 2012) (where plaintiff “testified that he slipped while going from his car to a trailer and that, during the two days immediately before his accident, he had lodged multiple complaints to the foreman and superintendents about snow and/or ice covering that area,” there was a “question of fact … as to whether the City had actual or constructive notice of the icy condition that caused plaintiff’s injury” and it was immaterial where “the Labor Law § 200 and common-law negligence claims are based on a dangerous condition on the site, not on the methods or materials used in the work” whether the defendant-owner “exercised supervisory control over the manner of performance of plaintiff’s work”); Landahl v. City of Buffalo, supra, 103 A.D.3d 1129, 1130-1131, 959 N.Y.S.2d 306 (4th Dep’t 2012) (where plaintiff-worker was injured when “his foot slid from a worn marble step with a 1 1/2-inch depression on a stairway in City Hall,” and where plaintiff asserted claims under Labor Law §§ 241(6), 200, the project manager’s liability, if any, under Labor Law § 200 turned on whether it had actual or constructive notice of the hazard, not on whether it controlled the details of the work); Burton v. CW Equities, LLC, supra, 97 A.D.3d 462, 950 N.Y.S.2d 1 (1st Dep’t 2012) (“[s]ince plaintiff’s injury did not arise from the method he used to perform his work, but from a dangerous condition of the workplace, it is not dispositive of his Labor Law § 200 claim that CW Equities did not control the work at the building site”); Ventimiglia v. Thatch, Ripley & Co., LLC, supra, 96 A.D.3d 1043, 947 N.Y.S.2d 566 (2nd Dep’t 2012) (where “a trench approximately 10 feet wide and 8 feet deep [allegedly] surrounded the work site,” where several planks that had been placed across the trench purportedly “served as the only way into and out of the site,” and where the planks allegedly “opened up” as plaintiff walked across, “causing him to fall into the trench,” defendants were not entitled to dismissal of plaintiff’s 200 claim inasmuch as “plaintiff raised a triable issue of fact as to whether the Thatch defendants had constructive notice of a dangerous premises condition by adducing evidence that the trench and planks from which he allegedly fell had existed for approximately six months prior to the occurrence of the accident”); Oakes v. Wal-Mart Real Estate Business Trust, supra, 99 A.D.3d 31, 948 N.Y.S.2d 748 (3rd Dep’t 2012) (where plaintiff “was responsible for reading the numbered tags on pieces of structural steel and, after comparing them to the blueprint, directing the sequence for the placement of the steel components into the building structure,” and where a forklift driven by a co-worker sunk into a soft spot on the ground causing its right tire to sink, which in turn caused
This applies not only as to the property owner, but also to the general contractors and subcontractors, provided they had the requisite control of the area and notice of the condition.\footnote{118}{Piazza v. CRP/RAR III Parcel, J., LP, 103 A.D.3d 580, 581, 962 N.Y.S.2d 74, 74 (1st Dep’t 2013) (where plaintiff “testified that he tripped on a piece of excess tarpaulin and fell partially into the elevator shaft, and … alleged that there were no guardrails or other safety protections around it,” that was “contradicted by his supervisor, who testified that plaintiff told him he tripped and fell after he had stepped off a ladder and had ascended to the floor on which the tarp was located,” there was thus “there are questions of fact concerning … whether Bovis, the general contractor, had actual or constructive notice of the hazardous opening sufficient to impose liability under Labor Law § 200 and common law negligence”); Steiger v. LPCiminelli, Inc., supra, 104 A.D.3d 1246, 1248-1249, 961 N.Y.S.2d 634, 635 (4th Dep’t 2013) (where plaintiff tripped and fell while exiting a portable toilet that was set back approximately 1 1/2 to 2 feet form the sidewalk curb, the defendant general contractor failed to prove that it “lacked any supervisory control over the general condition of the premises inasmuch as their own submissions established, inter alia, that [its] project superintendent and project manager had offices on the premises and were present at the construction site on a daily basis, held coordination meetings with field personnel, and required all contractors and subcontractors to sign a safety form”); Stallone v. Plaza Constr. Corp., supra, 95 A.D.3d 633, 944 N.Y.S.2d 130, 132 (1st Dep’t 2012) (where plaintiff fell “in the course of descending a fixed 14-foot ladder linking upper and lower platforms on a large crane” when “his foot slipped on a metal rung and he fell 13 feet to the next platform below,” there were issues of fact whether defendant

an unsecured bar joist to shift, which caused a truss to fall on the plaintiff, “Supreme Court correctly denied defendants’ motion for summary judgment dismissing plaintiffs’ Labor Law § 200 and common-law negligence causes of action” since “plaintiffs alleged both that defendants failed to remedy a hazardous condition existing at the work site - the uneven ground, unstable soil and holes - and that the work was performed in a dangerous manner due to the failure to secure the bar joist on the forklift and the truss on the ground”); Bannister v. LPCiminelli, Inc., 93 A.D.3d 1294, 940 N.Y.S.2d 749, 751 (4th Dep’t 2012) (where plaintiff “slipped on ice and fell while working in an open courtyard at a school renovation project,” liability turned on whether defendants had actual or constructive notice of a hazardous premises condition and it was no defense that defendants “did not have the authority to supervise or control the methods and manner of plaintiff’s work”); Sotomayer v. Metro. Transp. Auth., 92 A.D.3d 862, 938 N.Y.S.2d 640 (2nd Dep’t 2012) (“Where a plaintiff’s injuries stem not from the manner in which the work was being performed but, rather, from a dangerous condition on the premises, a contractor may be liable in common-law negligence and under Labor Law § 200 only if it had control over the work site and either created the dangerous condition or had actual or constructive notice of it … Here, contrary to the Supreme Court’s determination, Hudson failed to establish, prima facie, that it did not have control over the work site or that it did not create or have actual or constructive notice of the alleged dangerous condition”); see also Sanders v. St. Vincent Hospital, supra, 95 A.D.3d 1195, 945 N.Y.S.2d 343 (2nd Dep’t 2012) (\textit{Dictum}: “Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident [citation omitted]”).

\footnote{118}{Piazza v. CRP/RAR III Parcel, J., LP, 103 A.D.3d 580, 581, 962 N.Y.S.2d 74, 74 (1st Dep’t 2013) (where plaintiff “testified that he tripped on a piece of excess tarpaulin and fell partially into the elevator shaft, and … alleged that there were no guardrails or other safety protections around it,” that was “contradicted by his supervisor, who testified that plaintiff told him he tripped and fell after he had stepped off a ladder and had ascended to the floor on which the tarp was located,” there was thus “there are questions of fact concerning … whether Bovis, the general contractor, had actual or constructive notice of the hazardous opening sufficient to impose liability under Labor Law § 200 and common law negligence”); Steiger v. LPCiminelli, Inc., supra, 104 A.D.3d 1246, 1248-1249, 961 N.Y.S.2d 634, 635 (4th Dep’t 2013) (where plaintiff tripped and fell while exiting a portable toilet that was set back approximately 1 1/2 to 2 feet form the sidewalk curb, the defendant general contractor failed to prove that it “lacked any supervisory control over the general condition of the premises inasmuch as their own submissions established, inter alia, that [its] project superintendent and project manager had offices on the premises and were present at the construction site on a daily basis, held coordination meetings with field personnel, and required all contractors and subcontractors to sign a safety form”); Stallone v. Plaza Constr. Corp., supra, 95 A.D.3d 633, 944 N.Y.S.2d 130, 132 (1st Dep’t 2012) (where plaintiff fell “in the course of descending a fixed 14-foot ladder linking upper and lower platforms on a large crane” when “his foot slipped on a metal rung and he fell 13 feet to the next platform below,” there were issues of fact whether defendant

\textit{Dictum}: “Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident [citation omitted]”).}
It can even apply to a construction manager if that party had the requisite notice and control of the condition.\textsuperscript{119}

If the accident was caused not by the work methods or the contractor’s equipment but instead by a dangerous site condition, liability is not a function of the defendant’s control \textit{over the work} and is instead a function of the defendant’s actual or constructive notice of the hazard plus control \textit{over the area in issue} or, alternatively, that the defendant negligently created the hazard.\textsuperscript{120}

That is, because liability is necessarily premised on negligence, plaintiff must establish either that the defendant had actual or constructive notice of the allegedly dangerous condition or that defendant caused the hazard. As has already been indicated, constructive notice (as opposed to actual notice) is sufficient,\textsuperscript{121} but there must be proof of notice or that defendant caused the hazard for liability to attach.\textsuperscript{122}

Livingston was liable under common law, and, more specifically, “whether plaintiff’s fall was caused, at least in part, by inadequate lighting in the area of the crane’s internal ladder, and whether Livingston, which had a contractual duty to supply electricity to the tower crane, was on notice of recurrent electrical outages on the crane”); \textit{Beltran v. Navillus Tile, Inc.}, 108 A.D.3d 414, ___ N.Y.S.2d ___ (1st Dep’t 2013) (there were “issues of fact as to whether Unisys Electric Inc., as the electrical contractor responsible for providing temporary lighting in the building, had constructive notice of the inadequate temporary lights in the corridor at the time of the accident”).

\textsuperscript{119} \textit{Sosa v. 46th Street Dev. LLC}, 101 A.D.3d 490, 955 N.Y.S.2d 589, 590-591 (1st Dep’t 2012) (by 4 to 1 vote: where the accident arose from the plaintiff-worker’s contact with a live electric wire, where construction manager Plaza had not authorized activation of power in the area in issue, but where “there was some history during the project of contractors activating the electricity in individual apartments without having first received the proper authorization” and the issue “was discussed at Plaza’s safety meetings,” there were issues of fact as to whether Plaza could be held responsible for the “dangerous condition of the premises”; the dissenter would have ruled that Plaza at most had “a general awareness of a potentially hazardous condition” (955 N.Y.S.2d at 593)).

\textsuperscript{120} \textit{Bayo v. 626 Sutter Avenue Associates, supra}, 106 A.D.3d 648, 648, 966 N.Y.S.2d 390, 391 (1st Dep’t 2013) (“Where, as here, the injury is caused not by the methods of decedent’s work, but by a defective condition on the premises, liability depends on whether the owner or general contractor created or had actual or constructive notice of the hazardous condition”); \textit{Picaso v. 345 E. 73 Owners Corp.}, 101 A.D.3d 511, 956 N.Y.S.2d 27, 28 (1st Dep’t 2012) (where plaintiff testified “that he noticed the defective condition of the step two weeks before the accident occurred,” and the manager for the defendant-owner testified “that he performed daily inspections of staircases in the building to determine whether there were any defects requiring repairs,” there were “triable issues” concerning defendants’ constructive notice of the hazard”); \textit{Lopez v. Dagan, supra}, 98 A.D.3d 436, 949 N.Y.S.2d 671 (1st Dep’t 2012) (by 4 to 1 vote: where a “section of the plywood floor on which [plaintiff] was standing collapsed,” proof that “the owners had ample opportunity to observe any defective condition which might manifest itself” could not establish actual or constructive notice where “the defective condition was latent and not visibly apparent”).
121 Tomecek v. Westchester Additions & Renovations, Inc., supra, 97 A.D.3d 737, 948 N.Y.S.2d 671 (2nd Dep’t 2012) (where plaintiff “alleged, inter alia, that he was required to set up the ladder on uneven ground, thus creating an unsafe workplace, and that he was given dangerous or defective equipment with which to work,” the defendant-owner was entitled to dismissal of plaintiff’s Labor Law § 200 claim since defendant “offered proof that he did not create the allegedly uneven area of ground on which the plaintiff placed a ladder, and did not have notice of its existence”); Wowk v. Broadway 280 Park Fee, LLC, supra, 94 A.D.3d 669, 944 N.Y.S.2d 23 (1st Dep’t 2012) (plaintiff, who slipped on a wet, permanent stairway, “raised an issue of fact whether defendant had constructive notice of a dangerous condition on the work site, based on a recurring condition” when plaintiff “testified that the treads on the staircase were wet when he was ascending and descending them, that the wetness was caused by condensate from the nearby air conditioning units and their water tanks, and that there was moisture on the same part of the staircase every morning in August and September until 10 or 11 A.M., when it burned off”).

122 Bayo v. 626 Sutter Avenue Associates, supra, 106 A.D.3d 648, 649, 966 N.Y.S.2d 390, 391 (1st Dep’t 2013) (where decedent, a night watchman, “died from carbon monoxide poisoning caused by a gasoline-powered generator in the shed,” and where the testimony established that the general contractor “built the temporary shed for its own use, that it did not need [the defendant-owner’s] permission to do so, and that it owned the generator,” “Defendant established prima facie absence of creation or notice on its part by submitting its managing member’s testimony that he did not recall seeing a shed during his occasional visits to the site, and that he had never seen the subject generator and heater”; in this case in which the decedent was found dead, the Court actually referred to his shift as the “graveyard shift”); Rodriguez v. Dormitory Authority of the State, supra, 104 A.D.3d 529, 530, 962 N.Y.S.2d 102, 104 (1st Dep’t 2013) (where plaintiff tripped over “a scaffold clamp that had been left on the floor where plaintiff was walking while carrying boxes,” “defendants met their burden by showing that they neither created nor had actual or constructive notice of the alleged dangerous condition” and plaintiff’s testimony failed to raise a triable issue “since he merely testified that he had seen similar hazards on the floor on the day of the accident and the day before; there was no testimony indicating how long the specific clamp that caused his fall had been in the location of his accident”); Fabrizi v. 1095 Ave. of the Americas, L.L.C., supra, 98 A.D.3d 864, 951 N.Y.S.2d 480 (1st Dep’t 2012) (by 3 to 2 vote: where plaintiff was struck by a falling pipe, and where pipe had been “attached to another piece of pipe by a compression coupling at the ceiling,” the case fell within Labor Law § 240 but there was “an issue of fact as to whether defendants failed to provide a protective device” or whether, as defendants claimed, “in light of the Kindorf support system and compression coupling that attached the conduit to the ceiling, no protective devices were called for”); Hernandez v. The Argo Corp., supra, 95 A.D.3d 782, 945 N.Y.S.2d 662 (1st Dep’t 2012) (where “[t]he configuration of the scaffold required workers regularly to travel across an open and unguarded gap of three feet,” where defendant Accura “exercised daily oversight of DMA workers’ safety, provided all materials, and played a role in designating where they would be kept and how accessed, [and] had the authority to control the activity that brought about plaintiff’s injury,” and where there was proof “that DMA installed the scaffold under Accura’s direction,” “issues of fact exist whether Accura was not only aware of the defective scaffold but also created the defect”); Sanders v. St. Vincent Hospital, supra, 95 A.D.3d 1195,
Third, where the plaintiff contends that the accident was caused by a premises defect and dangerous work practices or equipment, a defendant seeking summary judgment will have to address and negate liability under both standards in order to obtain summary judgment.123

The Second Department, which had earlier provided helpful and detailed analysis of Labor Law § 200 in Ortega v. Puccia, 57 A.D.3d 54, 866 N.Y.S.2d 323 (2nd Dep’t 2008) (standard where the plaintiff’s employer provides a defective appliance that causes the subject accident) and Chowdhury v. Rodriguez, 57 A.D.3d 121, 867 N.Y.S.2d 123 (2nd Dep’t 2008) (standard where the accident was caused by an owner-provided appliance), “complete[d] [the] trilogy of opinions by addressing the liability standard that is to apply to property owners when a worker’s injury may be concurrently caused by both an alleged dangerous or defective premises condition and by dangerous or defective equipment” in Reyes v. Arco Wentworth Mgt. Corp., 83 A.D.3d 47, 49, 919 N.Y.S.2d 44, 46 (2nd Dep’t 2011).124 The rule governing that intersection of the Venn diagrams was stated in Reyes as follows:

In determining how to resolve cases that contain overlapping allegations of both dangerous premises conditions and defective equipment, we note that as a general principle of tort law, there may be more than one cause of an occurrence, with injury attributable to two or more tortfeasors.

* * *

We find that when an accident is alleged to involve defects in both the premises and the equipment used at the work site, the

945 N.Y.S.2d 343 (2nd Dep’t 2012) (defendant “established its prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 200 cause of action by demonstrating that it did not create the allegedly dangerous condition, and it did not have either actual or constructive notice of the allegedly dangerous condition”).

123 Giovanniello v. E.W. Howell, Co., LLC, supra, 104 A.D.3d 812, 813-814, 961 N.Y.S.2d 513, 516 (2nd Dep’t 2013) (“[w]hen an accident is alleged to involve defects in both the premises and the equipment used at the work site, a defendant moving for summary judgment with respect to causes of action alleging a violation of Labor Law § 200 is obligated to address the proof applicable to both liability standards”; here, however, “Fratello established, prima facie, both that it did not create or have actual or constructive notice of the alleged condition which caused the injured plaintiff’s injury, and that it lacked the authority to supervise or control the means and methods of the injured plaintiff’s work”); Keller v. Kruger, supra, 39 Misc.3d 720, 740-744, 961 N.Y.S.2d 876, 891-894 (Sup. Ct. Kings Co. 2013) (Battaglia, J.) (where the plaintiffs were road workers who were allegedly injured because defendants purportedly failed to “take adequate measures, including proper placement of attenuator trucks, to prevent vehicles from entering into the area of the roadway that was under construction,” plaintiffs’ claim involved alleged “defects in the both the premises and the methods and materials used at the work site” and defendants Lockwood and Tully failed to establish that they lacked control over the work and the area).

124 All three decisions were signed opinions by Justice Mark C. Dillon on behalf of unanimous panels.
property owner moving for summary judgment with respect to causes of action alleging a violation of Labor Law § 200 is obligated to address the proof applicable to both liability standards. Defendants moving for summary judgment with respect to causes of action alleging a violation of Labor Law § 200 and common-law negligence must examine the plaintiff’s complaint and bill of particulars to identify the theory or theories of liability, in order to properly direct proof to premises issues, or means and methods issues, or both, as may be indicated on a case-by-case basis. The property owner is entitled to summary judgment only when the evidence exonerates it as a matter of law for all potential concurrent causes of the plaintiff’s accident and injury, and when no triable issue of fact is raised in opposition as to either relevant liability standard.

83 A.D.3d at 52-53, 919 N.Y.S.2d at 48-49, emphasis added.

Fourth, and as has already been tangentially noted, liability can be imposed if the defendant affirmatively caused the dangerous condition. 125 Of course, that plaintiff contends that the defendant caused the condition is unavailing in the absence of proof to that effect. 126

125 Beltran v. Navillus Tile, Inc., supra, 108 A.D.3d 414, ___ N.Y.S.2d ___ (1st Dep’t 2013) (where there were “issues of fact about whether Navillus created a puddle of water on the floor, on which plaintiff allegedly slipped and fell, in a corridor in which defendants were performing renovation, by suspending a leaking hose above the floor” and where there were “also issues of fact about whether Navillus, URS, or Liro had constructive notice of the wet condition, since the testimony of plaintiff and two other witnesses indicated that the hose was slowly dripping water onto the floor near where plaintiff fell, and that the floor of the wide corridor was covered in water about half an inch deep,” Supreme Court “properly denied all defendants’ motions for summary judgment dismissing plaintiff’s Labor Law § 200 and common-law negligence claims against them”; defendants’ claims that “control and responsibility over the corridor had been turned over to the building owner prior to the accident” were unavailing “since a Navillus employee testified that vinyl tiles would be installed on the floor before the area was turned over to the owner” and plaintiff testified that the floor was made of cement); Vargas v. Peter Scalamandre & Sons, Inc., supra, 105 A.D.3d 454, 456, 963 N.Y.S.2d 73, 75 (1st Dep’t 2013) (where plaintiff fell over a pile of materials, there were triable issues as to concrete supplier Ferrara and concrete contractor Scalamandre “in that evidence was adduced that Ferrara created the pile … that Scalamandre was obligated by contract to clean the concrete wash down area during pour operations … and that Scalamandre was placed on actual notice that its vendor had created the pile”; so, those defendants’ “motions to dismiss plaintiff’s common law and Labor Law § 200 claims were properly denied”); Steiger v. LPCiminelli, Inc., supra, 104 A.D.3d 1246, 1248-1249, 961 N.Y.S.2d 634, 635 (4th Dep’t 2013) (where plaintiff tripped and fell while exiting a portable toilet that was set back approximately 1 1/2 to 2 feet form the sidewalk curb, defendants “likewise failed to establish that Ciminelli did not create the allegedly dangerous condition, i.e., the placement of the portable toilets in proximity to the curb”); Wade v. Bovis Lend Lease LMB, Inc., supra, 102 A.D.3d 476, 477, 958 N.Y.S.2d 344 (1st Dep’t 2013) (where plaintiff “was a passenger in a temporary personnel lift … at a construction site when the lift became stuck,” where he and others “were directed to exit the hoist through an exit in the top,” and where plaintiff was thereupon “struck by a piece of guide rail that … had broken off and fell
over 200 feet to where it struck plaintiff,” there were issues of fact concerning defendant Atlantic’s common-law liability … inasmuch as “[t]he contract between Atlantic and the general contractor, required Atlantic to install the hoist using ‘new and of first quality’ parts” and Atlantic instead used recycled parts; there were “also triable issues concerning whether, as the contractor with sole authority over the hoist, Atlantic had sufficient oversight authority for the hoist to impose § 200 liability”); Fraser v. Pace Plumbing Corp., 93 A.D.3d 616, 616-617, 941 N.Y.S.2d 114, 116 (1st Dep’t 2012) (contractor Pace was not entitled to dismissal of plaintiff’s Labor Law § 200 claim where “plaintiff was injured when the scaffold on which he was standing slipped into an open, uncovered hole in the concrete floor and tipped over” and where there were triable issues “whether Pace created the hole into which the scaffold slipped; whether Pace’s workers removed the plywood coverings from the holes, in light of the evidence that the coverings were piled in the same manner that Pace’s witness described; and whether Pace’s witness was credible when he described how the site supervisor was notified after the holes were drilled, considering that another subcontractor drilled the holes”); Reilly-Geiger v. Dougherty, 85 A.D.3d 1000, 925 N.Y.S.2d 619 (2nd Dep’t 2011) (where “a worker at a job site is injured as a result of a dangerous or defective premises condition, a property owner may be held liable if he or she created the condition or had actual or constructive notice of it without remedying it within a reasonable time”); see also White v. Village of Port Chester, supra, 92 A.D.3d 872, 940 N.Y.S.2d 94 (2nd Dep’t 2012) (where plaintiff, “an employee of a nonparty trucking company, picked up steel from the defendant Orange County Ironworks, LLC … and delivered it to the area outside [the site], parking his truck alongside a sidewalk area where freshly poured concrete was covered with a plastic sheet that extended into the roadway,” where plaintiff “stepped onto the edge of the plastic that extended into the road, tripped and fell,” and where he thereafter “pulled back the plastic sheet and saw a brick laying there, and another brick about four feet away” and testified “that the bricks ‘were folded up inside the plastic,’” “Etre, as the contractor hired to install the sidewalk, failed to establish, prima facie, that it lacked control over the sidewalk and, further, failed to establish, prima facie, that it neither created nor had actual or constructive notice of the alleged dangerous condition”); Kittelstad v. Losco Group, Inc., 92 A.D.3d 612, 939 N.Y.S.2d 382 (1st Dep’t 2012) (where there was “a question of fact as to whether [contractor] Clean Air created the dangerous condition in the air handler unit, or whether it had notice of the condition,” “the Labor Law § 200 and common-law negligence causes of action should not have been dismissed as against it”); Eversfield v. Brush Hollow Realty, LLC, 91 A.D.3d 814, 937 N.Y.S.2d 287, 289-290 (2nd Dep’t 2012) (plaintiff was injured when, as he turned to exit a portable restroom, “the restroom tilted, and he fell out of it”; “the Brush Hollow defendants failed to make a prima facie showing that they did not create or have actual or constructive notice of a dangerous condition regarding the placement of the portable restroom,” but the “Mr. John defendants made a prima facie showing that they did not possess any authority to supervise or control the area in question, and that they were not the entity that placed the portable restroom in an allegedly defective manner”).

126 Purcell v. Metlife Inc., 108 A.D.3d 431, 969 N.Y.S.2d 43, 45 (1st Dep’t 2013) (where “plaintiff testified that he slipped on wet plywood while carrying a heavy steel beam,” “[t]he motion court properly dismissed plaintiff’s Labor Law § 200 claim against defendant JRM, because there is no evidence that JRM supervised the means or methods of plaintiff’s work … and no evidence that it created or had actual or constructive notice of the allegedly dangerous
Fifth, liability will lie where the owner (or contractor) affirmatively provides plaintiff or plaintiff’s employer with a defective appliance, but only if the defendant had actual or constructive notice of the defect.

condition that caused plaintiff’s injury); Sellars v. City of New York, 40 Misc.3d 1205(A), 2013 N.Y. Slip Op. 51053(U) (Sup. Ct. Queens Co. 2013) (Kerrigan, J.) (where plaintiff “allegedly sustained injuries as a result of being exposed to an unknown toxic substance while working in the basement of the Hypochlorite Building of the Jamaica Wastewater Treatment Plant, which is owned by the City,” the City’s “liability may only be imposed upon the owner under either § 200 or the common law if the owner created the dangerous condition or, where the condition was a defect of the premises itself as opposed to one created by the contractor, if it is shown that the owner had actual or constructive notice of the condition,” but the City here “met its initial burden of demonstrating that it neither created the alleged unsafe condition nor had actual or constructive notice of it”).

Murillo v. Porteus, supra, 108 A.D.d 753, ___ N.Y.S.2d ___ (2nd Dep’t 2013) (defendant Porteus was properly denied summary judgment where the accident was purportedly caused by a defective table saw, there was “evidence in the record that a table saw owned or controlled by him was at the house where the accident occurred, and was the table saw used by the plaintiff at the time of his injury,” and defendant failed to show “that he ‘neither created the alleged danger or defect in the instrumentality nor had actual or constructive notice of the dangerous or defective condition’”); Cevallos v. Morning Dun Realty, Corp., 78 A.D.3d 547, 549, 911 N.Y.S.2d 329, 331 (1st Dep’t 2010) (where defendant provided a defective ladder: “[t]he record also presents an issue of fact whether defendant had constructive notice that the ladder was defective, which precludes summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action”); Navarro v. City of New York, 75 A.D.3d 590, 905 N.Y.S.2d 258 (2nd Dep’t 2010) (where plaintiff dropped his spatula in the course of caulking the windows of a public school, and where the school’s custodian took him inside the school to the basement to retrieve his tool and plaintiff fell while trying to retrieve it because the ladder was unsecured and apparently covered with grease, Supreme Court erred in determining that the City and the Board were entitled to summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action inasmuch as “the foreman for the general contractor at the site testified at his deposition that the ladder in the basement was ‘school property’” and a property owner who “‘lends allegedly dangerous or defective equipment to a worker that causes injury during its use’” cannot obtain summary judgment unless the owner establishes that he or she “did not create or have notice of the alleged defect”).

Konaz v. St. John’s Preparatory School, supra, 105 A.D.3d 912, 914, 963 N.Y.S.2d 337, 339 (2nd Dep’t 2013) (where “plaintiff, a building mechanic, allegedly was injured when he fell from a ladder while attempting to replace a ballast in a malfunctioning fluorescent light fixture in the school building,” and where plaintiff said that the ladder went out from under him and that he afterwards “observed the ladder laying on its side and that one of the hinges was ‘bowing in,’” “Even assuming that St. John’s owned the allegedly defective ladder used by the plaintiff, it demonstrated that the plaintiff’s employer kept the ladder in its ‘maintenance shop’ located in the basement of the school building and that its employees used the ladder exclusively”: St. John’s thus “made a prima facie showing that it neither created the alleged defect in the ladder nor had
Sixth, where the plaintiff charges a contractor (i.e., not the property owner) with nonfeasance, plaintiff will first have to establish that the contractor (presumably not in privity with plaintiff) owed plaintiff a duty of care. Yet, this is just another way of saying that control over the causative factor is always prerequisite to Labor Law § 200 liability.

Seventh, where one contractor affirmatively and negligently injures the employee of another contractor, a claim for common-law negligence will lie even if Labor Law § 200 is inapplicable. The point here is that while Labor Law § 200 is a codification of one particular common-law duty, the duty to provide a safe place to work, there are, of course, valid tort claims that have nothing at all to do with failure to provide a safe place of work. For this reason, there will be instances in which plaintiff can sue at common law but not under Labor Law § 200.

actual or constructive knowledge of any defect in the ladder”); see also Guodace v. AP Wagner, Inc., supra, 96 A.D.3d 1263, 947 N.Y.S.2d 642 (3rd Dep’t 2012) (where plaintiff contended that the platform of defendant’s forklift truck spontaneously lifted while plaintiff was standing on it, there was no basis for a finding of notice on defendant’s part where the repair records indicated that the forklift was operating properly, defendant’s general manager said it was operating properly, and plaintiff himself testified “that he did not experience any problems raising or lowering the forklift four or five times in the half hour or so that he operated it prior to the accident”).

129 Morris v. C&F Builders, Inc., 87 A.D.3d 792, 793, 928 N.Y.S.2d 154, 156 (3rd Dep’t 2011) (where defendant was a prime contractor that had no control over plaintiff’s work and had no duty, contractual or otherwise, to enforce safety standards at the work site, Supreme Court correctly dismissed the plaintiff’s Labor Law § 200 claim); Posa v. Copiague Public School District, 84 A.D.3d 770, 922 N.Y.S.2d 499, 501 (2nd Dep’t 2011) (where defendant was a subcontractor that was hired to provide and install furniture and fixtures, and where the negligence of its subcontractor allegedly injured the plaintiff, who worked for a nonparty company which installed bathroom partitions, defendant could not be held liable under Labor Law § 200 because it did not control “the work that allegedly caused the plaintiff’s injury”).

130 Betancur v. Lincoln Ctr. for the Performing Arts, Inc., 101 A.D.3d 429, 956 N.Y.S.2d 7, 8-9 (1st Dep’t 2012) (where defendant JDP had no supervisory responsibility regarding plaintiff’s work and was not a statutory agent for purposes of Labor Law § 240(1), but where there were issues as to whether JDP’s negligence was a cause of plaintiff’s accident, “the cause of action for common-law negligence and the cross claims for indemnification and contribution should not be dismissed as against JDP”); Frisbee v. 156 Railroad Ave. Corp., 85 A.D.3d 1258, 924 N.Y.S.2d 640, 642 (3rd Dep’t 2011) (the “rare case” in which a subcontractor “may be liable under the statute,” this as opposed to standing liable under common law, “must include a showing that the subcontractor had ‘authority and control over the plaintiff’s ‘work’”; here, Labor Law § 200 was “not implicated” but there were nonetheless triable issues whether the subcontractor negligently created a condition that posed “an unreasonable risk of harm” and that was “a proximate cause of a worker’s injuries” where “there was testimony by one individual familiar with commercial carpeting who described the glue as being ‘like ice’ when first applied” and where plaintiff testified “that he did not know glue had been applied, there were no barriers or caution tape in the doorway and none of the carpet installers otherwise warned him”).
Eight, because liability ultimately turns on negligence, liability will not be imposed if the allegedly dangerous condition was inherent to the work and could not be avoided.  

Ninth, it goes without saying that proximate causation is prerequisite for liability and, in addition, that liability will not be imposed for a dangerous premises condition if the condition

---

131 O'Sullivan v. IDI Constr. Co., Inc., 7 N.Y.3d 805, 822 N.Y.S.2d 745 (2006); Bodtman v. Living Manor Love, Inc., supra, 105 A.D.3d 434, 434-435, 963 N.Y.S.2d 35, 37 (1st Dep’t 2013) (where plaintiff “slipped off the roof” while attempting “to drill several holes in the roof of a motel in order to attach a temporary sign,” Supreme Court “should have dismissed the Labor Law § 200 and common-law negligence claims” inasmuch as “[t]he duty of an employer or owner to provide workers with a safe place to work ‘does not extend to hazards which are part of or inherent in the very work being performed or to those hazards that may be readily observed by reasonable use of the senses in light of the worker’s age, intelligence and experience’” [citation omitted] and plaintiff’s own testimony “suggest[ed] that the accident was caused by the inherently slippery nature of the smooth surface at an incline of approximately 30 degrees”); Annicaro v. Corporate Suites, Inc., 98 A.D.3d 542, 949 N.Y.S.2d 717 (2nd Dep’t 2012) (where plaintiff’s job “was to clean up the debris generated by the construction project,” and where plaintiff tripped on “garbage,” lost his balance, and fell down the staircase, “[t]he common-law duty to provide employees with a safe place to work does not extend to hazards that are part of, or inherent in, the very work the employee is to perform”).

132 See, e.g., Klewinowski v. City of New York, supra, 103 A.D.3d 547, 595 N.Y.S.2d 493, 494-495 (1st Dep’t 2013) (where plaintiff was injured “when an excavating machine knocked into electrical cables and pulled down a light pole which fell on top of him,” “the jury could have determined that Welsbach properly installed the cables at the proper height and that they dropped to a lower height in the five weeks that passed between the installation and plaintiff’s accident”; “the jury’s finding in favor of Welsbach is not inconsistent with its finding that defendant Ammann & Whitney Consulting Engineers, P.C. (A&M), who was responsible for inspecting the site ensuring continued maintenance, was negligent and is based on a fair interpretation of the evidence”); Rhodes v. E. 81st, LLC, 81 A.D.3d 453, 916 N.Y.S.2d 85 (1st Dep’t 2011) (where plaintiff “jumped from a stalled elevator allegedly at the direction of an employee of the subcontractor” even though plaintiff “was not faced with any immediate danger in the stalled elevator,” his conduct was a superseding cause which “terminated” any liability under Labor Law § 200).
was not dangerous.\textsuperscript{133} Similarly, liability will not lie if the defendant had no relation to the injury-producing hazards.\textsuperscript{134}

\textit{Tenth}, the usual rules regarding summary judgment apply, meaning that, in the context of a motion for summary judgment, it is the defendant’s burden to make a \textit{prima facie} showing that it did not control the work (where a work condition or practice was to blame)\textsuperscript{135} or that it \textit{lacked} notice of the defect or hazard (where a premises defect was to blame)\textsuperscript{136} before summary

\begin{flushright}
\textsuperscript{133} \textit{Ulrich v. Motor Parkway Properties, LLC}, 84 A.D.3d 1221, 924 N.Y.S.2d 493, 496 (2nd Dep’t 2011) (where plaintiff, a laborer for a masonry company, “had to walk down a slope of dirt, debris, and rock” that existed at the excavation site and slipped when the ground gave way, defendants were entitled to dismissal of plaintiff’s Labor Law § 200 claim inasmuch as “no defective or dangerous condition existed at the job site” given that there was “no evidence in the record to contradict the testimony of Eugene Augusiewicz that the measurements of the slope were within OSHA guidelines and the guidelines set forth in Table I of 12 NYCRR 23-4.2 and that the excavation did not require sheeting or shoring, or to otherwise indicate that the angle of the slope or a lack of sheeting or shoring constituted a dangerous condition”).
\end{flushright}

\begin{flushright}
\textsuperscript{134} \textit{Alvarez v. Hudson Valley Realty Corp.}, supra, 107 A.D.3d 748, 748-749, 966 N.Y.S.2d 686, 686 (2nd Dep’t 2013) (where defendant established that it was merely an abutting owner that did not contact for any of the work, “the defendant demonstrated its prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging common-law negligence and violation of Labor Law § 200 by establishing that it did not own, occupy, or control the premises … and that it did not have the authority to supervise or control the manner in which the work was performed”).
\end{flushright}

\begin{flushright}
\textsuperscript{135} \textit{Torres v. Perry Street Development Corp.}, supra, 104 A.D.3d 672, 676, 960 N.Y.S.2d 450, 455 (2nd Dep’t 2013) (where plaintiff claimed that “he was walking past a 20-foot extension ladder which a worker from another trade was using to scrape the ceiling, when the ladder suddenly fell, and he was struck by both the falling ladder and the worker who had been standing on it,” “[w]here as here, a plaintiff’s claim arises out of alleged defects or dangers in the methods or materials of the work, to prevail on a cause of action alleging a violation of Labor Law § 200, the plaintiff must show that the defendant ‘had the authority to supervise or control the performance of the work’”; however, the defendant-construction managers and owners “each failed to make a prima facie showing that they did not have the authority to control the manner in which the plaintiff, or the workers using the ladder which allegedly caused his injury, performed their work”); \textit{Letts v. Globe Metallurgical, Inc.}, 89 A.D.3d 1523, 933 N.Y.S.2d 156 (4th Dep’t 2011) (where plaintiff “commenced this action to recover damages for injuries he sustained when a 2,400-pound steel plate that he had welded into place fell on him, pinning him to the floor,” Supreme Court “properly denied those parts of [defendant’s] motion with respect to the common-law negligence and Labor Law § 200 claims” inasmuch as “the evidence offered by defendant in support of its motion raised an issue of fact whether defendant, through one of its agents, had input into the method used by plaintiff in carrying out the injury-producing work, and thus defendant failed to meet its initial burden with respect to those two claims”).
\end{flushright}
supra, 106 A.D.3d 938, 940, 966 N.Y.S.2d 153, 156 (2nd Dep’t 2013) (where plaintiff “fell partially through an open manhole stop a 10-foot-deep precast drainage vault” as he returned to his truck after delivering equipment and supplies to his crew, Supreme Court “properly denied those branches of the cross motions which were to dismiss the causes of action alleging common-law negligence and violation of Labor Law § 200” inasmuch as defendants “failed to establish prima facie that they neither created nor had constructive notice of the allegedly dangerous condition presented by the dislodged collar and manhole cover”); Mayo v. Metropolitan Opera Association, Inc., supra, 108 A.D.3d 422, 969 N.Y.S.2d 39, 41-42 (1st Dep’t 2013) (where plaintiff had to climb a ladder located on the sixth floor of the Opera House and exit onto the roof through a hatch door in the ceiling in order to reach the work, where “[p]laintiff and his witnesses testified that the hatch door was easy to open, but difficult to close, in part because of a broken hinge,” and where “plaintiff fell off the ladder while trying to close the hatch using both hands,” where Lincoln Center argued, but where LC’s chief engineer testified that “a worker standing on the ladder had to wedge his body against the wall to avoid falling while reaching up with both hands to close the hatch door,” such “raises an issue of fact whether Lincoln Center had notice of the defect in the hatch door”); Abreu v. Wel-Made Enterprises, Inc., 105 A.D.3d 878, 880, 964 N.Y.S.2d 198, 200-201 (2nd Dep’t 2013) (defendant was not entitled to dismissal of plaintiff’s common-law and Labor Law § 200 claims since it “failed to make a prima facie showing that it lacked notice of the allegedly defective platform and railings”); Mohamed v. City of Watervliet, supra, 106 A.D.3d 1244, 1247-1248, 965 N.Y.S.2d 637, 641 (3rd Dep’t 2013) (where plaintiff and his co-workers “were installing a T-connection to an existing water main so that a new fire hydrant could be connected,” where plaintiff was standing in a trench and the T-connection was attached to the bucket of a backhoe, where the bucket was being lowered into the trench, and where the bucket had remained suspended approximately 3 1/2 feet above plaintiff when it “then descended precipitously into the trench and crushed plaintiff,” “given the contradictory proof regarding whether defendants [City of Watervliet and defendant Clough Harbour & Associates, LLP, which was hired “to provide design and engineering services on the project”] exercised the requisite supervisory control and directed the portion of the work that brought about the injury, summary judgment dismissing plaintiffs’ Labor Law § 200 claim is unwarranted”); Ferguson v. Hanson Aggregates New York, Inc., 103 A.D.3d 1174, 1175, 959 N.Y.S.2d 326 (4th Dep’t 2013) (where plaintiff “fell from the trailer of his truck at defendant’s ‘mine facility,’” and where plaintiff “alleged that defendant was negligent in failing to provide a tarping platform’ or other type of fall protection so that he could have safely affixed the tarp to this trailer,” that defendant did not supervise the operation was immaterial since, (1) defendant “may be liable for common-law negligence or the violation of Labor Law § 200 if it ‘had actual or constructive notice of the allegedly dangerous condition on the premises which caused the … plaintiff’s injuries, regardless of whether [it] supervised [plaintiff’s] work,” and, (2) “defendant failed to establish that it did not have actual or constructive notice of the allegedly dangerous condition on the premises that caused plaintiff’s injuries’); Ruperti v. Avalon Gold, LLC, 103 A.D.3d 701, 701, 959 N.Y.S.2d 703 (2nd Dep’t 2013) (where “defendants failed to show that they neither created nor had actual or constructive notice of the existence of the dangerous condition in the subject elevator,” it was “not necessary to review the sufficiency of the plaintiff’s opposition papers”); Mendez v. Jackson Dev. Group, Ltd., supra, 99 A.D.3d 677, 951 N.Y.S.2d 736 (2nd Dep’t 2012) (where plaintiff and a co-worker “jointly lifted a glass window pane in order to install it in a window frame,” where
plaintiff was standing on a ladder at the time, and where “[t]he glass window pane split in half and the pieces struck the plaintiff, causing injuries,” “appellants’ submissions failed to eliminate all triable issues of fact as to whether they had control over the work site and whether they had actual or constructive notice of a dangerous condition”); Edick v. Gen. Elec. Co., 98 A.D.3d 1217, 951 N.Y.S.2d 251 (3rd Dep’t 2012) (where plaintiff was injured when he slipped on a patch of ice and fell while working on a construction project at a site owned by GE, “[t]o meet[] its initial burden on the motion for summary judgment, GE was required to establish, as a matter of law, that it did not create the allegedly dangerous condition or have actual or constructive notice thereof … GE made no such showing here, contending instead that its general duty to provide a safe work site did not extend to removing snow or ice from the area where plaintiff fell because that location was not frequented by pedestrian traffic … Regardless of whether GE was obligated to remove snow and ice from the area in question… [plaintiff’s proof] coupled with the proximity of the fire hydrant to a paved parking lot, raises factual issues with respect to the frequency with which workers such as plaintiff utilized the area in question, as well as GE’s awareness of such practices and the reasonableness of its response thereto”); McLean v. 405 Webster Avenue Associates, supra, 98 A.D.3d 1090, 951 N.Y.S.2d 185, 189 (2nd Dep’t 2012) (where plaintiff “was installing microduct … in a dumbwaiter shaft of a building owned by the defendant” when “he was hit by the counterweight for the dumbwaiter,” and where “[s]ome of the workers involved in the project testified that they were apprehensive of danger in the dumbwaiter shaft where the accident occurred,” “there was conflicting evidence as to which of the moving defendants had a duty to inspect the shafts, and issues of fact existed as to which of the moving defendants, if any, had control over the work site and constructive notice of the allegedly dangerous condition” and summary judgment was not warranted); Rodriguez v. BCRE 230 Riverdale, LLC, 91 A.D.3d 933, 938 N.Y.S.2d 146, 149 (2nd Dep’t 2012) (where plaintiff “and two coworkers were pushing a dumpster filled with demolition debris through an alley behind the building when one of its wheels became stuck and stopped moving,” and where one of the wheels fell into a hole and plaintiff then tripped on the hole while trying to steady the dumpster, the injury in this case arose from an allegedly defective condition on the premises rather than from the manner in which the work was being performed; defendant therefore “had the initial burden of making a prima facie showing that it neither created the dangerous condition nor had actual or constructive notice of its existence”); White v. Vill. of Port Chester, supra, 92 A.D.3d 872, 940 N.Y.S.2d 94 (2nd Dep’t 2012) (where plaintiff, “an employee of a nonparty trucking company, picked up steel from the defendant Orange County Ironworks, LLC … and delivered it to the area outside [the site], parking his truck alongside a sidewalk area where freshly poured concrete was covered with a plastic sheet that extended into the roadway,” where plaintiff “stepped onto the edge of the plastic that extended into the road, tripped and fell,” and where he thereafter “pulled back the plastic sheet and saw a brick laying there, and another brick about four feet away” and testified “that the bricks ‘were folded up inside the plastic,’” “March Associates, as the contractor for six interior spaces at the subject construction site demonstrated, prima facie, that it lacked control over the sidewalk”); see also Zastenchik v. Knollwood Country Club, 101 A.D.3d 861, 955 N.Y.S.2d 640, 642 (2nd Dep’t 2012) (where plaintiff’s foot “became stuck in the mud to the depth of about 10 inches as he was retrieving pipes,” defendant Aqua “did not establish, prima facie, its entitlement to judgment as a matter of law dismissing the causes of action to recover damages for common-law negligence and a violation of Labor
judgment can be granted. Once that is established \textit{prima facie}, the defendant will be granted summary judgment unless the plaintiff demonstrates a triable issue of fact.\footnote{Gray v. City of New York, \textit{supra}, 87 A.D.3d 679, 679, 928 N.Y.S.2d 759, 761 (2nd Dep’t 2011) (where plaintiff stepped on a wooden ramp while alighting from his truck and the ramp purportedly separated underneath his feet, causing him to fall to the ground, the defendants, who were essentially the site owners and who admittedly did not supervise or control the plaintiff’s work, “established their \textit{prima facie} entitlement to judgment as a matter of law based upon evidence that they did not create the alleged dangerous condition and that they had no actual or constructive notice of the condition”; indeed, “plaintiff’s own deposition testimony, submitted in support of the motion, demonstrated that the defect was not visible and apparent”); Nicoletti v. Iracane, 38 Misc.3d 1220(A), 2013 N.Y. Slip Op. 50160(U) (Sup. Ct. Kings Co. 2013) (Schmidt, J.) (where the defendant-owner hired a contractor who in turned hired plaintiff to supply and install a new exterior deck and where the “deck’s structure collapsed” and plaintiff fell, defendant “established \textit{prima facie} that she had no actual or constructive notice of the deck’s structural deficiencies” inasmuch as “[i]t would appear that defendant would have had to take off the deck’s surface to discover the deck’s structural deficiencies and that would have been unreasonable”).}

\textit{Finally}, and I suppose one could label everything that will now follow as miscellaneous, there have been some recent rulings on § 200 claims that were, well, interesting.

The Third Department held that a landowner was not responsible where the work was done \textit{for the benefit} both of that landowner and the owner of an adjoining property but where the accident occurred on the other’s property and the other controlled the work.\footnote{Larosae v. American Pumping, Inc., 73 A.D.3d 1270, 902 N.Y.S.2d 202 (3rd Dep’t 2010) (where plaintiff’s work benefitted the owners of both adjoining properties, but where the work was directly controlled by one owner, who was plaintiff’s employer, and the owner of the adjoining property merely paid half of the expenses, the non-directing owner was not responsible as to a subject accident which was not caused by that owner and did not occur on that owner’s land).}

The Second Department held that the “integral part of the work” rule served as a defense to the alleged § 241(6) claim, but not, in the circumstances, to the alleged § 200 claim.\footnote{DeLiso v. City of New York, 69 A.D.3d 786, 892 N.Y.S.2d 533 (2nd Dep’t 2010) (where plaintiff allegedly tripped over hoses, “[t]he hoses on which the claimant allegedly tripped were an integral part of the work being performed at the purported site of the accident and, thus, did not violate 12 NYCRR 23-1.7(e)(1) or (2)”; yet, there was nonetheless a triable issue “as to whether the defendant had sufficient control over the work site and notice of the alleged hazardous conditions” for purposes of Labor Law § 200).}

There now seems to be a split of authority as to whether a violation of OSHA standards can constitute some evidence of the defendant’s negligence. The First Department ruled in the
negative,\textsuperscript{140} while the Fourth Department went the other way, albeit in dictum.\textsuperscript{141} The Fourth Department more recently ruled that violation of ergulations promulgated by the Mine Safety and Health Administration constituted evidence of negligence.\textsuperscript{142}

The Third Department ruled that the fact that the condition was “readily observable” is, “standing alone,” not a defense.\textsuperscript{143}

A recent Fourth Department decision rejected a defendant-municipality’s argument that its prior written notice law applied to a stairway depression that was purportedly actionable under Labor Law §§ 241(6) and 200.\textsuperscript{144} The same decision distinguished an “open and obvious”

\textsuperscript{140} Delaney v. City of New York, 78 A.D.3d 540, 541, 911 N.Y.S.2d 57, 58 (1st Dep’t 2010) (“Nor can section 200 liability against defendant be based on alleged violations of the Occupational Safety and Health Act, which governs employee/employer relationships … as defendant was not plaintiff’s employer”).

\textsuperscript{141} Murdoch v. Niagara Falls Bridge Commission, 81 A.D.3d 1456, 917 N.Y.S.2d 501 (4th Dep’t 2011) (on claims for Labor Law § 200 and common law negligence, the trial court erred “in refusing to instruct the jury that the violation of a regulation promulgated by the Occupational Safety and Health Administration (OSHA) may constitute evidence of negligence” in this case in which “plaintiff’s expert safety consultant testified with respect to the applicability of specific OSHA regulations to plaintiff’s accident,” but, “[g]iven the jury’s determination that defendant did not have the authority to control the activity that caused plaintiff’s injury, a proper charge concerning the effect of defendant’s alleged regulatory violations would not have changed the jury’s verdict”).

\textsuperscript{142} Ferguson v. Hanson Aggregates New York, Inc., 103 A.D.3d 1174, 1175-1176, 959 N.Y.S.2d 326 (4th Dep’t 2013) (where plaintiff “fell from the trailer of his truck at defendant’s ‘mine facility,’” and where plaintiffs “alleged that defendant was negligent in failing to provide a ‘tarping platform’ or other type of fall protection so that he could have safely affixed the tarp to this trailer,” Supreme Court “erred in determining that the regulations promulgated by the Mine Safety and Health Administration were inapplicable”; rather, “an alleged violation of those regulations as they relate to defendant’s common-law and statutory duty to maintain the premises in a reasonably safe condition so as to provide a safe place to work may be considered as some evidence of defendant’s negligence”).

\textsuperscript{143} Coleman v. Crumb Rubber Manufacturers, supra, 92 A.D.3d 1128, 940 N.Y.S.2d 170 (3rd Dep’t 2012) (where plaintiff fell into a floor hole that was 12 inches by 16 inches such that “[h]is left leg fell in up to his groin, while his body and other leg remained above the hole,” “defendant was required to establish that it did not create the opening in the floor and had no actual or constructive notice of it” and “made no such showing, contending instead that its general duty to provide plaintiff with a reasonably safe workplace did not extend to the hole in the floor because it was ‘readily observable’ and plaintiff acknowledged that he was aware of its presence”; this was insufficient since “an injured person’s knowledge of a readily observable dangerous condition ‘does not, standing alone, necessarily obviate a landowner’s duty to maintain his or her property in a reasonably safe condition’”).

\textsuperscript{144} Landahl v. City of Buffalo, supra, 103 A.D.3d 1129, 1132, 959 N.Y.S.2d 306 (4th Dep’t 2012) (where plaintiff-worker was injured when “his foot slid from a worn marble step with a 1
condition that is inherent to the work (recovery barred) from one that is not inherent to the work (no bar).

The Second Department deemed summary judgment for the defendants unwarranted where they failed to demonstrate that the doctrine of res ipsa loquitur did not apply to the case.

1/2-inch depression on a stairway in City Hall,” and where plaintiff asserted claims under Labor Law §§ 241(6), 200, “we reject the City’s contention that the prior written notice requirement of Buffalo City Charter § 21-2 applies to the facts of this case”.

Landahl v. City of Buffalo, supra, 103 A.D.3d 1129, 1130-1131, 459 N.Y.S.2d 306 (4th Dep’t 2012) (where plaintiff-worker was injured when “his foot slid from a worn marble step with a 1 1/2-inch depression on a stairway in City Hall,” and where plaintiff asserted claims under Labor Law §§ 241(6), 200, and common law, “we reject [the project manager’s] contention that its duty to maintain the premises in a safe condition was obviated by the open and obvious nature of the stair in question”; “an open and obvious hazard inherent in the injury-producing work is not actionable, but here the defect complained of lies in the condition of the stair in question, not in the installation work plaintiff was assigned to perform”).

Flossos v. Waterside Redevelopment Company, L.P., supra, 108 A.D.3d 647, ___ N.Y.S.2d ___ (2nd Dep’t 2013) (where the plaintiff-painter “leaned a closed 4-foot A-frame ladder against a closet door” and “did not lock the horizontal bars of the ladder,” and where “[a] piece of ceiling fell down on the plaintiff, propelling him and the ladder to the floor,” defendants “failed to meet their prima facie burden of establishing that the doctrine of res ipsa loquitur does not apply”).
VIII. THIRD-PARTY ISSUES


**The Issue:** Where defendants who were subject to the “strict liability” provisions of Labor Law § 240(1) and who settled with the personal injury plaintiff seek common law indemnification from the contractor that controlled the plaintiff’s work, is it enough for the defendants to show that the contractor had “the authority to direct, control or supervise the injury producing work” or must the defendants show that the contractor was “actively at fault in bringing about the injury”?

A unanimous bench chose the latter alternative, per an opinion authored by Judge Jones.

**Facts:** The defendants leased a retail storefront to non-party Ann Taylor, Inc. Ann Taylor engaged John Gallin & Son, Inc. (“Gallin”) to serve as general contractor for a project that would entail building out of the retail space. Gallin hired a subcontractor, Linear Technologies, to install telephone and data lines. Linear Technology hired a subsubcontractor, Samuels Datacom, to perform part of Linear’s work. Plaintiff worked for Samuels.

During the course of the work, plaintiff fell from an A-frame ladder.

Gallin’s contract with the owner required Gallin to “supervise and direct the Work, using [its] best skill and attention[; and] be solely responsible for and have control over construction means, methods, techniques, sequences and procedures for coordinating all portions of the Work under the Contract ….” But Gallin did not in fact supervise the work.

Supreme Court granted plaintiff summary judgment on his Labor Law § 240(1) claim, finding that the property owners and Gallin were vicariously liable for plaintiff’s injuries under the statute. The defendants afterwards settled with plaintiff for $1.6 million, with the property owners contributing $800,000 and Gallin contributing $800,000.

**Parties’ Claims:** “The property owners argue[d] they [were] entitled to common law indemnification, whether or not Gallin directly supervised and controlled plaintiff’s work, since Gallin, by virtue of its agreement with Ann Taylor, Inc., contractually assumed sole responsibility and control of the entire project, and had the contractual authority to (1) direct, supervise and control the means and methods of plaintiff’s work, and (2) institute safety precautions to protect the workers.”

Gallin urged that it could be held liable for common law indemnification only if it had actually been at fault in causing the accident.

The Court of Appeals agreed with Gallin.

**Holding:** The Court held that, for purposes of indemnification, the party seeking same must show that the other was “actively at fault” in causing the accident:

We reject the property owners’ arguments and their proposed articulation of the applicable rule because under their rule, every party engaged as a general contractor or construction manager, whether by the owner or not, would owe a common law duty to indemnify the owner regardless of whether such party was actively at fault in bringing about the injury. This proposed rule is not consistent with the equitable purpose underlying common law indemnification.
Common law indemnification is generally available “in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer” (Mas, 75 N.Y.2d at 690, 555 N.Y.S.2d 669, 554 N.E.2d 1257; see D’Ambrosio v. City of New York, 55 N.Y.2d 454, 460 [1982]).

Consistent with the equitable underpinnings of common law indemnification, our case law imposes indemnification obligations upon those actively at fault in bringing about the injury, and thus reflects an inherent fairness as to which party should be held liable for indemnity (see e.g., Rogers v. Dorchester Assoc., 32 N.Y.2d 553 [1973]; Kelly v. Diesel Constr. Div. Of Carl A. Morse, Inc., 35 N.Y.2d 1 [1974]; Felker v. Corning, Inc., 90 N.Y.2d 219 [1997]).

Based on the foregoing, a party cannot obtain common law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on their own part. But a party’s (e.g., a general contractor’s) authority to supervise the work and implement safety procedures is not alone a sufficient basis for requiring common law indemnification.

17 N.Y.3d at 374, 375, 377-378, emphasis added; see also Allan v. DHL Express (USA), Inc., supra, 99 A.D.3d 828, 952 N.Y.S.2d 275 (2nd Dep’t 2012) (even though “DHL’s liability, if any, is purely vicarious, it failed to make a prima facie showing that 500 Lincoln was either negligent or exercised actual supervision and control over the plaintiff’s work” and “Supreme Court properly denied that branch of DHL’s motion which was for summary judgment on its cross claim for common-law indemnification asserted against 500 Lincoln”).

B. Other Decisions Regarding Common-Law Indemnification

(a) Recovery Granted or Allowed

Wahab v. Agris & Brenner, LLC, supra, 102 A.D.3d 672, 674-675, 958 N.Y.S.2d 401 (2nd Dep’t 2013) (although there were issues concerning whether the defendant-owners were liable under Labor Law § 240, they should have been granted conditional summary judgment on their third-party cause of action for common-law indemnification inasmuch as they “made a prima facie showing that any liability to the plaintiff on their part would be purely statutory and vicarious to [employer] Atlantic’s direct liability”).

Mouta v. Essex Market Dev. LLC, supra, 106 A.D.3d 549, 966 N.Y.S.2d 13 (1st Dep’t 2013) (where “[t]he contract between JF and Marangos obligated Marangos to indemnify JF against losses arising out of Marango’s negligent performance of its work” but the record “establishe[d]
that plaintiff’s accident was not caused by any negligence on JF’s part,” and also that “JF’s liability is purely vicarious under Labor Law § 240(1)” and “Marangos was responsible for the accident,” “JF is entitled to summary judgment on its contractual and common-law indemnification claims against Marangos”).

*Imbriale v. Richter & Ratner Contr. Corp., supra*, 103 A.D.3d 478, 479-480, 960 N.Y.S.2d 9 (1st Dep’t 2013) (“defendants/third-party plaintiffs ATNY and 24 West 57th, the tenant and owner of the property, respectively, were entitled to summary judgment on their third-party claims for common law indemnification, inasmuch as Competition [the third-party defendant] neither rebutted the evidence of its own negligence nor adduced any evidence of negligence on the part of either ATNY or 24 West 57th”).

(b) Triable Issues

*Flossos v. Waterside Redevelopment Company, L.P., supra*, 108 A.D.3d 647, ___ N.Y.S.2d ___ (2nd Dep’t 2013) (where the plaintiff-painter “leaned a closed 4-foot A-frame ladder against a closet door” and “did not lock the horizontal bars of the ladder,” and where “[a] piece of ceiling fell down on the plaintiff, propelling him and the ladder to the floor,” Supreme Court properly denied defendants’ motions “for summary judgment on the third-party causes of action for common-law and contractual indemnification, because they failed to satisfy their prima facie burden of establishing that they were not negligent”).

*Dwyer v. Central Park Studios, Inc., supra*, 98 A.D.3d 882, 951 N.Y.S.2d 16 (1st Dep’t 2012) (the plaintiff’s employer’s motion for summary judgment dismissing the contribution and common-law indemnification claims was “premature, given that plaintiff was still scheduled to undergo three additional surgeries, an additional deposition of the plaintiff was still pending following the three surgeries, and plaintiff has not yet been examined by any physicians at the request of the defendants”).

*Robbins v. Goldman Sachs Headquarters, LLC*, 102 A.D.3d 414, 415, 958 N.Y.S.2d 96 (1st Dep’t 2013) (although “the sheet of metal that had been covering a large opening in the floor bore the words ‘danger’ and ‘hole,’” both plaintiff and his foreman testified that it was very dark” and “neither worker observed the writing”; there were, accordingly, questions of fact as to whether the third-party defendant electrical contractor was culpable and “as to whether insufficient lighting was a proximate cause of plaintiff’s accident,” an accident that occurred where the two workers removed the metal and plaintiff then fell into the resultant hole).

*Betancur v. Lincoln Cent. for the Performing Arts, Inc.*, 101 A.D.3d 429, 956 N.Y.S.2d 7, 8-9 (1st Dep’t 2012) (where defendant JDP had no supervisory responsibility regarding plaintiff’s work and was not a statutory agent for purposes of Labor Law § 240(1), but where there were issues as to whether JDP’s negligence was a cause of plaintiff’s accident “the cause of action for common-law negligence and the cross claims for indemnification and contribution should not be dismissed as against JDP”).

168
Muriqi v. Charmer Ind. Inc., supra, 96 A.D.3d 535, 947 N.Y.S.2d 26 (1st Dep’t 2012) (notwithstanding that defendant P&P was properly held liable to plaintiff as a statutory agent of the owner or general contractor, defendant Charmer “should not have been granted summary judgment on its claim for common-law indemnification against P&P since it made no showing that P&P was actively negligent, or that P&P exercised actual supervision or control over plaintiff’s work”).

Colon v. Empire Holding Group, LLC, 39 Misc.3d 1238(A), 2013 N.Y. Slip Op. 50927(U) (Sup. Ct. Kings Co. 2013) (Schmidt, J.) (where third-party defendant Pro Safety Services argued “that the common-law indemnification claims against it must be dismissed inasmuch as it did not supervise or control plaintiff’s work,” “the deposition testimony of PSS’s own witness belie[d] its argument that it did not control and supervise the work giving rise to plaintiff’s injuries”).

(c) Recovery Denied

Durando v. City of New York, supra, 105 A.D.3d 692, 696, 963 N.Y.S.2d 670, 675 (2nd Dep’t 2013) (where plaintiff “was working as a scaffolding installer and remover … on the SS Chemical Pioneer, a ship in dry dock for repairs at the Brooklyn Navy Yard” when he allegedly “fell through an improperly covered opening in the floor, or deck, of one of the ship’s cargo holds”, “the Supreme Court properly determined that the City’s third-party cause of action for common-law indemnification and contribution against Champion, the injured plaintiff’s employer, was barred by Workers’ Compensation Law § 11 … Contrary to the City’s contention, the Supreme Court properly determined that the bar imposed by Workers’ Compensation Law § 11 was not preempted by general maritime law”).

Picaso v. 345 E. 73 Owners Corp., 101 A.D.3d 511, 956 N.Y.S.2d 27, 28 (1st Dep’t 2012) (plaintiff’s employer could not be held liable for common-law indemnification “since plaintiff does not allege, nor does his bill of particulars evince, a ‘grave injury’ within the meaning of Workers’ Compensation Law § 11”).

Naughton v. City of New York, supra, 94 A.D.3d 1, 940 N.Y.S.2d 21 (1st Dep’t 2012) (general contractor could not obtain common law indemnification from subcontractor where the latter was not personally negligent with respect to work it had subsubcontracted out).

Osgood v. KDM Dev. Corp., 92 A.D.3d 1222, 938 N.Y.S.2d 397, 398 (4th Dep’t 2012) (third-party defendant, which allegedly owned the mobile home in issue, could not be held liable under common law where it proved that “it did not supervise or control the injury-producing work, and that it did not provide the ladder from which plaintiff fell”).
C. Contractual Indemnification

(a) Construction of the Agreement

_Vail v. 1333 Broadway Associates, supra_, 105 A.D.3d 636, 637, 963 N.Y.S.2d 647, 648 (1st Dep’t 2013) (“[d]ismissal of the contractual indemnification claim … was proper, since there was no indemnification agreement in existence at the time of the accident, and nothing indicates that the terms and conditions on the back of the purchase order, which contains the indemnification clause, were to have a retroactive effect”).

_Samaroo v. Patmos Fifth Real Estate, Inc., supra_, 102 A.D.3d 944, 945-946, 959 N.Y.S.2d 229 (2nd Dep’t 2013) (where the former owner of the building initiated a renovation project, where its contractor contractually agreed to indemnify it for injuries arising from the work, and where the former owner thereafter assigned the contract to the new owner, there was “no merit” to the contractor’s argument that the assignment was invalid inasmuch as “[c]ontracts are freely assignable absent a contractual, statutory, or public policy prohibition”).

_Reyes v. Post & Broadway, Inc.,_ 97 A.D.3d 805, 949 N.Y.S.2d 141 (2nd Dep’t 2012) (although “[t]he promise [to indemnify] should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances,” contract that provided that the appellant ‘assumes all liabilities’ of the defendants,” when “combined with the unrebutted testimony of the defendants’ principal that the appellant’s principal agreed to provide complete ‘protection’ to the defendants in the event of any accidents at the work site,” “contractually obligated the appellant to indemnify the defendants”).

_Lipari v. At Spring, LLC, supra_, 92 A.D.3d 502, 938 N.Y.S.2d 303 (1st Dep’t 2012) (where the agreement in issue required the subcontractor to indemnify the general contractor for “any and all claims … arising out of or resulting from any work of and caused … by any negligent act or omission of Subcontractor or those employed by it or working under those employed by it at any level,” such “clearly” included “claims caused by the negligence of Imperial’s sub-contractor, Wood Pro”).

_Mayo v. Metropolitan Opera Association, Inc., supra_, 108 A.D.3d 422, 969 N.Y.S.2d 39, 41-42 (1st Dep’t 2013) (“[t]he contract identified the ‘Contractor’ as “Strauss Painting, Inc./Creative Finishes, Ltd.’ but the only signature under “Contractor” was that of Strauss’s vice president,” where Strauss’s vice-president “testified that he was also a vice president of Creative and had authority to bind Creative to the general contract,” but where “the presidents of Strauss and Creative dispute this; they claim that Creative is not bound by the general contract,” there were “issues of fact whether Creative was contractually obligated to procure insurance”).

(b) Whether Barred By GOL § 5-322.1

_Mathews v. Bank of America, supra_, 107 A.D.3d 495, 496, 968 N.Y.S.2d 15, 17 (1st Dep’t 2013) (although the indemnity agreement required EFI to indemnify BOA for its own
negligence, it did not run afoul of General Obligations Law § 5-322.1 inasmuch as there was no evidence that BOA was negligent).

**Picasso v. 345 East 73 Owners Corp., supra,** 101 A.D.3d 511, 956 N.Y.S.2d 27, 28 (1st Dep’t 2012) (where the governing clause “contains no language limiting indemnification to damages arising from accidents caused by [the plaintiff’s employer’s] negligence, or precluding indemnification for damages caused by their own [that is, defendants’] negligence,” “if it is found that plaintiff’s injuries are attributable to any negligence on their part, enforcement of the indemnification provision will be barred by General Obligations Law § 5-322.1”).

**Dwyer v. Central Park Studios, Inc., supra,** 98 A.D.3d 882, 951 N.Y.S.2d 16 (1st Dep’t 2012) (where “plaintiff was standing on a ladder, unassisted, attempting to install a large piece of sheetrock” when “the ladder collapsed” and “the sheetrock slab fell on top of him,” where the third-party defendant “produced a ladder in excellent condition that was purportedly used by plaintiff on the day of the accident,” but where “the ladder’s manufacturer, in an affidavit, stated that, based on markings on the ladder, it was manufactured several years after plaintiff’s accident,” where the co-op resident/shareholders agreed to indemnify the co-op building against “claims for damage to persons or property suffered as a result of the alterations,” the building was entitled to indemnification as there was “no question that plaintiff’s injuries arose out of the alterations”; that the agreement purported to indemnify the building for its own negligence was immaterial since there was “no view of the evidence” that it “was actually negligent”).

**Hernandez v. The Argo Corp., supra,** 95 A.D.3d 782, 945 N.Y.S.2d 662 (1st Dep’t 2012 (contract that called for DMA to “indemnify Jemrock, Argo and Accura ‘[t]o the fullest extent of the law’” and “only to the extent caused by its own negligence” was not barred by GOL § 5-322.1).

(c) **Triable Issues Concerning the Negligence Of the Party Seeking Indemnification**

**Babiack v. Ontario Exteriors, Inc., supra,** 106 A.D.3d 1448, 1450, 964 N.Y.S.2d 828, 831 (4th Dep’t 2013 (Supreme Court was not required to make a finding that Crescent was not negligent in order to conclude that Crescent was entitled to contractual indemnification, but recovery was conditional, “depending on the extent to which Crescent’s negligence, if any, is determined to have contributed to the accident”).

**Tzic v. Kasampas, supra,** 93 A.D.3d 438, 940 N.Y.S.2d 218 (1st Dep’t 2012 (where there was testimony that the owner directed which safety device was to be used, “[t]he motion court correctly denied the owners’ motion seeking summary judgment on their indemnification claims” since “[if] credited, such testimony would establish that the owners ‘possessed the requisite supervisory control over that portion of the work activity bringing about the injury to enable [them] to prevent the creation of the unsafe condition or plaintiff’s exposure to it”).

**Rodriguez v. Tribeca 105 LLC, supra,** 93 A.D.3d 655, 939 N.Y.S.2d 546 (2nd Dep’t 2012 (movant’s motion for contractual indemnification should have been denied “without regard to the
sufficiency of the opposition papers” where movant “failed to eliminate the existence of all triable issues of fact regarding its negligence”).

**Nenadovic v. P.T. Tenants Corp., supra**, 94 A.D.3d 534, 942 N.Y.S.2d 474 (1st Dep’t 2012 (where plaintiff “and his two co-workers, were assigned to work together on a 50-foot suspended scaffold that ultimately broke in two, causing them to sustain injuries,” and where “the evidence demonstrated, inter alia, that the defendant contractors were aware that the scaffold was indicated to have a two-man maximum capacity, that three workers (including plaintiff) were nonetheless assigned to work together from the scaffold, and that there was no other adequate safety equipment made available to the workers,” “[a]s issues on this record remain as to whether and to what extent each of the defendants might be negligent in having caused the scaffold to collapse, denial of PT Corp.’s motion for summary judgment on its contractual indemnification claim and its common law indemnification claim is warranted at this time”).

**Fritz v. Sports Auth., supra**, 91 A.D.3d 712, 936 N.Y.S.2d 310, 311 (2nd Dep’t 2012 (motion for summary judgment on contractual indemnification was properly denied inasmuch as “there are triable issues of fact as to whose negligence, if anyone’s, caused the plaintiff’s accident”).

**Contrast Durando v. City of New York, supra**, 105 A.D.3d 692, 697, 963 N.Y.S.2d 670, 675 (2nd Dep’t 2013 (where plaintiff “was working as a scaffolding installer and remover … on the SS Chemical Pioneer, a ship in dry dock for repairs at the Brooklyn Navy Yard” when he allegedly “fell through an improperly covered opening in the floor, or deck, of one of the ship’s cargo holds”, “Supreme Court properly awarded summary judgment to GMD Shipyard on its third-party cause of action for contractual indemnification” and where “Champion and GMD Shipyard entered into an indemnification agreement which, by its clear and unequivocal language, provided for indemnification of GMD Shipyard regardless of its own negligence” and where “[u]nder general maritime law, an indemnification agreement is enforceable even if full enforcement thereof would result in a contractor—like GMD Shipyard—being indemnified for its own negligence, so long as the language of the agreement clearly and unequivocally reflects such an intention”).

(d) **Triable Issue Concerning the Negligence of the Party From Whom Indemnification Is Sought**

**Beltran v. Navillus Tile, Inc., supra**, 108 A.D.3d 414, ___ N.Y.S.2d ___ (1st Dep’t 2013 (because there were issues as to whether Navillus created or had actual or constructive notice of the puddle that allegedly caused plaintiff to slip and fall, Supreme Court “properly denied Liro’s motion for summary judgment on its cross claim seeking indemnification and defense from Navillus, pursuant to a contractual provision providing for such indemnification and defense for damages ‘arising out of or occurring in connection with’ Navillus’s performance of the work or failure to perform the work”).

**Bellreng v. Sicoli & Massaro, Inc., supra**, 108 A.D.3d 1027, ___ N.Y.S.2d ___ (4th Dep’t 2013 (where “[t]he indemnification provision in the subcontract between Guard and Innovative requires indemnification only for damages that were caused by the negligent acts or omissions of
Innovative or its subcontractors,” and where “there are questions of fact whether Innovative was negligent,” Guard’s motion for partial summary judgment on its contractual indemnification cause of action against Innovative was correctly denied).

**Smith v. Nestle Purina Petcare Company, supra,** 105 A.D.3d 1384, 966 N.Y.S.2d 292, 295-296 (4th Dep’t 2013 (the motion court correctly denied all motions with respect to the claim for contractual indemnification where there was a triable issue as to whether the party seeking indemnification was negligent and the “the contract’s indemnification provision [did not] contain limiting language that insulates it from the ambit of General Obligations Law § 5-322.1”).

**Mercado v. Caithness Long Island LLC, supra,** 104 A.D.3d 576, 577-578, 961 N.Y.S.2d 424, 427 (1st Dep’t 2013 (where plaintiff “was struck on the head by a pipe that fell from a height of approximately 85 to 120 feet as a result of a gap in a toeboard installed along a grated walkway near the top of a generator in the power plant,” and where it was “undisputed that there was no netting to prevent objects from falling on workers,” although the indemnity provision in issue required FMP “to indemnify the Caithness Defendants only to the extent the accident was caused by FMP’s negligence,” there were “triable issues of fact as to whether FMP’s negligence contributed to the accident, since plaintiff’s failure to wear a hard hat can be imputed to FMP, his employer, for purposes of contractual indemnity”).

**Zastenchik v. Knollwood Country Club,** 101 A.D.3d 861, 955 N.Y.S.2d 640, 642-643 (2nd Dep’t 2012 (because “[t]he right to contractual indemnification depends upon the specific language of the contract,” and also because the contract here required Aqua to indemnify Knollwood against “claims, damages, losses and expenses … only to the extent caused in whole or part by negligent acts or omissions of [Aqua],” Knollwood was not entitled to indemnification since it had not yet been demonstrated that Aqua was at fault in causing the subject accident).

**Allan v. DHL Express (USA), Inc.,** 99 A.D.3d 828, 952 N.Y.S.2d 275 (2nd Dep’t 2012 (where DHL, which leased the premises, established by testimony and by submission of the applicable contract that “neither DHL nor the engineering company, Paragon Engineering … which DHL had hired to observe and monitor the work performed by SPS, directed, controlled, or supervised SPS’s work or had the right or authority to do so,” “DHL established, prima facie, its entitlement to judgment as a matter of law dismissing the cause of action alleging violations of Labor Law § 240(1) insofar as asserted against it on the ground that it is not an owner within the meaning of that statute”).

**Fernandez v. Stockbridge Homes, LLC,** 99 A.D.3d 550, 952 N.Y.S.2d 522 (1st Dep’t 2012 (“[t]he motion court properly denied that branch of Stockbridge’s motion seeking … contractual indemnification since Stockbridge did not establish, as a matter of law, that the plaintiff’s accident resulted from “negligent acts or omissions” on the part of Stratis or Sanita, as required by the defense and indemnification clause of its contracts with them”).
Right To Indemnification Established

Bellreng v. Sicoli & Massaro, Inc., supra, 108 A.D.3d 1027, ___ N.Y.S.2d ___ (4th Dep’t 2013) (although there were factual issues as to whether general contractor Sicoli would ultimately stand liable under Labor Law §§ 240(1) or 241(6), “Sicoli established that it was not negligent as a matter of law,” “the indemnification provision in the subcontract between Sicoli and Guard evinces a clear intent that Guard indemnify Sicoli for all damages arising out of the work subcontracted to Guard, regardless of who ultimately performed that work,” and Sicoli was therefore entitled to contractual indemnity for any liability it might incur).

Flynn v. 835 6th Avenue Master L.P., supra, 107 A.D.3d 614, 969 N.Y.S.2d 13, 14-15 (1st Dep’t 2013) (although plaintiff’s case was being dismissed on the merits, defendants were entitled to the costs and attorneys’ fees incurred by them in defense of this action inasmuch as, (a) their contracts with the contractors “provide for indemnification, including costs and fees arising from ‘any act or omission,’ and do not require proof of negligence to be enforced,” and, (b) “the record does not contain any evidence that defendants were negligent”).

Britez v. Madison Park Owner, LLC, supra, 106 A.D.3d 531, 532, 966 N.Y.S.2d 7, 9 (1st Dep’t 2013) (where National entered into a subcontract “for the drywall and carpentry work” and then “subcontracted part of its work to Citywide Interiors Contractors, Inc., which in turn subcontracted the taping and spackling work to plaintiff’s employer, Pecci Construction LLC,” where “[t]he indemnification clause in the Master Agreement between G Builders and National [required] National to indemnify G Builders, Madison Park and their agents against ‘claims ... arising out of or resulting from the performance of the Work ... provided such claim ... is caused in whole or in part by any act or omission of [National], anyone directly or indirectly employed by [National], or anyone for whose acts any of them may be liable,’” and where the accident occurred during the performance of Pecci’s work, G Builders was entitled to contractual indemnification from National).

Mouta v. Essex Market Development LLC, supra, 106 A.D.3d 549, 551, 966 N.Y.S.2d 13, 15 (1st Dep’t 2013) (where the contract between the GC and plaintiff’s employer obligated the latter to indemnify the GC against losses arising from the latter’s work, and where the GC’s “liability is purely vicarious under Labor Law § 240(1), and potentially under § 241(6),” the GC was “entitled to summary judgment on its contractual indemnification claim”).

Clavijo v. Atlas Terminals, LLC, 104 A.D.3d 475, 476, 961 N.Y.S.2d 113, 114 (1st Dep’t 2013) (where plaintiff “was injured in the course of building a mezzanine floor by nailing plywood to beaming when he stepped through tile he believed to be plywood and fell to the concrete floor below,” where “Marlite’s lease obligated it to indemnify Atlas for any losses resulting from its (Marlite’s) breach of any covenant or condition of the lease or from any carelessness, negligence or improper conduct on its part,” and where Marlite sent “plaintiff to work on a mezzanine under construction on which the floor beams were only partially covered, some with ceiling tiles, without safety equipment,” Atlas was entitled to indemnification from Marlite).

Gunderman v. Sure Connect Cable Installation, Inc., 101 A.D.3d 1214, 956 N.Y.S.2d 211, 215 (3rd Dep’t 2012 (where plaintiff was injured while upgrading a residential subscriber’s cable
television service, where the work was performed by a Sure Connect hiree, and where Sure Connect’s contract with cable provider Time Warner stated that Sure Connect “shall be responsible for its own acts and the acts of its … subcontractors during the performance of the [s]ervices” outlined therein and, further, that it ‘shall defend, indemnify [sic], and hold [Time Warner] harmless with respect to … any liabilities, claims, demands, damages, actions, suits[,] costs or fees arising out of or resulting from its negligent acts or omissions or those of workers furnished by it,’” the record was “devoid of proof” that Time Warner exercised “‘any actual control or supervision over [Gunderman] or the manner in which [his] work was performed’” and Time Warner was therefore “entitled to contractual indemnification from Sure Connect”).

_Fiorentino v. Atlas Park LLC, supra, 95 A.D.3d 424, 944 N.Y.S.2d 60 (1st Dep’t 2012)_ (where owner and its general contractor were not personally negligent and would be liable, if at all, under the vicarious liability provisions of Labor Law § 241(6), they would be entitled to contractual indemnification [if found liable to plaintiff] under their contracts with, (a) the carpentry subcontractor which employed plaintiff, and, (b) the electrical subcontractor which caused plaintiff’s accident).

(f) Claims Dismissed

_Meabon v. Town of Poland, 108 A.D.3d 1183, ___ N.Y.S.2d ___ (4th Dep’t 2013)_ (Cadillac was entitled to dismissal of the claim for contractual indemnification where it established that the subject contract “was executed nearly a week after plaintiff’s accident” and “that the parties did not intend that the contract be applied retroactively”).

_Mikelatos v. Theofilaktidis, 105 A.D.3d 822, 962 N.Y.S.2d 693 (2nd Dep’t 2013)_ (where the contract required tile subcontractor P&P to indemnify GC TMA Construction “‘from and against all claims, damages, losses and expenses … arising out of or resulting from performance of [P&P’s] Work under this [contract] … but only to the extent caused by the negligent acts or omissions of [P&P],’” and where the plaintiff, a principal of P&P, “was injured when he slipped on ice and fell on a driveway at [the] construction site,” TMA was not entitled to either contractual or common-law indemnification inasmuch as P&P “submitted evidence showing, among other things, that it had no duty to remove snow at the premises”).

(g) Miscellaneous

_Rodriguez v. Gilbane/TDX Joint Venture, supra, 102 A.D.3d 484, 484–485, 958 N.Y.S.2d 130 (1st Dep’t 2013)_ (where “[t]he Gilbane/TDX defendants sought summary judgment on the issue of indemnification conditionally, predicking it on a finding by the motion court that they were liable for plaintiff’s injuries,” and where Supreme Court granted defendants summary judgment as to the plaintiff’s claims, “there was no need for it to address the alternative of indemnification”).
IX. THE KITCHEN SINK

A. “Special Employment” And “Alter Ego” Issues

*Abreu v. Wel-Made Enterprises, Inc., supra,* 105 A.D.3d 878, 879-880, 964 N.Y.S.2d 198, 200 (2nd Dep’t 2013) (in a relatively short decision that nonetheless managed to succinctly summarize the law pertaining to the “special employer” defense, the Court ruled that the defendant was not entitled to summary judgment inasmuch as it “failed to make a prima facie showing that the plaintiff was its special employee, as it did not submit sufficient evidence to establish, inter alia, that it controlled and directed the manner, details, and ultimate result of his work” and the “evidence submitted by the defendant also was insufficient to establish that the Workers’ Compensation Law bars this action because it was an alter ego of the plaintiff’s employer”).

*Vasquez v. Cohen Brothers Realty Corporation, supra,* 105 A.D.3d 595, 598, 963 N.Y.S.2d 626, 629 (1st Dep’t 2013) (where defendant maintained that it was decedent Vasquez’s “special employer because it hired all building employees, including Vasquez, and was also responsible for firing” but plaintiff claimed that “the property owner, not defendant, paid and provided benefits to Vasquez,” there was a triable issue of fact).

*Olsen v. Kozlowski,* 100 A.D.3d 1396, 1397, 953 N.Y.S.2d 521, 521 (4th Dep’t 2012) ( “[A] worker, such as the plaintiff, who is injured during the course of his employment cannot maintain an action to recover damages for personal injuries against the owner of premises where the accident occurred when the owner is also an officer of the corporation that employed the worker”; the defendant-owner here “submitted evidence raising a triable issue of fact whether she was an officer of L&A [plaintiff’s employer] at the time of the accident, and thus whether the action against her is barred by the exclusivity provisions of Workers’ Compensation Law § 29(6)”).

*Williams v. Town of Pittstown,* 100 A.D.3d 1250, 955 N.Y.S.2d 234 (3rd Dep’t 2012) (where defendant hired the self-employed plaintiff, a hydraulics specialist, to repair defendant’s Gradall, where plaintiff borrowed two workers and some equipment to assist him in putting the 6,000 pound counterweight back on the Gradall, and where the counterweight fell and landed on plaintiff’s foot [requiring a below-the-knee amputation of his leg] as it was being lifted into place via forklift, Supreme Court erred in denying plaintiff’s motion for summary judgment; “[a]lthough the two employees took all of their directions for this project from plaintiff and were instructed by the highway superintendent to treat plaintiff as their boss for the project,” defendant did not show as a matter of law that plaintiff was their “special employer” inasmuch as the two workers “were assigned to the project for one day, were paid by defendant, used defendant’s equipment and did not consider themselves plaintiff’s employees”).

*Gonzalez v. Woodbourne Arboretum, Inc.,* 100 A.D.3d 694, 698, 954 N.Y.S.2d 113, 117 (2nd Dep’t 2012) (where water cannon tipped over and fell on decedent just after decedent and other workers had moved it, Supreme Court properly determined, (a) that “defendants failed to make a prima facie showing that the decedent was their special employee at the time of his death because they did not submit sufficient evidence to establish, inter alia, that they controlled and
directed the manner, details, and ultimate result of his work,” and, (b) that defendants failed “to establish that the Workers’ Compensation Law bars this action because they were alter egos of the decedent’s employer Litwin, or engaged in a joint venture with Litwin”; Supreme Court also properly dismissed those defenses inasmuch as, (a) plaintiff established “that the decedent, who received his salary and benefits from Litwin and was supervised by another Litwin employee, was not the defendants’ special employee,” and, (b) “that the defendants were not Litwin’s ‘alter egos or engaged in a joint venture with him”.

B. Other Employment Or WCB Issues

Durando v. City of New York, supra, 105 A.D.3d 692, 695-696, 963 N.Y.S.2d 670, 674 (2nd Dep’t 2013) (where plaintiff “was working as a scaffolding installer and remover … on the SS Chemical Pioneer, a ship in dry dock for repairs at the Brooklyn Navy Yard” when he allegedly “fell through an improperly covered opening in the floor, or deck, of one of the ship’s cargo holds”, plaintiff could not sue the entity that had provided LHWCA coverage inasmuch as such action “was barred by the Federal Longshore and Harbor Workers’ Compensation Act”).

Torres v. Perry Street Development Corp., supra, 104 A.D.3d 672, 674-675, 960 N.Y.S.2d 450, 453-454 (2nd Dep’t 2013) (where there was a factual dispute as to whether plaintiff was working at the site or merely visiting the site, the WCB finding that he “sustained a work-related injury does not collaterally estop the J defendants from arguing that he was not employed at the site at the time of the accident, because there is no indication in the record that this was a disputed issue at the Workers’ Compensation proceeding or that the WCB specifically adjudicated this issue”).

C. Labor Law § 202

Bell v. Kandler, 103 A.D.3d 469, 469, 960 N.Y.S.2d 11 (1st Dep’t 2013) (there were triable issues of fact as to whether, where the “defendant building owner required tenants and subtenants to clean the windows on their lease premises,” whether “the owner, by lack of objection, either informally approved or permitted window washing by its tenants’ and subtenants’ hired workers, including plaintiff, who testified that he washed windows in the building on almost a monthly basis since the late 1980’s,” whether “the owner informally approved of, if not directly recognized, third-party defendant Baltz’s subtenancy, such that the lease terms at issue would then be binding upon Baltz,” whether “owner had installed and provided notice of tilt-in windows in Balt’s subleased premises before plaintiff’s accident, such that a safe means was provided for washing the windows form inside the building, rather than form the exterior,” and whether the anchor hooks on the building’s facade complied with the relevant Industrial Code provisions (12 NYCRR 21.3[b, [d], [h], [i]: 21.6[a], [c], [k]), defendants should not have been granted dismissal of plaintiff’s Labor Law § 202 cause of action).
D. Labor Law § 241-a

**Gonzalez v. City of New York**, 38 Misc.3d 1226(A), 2013 N.Y. Slip Op. 50290(U) (Sup. Ct. Kings Co. 2013) (Schmidt, J.) (although plaintiff testified that the ladder which fell “was not attached to anything nor was it tied down, and that he fell because ‘the ladder went to one side, it tilted,’” and although the fact that plaintiff was working in an elevator shaft implicated Labor Law § 241-a [providing that persons working in elevator shaftways must be protected by planking laid not more than two floors above and not more than one floor below the level on which the individual is working], “plaintiff’s testimony raises an issue of fact as to whether his failure to attach his safety harness onto either one of the two nearby ropes or the metal beam was the sole proximate cause of his accident”).

E. The Ethical Issues In Simultaneously Representing Purportedly Liable Parties Whose Interests Partially Conflict

**Zambrotta v. 2935 Equities LLC**, 38 Misc.3d 1226(A), 2013 N.Y. Slip Op. 50277(U) (Sup. Ct. Kings Co. 2013) (where plaintiff served a Supplemental Summons and Amended Complaint naming 2935 Equities and Vitra as party-defendants, where the Hoey law firm had already appeared for 2935 Equities, where 3935 Equities had previously commenced a third-party action against Vitra, and where the Hoey firm now served a Verified Answer on behalf of both 2935 Equities and Vitra, “the Court *sua sponte* raised the question whether the Firm had a clear conflict of interest in representing both 2935 Equities and Vitra, such that it must be disqualified from representing one or both”; while Hoey argued that both parties had consented and that sufficed, the standard provides that representation is appropriate only “where a disinterested lawyer would believe that the lawyer can competently represent the interest of each client and that each consents to the representation after full disclosure of the implication of simultaneous representation as well as the advantages and risks involved” and Hoey here failed to show “that 2935 Equities and Vitra do not have different interests implicated in this action, or that a disinterested lawyer would believe that the lawyer could competently represent the interest of each client, or that full disclosure of the advantages and risks of joint representation was made to each client as the basis of the clients’ respective consent”; the ruling was reached notwithstanding that the Court was “aware that arrangements of the type that 2935 Equities and Vitra appear to have been made here are not uncommon, and suspects that often joint representation might be undertaken without violating the ethical responsibilities of counsel”).

F. About Those Exhibits To The Motion Papers

**Draper v. Danica Group LLC**, 39 Misc.3d 1241(A), 2013 N.Y. Slip Op. 50969(U) (Sup. Ct. Queens Co. 2013) (McDonald, J.) (where plaintiff moved for summary judgment based upon Labor Law § 241(6), plaintiff’s motion was denied, without reaching the merits, on the ground that “plaintiff unfairly and prejudicially served an unsworn statement that the purported exhibits are already in the possession of the adverse parties” even though “CPLR 2214(c), provides that each party shall furnish to the court all papers served by him”).