Construction Accident Litigation Update:
The Pertinent New York Law

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[Cases through August 13, 2019]

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I. Scope Of Labor Law §§ 240 and 241: The Places And Activities To Which Those Statutes Apply, And The Persons Whom the Statutes Benefit

A. Covered Work

1. The Construction/Demolition Issue

Broggy v Rockefeller Group, Inc., 8 NY3d 675, 680 [2007] (statutorily listed **Labor Law § 240** activities **need not** necessarily occur "as **part of** a construction, demolition and repair project" in order to come within the statute's scope).

Nagel v D & R Realty Corp., 99 NY2d 98, 103 [2002] (**But Labor Law § 241(6)** "covers industrial accidents that occur in the context of construction, demolition and excavation").

Barrios v 19-19 24th Ave. Co., LLC, 169 AD3d 747, 749 [2d Dept 2019] (where plaintiff was injured "when a differential block and chain fell onto his head as he and his coworkers were preparing a hoisting apparatus to remove and **replace a broken roll-up gate** on the defendant's premises," **the activity fell within the ambit of Labor Law § 240 but not within the scope of Labor Law § 241[6]** inasmuch as **the latter statute** "**is limited to those areas in which construction, excavation, or demolition work is being performed**").

DeJesus v 888 Seventh Ave. LLC, 114 AD3d 587, 587-588 [1st Dept 2014] (where plaintiff was assisting caulkers, "**[t]he protections of Labor Law § 241(6) are inapplicable** to plaintiff's claims **because he was not engaged in construction work at the time of the accident," but Labor Law § 240[1] nonetheless applied**).

Lopez v 6071 Enterprises, LLC, 159 AD3d 1092, 1093-1094 [3d Dept 2018] (where plaintiff **fell from an open trailer** while **assisting his coworker load crushed cars and scrap metal** into the trailer, and where plaintiff was not "erecting the open trailer in a building process evidenced by fitting together materials or parts or by fixing the open trailer in an upright position," "Supreme Court properly granted defendant's motion for summary judgment dismissing plaintiff's Labor Law § 240(1) claim").

Guevarra v Wreckers Realty, LLC, 169 AD3d 651, 652 [2d Dept 2019] (where plaintiff was injured on the premises of an "auto wrecker," "'**the mere act of dismantling a vehicle**, whether

a boat, a car or otherwise, unrelated to any other project, **is not the sort of demolition intended to be covered by Labor Law § 241(6)**' [citation omitted]").

2. The *Prats* Or Relatedness Issue

(a) Sufficiently Related To Covered Work, Or Issue Triable

Prats v Port Auth. of New York and New Jersey, 100 NY2d 878, 882 [2003] (Labor Law §§ 240 and 241[6] 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).

Gerrish v 56 Leonard LLC, 147 AD3d 511, 513 [1st Dept 2017], *aff'd* 30 NY3d 1125 [2018] (by 4 to 1 vote: where plaintiff, an ironworker, "tripped and fell on debris at a work site," and where defendants moved to dismiss plaintiffs' Labor Law § 241[6] claim on the ground that plaintiff was injured while "**fabricating 'steel rebars at an off-site temporary project facility in the Bronx** … for a construction project located at 56 Leonard Street in Manhattan,'" **the motion should have been denied** since it was the site owner's hiree that "was responsible for furnishing '[a]ll temporary Project site facilities' and agreed 'to place its Temporary Facilities in locations designated by Owner or Construction Manager'" and "**there is no set distance [between the accident site and the construction site] which would automatically include or exclude applicability of Labor Law § 241(6)**").[1]

Sochan v Mueller, 162 AD3d 1621 [4th Dept 2018] (without stating what the employed-by-Verizon plaintiff was actually trying to do when he was injured, the Court ruled that defendants "failed to establish as a matter of law that plaintiff was neither 'permitted or suffered to work on a building' nor hired by someone to do that work" and also failed "to establish as a matter of law that plaintiff was not engaged in an enumerated activity, i.e., altering a building or structure … or repairing a building or structure," adding that it was "**of no moment that the injury occurred when plaintiff was doing his 'pre-job survey'** to determine the best way to perform his work inasmuch as '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" and this was "not a situation where the inspection and work fell into two separate and distinct phases of a larger project").

Fedrich v Granite Bldg. 2, LLC, 165 AD3d 754, 758 [2d Dept 2018] (where plaintiff, a **fire marshal**, "allegedly was **injured while in the process of conducting an inspection** of the **fire alarm and sprinkler systems** at an **office building under construction**" when he "tripped on a pile of construction debris as he was walking from an electric room situated on the uppermost level of an underground parking garage where he had been inspecting the heat sensors and sprinkler heads," **defendant** "**failed to demonstrate, prima facie, that the injured plaintiff**

[1] The majority in ***Gerrish*** distinguished ***Flores v ERC Holding LLC***, 87 AD3d 419 [1st Dept 2011] on the ground that the plaintiff was there injured at his employer's facility, a facility over which the site owner and site general contractor exercised no control.

was not within the class of persons entitled to Labor Law § 241(6) protection" inasmuch as "**construction was still taking place at the site when the accident occurred**, and **the injured plaintiff's inspection work was essential and integral to the progress of the construction**").

Channer v ABAX Inc., 169 AD3d 758, 759-760 [2d Dept 2019] (where "plaintiff allegedly sustained injuries when he fell while **climbing through a window at a public school that was in the midst of an asbestos abatement project**," and where **plaintiff's employer** "**had been hired to monitor the asbestos removal** in progress at the school," the plaintiff was "a 'covered' person under Labor Law §§ 240(1) and 241(6) because '**his inspections are essential, ongoing, and more than mere observation**'").

Serrano v TED Gen. Contr., 157 AD3d 474, 475 [1st Dept 2018][2] (where plaintiff "was **injured when, during the course of moving sheetrock into a building**, he stood on top of a sidewalk shed that broke beneath him, causing him to fall to the sidewalk below," plaintiff was **correctly "found to be a worker protected under the statute** because he was **making deliveries of construction materials to the worksite during an ongoing construction project**").

Saquicaray v Consol. Edison Co. of New York, Inc., 171 AD3d 416 [1st Dept 2019] (where "plaintiff was **injured in the course of unloading an approximately two-ton steel plate at a construction site** owned by defendant Con Ed, after transporting the plate to the site by truck," where witnesses "consistently indicated that **[plaintiff's employer] routinely unloaded steel plates** at the site for the purpose of covering areas excavated for electrical work," where **the work was performed "pursuant to a contract that required it to provided steel plates at excavation sites owned by defendant** including the subject site, and also required [plaintiff's employer] to perform work ancillary to other tasks enumerated under Labor Law § 240(1) such as removing construction-related debris and installing barricades for excavation work," and where "**plaintiff performed this work** on an active construction site **while another worker on the site was building a removable roof for a transformer vault**," plaintiff was entitled to the protections of Labor Law § 240 and it "**does not avail [plaintiff's employer] to assert that plaintiff unloaded the plate merely for the purpose of storage**" inasmuch as **the case was** "**distinguishable from cases where a worker was injured while performing preparatory or fabrication work at his or her employer's facility, remote from the defendants' construction site**").

Cross v Noble Ellenburg Windpark, LLC, 157 AD3d 457, 458 [1st Dept 2018] (where plaintiff was "attaching **lifting lugs to a wind turbine base tower so it could be hoisted** off its trailer and onto a concrete foundation," plaintiff was "**engaged in an enumerated activity**" under Labor Law § 240).

Karwowski v 1407 Broadway Real Estate, LLC, 160 AD3d 82 [1st Dept 2018] (where plaintiff was "**involved in the fabrication and transportation of a component part to be used in the renovation project**," and where there were disputed issues of fact whether the area in which plaintiff was working was "a temporary work space or staging area created for the renovation of

[2] Disclosure: I represented the plaintiffs on the appeal.

Cayre's offices and executive bathroom" or instead, "XCEL's permanent workshop," the motion court erred in ruling that Labor Law § 241[6] did not apply as a matter of law; "**[m]erely because it was more convenient to leave the table saw on the 16th floor and cut the wood there, and then bring the wood up to the 41st floor by elevator, should not result in the automatic loss of the protections afforded by the statute**").

Bonilla-Reyes v Ribellino, 169 AD3d 858, 859-860 [2d Dept 2019] (where plaintiff was **hired** "**to perform various tasks attendant to the renovation of the warehouse** for storage of Euro's merchandise, including demolishing an office inside the warehouse and assembling metal shelving units," where "**[t]he demolition had been completed and the shelving units had been assembled approximately 15 days prior to the plaintiff's fall**," and where plaintiff "allegedly was **injured after falling 20 feet from the platform of a raised forklift while stocking shelves**," "the warehouse **defendants' submissions failed to demonstrate, as a matter of law, that the plaintiff's activity in stocking shelves was not performed as part of the larger renovation project** that he had been hired to complete on the premises, including assembly of the shelving structures and other tasks attendant to preparing the warehouse to receive Euro's stock merchandise").

Doskotch v Pisocki, 168 AD3d 1174, 1175, 1176 [3d Dept 2019] (where **plaintiff** "**fell from a ladder while climbing to the roof of defendant's rental property to inspect a chimney that needed repairs**," there was a **triable issue** as to whether the work fell within the ambit of Labor Law § 240; **although the work would not fall within the scope of the statute if someone else was to do whatever repair work would follow** as a result of the plaintiff's inspection, "**plaintiff and defendant both anticipated that plaintiff would carry out the repair if his inspection revealed that this would be feasible**" the record therefore did not "permit a determination as a matter of law that the chimney inspection was 'a separate phase easily distinguishable from' the actual repair, and thus outside the statutory protection").[3]

(b) Not Sufficiently Related To Covered Work

Allyn v First Class Siding, Inc., 174 AD3d 1340 [4th Dept 2019] (where plaintiff was injured "while he was **delivering supplies to a prospective worksite four days before any construction work began**," and where "**the contractor that bought the supplies** and was to perform the work" **was "not yet present on the site** when the accident occurred," defendants "met their initial burden on the motion with respect to the Labor Law § 240(1) claim against defendant by establishing that plaintiff was not 'hired to take any part in the repair work' [internal quotation marks omitted]" in that "**the activity in which plaintiff was engaged was not 'performed *during* the repair of a structure nor was it ancillary to … ongoing renovation work'** [internal quotation marks omitted]").

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[3] The court did not say what exactly the jury was supposed to decide. Would the issue turn on whether the defect, which was not yet identified when plaintiff fell, was later discovered to be of such nature that plaintiff could have repaired it? Or was the jury supposed to more generally say whether the inspection was "a separate phase easily distinguishable" from the repair?

Kusayev v Sussex Apartments Assoc., LLC, 163 AD3d 943, 944 [2d Dept 2018] (where "plaintiff, a **delivery truck driver**, allegedly was **injured while delivering building materials to an apartment building**," "the plaintiff was **not engaged in construction work** within the meaning of Labor Law § 240(1), and was **not working in a construction area** within the meaning of Labor Law § 241(6), **since the building materials were not being 'readied for immediate use' … but were instead being 'stockpil[ed] for future use'** [citations omitted]").

Calvert v Duggan & Duggan Gen. Contr., Inc., 159 AD3d 1490 [4th Dept 2018] (where plaintiff sustained injuries "when **a coworker ran over him** with a skid steer **while they were performing landscaping work** in **preparation for the opening of an entertainment complex**," plaintiff's Labor Law § 241 claim was properly dismissed since "the landscaping work being performed by plaintiff and the coworker was not itself" covered work and the **landscaping work "was unrelated to the construction work"**).

Solecki v Oakwood Cemetery Assn., 158 AD3d 1088, 1089 [4th Dept 2018] (where the plaintiff, a **funeral director**, "went to the cemetery to make sure that the grave site was ready for a burial that was to take place that day" and **fell into the grave**, "plaintiff was **not entitled to the protection of Labor Law § 241(6)** inasmuch as his inspection of the grave site in his capacity as a funeral director had no direct connection with the alteration or excavation work performed by Wolcott").

Hernandez v 601 W. Assoc., 98 NYS3d 744 [1st Dept 2019] ("[n]otwithstanding the work being performed in other parts of the premises, and contrary to his own characterization of his work as demolition, plaintiff, whose **task was to remove debris and garbage, including the refrigerator**, from the basement, was **not engaged in an activity protected by Labor Law § 240(1) or 241(6)** at the time of his accident").

Acox v Jeff Petroski & Sons, Inc., 172 AD3d 1886, 1887 [4th Dept 2019] (where **decedent went to defendant's residence** "as **a precursor to the installation of window treatments**" and fell into a hole which "a circular staircase was to be constructed," Labor Law § 240[1] was inapplicable "inasmuch as **the work of measuring windows for the future installation of window treatments is not a protected activity** under Labor Law § 240(1)" and plaintiff was not entitled to the protection of Labor Law § 241[6] "'inasmuch as decedent 'was not involved with [any] construction' [citation omitted]" and "**the window treatment work was separate and 'distinct from the construction work'** [citation omitted]").

Archer-Vail v LHV Precast Inc., 168 AD3d 1257, 1259-1260 [3d Dept 2019] (where "plaintiff alleged that, at the time that decedent sustained the fatal injuries, he had been **unloading a bridge form** that had been **delivered to the manufacturing facility operated by LHV** so that it **could be used in the manufacture and fabrication of construction materials** that would be eventually used during unspecified construction at an unspecified construction site," **such allegations did not** "'**support any contention that the work being done at the time of the incident was, in any manner, an integral part of an ongoing construction contract** or was being performed at an ancillary site, **incidental to and necessitated by such construction**

project, where the materials involved were being readied for use in connection with a covered activity'" so as to bring the case within the ambit of Labor Law §§ 240 or 241[6]).

3. "Altering"

Joblon v Solow, 91 NY2d 457, 465 [1998] ("altering" defined as a "**significant physical change**" to a "building or structure").

Belding v Verizon New York, Inc., 14 NY3d 751, 752-753 [2010] (**application of** "**bomb blast film**" to "windows" constituted "altering").

"Altering" Of A Billboard — *Saint v Syracuse Supply Co.*, 25 NY3d 117 [2015], *rev'g* 110 AD3d 1470 [4th Dept 2013].

Where plaintiff and the other members of his crew were assigned to remove one billboard advertisement and install another, was that "altering" for the purpose of Labor Law § 240?

Some years ago, in ***Munoz v DJZ Realty, LLC***, 5 NY3d 747 [2005], the Court of Appeals ruled that another worker's replacement of a billboard advertisement was merely "cosmetic negligence" and therefore not "altering." Here, a unanimous Court reached the opposite conclusion by virtue of the different facts of the case.

Labor Law § 240[1] applies to "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." In order to obtain the benefit of the statute's protections, the plaintiff must establish that she or he was engaged in a listed activity. "Maintenance" is not a covered activity.

In consequence, the issue frequently arises as to whether the work activity was "repairing" … or just maintenance, "painting" … or just maintenance, or, as here, "altering" … or just maintenance.

The settled definition of "altering," which comes from the Court of Appeals' ruling in ***Joblon***, 91 NY2d at 465, is that "'altering within the meaning of Labor Law § 240 [1] requires making a significant physical change to the configuration or composition of the building or structure.'"

The word "significant" is itself a term of art. Amongst those activities that were held to constitute "altering" have been the application of "bomb blast film" to render existent windows more resistant to explosions,[4] dismantling of shelves in a warehouse,[5] moving a ceiling-mounted fluorescent light from one location to another,[6] boarding up windows to protect the vacant building from vandalism,[7] and extensive re-wiring of a business's telephone system.[8]

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[4] ***Belding***, 14 NY3d at 752-753.

[5] ***Kharie v S. Shore Record Mgt., Inc.***, 118 AD3d 955, 956 [2d Dept 2014].

[6] ***Vasquez v C2 Dev. Corp.***, 105 AD3d 729, 730 [2d Dept 2013].

Amongst those activities that were held *not* to constitute "altering" have been painting of decorative images on wooden panels,[9] attachment of a temporary exterior sign,[10] hanging of window shades,[11] and removal of a satellite dish.[12]

Interesting, the same court that deemed *removal* of a satellite dish as *not* constituting an alteration had earlier held that the (factually distinguishable, in its view) activity of *installing* a satellite dish *was* "altering"[13] — which nicely illustrates how fine the line can be.

And that brings us to billboards, "cosmetic maintenance," and ultimately to ***Saint***. Back in ***Munoz***, the plaintiff fell from a ladder while applying a new advertisement to the face of a billboard that sat atop the defendant's building. There was no doubt that the accident was sufficiently "elevation-related" to come within the statute's scope. The plaintiff first had to ascend a 28-foot ladder just to reach the roof, and then had to climb a 14-foot ladder in order to reach the face of the 12-foot by 24-foot billboard. The accident occurred when the 14-foot ladder slipped, causing the plaintiff to fall.

But was the work in ***Munoz*** "altering" for purposes of Labor Law § 240[1]? A unanimous Court of Appeals said it was not, stating, "Plaintiff's activities may have changed the outward appearance of the billboard, but did not change the billboard's structure, and thus were more akin to cosmetic maintenance or decorative modification than to 'altering' for purposes of Labor Law § 240 [1]" (5 NY3d at 748).

Facts: So, finally, we come to ***Saint***. At least at first blush, the facts seem very similar to those in ***Munoz***.

The plaintiff was, the Court of Appeals said, "part of a three-person construction crew working to replace an advertisement on a billboard located in Erie County" (25 NY3d at 121). He had been working "on the lower rear catwalk [of the billboard] when he heard the other crew members call for assistance because they were having difficulty due to the day's wind conditions" (*id*. at 122). He "went to the upper catwalk to assist them, and in order to get around one of the crew members … detached his lanyard from the catwalk's safety cable." (*id.*). A strong gust of wind caught the vinyl advertisement that was the object of the work. The advertisement struck plaintiff in the chest, causing him to fall some ten feet to a lower catwalk.

The question, once again, was whether the project was "altering." But this time the answer was Yes.

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[7] ***Santiago v Rusciano & Son, Inc.***, 92 AD3d 585, 586 [1st Dept 2012].

[8] ***Becker v ADN Design Corp.***, 51 AD3d 834, 836-837 [2d Dept 2008].

[9] ***Adika v Beth Gavriel Bukharian Congregation***, 119 AD3d 827, 827-828 [2d Dept 2014].

[10] ***Bodtman v Living Manor Love, Inc.***, 105 AD3d 434, 434 [1st Dept 2013].

[11] ***Amendola v Rheedlen 125th St., LLC***, 105 AD3d 426, 427 [1st Dept 2013].

[12] ***Zolfaghari v Hughes Network Sys., LLC***, 99 AD3d 1234, 1235 [4th Dept 2012].

[13] ***Tassone v Mid-Val. Oil Co. Inc.***, 291 AD2d 623, 624 [3d Dept 2002].

Held: The key distinction, the Court said in an opinion penned by Judge Rivera, was that the job here in ***Saint*** entailed modification of the billboard's structure, not just its appearance. Here, the installation of the new advertisement on the billboard (which was also much larger and higher than the billboard in ***Munoz***) entailed the attachment of four additions known as "extensions." The extensions were so large that a crane was needed to lift them up to the level of the billboard, and the job itself was large enough to require a three-person crew (as opposed to the lone worker in ***Munoz***).

In concluding that the project constituted "altering," the Court distinguished other cases that "involved simple tasks, involving minimal work" (*id.* at 126). It also distinguished the "cosmetic maintenance" in ***Munoz*** from the structure-altering work in the case before it (*id.* at 127).

Perhaps most important in terms of the ruling's impact on future cases, the ***Saint*** Court expressly rejected the argument that the term "altering" applies only to "permanent changes." The Court reasoned, "Nowhere does section 240(1) impose or even mention a requirement that an alteration be of a permanent and fixed nature … in this case the fact that the advertisement extensions stay up as long as the sign does, makes the work no less an alteration within the meaning of section 240(1)" (*id*. at 128).

Comment: I think the message we should draw from *Saint* is that the determination of whether a given project entails a "*significant* physical change to a building or structure" is necessarily fact-intensive, so much so that the same general category of activity (here, replacement of one billboard advertisement with another) may well be "altering" in one instance but not in another.

Mananghaya v Bronx-Lebanon Hosp. Ctr., 165 AD3d 117, 124-126 [1st Dept 2018] (where the approximately 475,000 square foot **hospital needed massive "chillers" in order to maintain the legally required temperatures**, where **decedent and his coworkers were attempting to remove a rented chiller** which **included a trailer that weighed approximately 40,000 pounds**, and where the task required that the workers close off 173rd Street, **Supreme Court erred in determining that the fact that the building's "structural integrity" would be unchanged meant that the work was not an alteration** within the ambit of Labor Law § 240; rather, "[i]n cases decided by this Court and the Court of Appeals since *Joblon* [91 NY2d 457 [1998], work being performed that affects a crucial building system has been found to constitute a significant physical change to the configuration or composition of the building" and here "the work being performed was a significant change to the hospital's air conditioning system" and "**disconnecting and removing the rented chiller and generator was a significant undertaking, was not simple, routine, or cosmetic, and fundamentally altered the function of a significant building system**, the hospital's air conditioning system").

Concepcion v 333 Seventh LLC, 162 AD3d 493, 494 [1st Dept 2018] (where the plaintiff's work "included **reconfiguring the premises' sprinkler system to comply with the fire code** and entailed, inter alia, cutting and removing pipes, relocating pipes and valves, and installing components," **such** "**constituted an alteration within the meaning of section 240(1)**").

McCarthy v City of New York, 173 AD3d 1165 [2d Dept 2019] (where **plaintiff, "a stagehand** working as a lighting director at the 2014 U.S. [Tennis] Open," allegedly fell from the ledge of

the domestic broadcast booth at the defendant USTA Bille Jean King National Tennis Center's Arthur Ashe Stadium while he was "**removing a C-clamp that had been used to secure lighting scrim to the exterior of the broadcast booth**," while the physical change "does not need to be permanent in order to qualify as an alteration under the statute [Labor Law § 240]," "defendants established their prima facie entitlement to judgment as a matter of law" inasmuch as plaintiff's **work "of bringing in and removing portable lighting equipment did not constitute altering of any building or structure"** and "the placement of a lighting scrim, secured to the exterior of the broadcast booth with screw-based C-clamps, involved no significant physical change to a structure").

Spencer v 322 Partners, L.L.C., 170 AD3d 415, 416 [1st Dept 2019] ("[p]laintiff's actions of **opening a splice box affixed to the wall and splicing telephone wires therein** while **on a service call for a customer** of his employer **did not constitute an alteration** of the building, but rather routine maintenance").

4. "Cleaning"

Dahar v Holland Ladder & Mfg. Co., 18 NY3d 521, 525-526 [2012] (Labor Law § 240 applies to "cleaning," but not to "every act of cleaning," and **not to "cleaning" that occurs in a factory setting**, far removed from any construction or demolition activity).

Soto v J. Crew Inc., 21 NY3d 562, 564, 568 [2013] (where plaintiff, "an employee of a commercial cleaning company hired to provide **janitorial services for a retail store**, was injured when he fell from a four-foot-tall ladder while **dusting a six-foot-high display shelf**," plaintiff's activity did not constitute "cleaning" within the ambit of Labor Law § 240(1); "Outside the sphere of commercial window washing (which we have already determined to be covered), **an activity cannot be characterized as 'cleaning'** under the statute, if the task: **(1) is routine**, in the sense that it is the **type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis** as part of the ordinary maintenance and care of commercial premises; **(2) requires neither specialized equipment or expertise**, nor the unusual deployment of labor; **(3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning**; and **(4)** in light of the core purpose of Labor Law § 240(1) to protect construction workers, is **unrelated to any ongoing construction, renovation, painting, alteration or repair project**").

Padilla v Park Plaza Owners Corp., 165 AD3d 1272, 1275 [2d Dept 2018] (where the building defendants **hired plaintiff's employer to remove the oil from a temporary oil tank** and **then clean the tank**, and where plaintiff fell from the top of the tank, plaintiff "demonstrated that **he was engaged in a protected activity** under Labor Law §§ 240(1) and 241(6) when he was injured" [*citing Soto*, 21 NY3d at 568-569]).

Burns v Marcellus Lanes, Inc., 169 AD3d 1457, 1457 [4th Dept 2019] (where plaintiff was **injured** "**while removing snow and ice from the roof of a building** owned by defendant after he fell from the bucket of a backhoe being used to lift him to the roof," "**the removal of snow**

and ice from the roof of a commercial building, under these circumstances, constitutes a form of 'cleaning,' thereby bringing it within the ambit of Labor Law § 240(1)").

Guevarra v Wreckers Realty, LLC, 169 AD3d 651, 652 [2d Dept 2019] (plaintiff's activity of "**sweeping the floor at Jet Auto Wreckers**" **did not constitute "cleaning" within the scope of Labor Law § 240** since "it was the type of **routine maintenance** that occurs in any type of premises, **did not require specialized tools**, and **could be accomplished 'using tools commonly found in a domestic setting'**" [*citing* ***Soto***, 21 NY3d 562, 569]).

Holguin v Barton, 160 AD3d 819 [2d Dept 2018] (where "plaintiff was an **employee of a cleaning services company** which was **hired to clean a condominium apartment following a renovation by the defendant**," and where plaintiff fell from a stepladder while dusting certain floor-to-ceiling cabinets, "the moving defendants demonstrated, prima facie, that the **plaintiff was not engaged in 'cleaning' within the meaning of Labor Law § 240(1)**, as her work **did not require specialized equipment**, and was **unrelated to any ongoing construction or renovation** of the apartment").

5. "Repairing"

Esposito v New York City Indus. Dev. Agency, 1 NY3d 526, 528 [2003] (Labor Law sections 240 and 241(6) do not apply if the plaintiff was performing "**routine maintenance**").

Wass v County of Nassau, 173 AD3d 933 [2d Dept 2019] (where plaintiff "fell from atop an eight-foot wooden A-frame ladder while he was working on a lighting fixture at the Nassau Coliseum," "the County defendants' own submissions highlighted rather than eliminated triable issues of fact as to whether the plaintiff was engaged in repairs or routine maintenance at the time of his accident"; "**[a]lthough the plaintiff's testimony demonstrated** that **some of the lighting poles** on which he worked **may have only required the tightening or replacement of a lightbulb**, he testified that **more labor intensive work was performed on other lighting poles** in order to make them function, **which fell within the scope of 'repairing' a light fixture** and, concomitantly, **within the scope of Labor Law § 240(1)**").

Wass v County of Nassau, ***supra*** (where plaintiff "fell from atop an eight-foot wooden A-frame ladder while he was working on a lighting fixture at the Nassau Coliseum," "'[t]he courts have generally held that the scope of **Labor Law § 241(6) is governed by 12 NYCRR 23-1.4(b)(13)**, which **defines construction work expansively** [citation omitted]'" and "[s]ince the **plaintiff was arguably engaged in the repair of the subject lighting fixtures**, the County **defendants failed to establish**, prima facie, that **Labor Law § 241(6) was inapplicable** to the plaintiff's activities").

Barrios v 19-19 24th Ave. Co., LLC, 169 AD3d 747, 748 [2d Dept 2019] (where plaintiff was injured "when a differential block and chain fell onto his head as he and his coworkers were preparing a hoisting apparatus **to remove and replace a broken roll-up gate** on the defendant's

premises," "**[t]he activity of the removal of the old roll-up gate** and the **installation of a new roll-up gate is a repair within the purview of Labor Law § 240(1)**").

Garbett v Wappingers Cent. School Dist., 160 AD3d 812 [2d Dept 2018] (where workers were **disassembling a boiler in order to fix a leak**, but where the **school's head custodian testified that the boiler was disassembled every summer for routine cleaning** and refurbishing and that he was "not aware of any problem with the boiler in need of repair" at the time in issue and the "record does not otherwise clarify the degree to which boiler sections are 'components that require replacement in the normal course of wear and tear,'" "Supreme Court properly determined that **triable issues of fact** exist with respect to whether the plaintiff's activity was covered under Labor Law § 240(1)").

Colon v Third Avenue Open MRI, Inc., 172 AD3d 614, 615 [1st Dept 2019] (where the **plaintiff-handyman was "climbing to fix a leak** from the ceiling in defendant's x-ray room," where **plaintiff "surmised that the leak was coming from the joint of a cast iron drain pipe** in the ceiling, and that **he could tighten the clamps with a screwdriver** that he had on his person," and where "**[d]efendant's principal testified that the leak eventually stopped on its own, and he ultimately learned that the source of the leak was a spill from the apartment above**, and not an issue with the plumbing system at all," "**the motion court correctly found that plaintiff was engaged in routine maintenance**, rather than 'repairing,' and, therefore, that defendants cannot be held liable for his injury under Labor Law § 240(1)").

Dahlia v S & K Distrib., LLC, 171 AD3d 1127 [2d Dept 2019] (where plaintiff, an **HVAC service technician, fell while servicing a heating unit**, where "plaintiff testified that before the accident occurred, he determined that **a belt was missing from the heating unit**" and where plaintiff further testified "**there was nothing extraordinary or unusual about a belt needing to be replaced or a pilot light going out** on a heating unit" that "**belts generally should be replaced approximately once a year**," and where plaintiff had not yet determined "whether the pilot light on the heating unit was [also] out" but "testified that the only tools he needed to turn on the pilot light were a Crescent wrench or a screwdriver and a lighter," the evidence "showed that the **plaintiff's work 'involved replacing components that require replacement in the course of normal wear and tear' and did not constitute 'repairing' or any other enumerated activity**" [*quoting* ***Esposito***, 1 NY3d 526, 528 [2003]) inasmuch as "'the distinction between routine maintenance and repairing does not turn solely on whether the work involves fixing something that is not functioning properly [citation omitted]'").

Gutkaiss v Delaware Avenue Merchants Group, Inc., 173 AD3d 1327 [3d Dept 2019] (where defendant **hired plaintiff, an independent contractor, to wrap "strands of decorative LED lights around the light poles** located along a portion of Delaware Avenue **for the purpose of creating a brighter appearance in the neighborhood**," where plaintiff was **also tasked "to replace light strands located on 36 light poles because many of the light bulbs had become inoperable**," and where plaintiff "was injured when he fell from a 16-foot aluminum-rung extension ladder when the pole that it was leaning on suddenly fell over," while "replacement of a light fixture on a lighting pole is a repair within the protections of Labor Law § 240(1)," the **work in issue constituted "routine maintenance"** inasmuch as, [1] mere replacement of burnt-

out bulbs is routine maintenance, and, [2] the light strands could not be considered fixtures since they "were placed on the poles for decorative purposes and were not required to fulfill the primary purpose of the light poles in providing illumination to the street and adjacent sidewalk" and "were merely plugged into standard electrical outlets located near the top of each light pole, wrapped around the outside of each pole and secured at the bottom of the pole with a single zip tie").

Trotman v Verizon Communications, Inc., 166 AD3d 707 [2d Dept 2018] (where plaintiff was **a fleet mechanic** who was **injured while** "**engaged in the task of replacing burnt out light bulbs**," such work "**constitutes routine maintenance** and therefore **falls outside of the scope of Labor Law § 240(1)**" and "[c]ontrary to the plaintiff's contention, his work did not take place in the context of a larger project which 'encompassed activity protected under the statute [citation omitted]'").

Byrnes v Nursing Sisters of Sick Poor, Inc., 170 AD3d 796, 796-797 [2d Dept 2019] (where plaintiff was **injured while** "**performing a seasonal 'start-up' of a cooling tower** on the defendant's HVAC system, which consisted of transitioning the HVAC system from heating to cooling," and where **plaintiff's employer** "**had done this work on a yearly basis for the past 10 years**," "[t]he facts establish that the work the plaintiff was performing at the time of his injury **consisted of routine maintenance, which is outside the scope of Labor Law § 241(6)**").

B. Territorial Limitations

1. Labor Law §§ 240 and 241[6] Apply Only Within State

Osborn v 56 Leonard LLC, 138 AD3d 624, 625 [1st Dept 2016] (where plaintiff, "a New Jersey Domiciliary, was injured by an unguarded saw blade while working at a site located in New Jersey," the mere fact "that the part he was fabricating was going to be installed at a construction site owned and operated by defendants, located in Manhattan" did not render the Labor Law applicable inasmuch as it is "'**well settled that the protection afforded** to New York employees by the Labor Law, including **Labor Law §§ 200, 240(1) and 241(6)**, has **no application to an accident that occurs outside New York State**, even where all parties are New York domiciliaries'").

2. Maritime Boundary

Cammon v City of New York, 95 NY2d 583 [2000] (Labor Law §§ 240 and 241(6) ***can*** **apply, even if the case falls within the maritime regime**).

Lee v Astoria Generating Co., L.P., 13 NY3d 382 [2009] (however, because of the limitations of 33 U.S.C. § 905[b], **the statutes cannot apply to the vessel owner** in such a case).

C. Covered Plaintiffs

1. Apply Only To Persons "Employed," Not To "Volunteers" Or Contract Vendees

Whelen v Warwick Val. Civic and Social Club, 47 NY2d 970, 970 [1979] (**volunteers not covered**).

Mordkofsky v V.C.V. Dev. Corp., 76 NY2d 573, 576-577 [1990] (**only "employees"** are covered; contract vendee not covered).

Doskotch v Pisocki, 168 AD3d 1174, 1175, 1176 [3d Dept 2019] (where plaintiff "fell from a ladder while climbing to the roof of defendant's rental property to inspect a chimney that needed repairs," and where **the defendant-owner was also the plaintiff's mother**, there was **a triable issue whether plaintiff was a volunteer who would not be paid for the work or an employee entitled to the protection of Labor Law § 240**; while defendant testified "that she did not intend to pay plaintiff for the inspection task" and plaintiff testified that he had done "other volunteer services for friends and neighbors, such as plowing snow and repairing mailboxes, without requesting or expecting payment," "**defendant's testimony established** that **she directed plaintiff on what to do** when he inspected the chimney, **had previously paid him for repairs** and **would have paid him if he had carried out the chimney cap repairs**").

Lopez v La Fonda Boricua, Inc., 136 AD3d 588 [1st Dept 2016] (without further explanation or recitation of the facts: "Defendant failed to establish prima facie, with respect to the Labor Law § 240(1) claim, that the injured plaintiff was not an 'employee' but a 'volunteer' within the meaning of the Labor Law, **notwithstanding that his employer may have agreed to perform the work at the restaurant gratuitously**").

2. But Contractors And Higher-Ups Can Be "Employees"

Eliassian v G.F. Constr., Inc., 163 AD3d 528 [2d Dept 2018] (where the **plaintiff-owner** hired the defendant contractor "to perform excavation work to prepare for the addition of a room on the home," where plaintiff alleged "that he was on his property on behalf of his company Alliance to inspect the progress of the work of the defendant," Labor Law § 240 "**may apply to the president of the general contractor for the project**, who is inspecting work performed by subcontractors" and "[i]nspecting the work on behalf of a general contractor is a protected activity covered by these Labor Law provisions").

Vera v Low Income Mktg. Corp., 145 AD3d 509, 511-512 [1st Dept 2016] (by 4 to 1 vote: where plaintiff submitted proof "demonstrating that **his company was hired by general contractor** NY Fast to supply containers and that **plaintiff was properly at the work site**," plaintiff "testified that he had **an agreement with a principal of NY Fast to help load the dumpsters** and that he **received compensation for doing so**," and it was "undisputed that plaintiff was 'permitted or suffered to work' on the premises on the date of the accident,"

plaintiff was as a matter of law an "employee" for the purposes of Labor Law § 240 even though the WCB found him to be "an independent contractor" for purposes of the WCL).

Makkieh v Judlau Contr. Inc., 162 AD3d 468 [1st Dept 2018] (as "an **engineer supervising the construction of the Second Avenue subway**, [plaintiff] was engaged in an activity falling within the protections of the statute").

Radeljic v Certified of N.Y., Inc., 161 AD3d 588 [1st Dept 2018] ("[c]ontrary to Prokraft's argument, the accident is covered by the Labor Law **notwithstanding plaintiff's position as a foreman**").

Bundo v 10-12 Cooper Sq., Inc., 140 AD3d 535, 1 [1st Dept 2016] ("**Independent contractor status would not exclude the injured plaintiff** from the Labor Law's protective ambit").

Griffin v AVA Realty Ithaca, LLC, 150 AD3d 1462 [3d Dept 2017] ("[w]e find **no merit in Varish's contention** that **Labor Law § 240(1) does not apply** in that plaintiff was **allegedly an independent contractor**, not an employee").

3. Purportedly Unauthorized Work

Daeira v Genting New York, LLC, 173 AD3d 831 [2d Dept 2019], *mod'g* 51 Misc.3d 1216(A) [Sup Ct 2016] (where **plaintiff, a project manager** for AFI, "**stepped over a guardrail in order to take measurements of a damaged window pane** and **fell through the glass floor to the ground** below," where "**AFI had not been hired to perform work on the Longshots restaurant** project, which was a separate and distinct project from the rest of the construction work going on at Aqueduct Raceway," and **plaintiff said "he went to the Longshots construction site to prepare an estimate for the replacement of a damaged window pane** on the curtain wall," **plaintiff was <u>not</u> a person entitled to the protection of sections 240 or 241[6]** of the Labor Law and the case was "distinguishable from those where a plaintiff or his or her employer has already procured a contract to perform a covered activity").[14]

Goya v Longwood Hous. Dev. Fund Co., Inc., 167 AD3d 402, 403 [1st Dept 2018] (where "[t]here was **conflicting evidence** as to **whether plaintiff had permission to perform work at the accident site on the day in question**," the motion court "correctly denied plaintiff's motion for partial summary judgment because **there were issues of fact** as to whether he was **'permitted or suffered to work on [the] building'** at the time of the accident").

Dos Anjos v Palagonia, 165 AD3d 626, 627 [2d Dept 2018] (defendants' motion for dismissal of the plaintiffs' Labor Law §§ 240 and 241[6] claims were **correctly denied** where **defendants**

[14] I should note that the quotations all come from Justice Robert J. McDonald's opinion in Supreme Court. The Appellate Division, which affirmed that part of the ruling, said that "plaintiffs failed to demonstrate, prima facie, that the injured plaintiff was subject to the protection of the Labor Law," but without providing any factual context for the ruling.

"**met their prima facie burden** for summary judgment dismissing the Labor Law causes of action **by establishing that neither the plaintiff nor his employer had been retained to perform work** on the subject project" and "**plaintiff raised a triable issue of fact** as to whether **the Stewart defendants retained the plaintiff's employer to perform floor installation work** on the project").

McCue v Cablevision Sys. Corp., 160 AD3d 595 [1st Dept 2018] (where plaintiff allegedly sustained injuries "when he **fell from a utility pole while attempting to troubleshoot a cable installation activation** that did not work," and where plaintiff's supervisor "submitted an affidavit asserting, inter alia, that **plaintiff's sole job functions were as a manager, providing administrative services and training**, assessing materials and equipment needed for a job, and **occasionally following up with an activation from ground level only**, but that in no event were his duties to entail climbing any poles," "Supreme Court correctly determined that **issues of fact exist** as to **whether the aerial work** plaintiff contends he was performing when he fell **was outside the scope of his employment** and thus outside the protection of Labor Law § 240(1)").

D. Limitation To Buildings Or Structures

Gordon v E. Ry. Supply, Inc., 82 NY2d 555, 560 [1993] (a railroad car is a "structure").

Lewis-Moors v Contel of New York, Inc., 78 NY2d 942, 943 [1991] (as is a telephone pole).

Mosher v State, 80 NY2d 286, 288 [1992] (as are highways).

Lombardi v Stout, 80 NY2d 290, 295-296 [1992] (but a tree is, instead, "a product of nature").

Moura v City of New York, 165 AD3d 434, 434 [1st Dept 2018] (where "plaintiff's employer was hired to erect, move, and adjust rolling scaffolding to facilitate B & H's inspection of the Manhattan Bridge," "this work constituted construction and alteration within the contemplation of Labor Law § 241(6) and Industrial Code § 23–1.4(b)(13)"; additionally, "**plaintiff's work was a covered activity** because it **involved the construction and alteration of a structure, namely, the large rolling pipe scaffold** that he helped erect and alter").

Perez v Beach Concerts, Inc., 154 AD3d 602 [1st Dept 2017] (where plaintiff fell while "helping **set up the second tier truss system of a sponsorship booth**" at **Jones Beach Marine Theater**, the "truss system **constituted a 'structure'** [for purposes of Labor Law § 240] because, viewed as a whole, it extended the height of the booth from 10 feet to 16 feet, was comprised of several interlocking parts that were connected in a specific way, and required the use of a forklift and several people to construct it" and such was so *even though* it was "being set up to allow for the display of branding" inasmuch as "'the work … entail[ed] **far more than a mere change[] [to] the outward appearance of' the booth** and, instead, constituted an alteration to the preexisting structure'" (quoting ***Saint***, 25 NY3d 117, 126 [2015]).

Tamarez De Jesus v Metro-N. Commuter R.R., 159 AD3d 951 [2d Dept 2018] (where plaintiff "was **cutting and removing a tree that had fallen during Hurricane Sandy** onto catenary wires situated above the railroad tracks along the New Haven Railroad Line," where "**plaintiff was standing on the ground and using a power saw to cut through the tree trunk** when the tension in the catenary wires suddenly released, propelling the tree into the air," where "[t]he **tree broke in two and then fell, striking the plaintiff's leg**," and where "the catenary wires could not be repaired and train service restored without first removing the tree," although "'tree cutting and removal, in and of themselves, are not activities subject to Labor Law § 240(1)'" "**where, as here, the plaintiff's tree removal work constituted the first step in effectuating repairs to the catenary wires**, the provisions of Labor Law § 240(1) are applicable").

Olarte v Morgan, 148 AD3d 918 [2d Dept 2017] (inasmuch as "**tree branch cutting work" is "outside the ambit of Labor Law § 240(1)**, because **a tree is not a 'building or structure'** within the meaning of the statute," and inasmuch as **plaintiffs' claim "that the tree branch cutting work** was **necessary to complete a larger renovation project** with respect to the building on the premises" was "**unsupported by the record**," Supreme Court "properly granted that branch of the defendants' motion which was for summary judgment dismissing the Labor Law § 240(1) cause of action" and also "properly granted that branch of the defendants' motion which was for summary judgment dismissing the Labor Law § 241(6) cause of action").

II. Defendants Who Are Subject To Statutory Liability Under Labor Law §§ 240 Or 241(6)

A. Owners In General

Sanatass v Consol. Inv. Co., Inc., 10 NY3d 333, 341-342 [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 NY3d 50, 56 [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 NY3d 194 [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).

Powell v Norfolk Hudson, LLC, 164 AD3d 1283, 1283-1284 [2d Dept 2018] (where plaintiff was purportedly **injured while** "**removing equipment and construction materials** from the roof of a building located at 101 Norfolk Street," where **the work in issue entailed constructing a new building on an adjacent lot**, where **defendant owned the already existent building**, and where **a related corporation owned the adjacent lot**, "**it cannot be said, as a matter of law, that the defendant 101 Norfolk was not an 'owner'** for purposes of liability under the Labor Law. Rather, the evidence demonstrated that the defendant 101 Norfolk owned the property on which the plaintiff allegedly was injured and there was evidence that the plaintiff

was injured in the course of a construction project encompassing both 103-105 Norfolk Street and the defendant 101 Norfolk's property, 101 Norfolk Street").

Singh v Nadlan, LLC, 171 AD3d 1239 [2d Dept 2019] (where the subject **premises were owned by a limited liability company, plaintiff could *try* to pierce the corporate veil** in order to reach the LLC's members but **such generally requires the plaintiff to prove** "'**(1) the owners exercised complete domination of the corporation in respect to the transaction** attacked; and **(2) that such domination was used to commit a fraud or wrong against the plaintiff** which resulted in plaintiff's injury'").

Gordon v City of New York, 164 AD3d 1110, 1111 [1st Dept 2018] (where **defendant Metropolitan Transportation Authority (MTA) hired plaintiff's employer** to work on a construction project designed to bring LIRR service to Grand Central Terminal (GCT), where plaintiff was instructed to re-position a stadium light that was approximately 15-to-20 feet above the tunnel floor, where a co-worker "placed the ladder on the tunnel floor, which was covered in muddy water and debris," and where the ladder slipped out from under plaintiff and caused him to fall, **defendant MTA was an "owner" but "defendant LIRR and the City satisfied their prima facie burden of establishing that they were not subject to liability as 'owners'** within the purview of Labor Law §§ 240(1) and 241(6)" inasmuch as **neither "was a party to any contract for plaintiff's work on the subject premises**, and … **neither performed, supervised or controlled any construction work at the subject premises**").

Penza v Quoohs, 169 AD3d 505, 505 [1st Dept 2019] (where "[p]laintiff and his company were **hired by defendants Edmund Sylvester and Anne Sylvester to remove trees situated along their property line or between their property and the Quoohses' property**," and where plaintiff "was **injured when he fell from the roof of the third-floor terrace of the Quoohses' property, which he was standing on so that he could reach branches of the trees**," plaintiff's Labor Law causes of action were **correctly dismissed as against the Quoohses**).

B. Lessees And Licensees

Reyes v Bruckner Plaza Shopping Center LLC, 173 AD3d 570 [1st Dept 2019] (where there was **proof** that **lessee Western Beef Retail, Inc. "was responsible for renovating the premises**, including the roof, and **had retained Metro as the general contractor** for the renovation work," such proof "**raise[d] an issue of fact as to whether Western had the authority to supervise** and control the work site" **notwithstanding that "Western's director of merchandising [testified]** that **he was not involved with the construction work**").

Tropea v Tishman Constr. Corp., 172 AD3d 450, 451 [1st Dept 2019] ("**as premises lessee which contracted for the work, AECOM was an owner** within the meaning of Labor Law § 240(1)").

Nava-Juarez v Mosholu Fieldston Realty, LLC, 167 AD3d 511, 513 [1st Dept 2018] ("Defendant Mosholu Enterprises **is liable as the tenant who hired plaintiff's employer**").

Rizo v 165 Eileen Way, LLC, 169 AD3d 943, 946 [2d Dept 2019] (where there was a **triable issue of fact whether the defendant-tenant contracted for the work in issue**, which was soundproofing, that meant there was a triable issue whether the defendant could be held liable under Labor Law §§ 240[1] or 241[6] inasmuch as "**[t]enants who either contract for or control and supervise the work may be held liable under these statutes** … [whereas] tenants who neither contract for nor control and supervise the work may not be held liable under them").

Karwowski v 1407 Broadway Real Estate, LLC, 160 AD3d 82 [1st Dept 2018] (Labor Law § 241[6] here applied to the lessee contractors; "**the term 'owners' within the meaning of 241 of the Labor Law is not 'limited to the titleholder** … [It] **encompass[es] a person who has an interest in the property and who fulfill[s] the role of owner** by contracting to have work performed for his benefit' (*id*.), as was the situation here with Cayre having hired XCEL").

Thompson v M and M Forwarding of Buffalo, New York, Inc., 174 AD3d 1433 [4th Dept 2019] ("'The **key factor** in determining **whether a non-titleholder is an 'owner'** is the '**right to insist that proper safety practices were followed** and it is the right to control the work that is significant, **not the actual exercise of nonexercise of control**' … M and M met its initial burden of establishing that it was **not an owner** for purposes of Labor Law §§ 240(1) and 241(6) because its submission establishes that '**it was an out-of-possession lessee of the property** [that] **neither contracted for nor supervised the work** that brought about the injury, and **had no authority to exercise any control over the specific work area** that gave rise to plaintiffs' injuries'").

Yiming Zhou v 828 Hamilton, Inc., 173 AD3d 943 [2d Dept 2019] (where **defendant Hamilton owned the building** and **defendant Bright Way owned and operated a kitchen/plumbing supply center on the premises, "plaintiff's evidence failed to establish**, prima facie, **that Bright Way was an agent of the property owner or one of its contractors at the site**" inasmuch as "'[t]he key question is whether the defendant had the right to insist that proper safety practices were followed [citation omitted]'" and **plaintiff's proof did not establish that Bright Way "'had the right to insist that proper safety practices were followed** [citation omitted]'" **or that it had "'broad responsibility' to coordinate and supervise 'all the work** being performed on the job site' [citation omitted]").

Ritter v Fort Schuyler Mgt. Corp., 169 AD3d 1419, 1419-1421 [4th Dept 2019] (where **defendant, which had** "**leased a portion of a public university** campus from the State of New York," "**subleased the property to nonparty Economic Development Growth** Enterprises Corporation (EDGE)," and **where EDGE then initiated and undertook the construction project in issue**, "defendant met its initial burden of establishing that it was not an owner for purposes of Labor Law §§ 240(1) and 241(6)" inasmuch as **it was** "'**an out-of-possession lessee of the property [that] neither contracted for nor supervised the work** that brought about the injury, **and had no authority to exercise any control over the specific work area** that gave rise to plaintiff's injuries [citation omitted]'").

C. Construction Managers, Contractors, General Contractors, Etc.

1. General Rule

Walls v Turner Const. Co., 4 NY3d 861, 864 [2005] (a rose by any other name, etc.; it's not the title that matters; it's the power [or lack thereof] to control the details of the work that is determinative).

Stiegman v Barden & Robeson Corp., 162 AD3d 1694 [4th Dept 2018] (where defendant "was the **self-proclaimed 'project manager' and 'supplier of material'** for the home construction," there were **nonetheless "triable issues of fact whether it had the authority to supervise or control the injury-producing work**, and thus **whether it may be liable as a general contractor** or an agent of the owner pursuant to those statutes"; "'**[t]he label given a defendant, whether 'construction manager' or 'general contractor,' is not determinative … [inasmuch as] the core inquiry is whether the defendant had the 'authority to supervise or control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition**'").

Johnsen v City of New York, 149 AD3d 822 [2d Dept 2017] (where a party is claimed to be a "contractor" for purposes of Labor Law §§ 240(1) and 241(6), "**[t]he determinative factor is whether the party had 'the right to exercise control over the work, not whether it actually exercised that right'**"; here, the Munoz defendants "**failed to establish that they were not agents** for the purpose of the Labor Law, and that they had no authority to supervise and control the work").

2. General Contractor, In Name Or *De Facto*

Serrano v TED Gen. Contr., 157 AD3d 474, 475 [1st Dept 2018][15] (without detailing the facts: "[t]he motion court **properly found that TED was the general contractor** of the project given that the **evidence clearly demonstrated that it had authority to control the work**").

White v 31-01 Steinway, LLC, 162 AD3d 473 [1st Dept 2018] (where owner Express LLC "hired defendant Russco to act as the general contractor on the store renovation project and to hire all necessary subcontractors for the renovation with the exception of signage and awning work," where the owner "had a preexisting vendor contract with defendant Ruggles, a national fabricator and installer of signage and awnings, which agreed to manufacture and install signage and awnings at the project," and where "Ruggles subcontracted the installation of the signage and awnings at the project to Capitol, plaintiff's employer," there was **an issue of fact** as to **whether Russco's "obligations as the general contractor on the project extended to the work performed by plaintiff"** inasmuch as **one provision of its contract with the owner ostensibly included a carve-out for signage** work but **the contract also provided that Russco was "responsible for 'taking all reasonable safety precautions** to prevent injury or death to

[15] Disclosure: I represented the plaintiffs on the appeal.

persons or damage to property' and that such responsibility extend[ed] 'to the protection of *all employees on the Project* and all other persons who may be affected by the Work in any way'").

Ajche v Park Ave. Plaza Owner, LLC, 171 AD3d 411 [1st Dept 2019] (where CPM "**did not retain plaintiff's employer**" but "**oversaw the entire construction project**, and **coordinated [plaintiff's employer's] work with the other trades**," **it could be** "**held liable as a general contractor**").

Oseguera v Lincoln Properties LLC, 147 AD3d 704 [1st Dept 2017] (although defendant Azimuth "established prima facie that it could not be held liable for the decedent's injuries … by submitting evidence that it did not own the subject premises, was not the general contractor on the project, was not the agent of the owner or general contractor, and did not supervise or control the decedent's work," "plaintiff and defendants-respondents submitted evidence that raises **an issue of fact** whether Azimuth **played a much greater role than it claims in coordinating and arranging for the work** that resulted in the accident").

Hall v Queensbury Union Free School Dist., 147 AD3d 1249 [3d Dept 2017] (where defendant Turner alleged it was not a general contractor, owner or agent of the owner, "**triable issues of fact** exist as to whether Turner had supervisory control and authority over job-site safety, given the testimony of Collette's foreperson that he **would have brought any safety concerns to the attention of Turner's project manager**, as well as an **accident report detailing Turner's investigation** into the circumstances surrounding plaintiff's fall").

3. Construction Managers (And The Like)

Robinson v Spragues Washington Sq., LLC, 158 AD3d 1318, 1319-1320 [4th Dept 2018] (where **BGB claimed to be a mere construction manager** but its "**own submissions raise[d] triable issues of fact** whether BGB **had the authority to supervise or control the injury-producing work**, and thus whether it may be held liable as a general contractor or an agent of the owner").

Dennis v Cerrone, 167 AD3d 1475, 1475-1477 [4th Dept 2018] (where plaintiff was "performing framing work at a residential construction project" and "fell through a hole in the ground level subfloor that had been created for the installation of basement stairs," there was an **issue of fact** whether **defendant Mark Cerrone, Inc.** (MCI), an entity of which the defendant-owner was part owner, general superintendent, and vice president, "**had the requisite authority to control or supervise the work**" and was thereby subject to liability under Labor Law § 240 as a contractor or agent).

Uzeyiroglu v Edler Estate Care Inc., 171 AD3d 663 [1st Dept 2019] (where defendant Edler's contract with the owners provided that "**Edler was responsible for the 'day to day operations of site, trade coordination, material delivery and handling**, schedule required inspections, coordination with home owner on scheduling, material delivery, and quality control,'" but the proof also established that "**Edler did not hire, retain or pay any of the contractors working**

at the premises," and **Edler's principal denied "that he had the authority to stop the work at the premises,"** there was **an issue of fact** whether Edler "**had the ability to control the activity bringing about the injury and the authority to correct unsafe conditions**" such as to render it a "general contractor" for purposes of Labor Law § 240).

Maurisaca v Bowery at Spring Partners, L.P., 168 AD3d 711 [2d Dept 2019] (although "[a] construction manager of a work site is generally not responsible for injuries under Labor Law §§ 200, 240(1), or 241(6) unless it functions as an agent of the property owner or general contractor in circumstances where it has the ability to control the activity which brought about the plaintiff's injury," there was here "**a triable issue of fact** … as to whether **Walsh had the authority to supervise or control the activity that brought about the plaintiff's injury**" since, among other things, "Walsh agreed, inter alia, to provide certain services as 'agent' of Bakers Dozen" and **further agreed** "that, during the construction implementation phase, **[it] would '[i]ssue directives, clarifications and notices'** and **'monitor the site as required to maintain the progress of construction work'**").

Caban v Plaza Const. Corp., 153 AD3d 488 [2d Dept 2017] ("the **defendants failed to establish**, prima facie, that **[construction manager] Plaza did not have the authority to exercise supervision and control over the subject work**" inasmuch as "defendants' submissions demonstrated that Plaza, as the construction manager, had a project superintendent at the work site on a daily basis who was responsible for job coordination and safety supervision," that Plaza also "had the authority to stop work if a particular activity or condition was unsafe, and to regulate which workers and equipment were allowed in particular areas of the work site," and that "Plaza's project superintendent held weekly meetings with every subcontractor" and **while** "**the superintendent testified at his deposition that he gave directions to the subcontractors' supervisors, rather than to the workers themselves, he could tell a supervisor to immediately relay a safety-related instruction to a worker at any given time**").

Savlas v City of New York, 167 AD3d 546, 547 [1st Dept 2018] (without detailing the pertinent facts: the motion court "correctly found that **neither URS-MP, the construction manager, nor CSM, its subcontractor, was a general contractor or an agent** of the City, and correctly dismissed the complaint as against CSM").

Dennis v Cerrone, 167 AD3d 1475, 1475-1477 [4th Dept 2018] (where plaintiff was "performing framing work at a residential construction project" and "fell fell through a hole in the ground level subfloor that had been created for the installation of basement stairs," the defendant-owner "met his initial burden of establishing as a matter of law that neither he nor any MCI employee acting as his agent 'directed or controlled the methods and means of plaintiff's work,'" and that **he was in Australia at the time of plaintiff's accident**, thus **entitling him to the homeowner immunity** irrespective of whether MCI itself was a § 240 defendant).

4. Site Safety Consultants

Barreto v Metro. Transp. Auth., 25 NY3d 426, 434 [2015] (**based upon IMS's president's testimony** "that it was **part of IMS's responsibility** to **ensure that a guard rail system was in place** and the manhole cover was replaced once the system was removed, there [was] a **question of fact** concerning **whether IMS was a 'statutory agent'** subject to liability under Labor Law § 240(1)" in that "a jury could reasonably find that IMS 'had the ability to control the activity which brought about the injury'").

Santos v Condo 124 LLC, 161 AD3d 650 [1st Dept 2018] (where **defendant CRSG was the "site safety consultant," the "determinative factor"** in assessing whether it was an "agent" for purposes of Labor Law §§ 240 and 241(6) was "**whether the defendant had the right to exercise control over the work**, not whether it actually exercised that right"; here, "[t]he **authority of DeSimone, as an employee of CRSG, to stop work** in the event of unsafe practices **raises an issue of fact** as to whether CRSG [was] a 'statutory agent' for purposes of the Labor Law").

Oliveri v City of New York, 146 AD3d 522, 522-523 [1st Dept 2017] (where **site safety consultant** ELI argued "that at best it had only a general supervisory role that was not enough to establish agency," but where "ELI's principal testified that the responsibility of a site safety consultant was to consult with and make recommendations to the foreman, project manager or superintendent should he or she observe a potentially unsafe condition" and "the agreement under which ELI performed its services … provided that **the site safety consultant, in addition to making inspections of the work place to ascertain a safe operating environment, was to '[t]ake necessary and timely corrective actions to eliminate all unsafe acts and/or conditions,'** and '[p]erform all related tasks necessary to achieve the highest degree of safety,'" "[t]he **motion court properly found a material question of fact**" as to whether ELI "had supervisory control and authority over the work being done when plaintiff was injured, and can be held liable for plaintiff's injuries under the Labor Law as an agent of the owner or general contractor").

5. "Ordinary" Contractors And Subcontractors

(a) Lacking Control

Adagio v New York State Urban Dev. Corp., 161 AD3d 624 [1st Dept 2018] (neither defendant USRC nor defendant A-Deck was subject to § 241[6] liability where **both were subcontractors** and there was "**no evidence that either USRC or A-Deck exercised any control over the plaintiff, the specific work area involved or the work that gave rise to plaintiff's injury**").

Cusumano v AM & G Waterproofing, LLC, 160 AD3d 922, 923 [2d Dept 2018] (where defendant **AM&G established that it "had completed its work on the project** at the subject property and was **off the project for at least seven months** before Cusumano's alleged fall," and where it **also proved that it "never contracted any work to Cusumano's employer**" and

"that all its equipment had been removed from the job site months before the alleged incident," AM&G thus "**established, prima facie … that it was not an owner, contractor, or agent** with regard to Cusumano's work" and also "did not supply the ladder from which Cusumano fell, and it had no control over the work site").

(b) In Control

Tropea v Tishman Const. Corp., 172 AD3d 450, 451 [1st Dept 2019] (where a "cable tray" "fell on plaintiff's head from atop two ladders," and where "the terms of the subcontract by which **USIS Systems subcontracted the work to USIS Electric** demonstrate that **USIS Systems had been delegated authority to direct and control the work**," "Supreme Court correctly concluded that USIS Systems was **liable under Labor Law § 240(1) as an agent of the owner**").

Cabrera v Arrow Steel Window Corp., 163 AD3d 758, 759 [2d Dept 2018] (where defendant **Arrow contracted "to replace the windows and doors and to perform the asbestos abatement and masonry restoration** work for the project," and where Arrow "**subcontracted with Carbrera's employer, E&A, to perform the asbestos abatement** work," **Arrow was a "contractor" or "agent"** for purposes of Labor Law § 240 since it "had the authority to enforce safety standards and choose the subcontractor who did the asbestos work" and it "had the authority to exercise control over the work, even if it did not actually do so").

Eliassian v G.F. Constr., Inc., 163 AD3d 528, 539-530 [2d Dept 2018] (where the plaintiff-owner **hired the defendant contractor "to perform excavation work to prepare for the addition of a room on the home**," and **where plaintiff allegedly "slipped on oil, which allegedly leaked from a defective hydraulic line of a backhoe that was brought onto the premises by the defendant** and used by the defendant for its work," there were "**triable issues of fact as to whether the defendant could be liable under Labor Law §§ 240(1) and 241(6)** on the **ground that it had control of the work site** and was **delegated the duty to enforce safety protocols** at the time the accident occurred" **even though the defendant "[did] not own the property and did not appear to be acting as a general contractor**").

Wellington v Christa Constr. LLC, 161 AD3d 1278 [3d Dept 2018] (where plaintiff, a mason, was working at ground level, where defendant Tower, the roofing subcontractor, had placed an approximately 25-pound tire iron on the roof with the intent of using it "as a support for a safety warning barrier to alert workers that they were near the edge," where the wind was so gusty that no employees were working on the roof at the time, and wind evidently blew the tire iron off the roof such that it fell and struck the plaintiff, the court **rejected "Tower's argument that plaintiffs' claims against it pursuant to Labor Law §§ 200 and 240(1) should be dismissed** on the ground that Wellington was employed by another subcontractor and Tower had no authority over his work or the ground-level area where he was injured" inasmuch as the **activity that brought about the accident** was "Tower's placement of the tire rim in its own work area—the roof—for use in furtherance of its own activities").

White v 31-01 Steinway, LLC, 162 AD3d 473 [1st Dept 2018] (where owner Express LLC "hired defendant Russco to act as the general contractor on the store renovation project," where the **owner "had a preexisting vendor contract with defendant Ruggles**, a national fabricator and installer of signage and awnings, **which agreed to manufacture and install signage and awnings** at the project," and where "**Ruggles subcontracted the installation of the signage and awnings** at the project **to Capitol, plaintiff's employer," Ruggles was "a proper Labor Law § 240(1) defendant** because it was a statutory agent of Express, the owner of the project" inasmuch as Ruggles was hired "as the sole contractor responsible for the manufacture and installation of all signage and awning work on the project, which was the work that plaintiff was performing when he sustained his injuries" and "Ruggles may not escape liability under Labor Law § 240(1) based on its delegation of the signage and awning work to Capitol, plaintiff's employer").

6. "Agents"

Sanchez v 404 Park Partners, LP, 168 AD3d 491, 492 [1st Dept 2019] (where plaintiff "**fell through an opening in the floor** where he was working in a building undergoing construction and landed on the floor below," and where **the defendant-subcontractor** "'was **charged with the duty to provide [c]overs over all floor openings**, properly cleated to the floor,' and **thus 'was an agent of the contractor**, having been delegated the duties imposed by the statute upon the contractor' [citation omitted]," **it too was liable under Labor Law § 240**).

Burgund v Cushman & Wakefield, Inc., 167 AD3d 441, 441-442 [1st Dept 2018] (without providing any explanation that actually makes sense, "[t]he record demonstrates that defendant **property manager C&W was a statutory agent** of the property owner (Verizon) and general contractor **with respect to plaintiff's claims under Labor Law §§ 200 and 241(6)**, but **not as to the Labor Law § 240(1) cause of action**" inasmuch as "C&W's manager testified that **he lacked knowledge of the internet installation work plaintiff was performing when injured**, that he **did not direct or supervise such work**, and that the **focus of his office was centered on unrelated air conditioning upgrade work** on the second floor of the building at the time in question" and **plaintiff testified** "**that he supervised his own work** and was not supervised by C&W").[16]

Schaefer v Tishman Const. Corp., 153 AD3d 1169 [1st Dept 2017] ("to the extent **Petrocelli [an electrical contractor] remained on the job site** and the **dangerous condition arose from work delegated to it**, which it was in a position to control, **it was an agent of the owner and/or general contractor** subject to liability under Labor Law § 241(6)").

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[16] I can of course understand how work can fall within the ambit of Labor Law § 240 but not Labor Law § 241(6), and also how a claim can fall within the ambit of Labor Law § 241(6) but not Labor Law 240. *See* page 1 of this outline. However, I cannot understand how a party can be an agent within the meaning of one statute but not the other. In particular, if C&W had no authority to supervise the work plaintiff was performing, it would seem to me that it would then not be an agent under either statute.

Merino v Cont. Towers Condominium, 159 AD3d 471 [1st Dept 2018] (inasmuch as "**the test** of whether a defendant is a statutory agent subject to liability under those sections [Labor Law §§ 240 and 241(6)] is **not whether it actually supervised the work, but whether it had the authority to do so**," "[t]he motion court **erred in determining that Rose Associates is not an agent of defendant owner Continental Towers** Condominium").

Pacheco v Almeida Concrete Pumping and Equip., Inc., 161 AD3d 520 [1st Dept 2018] (the motion court properly denied Almeida's cross motion for summary judgment since there were "**issues of fact** … as to **whether Almeida was a subcontractor of the subject renovation project or a mere materialman** not owing plaintiff a duty under the Labor Law" in this case in which, [1] **Almeida's employees operated the equipment for the pouring of concrete but purportedly did so "under the supervision of defendant subcontractor** Paul J. Scariano, Inc.," and, [2] there were also "**issues of fact** as to whether **Almeida was a statutory agent of the owner or general contractor, with supervisory control and authority over the work** being performed at the time of plaintiff's injury").

Reyes v Bruckner Plaza Shopping Center LLC, 173 AD3d 570 [1st Dept 2019] (where property owner Bruckner Plaza **leased the premises to Western Beef and the latter entity hired the general contractor**, and where **managing agent Ashkenazy "had no interest in the property, and its responsibilities as the managing agent** entailed **only the 'upkeep of the shopping center, making sure the tenants get billed, and rents are collected**,'" **Ashkenazy** was **not an "owner" or "agent"** for purposes of Labor Law § 240).

Naupari v Murray, 163 AD3d 401, 402 [1st Dept 2018] (where plaintiff was **injured while painting and/or plastering an individually owned condominium**, the **motion court properly denied plaintiff's motion for summary judgment against**, (a) **defendant FAI**, "**an architectural firm without supervisory authority" that "did not direct or control the work** or activities other than providing architectural and design services," and, (b) **defendant Rose**, **a property manager that "did not have authority to supervise and control the work that plaintiff was performing**").

Santiago v 44 Lexington Assoc., LLC, 161 AD3d 444 [1st Dept 2018] (where plaintiff slipped on debris during the course of debris removal, and where defendant-subcontractor Tractel was **hired with respect to "the design, fabrication, and installation of a window washing system**," Tractel could not be held "liable to plaintiff under Labor Law §§ 240(1) or 241(6) as a statutory agent of the general contractor" **since "the debris removal giving rise to plaintiff's injury was not within the scope of authority or work delegated to Tractel**").

D. Exemption For Certain Owners Of One And Two-Family Dwellings Who Do Not Direct And Control The Work

1. General Principles

Van Amerogen v Donnini, 78 NY2d 880, 882-883 [1991] (**exemption does not apply to owners** who **use the premises solely for commercial purposes**, by, for example, renting out the entire premises).

Bartoo v Buell, 87 NY2d 362, 368 [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").

2. Direction And Control

Affri v Basch, 13 NY3d 592, 596 [2009] (the **"direction and control" standard is a high bar**, and it is not enough that the owner gave the kind of direction that any concerned owner might give).

Rajkumar v Lal, 170 AD3d 761, 762 [2d Dept 2019] (where **defendant testified** "that after telling the plaintiff which [tree] branch he wanted the plaintiff to cut, he **left the premises and was not present when the plaintiff was injured**," and where **plaintiff testified** "**that Lal was actually present, told him how to go about cutting the tree branch**, and actually participated in the work," the "**conflicting evidence** submitted by the defendants in support of their motion demonstrated the existence of a **triable issue of fact** as to **whether Lal supervised the method and manner of the actual work** and, if so, to what degree").

Chavez-Lezama v Kun Gao, 173 AD3d 826 [2d Dept 2019] (where defendant Kun Gao "**proffered evidence** establishing that he was the **owner of a one- or two-family dwelling who did not direct or control the work** being performed," and where "[t]he **affidavit submitted by the plaintiff failed to specify** Gao as the **individual who supervised or controlled the work**," "Supreme Court **should have granted that branch of Gao's motion which was for summary judgment** dismissing the Labor Law §§ 240(1) and 241(6) causes [of] action insofar as asserted against him").

Marquez v Mascioscia, 165 AD3d 912, 914 [2d Dept 2018] (where "defendants made a **prima facie showing that the defendant Frank Mascioscia intended to reside on the second floor** of the [two-family dwelling] after the renovations were completed" and "plaintiff failed to submit evidence in support of his contention that the defendants intended to rent out the second floor of the premises," and where **plaintiff did not contend that defendant directed or controlled the work**, plaintiffs' claims under Labor Law §§ 240 and 241(6) were correctly dismissed).[17]

[17] The ***Marquez*** Court provided the following, helpful summary concerning practical application of the homeowner's exemption:

Giannas v 100 3rd Ave. Corp., 166 AD3d 853, 856 [2d Dept 2018] (JF, **the construction manager, was not a statutory "contractor" or "agent"** where, **(a) "[t]he terms of the contract** between 100 Third and JF **specifically provided that JF 'shall not have control over or charge of** and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor[']s responsibility under the Contract for Construction,'" and**, (b) "the plaintiff testified that Dynatec was responsible for safety at the job site, that no one from JF controlled or supervised his work at the project**, and that he was hired by Dynatec to supervise the work that the subcontractors performed").

Bund v Higgins, 162 AD3d 1738 [4th Dept 2018] ("**although defendants acted as general contractors** on the construction of their home by obtaining the necessary permits, purchasing roofing materials, and hiring contractors to perform the construction work, defendants met their initial burden of demonstrating that **they did not supervise or control the method or manner of plaintiff's work** … that they **were not present at the site** when plaintiff performed the roofing work … [and that **plaintiff] admitted that he had never met defendants**").

Hicks v Aibani, 157 AD3d 870, 871 [2d Dept 2018] ("[g]iven **the lack of evidence that the Aibanis supervised the method and manner of the work**, the **limited evidence that Mohammad Azim Aibani may have previously worked in the construction industry** and that the Aibanis had excess insurance coverage does not create a triable issue of fact").

> In order for a defendant to receive the protection of the homeowner's exemption, the defendant must show that (1) the premises consisted of a one- or two-family residence, and (2) the owner did not direct or control the work being performed (*see Abdou v. Rampaul,* 147 A.D.3d 885, 47 N.Y.S.3d 430; *Chowdhury v. Rodriguez,* 57 A.D.3d 121, 867 N.Y.S.2d 123; *Ortega v. Puccia,* 57 A.D.3d 54, 57–58, 866 N.Y.S.2d 323). Applicability of the exemption turns on whether the site and purpose of the work was connected to the owner's residential use of the property (*see Khela v. Neiger,* 85 N.Y.2d 333, 624 N.Y.S.2d 566, 648 N.E.2d 1329; *Cannon v. Putnam,* 76 N.Y.2d 644, 650, 563 N.Y.S.2d 16, 564 N.E.2d 626; *Stejskal v. Simons,* 309 A.D.2d 853, 855, 765 N.Y.S.2d 886, *affd* 3 N.Y.3d 628, 782 N.Y.S.2d 397, 816 N.E.2d 186). Where an owner engages in both commercial and residential uses of the property, a "determination as to whether the exemption applies ... must be based on the owner's intentions at the time of the injury" (*Caiazzo v. Mark Joseph Contr., Inc.,* 119 A.D.3d 718, 721, 990 N.Y.S.2d 529; *see Batzin v. Ferrone,* 140 A.D.3d 1102, 1104, 32 N.Y.S.3d 660; *Lenda v. Breeze Concrete Corp.,* 73 A.D.3d 987, 903 N.Y.S.2d 417; *Morgan v Rosselli*, 9 AD3d 417 [2d Dept 2004]; *Moran v Janowski*, 276 AD2d 605, 606 [2d Dept 2000]).

Marquez, 165 AD3d at 913.

Urquiza v Park and 76th St., Inc., 172 AD3d 518, 518-519 [1st Dept 2019] (although "defendant owners failed to plead the homeowners' exemption as an affirmative defense, Supreme Court should have granted their motion for summary judgment dismissing the complaint" inasmuch as "[t]he **homeowners' exemption** to liability under Labor Law §§ 240(1) and 241(6) **is clearly applicable here** where defendant owners Edmund and Mary Carpenter **did not direct or control the work in their cooperative apartment** that they intended to use for personal use" and "'plaintiff was not surprised by the defense, and fully opposed the motion'").

3. Residential/Commercial Issues

Bautista v Archdiocese of New York, 164 AD3d 450 [1st Dept 2018] (where **plaintiff "was repairing a detached garage associated with a church rectory** used for **both residential and church purposes**" and "the **certificate of occupancy indicates that the rectory constituted a dwelling and a private garage**," **plaintiff "failed to raise issues of fact** as to the applicability of the homeowner exemption" and "[d]efendants' failure to plead this affirmative defense in their answer does not mandate the denial of their motion, since plaintiff was not surprised by the defense and fully opposed the motion").

Nicholas v Phillips, 151 AD3d 731 [2d Dept 2017] (where "**defendant lived on the first floor** of the home with her son, and **rented out the upper floor of the home to tenants**," where the proof established "that **the work being performed was directly related to its residential use**" and that defendant "did not direct or control that work," defendant was entitled to the homeowner exemption; the Court added: "[w]here, as in the present case, the property is used for both residential and commercial purposes, **the courts employ a flexible site and purpose test to determine whether the work contracted for directly relates to the residential use** of the building so as to warrant application of the exemption" and also that "the mere fact that the defendant provided the ladder from which the plaintiff fell is inadequate to deprive her of the exemption").

Vogler v Perrault, 149 AD3d 1298 [3d Dept 2017] (where plaintiff testified that **defendant told him he planned to rent both halves of the two-family home**, **there was an issue of fact** as to defendant's entitlement to summary judgment inasmuch as "[t]he exemption does not 'encompass homeowners who use their one or two-family premises entirely and solely for commercial purposes" and "'renovating a residence for resale or rental plainly qualifies as work being performed for a commercial purpose'").

Pelham v Moracco, LLC, 172 AD3d 1689, 1690 [3d Dept 2019] (where **defendant's principal averred in an affidavit that he intended to use the log cabin in issue "as a vacation home** … **did not intend to rent it or use it for any business purposes** and he did not direct or advise Pelham on any aspect of the construction," **plaintiff did not raise an issue of fact that the cabin would be "used for commercial purposes merely because defendant is a limited liability company** and real estate holding company, nor because the checks for the work came from Racco personally and from his medical practice, rather than from defendant itself").

Diaz v Trevisani, 164 AD3d 750, 753 [2d Dept 2018][18] (where "plaintiff allegedly sustained personal injuries when a ladder slipped out from underneath him as he was trying to open a window in order to gain access to a house owned by [decedent] Annette Trevisani," "defendants established the entitlement of Nina, as executrix of the decedent's estate, to the protection of the homeowner's exemption by submitting evidence that the **decedent owned the one-family residence** at which the work was being performed and that the **decedent did not direct or control the work being done**"; **that the "decedent's children intended to sell the premises at some point in the future" could not render the exemption inapplicable**).

Wood v Artifact Properties, LLC, 169 AD3d 1503, 1504-1505 [4th Dept 2019] (**that defendant classified "the property as commercial in certain tax filings does not estop it** from relying upon the [one and two-family exemption in this action" inasmuch as "**[t]he Internal Revenue Code's definition of a residential property** is **considerably narrower than the scope of the one- or two-family home exemption** to liability under section 240(1)").

4. Miscellaneous

Diaz v Trevisani, 164 AD3d 750, 754 [2d Dept 2018][19] (although the decedent-owner and thereafter her estate were entitled to the protection of the homeowner's exemption, **that exemption could not extend to decedent's son** inasmuch as **he "did not own the subject residence"** and "**a triable issue of fact** exists as to **whether [the son] had the authority to supervise and control the plaintiff's work**" inasmuch as he "**told the plaintiff which rooms to paint** and, according to the plaintiff, **directed him to use a ladder to access the house through a window**").

Hannan v Freeman, 169 AD3d 1016, 1017 [2d Dept 2019] (without providing much factual detail: although "defendant demonstrated, prima facie, that the premises were **improved by a one-family or two-family dwelling**, and that **he did not direct or control the work being** performed there," "plaintiffs **raised a triable issue of fact** as to **whether the premises were, in fact, a three-family dwelling and not entitled to the protection of the homeowners' exemption**").

Morales v 1415, LLC, 171 AD3d 913 [2d Dept 2019] (where **plaintiff's complaint "alleged that the premises was a three-family dwelling,"** and where "[d]uring the course of the litigation, the **attorneys for the plaintiff and the defendant executed a stipulation in which the defendant waived the affirmative defense that the premises was a one or two-family dwelling** exempt from the requirements of Labor Law §§ 240(1) and 241(6)," **the motion court abused its discretion in permitting defendant to amend its answer, post-note of issue, so as to "assert the affirmative defense for one- or two-family homes**," "to add this affirmative defense after discovery was completed was clearly prejudicial").

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[18] Disclosure: my firm represented the plaintiff-respondent in ***Diaz***.

[19] Disclosure: my firm represented the plaintiff-respondent in ***Diaz***.

Rashid v Hartke, 171 AD3d 1226 [2d Dept 2019] (where "plaintiff was injured while he was performing work on a brownstone façade of a dwelling in Brooklyn," "defendants made a prima facie showing that they were entitled to the benefit of the homeowners' exemption" by demonstrating, first, "that **the dwelling functions exclusively as a private home for the defendants**, who are a married couple" **notwithstanding that it is "classified as a multiple- or three-family dwelling** by the New York City Department of Buildings," and, second, "that **they did not have the authority to control or supervise the means and methods of the plaintiff's work**").

III. Liability Under Labor Law § 240

A. "Absolute" Liability

Zimmer v Chemung County Performing Arts, Inc., 65 NY2d 513, 522 [1985] (liability **imposed irrespective of fault**).

Sanatass v Consol. Inv. Co., Inc., 10 NY3d 333, 341-342 [2008] (liability **imposed irrespective of control**).

Nava-Juarez v Mosholu Fieldston Realty, LLC, 167 AD3d 511, 513 [1st Dept 2018] ("Defendant **Mosholu Realty, as the fee owner** of the subject premises, **is liable for any Labor Law violation** occurring on the premises, **regardless of whether it lacked knowledge of the work or control over how it was performed**").

Gonzalez v 1225 Ogden Deli Grocery Corp., 158 AD3d 582, 583 [1st Dept 2018] ("[p]laintiff's fall from an unsecured ladder establishes a violation of the statute … for which **defendant property owner is liable, even if the tenant contracted for the work without the owner's knowledge**").

Cacanoski v 35 Cedar Place Assoc., LLC, 147 AD3d 810 [2d Dept 2017] ("[a] worker's **comparative negligence is not a defense** to a claim under Labor Law § 240(1) and does not effect a reduction in liability … [w]hen however, the worker's own conduct is the sole proximate cause of the accident, no recovery under Labor Law § 240(1) is available").

B. "Elevation-Relatedness"

Rocovich v Consol. Edison Co., 78 NY2d 509, 514-515 [1991] (elevation prerequisite announced).

The Governing Standard For Elevation-Relatedness -- The Decision in *Runner v New York Stock Exch., Inc.*, 13 NY3d 599 [2009].

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, who was assigned to hold the rope used to lower the object, was thereby pulled "**horizontally**" and thus sustained injury, when the 800-pound object fell down the stairs?

Does the fact that plaintiff moved horizontally rather than vertically take the accident beyond the bounds of the statute?

And was 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 NY3d at 601, 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**.
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> * * *
>
> **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**.
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> * * *
>
> **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 NY3d at 602-605, emphasis added.

1. *Runner* Followed

Valdez v Turner Constr. Co., 171 AD3d 836 [2d Dept 2019] (where plaintiff was allegedly "performing landscaping on the fifth-floor roof of the property" and was "in the **process of detaching a bag of soil that weighed at least 2,500 pounds from a crane** that had hoisted the bag up to the fifth-floor roof," where the **crane then lifted "causing the straps connecting the bag to the crane to catch the plaintiff's hand and lift him off the roof,"** and where plaintiff fell to the roof when he freed his hand, defendants "**failed to demonstrate that Labor Law § 240(1) was inapplicable** since their submissions demonstrated that the **plaintiff's injuries 'flow[ed] directly from the application of the force of gravity to the object'"** [quoting ***Runner***] and defendant "did not submit evidence showing that the protections they put in place were sufficient to protect the plaintiff from the gravity-related risks of the craning operation").

Bellucia v CF 620, 172 AD3d 520 [1st Dept 2019][20] (where "**a manually operated freight elevator** in a building undergoing construction **dropped suddenly from the fourth floor to the basement** while carrying plaintiff Joseph Marandola, and other individuals working on the project, causing injuries," while one would never know it from the First Department's opinion, the lower court's ruling granting summary judgment to the plaintiffs on the basis of Labor Law § 240, was impliedly upheld).

Flores v Metro. Transportation Auth., 164 AD3d 418, 419 [1st Dept 2018] (where "plaintiff **fell off a flatbed truck after a load of steel beams, without tag lines, was hoisted above him by a crane**, and **began to swing towards him**," "**[t]he risk of the hoisted load of beams with no tag lines triggered the protections set forth in Labor Law § 240(1)**" and "[t]he motion court erred in denying plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim" inasmuch as plaintiff "established that the accident was proximately caused by defendants'

[20] Disclosure: I represented one of the many plaintiff-respondents in ***Bellucia***.

failure to provide safety devices necessary to ensure protection from the gravity-related risks posed by the work he was engaged in, in violation of Labor Law § 240(1)").

Makkieh v Judlau Contr. Inc., 162 AD3d 468 [1st Dept 2018] (where plaintiff "was injured when the **nylon sling attaching a one-to-two ton steel plate to an excavator snapped, causing the heavy plate to fall to the ground**, bounce, and sever the pole of a nearby street sign," where **the sign was thereby "propelled toward plaintiff, hitting his right forearm and causing him serious personal injuries**," and where "photographs taken immediately before the accident show that **the steel plate was about two or three feet above the ground**," that "**elevation differential cannot be viewed as de minimis**, given the weight of the steel plate and the amount of force it generated over the course of its relatively short descent").

Galvez v Columbus 95th St. LLC, 161 AD3d 530 [1st Dept 2018] (where plaintiff was "**ascending to the top of a building on a motorized suspended scaffold**," where plaintiff and his co-worker "**had to press their backs against the wall and use their legs to push the scaffold out" in order to clear a concrete beam**, and where **plaintiff thereby "injured his lower back**," "[c]ontrary to defendants' argument, the incident in which plaintiff was injured **falls within the ambit of Labor Law § 240(1)**, because the scaffold proved inadequate to shield plaintiff from 'harm directly flowing from the application of the force of gravity to an object or person" inasmuch as "[t]he force of gravity caused the scaffold to swing into the recessed areas between the spandrels, necessitating that plaintiff and his coworker use their backs to exert force to swing the scaffold out again").

2. *Runner* Distinguished

Clark v FC Yonkers Assoc., LLC, 172 AD3d 1159, 1161 [2d Dept 2019] (where "plaintiff **allegedly was injured** when he suffered a **herniation in his neck** as he **attempted to throw a hose onto an area located 14 to 20 feet above him** to provide a water supply required for the fireproofing of the retail space," "[a]lthough **the accident tangentially involved elevation**, it was **not caused by any elevation-related risk** contemplated by the statute"; "At the time that the plaintiff was injured, he was standing on the ground level, moving a 100-pound hose").

Tamarez De Jesus v Metro-N. Commuter R.R., 159 AD3d 951 [2d Dept 2018] (where **plaintiff "was cutting and removing a tree** that had fallen during Hurricane Sandy onto catenary wires situated above the railroad tracks along the New Haven Railroad Line," where "plaintiff was standing on the ground and using a power saw to cut through the tree trunk when the tension in the catenary wires suddenly released, propelling the tree into the air," and where "**[t]he tree broke in two and then fell, striking the plaintiff's leg**," plaintiff's injuries were "not the direct consequence of the application of the force of gravity to an object or person").

Horton v Bd. of Educ. of Campbell-Savona Cent. School Dist., 155 AD3d 1541 [4th Dept 2017] (where **plaintiff and a coworker** were in the process of **lifting a "heavy switchgear segment" to an upright position** that would enable them to maneuver it around obstructions, where **plaintiff purportedly "felt a sharp pain in his back when the segment dropped or**

'rock[ed]' approximately half an inch on his coworker's side and, for a 'split second,' the weight of the segment felt unstable and increased in plaintiff's hands," and where **they** "**did not drop the segment** and, after a momentary pause, they continued to raise it [the segment] to an upright position," "**the harm to plaintiff was not 'the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential**'"; "defendants established as a matter of law that plaintiff's injuries resulted from a 'routine workplace risk[]' of a construction site and not a 'pronounced risk[] arising from construction work site elevation differentials'").

C. *O'Brien* And The "Feasible" "Safety Device" Issue

Whether Wet, Slippery, Exterior Stairs Were, As A Matter Of Law, Violative Of Labor Law § 240[1] — *O'Brien v Port Auth. of New York and New Jersey*, 29 NY3d 27 [2017], *mod'g* 131 AD3d 823 [1st Dept 2015].

Some defense advocates heralded the ruling herein as having effected a sea change in the jurisprudence concerning Labor Law § 240. The case — ***O'Brien v Port Auth. of New York and New Jersey*** — presented the issue of **whether an exterior stairway that was wet, because it was raining, was violative of the statute as a matter of law**. The ***O'Brien*** majority held that **the issue was one of fact** in the context of the proof.

Some defense counsel construe the majority ruling as effectively holding that with the possible exception of those cases in which the ladder, scaffold, or other elevating or safety device actually breaks the defendant can now raise a triable issue of fact as to any and all dangerous site conditions simply by having its expert intone that the allegedly unsafe condition conformed to industry standards.[21]

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[21] In their New York Law Journal column entitled "The Elevation of the Expert" (NYLJ, 5/26/17, p. 4), defense attorneys Andrea M. Alonso and Kevin G. Faley took that very position, stating:

> O'Brien increases the ease with which summary judgment may be defeated. **When defendants can offer expert affidavits, the adequacy of a scaffold or ladder will now almost always be a question of fact**. Presumably, this will result in more trials on the issue of whether the ladder or scaffold, as the case may be, afforded proper protection.
>
> O'Brien elevates the status of expert witnesses. Defendants now should routinely retain an expert to examine the scaffold, ladder, etc. in order to provide an opinion of the adequacy of the safety device.

In another New York Law Journal column penned by four prominent members of the plaintiffs' bar ["O'Brien Reaffirms Decades of Law Protecting Workers," (NYLJ, 6/2/17)], the writers asserted the polar opposite view, stating:

That, I suppose, is one reading of the opinion. Yet, whether the majority actually intended such a radical departure from the landmark ruling in ***Zimmer v Chemung County Performing Arts, Inc.***, 65 NY2d 513 [1985] appears highly doubtful, at least to this writer. I think it far more likely for the reasons indicated below that ***O'Brien*** was, at bottom, just about exterior stairs and the impossibility of keeping them dry when it rains.

Background: The Court of Appeals' 1985 decision in ***Zimmer*** encompassed two actions that were joined for purposes of Court of Appeals' review: ***Zimmer*** itself and ***Hunt***. In each case, the plaintiff was an ironworker who fell from a height (31 feet up in ***Zimmer***, 25 feet up in ***Hunt***). In each case, the plaintiff-worker had not been provided with any safety devices to protect him from falling. However, the nature of the proffered defense in ***Hunt*** significantly differed from that advanced in ***Zimmer***.

In ***Zimmer***, the defendants urged that the accident occurred at an early stage of construction, that devices "such as netting, metal decking and lifelines, normally are not used during the early stages of construction projects," and that "it would have been infeasible, even dangerous, to have used any such device" (65 NY2d at 519). In ***Hunt***, the defendants adduced "evidence of industry custom" to the effect "that devices such as scaffolding, nets, safety lines and safety belts were never used on the type of building involved" (*id*. at 520). In contrast to ***Zimmer***, the ***Hunt*** defendants claimed only that such protection was not normally provided, not that it would have been "infeasible" or "even dangerous" to provide such safeguards.

The ***Zimmer*** Court rejected the defenses in both cases and held that both plaintiffs were entitled to judgment as a matter of law. In ***Hunt***, while "evidence of custom and usage was admissible to determine the standard of care in a negligence context under the claimed violation of sections 200 and 241(6)," such proof could not alter the standard of care dictated by Labor Law § 240 inasmuch as "liability is mandated by the statute without regard to external considerations such as rules and regulations, contracts or custom and usage" (65 NY2d at 523).

In ***Zimmer***, "it was error to submit to the jury for their resolution the conflicting expert opinion as to what safety devices, if any, should be used during the very early stages of the construction" (*id*.). Rather, "the uncontroverted fact that no safety devices were provided" to prevent the plaintiff-worker from falling meant that "a verdict of liability should have been

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> The recent decision by the Court Appeals [in O'Brien] addressing Labor Law § 240(1) reaffirmed the strong protections afforded workers under the statute.
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> * * *
>
> While ladders and scaffolds clearly fall within the statute's protections as specifically enumerated devices, the Court of Appeals has now made clear that so do staircases and other devices which serve as the functional equivalent of protected devices.
>
> * * *
>
> [Although some] argue that O'Brien stands for the proposition that where experts disagree on the adequacy of a safety device, the expert conflict creates a fact question … Nothing could be more inaccurate.

directed in plaintiff's favor" (*id.*). The Court added: "To determine an owner or contractor's liability for a violation of section 240 (1) by reference to whether safety devices customarily are used, and, if so, which ones give 'proper protection' would allow owners and contractors to diminish their obligations under that statute and to set their own standard of care for the protection of workers at the worksite. This would clearly contravene the legislative purpose of placing 'ultimate responsibility for safety *** on the owner and general contractor' (1969 NY Legis Ann, at 407)" (*id.* at 523-524).

In light of ***Zimmer*** and its progeny, the Appellate Division has repeatedly ruled that the contractors' failure to provide any safety devices to protect the plaintiff-worker from a fall constitutes a statutory violation irrespective of whether "industry custom" dictated that one or more safety devices be provided. *E.g.*, ***Celaj v Cornell***, 144 AD3d 590, 591 [1st Dept 2016] (where the plaintiff fell from a scaffold that lacked railings, plaintiff was entitled to summary judgment; "[d]efendant's expert's opinion that the lack of safety railings accorded with industry customs and regulations is irrelevant under Labor Law § 240(1)"); ***Cruz v Cablevision Sys. Corp.***, 120 AD3d 744, 745-746 [2d Dept 2014] (where "[t]here were no safety lines or guardrails along the perimeter of the roof, and no harnesses or safety lines were provided," the defense expert's opinion that it was enough to have a "perimeter warning system" per which a "safety monitor" would warn workers who came close the roof edge "was insufficient to raise a triable issue of fact as to whether the defendants violated Labor Law § 240(1)" inasmuch as Labor Law § 240 is "'a self-executing statute'" that "'contain[s] its own specific safety measures … regardless of whether there was compliance with federal regulations or general industry standards").

***O'Brien*, The Facts**: I take the facts from the majority opinion penned by Chief Judge DiFiore. "It had been raining periodically during the day" and the plaintiff headed downstairs to get his rain jacket. In order to do so, he used a "temporary exterior metal staircase." The stairs were wet.

There was a dispute whether the stairway's tread was worn as well as wet. Plaintiff testified that the stairs were "smooth on the edges." Based upon photographs in the record, the plaintiff's expert said that the "small round protruding [metal] nubs," which purportedly provided "limited anti-slip protection" even when new, were worn as a result of "longstanding wear and tear." He also said that "the stairs were 'smaller, narrower and steeper than typical stairs'" and that they were "'not in compliance with good and accepted standards of construction site safety and practice.'"

Defendants countered with expert opinion to the effect that "the staircase was designed for both indoor and outdoor use and was 'designed and manufactured so as to provide traction acceptable within industry standards and practice in times of inclement weather." Defendants' experts also maintained there was "'no evidence' that the perforated steel treads had been worn down by foot traffic." They also said that the staircase was not unusually small, narrow or steep.

But there was no dispute that the stairs were wet. Nor was there any dispute that plaintiff slipped and fell down the stairs, sustaining injuries.

Was the plaintiff entitled to summary judgment because he slipped from a definitely wet and apparently slippery stairway? Or was there a triable issue as to the adequacy of the "protection"?

Appellate Division: The Appellate Division split 4 to 1. The majority ruled that the experts' disagreement was irrelevant since "[a] plaintiff is entitled to partial summary judgment

on a section 240(1) claim where, as here, stairs prove inadequate to shield him against harm resulting from the force of gravity, and his injuries are at least in part attributable to the defendants' failure to take mandated safety measures to protect him against an elevation-related risk" (131 AD3d at 825).

Justice David Friedman dissented on the ground that "[t]he parties' conflicting expert affidavits raise a triable issue as to whether a staircase offering superior protection from slipping hazards could have been provided" (*id*.). The dissent expressly reasoned that it *was* a defense, to use the ***Zimmer*** vernacular, that protection was "infeasible," and also that a jury could here find such was the case.

Held: By 4 to 3 vote, the Court of Appeals ruled that there were "questions of fact as to whether the staircase provided adequate protection."

The majority **distinguished the case from those "'involving ladders or scaffolds that collapse or malfunction for no apparent reason.'"** It **distinguished *Zimmer* on the ground that *Zimmer* was a case in which "'*no* safety devices were provided** at the worksite,'" whereas this was a case in which the experts "differ[ed] as to the adequacy of the device that was provided."

Yet, while the distinction between the case at bar and those that involved elevating devices that collapsed or fell is clear enough, the Court's distinction of ***Zimmer*** is, at least to this writer, unclear. If the case differed from ***Zimmer*** and ***Hunt*** because the defendant herein had provided a "safety device," the obvious question then becomes, what, exactly, was the "safety device" that a jury could deem "adequate." Was the Court was referring to the metal nubs which, depending on whom one believed, were either worn or perfectly fine? Was it the stairway itself? If the latter, would that mean provision of **any** ladder or scaffold, no matter how defective or ineffectual, would also raise a triable issue? I think and hope not, but the question is a fair one.

The Court's explanation as to the import of industry standards in a § 240 case was equally puzzling. Is the rule going forward now to be that, excepting those cases in which the ladder, scaffold or other elevation device collapses, alleged compliance with industry standards automatically raises a question of fact as to the adequacy of the device? If so, that would mean that there will always be a triable issue of fact since defendants will always be able to find an expert to say that whatever was provided was adequate.

But that appears not to be what the majority meant. The majority said that "**such compliance [with industry standards] would not, in itself, establish the adequacy of a safety device within the meaning of Labor Law § 240(1)" but that "we do not read defendants' expert's opinion to be so limited**." Such would seemingly suggest there must be something more than alleged compliance with industry standards to raise an issue of fact. Yet, what that "something more" might be or could be remains a mystery since the majority did not explain what part or what feature of the expert opinions in the case before it made alleged compliance with industry standards a viable defense.

Or perhaps ***O'Brien*** is a sui generis ruling that ultimately relates only to stairways and holds only that the fact that an exterior stairway was wet due to rain does not of itself compel the imposition of liability?

Dissent: The lengthy dissent, penned by Judge Jenny Rivera with which two other judges joined, charged that the majority's ruling "reflect[ed] a misunderstanding of the legislative intent and statutory mandates of Labor Law § 240(1)."

In the dissenters' view, the mere fact that plaintiff fell did not entitle him to summary judgment. Workers can and do fall from perfectly safe ladders and scaffolds. However, where, as here, it was undisputed that the staircase was "generally … slippery, especially when wet, as it was on the day of plaintiff's injury," that was another matter. In the dissenters' view, "[a] metal outdoor staircase known to be slippery, especially one exposed to rain, is not an appropriate safety device within the meaning of the statute." Further, defendants *could have* provided safer conditions. For example, they "could have, but did not, limit use of the metal staircase at issue here to 'dry days.'"

Looking Ahead: Does ***O'Brien*** reflect a sea change in the jurisprudence and, if so, a bonanza for defense experts? Or is it about exterior stairs? And what did the Court mean when it distinguished ***Zimmer*** on the ground that the experts here in ***O'Brien*** "differ[ed] as to the adequacy of the device that was provided."

Looking ahead, I think two things are fairly certain. First, until such time as the Court of Appeals clarifies what it said in ***O'Brien***, defendants will no doubt argue that ***O'Brien*** constitutes a drastic departure from prior law and that they can avoid liability, no matter how dangerous or avoidable the condition, simply by presenting expert proof to the effect that the condition complied with industry standards and/or the applicable regulations. Indeed, the above-cited Alonso-Faley article has already offered that assessment. Second, the Court of Appeal will, whether this year or next, ultimately have the opportunity to clarify ***O'Brien*** and tell us whether (a) ***O'Brien*** was really about wet exterior stairs and it still remains that "liability is mandated by the statute without regard to external considerations such as rules and regulations, contracts or custom and usage" (***Zimmer***, 65 NY2d at 523), or, (b) it is now the industry itself — or worse still, the parties' experts — that determines how much protection is "proper."

Rom v Eurostruct, Inc., 158 AD3d 570, 570-571 [1st Dept 2018] ("[p]laintiff established his entitlement to partial summary judgment on the Labor Law § 240(1) claim through his testimony that he was caused to fall to the ground when **the unsecured ladder on which he was standing suddenly shifted and kicked out from underneath him**"; "**defendants' reliance on *O'Brien*** *v. Port Auth. of N.Y. & N.J.* … **is misplaced** because that case, which found an issue of fact about whether a slippery exterior staircase provided adequate protection to the plaintiff, **left intact the presumption that Labor Law § 240(1) is violated where, as here, a ladder collapses or malfunctions for no apparent reason**").

D. "Integral To The Work" Defense

Salazar v Novalex Contr. Corp., 18 NY3d 134 [2011] (where 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," the condition was **not violative of Labor Law § 240[1]**).

Ragubir v Gibraltar Mgt. Co., Inc., 146 AD3d 563, 564 [1st Dept 2017] (although **liability will not be imposed for failure to provide a safety device** "[w]here **use of such a safety device would defeat or be contrary to the purpose of the work**," such **was not so in this case** in

which "demolition of the structure was to occur bay by bay" and "the **roof above plaintiff was not the intended target of the demolition at the time it collapsed on him**, notwithstanding Lynch's testimony that the object of the work was to get the entire roof on the ground as fast as possible and that he was happy the roof of the adjoining bay came down at the same time, although he was unaware plaintiff was there"; "[a]ccordingly, plaintiff was entitled to judgment as a matter of law on the issue of liability on his Labor Law § 240(1) claim").

E. Other "Falling Worker" Issues

1. "Almost Fell" Cases

Monfredo v Arnell Constr. Corp., 171 AD3d 600 [1st Dept 2019] (where plaintiff apparently arrested his fall from **a scaffold that was "not elevated more than seven feet"** (i.e., the boundary at which a guardrail is required under 12 NYCRR 23-5.1[j][1]), "[t]he motion court properly granted partial summary judgment to plaintiffs on the issue of liability as to Labor Law § 240(1), as **the statute does not require a complete fall from an elevated safety device** for an event to come within its protection").

Wiscovitch v Lend Lease (U.S.) Constr. LMB Inc., 157 AD3d 576, 577-578 [1st Dept 2018] (where "plaintiff was assigned to a safety gang and was required to dismantle the safety protections that had been installed over openings in the construction floor for stairwells and elevator shafts so that workers could move on to another floor of the project," where plaintiff "**slipped on an oily substance on the floor**" and **ended up being struck by a plank and dragged towards an opening**, and where he **became tangled in a safety cable that "stopped him from falling completely into the opening**" but "**injured his neck and back while trying to maintain control of the plank**," "the **motion court property denied defendants' motion for summary judgment**" since "the cribbing and planking together constituted a safety device designed to protect the workers on the project from falling into the opening in the construction floor" and it was "undisputed that the cribbing was not secured at the time of plaintiff's accident"; further, that plaintiff "slipped due to the oily substance on the floor" was immaterial since "'[t]here may be more than one proximate cause of a workplace accident'").

2. Alleged *De Minimis* Falls And "Ordinary Work Hazards"

Idona v Manhattan Plaza, Inc., 147 AD3d 636 [1st Dept 2017] ("[p]laintiff's testimony that he **fell from scaffolding materials stacked atop the surface of a flatbed truck**, about **10 feet above the ground**, and that he was not provided with a safety device that would have prevented his fall, was **sufficient to establish his entitlement to partial summary judgment** on his Labor Law § 240(1) claim … Although plaintiff was wearing a safety harness at the time of the accident, there was no place on the truck where the harness could be secured").

Wright v Ellsworth Partners, LLC, 173 AD3d 1409 [3d Dept 2019] (where plaintiff was injured at a construction site "when **a brace gave way causing a stacked row of scaffolding to fall**

forward striking him," where the parties stipulated "that the scaffold frames were six feet tall and weighed 75 pounds each, and that there were 10 scaffold frames that fell," where the **defendants' expert "opined that 'the [five]-inch differential between the top of … plaintiff's head and the maximum height of [the] frames** … **did not significantly contributed to the 'total' force at impact** of the offending frame as it struck plaintiff,'" and where the defense expert said that "**the kinetic energy at the time of impact would have been 154.83 joules" as compared to 185.90 joules** in *Hebbard v. United Health Servs. Hosps., Inc*., 135 AD3d 1150 [3d Dept 2016] and **700.95 joules** in *Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1 [2011], "**defendants' submissions established a prima facie basis to conclude that the elevation differential here was de minimus** and that plaintiff's claim falls outside the scope of Labor Law § 240(1)" and plaintiff failed to raise an issue of fact inasmuch as **his expert disregarded the energy calculation** and **opined only that "the collapse of the frames was not insignificant** due to the weight and force created by the simultaneous lateral and downward movement of the scaffolding frames").

Jackson v Hunter Roberts Constr. Group, LLC, 161 AD3d 666 [1st Dept 2018] (where plaintiff "and a coworker were **carrying a water main pipe when he lost his balance upon stepping on a makeshift ramp** that 'bowed,'" and where "**[t]he weight of the pipe caused them to fall** and, as plaintiff was trying to push or eject the pipe from his shoulder to prevent it from landing on him, **the pipe struck either a cart or a column, retracted back and struck him in the leg**," "**[t]he height differential of 6 to 10 inches mediated by the ramp did not constitute a physically significant elevation differential** covered by the statute" and "[a]lso, as the ramp was serving as a passageway, as opposed to the 'functional equivalent' of a safety device enumerated under the statute, it did not fall within the purview of the statute" in this instance in which "**the impetus for the pipe's descent was plaintiff's loss of balance, rather than the direct consequence of the force of gravity**").

Adagio v New York State Urban Dev. Corp., 161 AD3d 624 [1st Dept 2018] (where plaintiff "**tripped on a pile of sand on the ground, at the same level at which he was walking**," "[t]he **Labor Law claim should be dismissed**, because the injured plaintiff's accident did not involve an elevation-related risk).

3. Falls Through Or Into Holes And Openings

Yiming Zhou v 828 Hamilton, Inc., 173 AD3d 943 [2d Dept 2019] (where **plaintiff**, who "**ordinarily worked as a salesman** at a kitchen plumbing supply center," "**allegedly was instructed to run thermostat cable wiring through a wall** on the second floor of the subject building," and where plaintiff "**allegedly stepped on a thin, unsecured piece of styrofoam covering a rectangular duct opening in the floor**, and **the styrofoam broke** underneath him, **causing him to fall through the hole approximately 15 feet to the building's first floor**," **plaintiff "demonstrated, prima facie, that his fall was the result of an elevation-related hazard** within the meaning of Labor Law § 240(1)" and the defendant-owner "failed to raise a triable issue of fact").

Sanchez v 404 Park Partners, LP, 168 AD3d 491, 492 [1st Dept 2019] (defendants were liable as a matter of law under Labor Law § 240 where plaintiff "**fell through an opening in the floor** where he was working in a building undergoing construction and **landed on the floor below**").

Poulin v Ultimate Homes, Inc., 166 AD3d 667, 668-670 [2d Dept 2018] (where plaintiff "alleged that he was injured at a residential construction site when he **fell through the opening of an unfinished stairwell** into the basement of the premises," **Supreme Court properly granted plaintiff summary judgment** on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1); "[r]egardless of the precise manner in which the accident occurred, a defendant is not absolved from liability where, as here, a plaintiff's injuries are at least partially attributable to the defendant's failure to provide protection as mandated by the statute").

Lord v Whelan and Curry Constr. Services, Inc., 166 AD3d 1496, 1497 [4th Dept 2018] (where **plaintiff** "**fell through a roof** while working on a demolition project," plaintiff was properly granted summary judgment, "defendants **failed to raise an issue of fact whether plaintiff's own negligence was the 'sole proximate cause' of his injuries**, in particular, whether safety harnesses 'were readily available at the work site, albeit not in the immediate vicinity of the accident'" [*citing Gallagher*, 14 NY3d at 88]).

Serrano v TED General Contractor, 157 AD3d 474, 474 [1st Dept 2018][22] (where plaintiff "was injured when, during the course of moving sheetrock into a building, he **stood on top of a sidewalk shed that broke beneath him, causing him to fall to the sidewalk below**," "the motion court correctly determined that **these facts demonstrated plaintiffs' prima facie entitlement to summary judgment**" but "erred in finding that [defendant] EAS raised a triable issue of fact" inasmuch as "defendant EAS's expert report was purely speculative in that it was not based on an examination of the sidewalk shed at the time of the accident" and "[t]hat no witness other than plaintiff testified as to the occurrence of the accident does not bar judgment in his favor").

Munzon v Victor at Fifth, LLC, 161 AD3d 1183 [2d Dept 2018] (where plaintiff **fell through a partially demolished floor** while helping a coworker move a heavy beam, where plaintiff detached his harness from the cable safety line "because the safety line was not long enough to allow him to reach his coworker," and where the two workers had been moving the beam "in the manner in which they had been instructed by their employer," plaintiff was **properly granted summary judgment under Labor Law § 240** because **he fell when and because he "was not provided with adequate safety equipment to prevent him from falling**").

Giancola v Yale Club of New York City, 161 AD3d 695 [1st Dept 2018] (where it was undisputed that "**the particle board** covering an escape hatch on top of the elevator car **where plaintiff was required to work … collapse[d] when traversed by him**," it was **immaterial for purposes of Labor Law § 240 whether the event was "foreseeable"**; "since plaintiff's work

[22]Disclosure: I represented the plaintiffs on the appeal.

exposed him to such risks, he was required to be provided with adequate safety devices in compliance with Labor Law § 240(1)").

Dos Santos v State, 169 AD3d 1328, 1328-1329 [3d Dept 2019] (where claimant "was working on a deck that was temporarily suspended under the upper deck of a bridge" when "he sustained a fractured ankle after his right foot backed into an opening in the temporary deck," and where "[t]he **opening measured approximately 1 foot by 12 feet** and was **partially covered by a board**," "**[t]he opening presented an elevation-related risk**, rather than a usual and ordinary danger of working on a construction site, **because it was of sufficient size that claimant could have fallen entirely through to a lower level**; therefore, Labor Law § 240(1) applies to this accident because it was caused by a failure of the suspended metal deck – which was functioning as a scaffold – to provide adequate protection, even though claimant did not fall entirely through the opening").

Maman v Marx Realty & Improvement Co., Inc., 161 AD3d 558 [1st Dept 2018] (where plaintiff "**fell through an opening in the floor of a building** under construction," "**[a] fall through an unguarded opening in the floor of a construction site constitutes a violation of Labor Law § 240(1) only where a safety device adequate to prevent such a fall was not provided**" and there was here **a triable issue "whether static lines were in place for him to safely tie off**").

Vitale v Astoria Energy II, LLC, 138 AD3d 981, 983 [2d Dept 2016] (where **the rebar grid** on which plaintiff walked "had **square openings**, which **measured at most 12 inches by 12 inches**," "defendants established, prima facie, that the openings of the grid, which **were not of a dimension that would have permitted the plaintiff's body to completely fall through** and land on the floor below, **did not present an elevation-related hazard** to which the protective devices enumerated in Labor Law § 240(1) are designed to apply").

4. Falls From Ladders, Scaffolds, Etc., Precipitated By Electrical Shocks

Whether Plaintiff Who Received An Electrical Shock And Fell Was Thereby Entitled To Summary Judgment Under Labor Law § 240[1] — *Nazario v 222 Broadway, LLC*, 28 NY3d 1054 [2016], *mod'g* 135 AD3d 506 [1st Dept 2016].

Plaintiff **received an electrical shock** while working from an A-frame ladder. **He and the ladder were thus caused to fall**. Did such circumstance establish plaintiff's entitlement as a matter of law to judgment under Labor Law § 240?

Facts: Plaintiff was "performing electrical work as a part of a retrofitting or renovation … when he received an electric shock from an exposed wire" (135 AD3d at 507). Although he managed to grab hold of the ladder, the ladder itself then fell while remaining in an open, locked position (*id.*).

Appellate Division: The Appellate Division ruled by 4 to 1 vote that plaintiff was entitled to summary judgment because his fall was due in part to the fact that the ladder had not been "secured to something stable" (135 AD3d at 508).

Justice Tom wrote that First Department precedent "constrained" him to concur with the majority's ruling, but he felt the precedent itself had been wrongly decided (135 AD3d at 510). While he agreed that "a worker injured by a fall from an elevated height is not necessarily required to show that the safety device provided was defective" and also agreed that "failure to supply any safety device whatsoever constitutes a violation of the statute," he believed that the plaintiff was required to adduce "record evidence" "to establish the need for such protective device" in a case in which liability was premised upon defendants' failure to provide a different, better, or additional device (135 AD3d at 512).

In Justice Tom's view, plaintiff had to "present evidence—for example from an expert—that he should have been provided with additional safety devices and that the failure to do so was a contributing cause of the accident" in order to establish an entitlement to summary judgment (*id*. at 513).

Held: The Court of Appeals ruled on section 500.11 review that plaintiff should have been denied summary judgment because "**[q]uestions of fact exist as to whether the ladder failed to provide proper protection**, and **whether plaintiff should have been provided with additional safety devices**" (28 NY3d at 1055). It provided no further explanation for the ruling.

Cutaia v Bd. of Managers of 160/170 Varick St. Condominium, 172 AD3d 424, 425-426 [1st Dept 2019] (by 3 to 2 vote: where plaintiff was provided with an A-frame ladder which "could not be opened or locked while plaintiff was performing his task, and the only way plaintiff could gain access to his work area on the ceiling at the end of the room was by folding up the ladder and leaning it against the wall," where it was "**undisputed that the ladder was not anchored to the floor or wall**" and that plaintiff was not provided with any other safety devices, and where plaintiff's expert "opined that had the ladder been supported or secured to the floor or wall by anchoring, it would have remained stable when plaintiff was shocked," **"[t]he fact that the fall was precipitated by an electric shock" did not alter "that the failure to properly secure a ladder and to ensure that it remain steady and erect is precisely the foreseeable elevation-related risk against which section 240(1) was designed to protect"** inasmuch as "[t]here is nothing in the statute that indicates that the Legislature intended to exempt from the protections of Labor Law § 240(1) a worker who falls from an unsecured ladder after receiving an electric shock" and plaintiff should therefore have been granted summary judgment on his Labor Law § 240 claim).

5. Cases Involving Failure Of A "Permanent" Floor, Stairway, Or Other Instrumentality

Sullivan v New York Athletic Club of City of New York, 162 AD3d 950 [2d Dept 2018] (where plaintiff and a coworker had to carry "a heavy beam" "down a set of stairs," where plaintiff "felt his 'knee go forward' as he neared the bottom of the steps with the beam on his shoulder, and he subsequently dropped the beam and fell to the floor" and where plaintiff thus "sustained a left knee quadriceps tendon rupture, which is medical expert opined was caused by 'the excessive

load of the steel beam he was carrying on his body coupled with the activity of descending stairs,'" the protections of Labor Law § 240 were inapplicable inasmuch as, (1) "[t]he mere fact that the plaintiff was injured by the weight of a heavy object being lifted or carried does not give rise to liability pursuant to Labor Law § 240(1)," (2) "there is **no liability arising from the plaintiff's act of descending the stairs**" because "'**[w]here a fall occurs from a permanent stairway, no liability pursuant to Labor Law § 240(1) can attach**'"), and, (3) defendant "established its prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 240(1) cause of action through evidence that the plaintiff was injured by the weight of the beam as opposed to an elevation-related risk").

Stiegman v Barden & Robeson Corporation, 162 AD3d 1694 [4th Dept 2018] (where plaintiff was injured "when **the staircase leading to the basement of a home under construction collapsed**," and where defendants moved for dismissal of plaintiff's Labor Law § 240 claim on the ground that the subject staircase was a permanent structure and thus not a safety device within the meaning of the statute, the Appellate Division ruled, (1) while "'[a] temporary staircase that is used for access to and from the upper levels of a house under construction is the 'functional equivalent of a ladder' and falls within the designation of 'other devices' within the meaning of Labor Law § 240(1)'" such is **not true of "a stairway which is, or is intended to be, permanent"** but, (2) there was "**a triable issue whether the stairs were temporary or permanent**" inasmuch as "**the original plans** for the home … **provided that only the subject stairs, referred to as knock-down stairs, would be installed**, and that the '[o]wner may purchase finished stairs later'").

Paguay v Cup of Tea, LLC, 165 AD3d 964, 966-967 [2d Dept 2018] (where plaintiff was injured "when, while renovating the third floor of a three-story apartment building, **he fell through the roof of the building to the floor below**," plaintiff's motion for summary judgment under Labor Law § 240 was correctly denied because "the **plaintiff failed to demonstrate, prima facie, that the partial collapse of the roof** and, in turn, **the need for safety devices to protect the plaintiff from that hazard, were foreseeable**").

Conlon v Carnegie Hall Socy., Inc., 159 AD3d 655 [1st Dept 2018] (where plaintiff "**tripped on an extension cord and fell down the stairs**," "**[b]ecause** the stairway **was an elevated surface on which plaintiff was required to work**, and **also the sole means of access to his work area**, it **constituted a safety device** within the meaning of the statute … **as well as an elevated work platform that required provision of an adequate safety device** … **the fact that the staircase from which plaintiff fell was a permanent structure of the building does not remove this case from the coverage of Labor Law § 240(1)**").

Esquivel v 2707 Creston Realty, LLC, 149 AD3d 1040 [2d Dept 2017] (where the **permanently affixed ladder** "provided the **only means of access to the elevated motor room**" that decedent had to read it "**functioned as a 'safety device'** within the meaning [of Labor Law § 240(1)]").

Goya v Longwood Hous. Dev. Fund Co., Inc., 167 AD3d 402, 403 [1st Dept 2018] (where plaintiff was **injured while climbing a fire escape**, the fire escape was a "safety device" within the meaning of Labor Law § 240(1) inasmuch as it "was **specifically used 'to provide access to**

different elevation levels for the worker and his materials'" and "the record does not permit the conclusion that this plaintiff was the sole proximate cause of his injuries, or, that there was another, readily available ladder or safety device, that plaintiff unreasonably chose not to use").

Dirschneider v Rolex Realty Co. LLC, 157 AD3d 538, 539-540 [1st Dept 2018] (where plaintiff **fell "while helping to transport a 600-pound, 14-foot-long steel I-beam down a staircase**," "plaintiff was entitled to summary judgment" under Labor Law § 240 because "**[t]he record establishes a failure to provide plaintiff and his coworker with devices offering adequate protection against the gravity-related risks of moving an extremely heavy object down a staircase**, leading to the workers' loss of control over the object's descent and plaintiff's injuries").

6. The Rest

Burns v Marcellus Lanes, Inc., 169 AD3d 1457, 1457-1458 [4th Dept 2019] (where plaintiff was injured "while removing snow and ice from the roof of a building owned by defendant after **he fell from the bucket of a backhoe being used to lift him to the roof**," "[w]e reject defendants' contention that plaintiff was not injured by an elevation-related risk within the scope of Labor Law § 240(1). Plaintiff established the necessary elements for liability under section 240(1) by submitting evidence that he suffered 'harm directly flowing from the application of the force of gravity to an object or person' [*quoting* ***Ross***, 81 NY2d 494, 501 [1993]").

F. Other "Falling Object" Issues

1. General Rule Regarding "Falling Objects," Including The Fall Of Permanently Installed Objects

Whether The Subject Falling Pipe Came Within The Ambit Of Labor Law § 240 -- *Fabrizi v 1095 Ave. of Americas, L.L.C.*, 22 NY3d 658 [2014], *rev'g* 98 AD3d 864 [1st Dept 2012].

Plaintiff, an electrician, was injured in the course of repositioning a "pencil box" that served as an access point for telecommunication wires. He was struck in the hand by a piece of galvanized steel conduit pipe. The pipe had been suspended at ceiling level, and was attached to another piece of pipe by a compression coupling.

In order to reposition the pencil box, "plaintiff disconnected the box from a structure known as a 'Kindorf support,' which anchored the box to the floor and the wall, and also from two sections of conduit pipe running above and below the pencil box" (Dissent). This left "a considerable length of galvanized steel conduit, weighing 60-80 pounds … hanging above plaintiff as he knelt below to drill [holes in the floor] in preparation for relocating the Kindorf."

The compression coupling was inadequate to the task of holding the conduit pipe in place. The latter came loose and fell roughly 15 minutes after plaintiff removed the pencil box.

Did the accident fall within the scope of Labor Law § 240?

Plaintiff contended that he had "requested a set screw coupling to secure the pipe to prevent the pipe from falling during the disassembly, and that the failure of defendants to provide this device was a proximate cause of his accident" (98 AD3d at 865). This, plaintiff urged, brought the case within the statute's scope.

The Appellate Division majority held, (a) the case came within the ambit of the statute, but, (b) there was a triable issue of fact as to whether defendants failed to provide a protective device within the scope of the statute.

The Court of Appeals split 4 to 2, with all six judges stating that the liability issue should be resolved as a matter of law (and that the Appellate Division majority had therefore erred).[23]

Majority: The majority, per an opinion by Judge Pigott, ruled that the purportedly inadequate compression coupling was "not a safety device 'constructed, placed, and operated as to give proper protection' from the falling conduit" since its "only function was to keep the conduit together as part of the conduit/pencil box assembly." It "follow[ed] that defendants' failure to use a set screw coupling [was] not a violation of 240(1)'s proper protection directive."

In the majority's view, "[p]laintiff's argument that the coupling itself [was] a safety device, albeit an inadequate one," would have extended "the reach of section 240(1) beyond its intended purpose to any component that may lend support to a structure."

In language that will undoubtedly be quoted in many defense briefs, the majority said that "[i]n order to prevail on summary judgment in a section 240(1) 'falling object' case … **the plaintiff must demonstrate that at the time the object fell, it either was being 'hoisted or secured' … or 'required securing for the purposes of the undertaking'** [citations omitted]." **The plaintiff must also "show that the object fell … *because of* the absence or inadequacy of a *safety device* of the kind enumerated in the statute'** [citation omitted, emphasis in original]." This was not done here inasmuch as the missing coupling was not a qualifying "safety device."

Dissent: Chief Judge Lippman, joined by Judge Rivera, would have ruled that plaintiff was entitled to summary judgment.

As they saw it, "the crucial legal questions arising from the face of this record are whether the task of repositioning the pencil box entailed an elevation-related risk that triggered defendants' duty to supply adequate safety devices, and whether the failure to do so caused the accident."

Here, plaintiff was, in their opinion, "[c]learly" "exposed to a gravity-related hazard within the meaning of the statute" inasmuch as "he was situated several feet below a 60-to-80 pound-segment of conduit pipe made of galvanized steel." Further, "a tool capable of stabilizing the conduit pipe — whether brace, clamp, coupling, or otherwise—would be precisely the sort of device contemplated by section 240(1)."

Carlton v City of New York, 161 AD3d 930 [2d Dept 2018] (where plaintiff and a co-worker were in the process of **installing an approximately 80 pound weld neck flange about 16 feet above ground level**, where they returned to ground level to obtain an additional tool they needed to complete the work, and where **the tack welds holding the flange in place gave way**, with the result that **the flange fell and struck plaintiff**, "**defendants failed to establish**, prima facie, that **Labor Law § 240(1) was inapplicable** on the ground that the flange was **a part of the**

[23]Judge Abdus-Salaam had been in the Appellate Division majority and took no part in the Court of Appeals.

permanent structure of the building and was not a falling object within the meaning of Labor Law § 240(1)" inasmuch as "**the flange was only temporarily secured** to the pipe by two tack welds" when it fell).

2. Rethinking Of The "Same Level" Rule

Wilinski v 334 E. 92nd Hous. Dev. Fund Corp., 18 NY3d 1, 9 [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").

Barrios v 19-19 24th Ave. Co., LLC, 169 AD3d 747, 748 [2d Dept 2019] (where plaintiff was injured "when **a differential block and chain fell onto his head as he and his coworkers were preparing a hoisting apparatus to remove and replace a broken roll-up gate** on the defendant's premises," Labor Law § 240 applied inasmuch as "'[t]he statutory requirement that workers be provided with proper protection **extends not only to the hazards of building materials falling,' but to the hazards of defective parts of safety devices 'falling from an elevated level to the ground** [citation omitted]'").

3. Objects Dropped *While* Being Hoisted, Lifted, Carried, Emptied, Or Rolled

Ramos-Perez v Evelyn USA, LLC, 168 AD3d 1112, 1113 [2d Dept 2019] (where plaintiff and a coworker "were **unloading flooring materials** from the back of a truck at a construction site owned by the defendants," where a hydraulic lift "weighing approximately 2,500 to 3,000 pounds" was being used "to lower the flooring materials in pallets," and where **one of the pallets "fell off the lift and struck the plaintiff,"** "[t]he plaintiff's evidence established, prima facie, that the Soha defendants violated Labor Law § 240(1) by **failing to provide an appropriate safety device to secure the subject materials as they were being lowered**, and that this failure was a proximate cause of the plaintiff's injury").

Miller v 177 Ninth Ave. Condominium, 158 AD3d 467, 467 [1st Dept 2018] (where a **300-pound laundry bin fell and struck plaintiff while plaintiff and a coworker were emptying** it, "[i]n light of the weight of the bin and the significant force it was capable of generating over the course of its five- to seven-foot fall, **the height differential is not de minimis**").

Gutierrez v Harco Consultants Corp., 157 AD3d 537, 537-538 [1st Dept 2018] ("[a]ssuming that the **piece of rebar** that allegedly struck plaintiff weighed what defendants claimed it weighed [not mentioned in the opinion], **it still presented an elevation-related risk even if it may have traveled only a short distance before striking plaintiff** … We reject defendants' contention that the rebar being passed to plaintiff did not require a safety device of the type contemplated by Labor Law § 240 because it was being carried by hand").

Sullivan v New York Athletic Club of City of New York, 162 AD3d 950 [2d Dept 2018] (where plaintiff and a coworker had to carry "a heavy beam" "down a set of stairs," where plaintiff "felt his 'knee go forward' as he neared the bottom of the steps with the beam on his shoulder, and he subsequently dropped the beam and fell to the floor" and where plaintiff thus "sustained a left knee quadriceps tendon rupture, which is medical expert opined was caused by 'the excessive load of the steel beam he was carrying on his body coupled with the activity of descending stairs,'" the protections of Labor Law § 240 were inapplicable inasmuch as, (1) "**[t]he mere fact that the plaintiff was injured by the weight of a heavy object being lifted or carried does not give rise to liability pursuant to Labor Law § 240(1)**," (2) "there is no liability arising from the plaintiff's act of descending the stairs" because "'[w]here a fall occurs from a permanent stairway, no liability pursuant to Labor Law § 240(1) can attach'"), and, (3) defendant "established its prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 240(1) cause of action through evidence that the plaintiff was injured by the weight of the beam as opposed to an elevation-related risk").

Sawczyszyn v New York Univ., 158 AD3d 510, 511 [1st Dept 2018] (where plaintiff "was allegedly **injured in the course of rolling a four-wheeled cart filled with about 100 to 200 pounds of materials over an unsecured, makeshift plywood ramp** which **bridged an approximately five- or six-inch gap** between a truck bed to a loading dock," and where plaintiff "admitted that the **vertical distance from the surface of the truck bed to the surface of the dock was about 8 to 12 inches**," **plaintiff's injury "was not proximately caused by a failure to protect him from any elevation-related risks** posed by the distance of almost four feet from the floor to the surface of the dock, since plaintiff remained on the dock while the cart became wedged in the gap between the truck bed and the dock, and there is **no evidence that the gap was large enough to pose a significant risk of any hazardous descent to the floor**").

4. Objects That Were Thrown, Or Which Fell For Unknown Reasons

Torres v Love Lane Mews, LLC, 156 AD3d 410, 411 [1st Dept 2017] (where plaintiff "was allegedly **struck by falling bricks**," "[t]he motion court **correctly denied both plaintiff's motion for partial summary judgment** on his Labor Law § 240(1) claim **and defendants' motion for summary judgment** dismissing that claim, as there are **issues of fact about whether the bricks fell accidently or were deliberately dropped** by demolition workers" and "[i]f the latter, then the bricks did not constituted falling objects pursuant to Labor Law § 240(1)").

5. Claim That Fall Was Not Due To Absence Or Inadequacy Of A "Safety" Device

Houston v State, 171 AD3d 1145 [2d Dept 2019] (where "claimant was injured when **iron posts** that were **suspended by a crane operated by a fellow employee fell and struck the claimant** on the head," where "**claimant testified … that he secured the subject posts** using a 3/8th-inch

choker for loading onto the crane," and "opined that the crane operator must have moved the load quickly or in a manner that caused the posts to become loose," where the crane operator "testified … that he lifted the load slowly and vertically and, nevertheless, the posts slipped from the choker and fell," and where "claimants did not submit expert testimony or affidavits in support of their motion for summary judgment," "**claimants failed to establish their prima facie entitlement to judgment as a matter of law**" inasmuch as the "evidence submitted by the claimants was **insufficient to establish that the posts fell due to the absence or inadequacy of an enumerated safety device**, and the claimants further failed to eliminate all triable issues of fact as to whether the claimant's conduct was the sole proximate cause of the accident").

Keerdoja v Legacy Yards Tenant, LLC, 166 AD3d 418, 418 [1st Dept 2018] (where "a **metal shim plate affixed to a steel column**, that was **being installed** as part of a temporary truss system, **suddenly detached and hit [plaintiff] in the head**," "**[t]he tack welds used to secure the metal shim plate to the column were 'safety devices'** for the purposes of Labor Law § 240(1) because **they were intended to be a temporary measure to keep the shim plate attached to the column during installation** … at which time the plates would be permanently bolted into place," and the accident thus occurred "'because of the inadequacy of a safety device … [that was] put in place as to give proper protection for' plaintiff, entitling him to partial summary judgment [internal quotations omitted]").

6. Allegedly De Minimis Elevation Risks

Slawsky v Turner Constr. Co., 167 AD3d 488, 488-489 [1st Dept 2018] (where plaintiff was apparently **struck by a glass partition which fell as it was being hoisted**, **"[t]hat the glass partition may have only traveled a short distance does not warrant dismissal in light of the partition's weight of between 300 and 400 pounds,"** and the motion court correctly granted plaintiff summary judgment inasmuch as "plaintiff adduced evidence that **the lifting device** provided **had an insufficient maximum vertical lift load**, and thus did not provide proper protection").

Villanueva v 114 Fifth Ave. Assoc. LLC, 162 AD3d 404 [1st Dept 2018] (where plaintiff "and three other workers were **attempting to load a 500-pound steel I-beam into an internal freight elevator** at a construction site in order to transport it from the 18th floor to the ground floor," where the elevator had "an eight foot ceiling, while the beam was 12 feet long," and where the workers "were **attempting to stand the beam on its end**" when "**the beam fell down half a foot onto plaintiff's shoulder**," plaintiff "established his entitlement to judgment as a matter of law on the issue of liability on the § 240(1) claim" inasmuch as **the half-foot drop was "not de minimis, given the I-beam's weight and since the hazard was one directly flowing from the application of the force of gravity to a person**" and inasmuch as "defendants failed to provide an adequate safety device to protect him, and … such violation was a proximate cause of the accident").

Gericitano v Brookfield Properties OLP Co. LLC, 157 AD3d 622 [1st Dept 2018] (plaintiff "established prima facie his entitlement to the protections of Labor Law § 240(1) by submitting

evidence that he was injured when **a corner of an electrical transformer weighing hundreds of pounds and suspended from a ceiling shifted downward and struck him on the head** as he was standing on a ladder working on it and that he had not been provided with any safety devices adequate to his task").

Greenwood v Whitney Museum of Am. Art, 161 AD3d 425 [1st Dept 2018] (where plaintiff "sustained injuries during construction of a building when **a piece of scrap metal fell on him**," where "[t]he piece of metal was **being used by his co-worker, who was welding steel about 30 feet above on a lift**, as a 'dunnage' to secure a 'fire blanket' to prevent sparks from igniting objects in surrounding areas," and where "plaintiff was 'fire watching,' which required him to remove flammable objects and suppress any fires started by errant sparks," **the "court correctly granted plaintiff partial summary judgment on his Labor Law § 240(1)** claim inasmuch as the record establishes that plaintiff's injury was the proximate result of the **failure to take adequate steps to secure the piece of scrap metal from falling from the height at which it was being used**").

Simmons v City of New York, 165 AD3d 725, 727 [2d Dept 2018] (where the plaintiff-plumber was allegedly "**injured while moving an air compressor, weighing in excess of 600 pounds**" when he and his co-workers removed it from its crate, placed it on the blades of a pallet jack, and then pushed and pulled the pallet jack until **it ultimately struck some debris which "caused the pallet jack to stop short and the compressor to roll off the pallet jack and onto the plaintiff's ankle**," and where "[t]he **blades of the pallet jack were then raised approximately three to six inches from the floor**," "**defendants established their prima facie entitlement to judgment** as a matter of law by demonstrating that the plaintiff's injuries were not caused by the elevation or gravity-related risks encompassed by Labor Law § 240(1)" — but the court did not quite say whether this was because the compressor fell only 3 to 6 inches or because "[a] plaintiff must also show that 'the object fell … *because of* the absence or inadequacy of a *safety device* of the kind enumerated in the statute'" [*quoting Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]).

Wiley v Marjam Supply Co., Inc., 166 AD3d 1106, 1109 [3d Dept 2018] (where the plaintiff-worker was walking across the second floor when **sheetrock that had been "stacked on its long side on the ground" fell and struck plaintiff's ankle**, "**[g]iven the absence of a significant elevation differential**, dismissal of the Labor Law § 240(1) cause of action was proper").

Salerno v Diocese of Buffalo, 161 AD3d 1522 [4th Dept 2018] (where "plaintiff was **ordered to operate a 'Bobcat skid-loader,'** which had a safety bar that lowered onto the operator's lap" and "**the safety bar allegedly fell and struck him**" as "plaintiff raised the safety bar to exit the machine," "the court properly granted defendants' motion with respect to the Labor Law § 240(1) claim because plaintiff was **not injured as the result of any 'physically significant elevation differential'**").

7. Objects That Did, Or Did Not, Require "Securing For The Purposes Of The Undertaking"

Ramos-Perez v Evelyn USA, LLC, 168 AD3d 1112, 1113 [2d Dept 2019] (where plaintiff and a coworker "were **unloading flooring materials from the back of a truck** at a construction site owned by the defendants," where **a hydraulic lift "weighing approximately 2,500 to 3,000 pounds" was being used "to lower the flooring materials in pallets,"** and where **one of the pallets "fell off the lift and struck the plaintiff,"** "[t]he **plaintiff's evidence established**, prima facie, that the Soha **defendants violated Labor Law § 240(1) by failing to provide an appropriate safety device to secure the subject materials** as they were being lowered, and that this failure was a proximate cause of the plaintiff's injury").

Passos v Noble Constr. Group, LLC, 169 AD3d 706, 707-708 [2d Dept 2019] (where plaintiff was **struck** "**by an unsecured four-by-eight-foot plywood sheet** that **fell from the first floor ceiling** onto the plaintiff as he was walking underneath," and where a "coworker stated that approximately 20 to 30 minutes before the accident, a Genuine worker had removed the vertical post supporting the plywood sheet and **left the plywood sheet unsecured in the ceiling**," plaintiff was entitled to summary judgment under Labor Law § 241[6] inasmuch as **the object "required securing for the purposes of the undertaking"** and **it fell "because of the absence or inadequacy of a safety device of the kind enumerated in the statute"**).

Tropea v Tishman Constr. Corp., 172 AD3d 450, 451 [1st Dept 2019] (where a **"cable tray" "fell on plaintiff's head from atop two ladders," it was "an object that required securing** to prevent it from falling" **inasmuch as "[t]he distance the tray fell was not de minimis and 'the harm to plaintiff was the direct consequence of the application of the force of gravity'** upon the unsecured cable tray [*quoting* ***Runner***]" and "securing the cable tray against falling would not have been contrary to the purpose of the work").

Gonzalez v Paramount Group, Inc., 157 AD3d 427, 428 [1st Dept 2018] (where plaintiff "was injured when, while making an opening in a concrete wall for HVAC ductwork to be installed, **cinderblocks above the opening fell and struck his knee** … the **cinderblocks above the opening that fell were 'falling objects'** under Labor Law § 240(1) **required to be secured for the purposes of the undertaking**").

Wellington v Christa Constr. LLC, 161 AD3d 1278 [3d Dept 2018] (where **plaintiff**, a mason, was **working at ground level**, where defendant Tower, the roofing subcontractor, **had placed an approximately 25-pound tire iron on the roof with the intent of using it "as a support for a safety warning barrier to alert workers** that they were near the edge," where **the wind was so gusty that no employees were working on the roof** at the time, and **wind evidently blew the tire iron off the roof** such that it **fell and struck the plaintiff**, plaintiff **should have been granted summary judgment under Labor Law § 240** inasmuch as, **(a) the object "required securing for the purposes of the undertaking" since** the tire rim "as part of a safety system mandated by federal regulations, **was an integral part of Tower's undertaking in renovating the roof**" and "a significant elevation-related risk was inherent in the placement of the tire rim on a roof several stories above an area where others were working," **(b) the accident occurred**

"because of the absence or inadequacy of a safety device of the kind enumerated in the statute" since several witnesses said "that cinder blocks and sandbags were sometimes used to secure them [tire rims] by adding additional weight" and Tower's alternative of relying "upon the tire rim's heaviness as a substitute for a safety device" "'clearly failed in its core objective of preventing the [tire rim] from falling because [it], in fact, fell,'" and **(c) plaintiff was not required to present expert testimony to establish "whether and how the tire rim should have been secured"** since "**the very fact that the tire rim fell established a statutory violation**").

Robinson v Sprague Washington Sq., LLC, 158 AD3d 1318, 1320-1321 [4th Dept 2018] [3 to 2] (by 3 to 2 vote: where plaintiff "was injured when he was attempting to install a door frame in an exterior doorway" when **a steel lintel that weighed 50 pounds fell on his head**, and where according to the dissent "the lintel had **previously been installed by another subcontractor**, and plaintiff was not in any way involved in that installation," there were nonetheless **issues of fact "whether the lintel required securing for the purpose of his undertaking"** and "whether the lintel was installed by plaintiff or by employees of another subcontractor has no bearing on whether SWS and BGB discharged their nondelegable duty under the statute").

Djuric v City of New York, 172 AD3d 456, 456 [1st Dept 2019] ("[t]he motion court correctly found that Labor Law § 240(1) was inapplicable here, because **the pipe saddle that detached from an overhead ceiling pipe assembly** and struck plaintiff was **not an object that required securing** for the purposes of the undertaking; rather **it was a permanent part of the structure**").

Ruiz v Ford, 160 AD3d 1001 [2d Dept 2018] (where plaintiff, a service technician for nonparty Verizon, was "**climbing a ladder** supplied by Verizon **in order to access the Verizon optical network terminal**," and where **one or more tires which had nothing to do with plaintiff's work but were being stored on the subject roof fell, struck the ladder, and thus caused plaintiff to fall**, "**the tires were not materials that were being hoisted or secured for the purposes of the undertaking**, nor was it expected, under the circumstances of this case, that the tires would require securing for the purposes of the undertaking at the time one or more tires fell").

IV. Summary Judgment Motions And Standards In Labor Law § 240 Cases

A. Summary Judgment Because Elevation Or Safety Device Broke Or Collapsed

Cruz v Roman Catholic Church of St. Gerard Magella, 2019 NY Slip Op 05763 [2d Dept July 24, 2019] (where "plaintiff **allegedly sustained injuries when the working platform of a scaffold on which he was working collapsed** and he **fell through the frame** of the scaffold **to the ground**," "plaintiff **demonstrated his prima facie entitlement** to **judgment as a matter of law** on the issue of St. Gerard's liability on the Labor Law § 240(1) cause of action" inasmuch as "**[t]he collapse of a scaffold or ladder for no apparent reason** while a plaintiff is engaged in

an activity enumerated under the statute **creates a presumption that the ladder or scaffold did not afford proper protection**"; the **defendants' claim** that "**plaintiff failed to utilize clips to secure the working platform** to the frame of the scaffold, and that this conduct was the sole proximate cause of the accident" **did not raise an issue of fact** inasmuch as, amongst other defects, **the affidavit on which defendant relied** "**did not explain** whether, when, or **in what manner he had undertaken a search for clips**" and "the **absence of clips** was **not noted in any of three incident reports** prepared by [the affiant] shortly after the accident").

Vucetic v NYU Langone Medical Center, 173 AD3d 527 [1st Dept 2019] (where "plaintiff Ante Vucetic was injured when the **A-frame ladder he was using** to perform insulation work **collapsed beneath him**, causing him to fall to the ground," **plaintiff was properly granted summary judgment** inasmuch as "the 'safety devices provided to plaintiff did not properly protect him from an elevation-related hazard' [citation omitted]").

Gomez v Kitchen & Bath by Linda Burkhardt, Inc., 170 AD3d 967, 968 [2d Dept 2019] (where **the A-frame ladder supporting the plaintiff-painter collapsed**, where **plaintiff testified** that the ladder "had a broken lock, and that **in order to hold the ladder open, his supervisor inserted a screwdriver into a hole** and used the screwdriver as a makeshift lock," where **plaintiff** "**further testified** that he **complained about the defect to his supervisor**, but his supervisor failed to correct the problem," and where plaintiff said that after falling he noticed that the screwdriver had fallen out, **plaintiff was correctly granted summary judgment** based on Labor Law § 240; **that medical records "contained notations** that the **plaintiff was injured when he lost his balance** and **fell from a scaffold**" **did not raise an issue of fact** inasmuch as "**defendant failed to offer evidence sufficiently connecting the plaintiff to the statements in the hospital records**" and "**none of the notations were germane to the plaintiff's diagnosis or treatment** and, at trial, would not be admissible for their truth under the business records exception to the hearsay rule").

Kind v 1177 Ave. of the Americas Acquisitions, LLC, 168 AD3d 408, 409 [1st Dept 2019] ("when **one end of a scaffold** that [plaintiff] he and a coworker were using to wash exterior windows on a building **dropped out from under him and the scaffold came to rest at an angle, causing everything in it to crash down on him," such established liability** and "**plaintiffs were not required to demonstrate a specific defect**"; furthermore, "[t]he conclusion of the Department of Labor investigator that the scaffold tilted because plaintiff and his coworker caused a safety line to become caught in a spool for the scaffold's suspension cables was speculation unsupported by the evidence").

Uvidia v Cardinal Spellman High School, 167 AD3d 421, 421-422 [1st Dept 2018] (where **plaintiff was standing on a plywood structure** while "he and a coworker were in the middle of erecting on top of a building's roof in preparation for asbestos abatement to be performed inside the structure" and where **a gust of wind caused the structure to collapse** and plaintiff to fall, **plaintiff was properly granted partial summary judgment** under Labor Law § 240 inasmuch as "**the bracing of the structure was inadequate to prevent its collapse**," the wind was therefore not the sole proximate cause of the accident, and the **statute "required the provision**

of devices to protect against the foreseeable risk that windy weather on the roof of the building could cause the structure to shift or collapse while it was under construction").

McDonnell v Sandaro Realty, Inc., 165 AD3d 1090, 1093-1094 [2d Dept 2018] (where "a **plank on the scaffold on which [plaintiff] was standing broke** and caused him to fall a distance of approximately six feet to the ground, "plaintiffs established their prima facie entitlement to judgment as a matter of law through the deposition testimony and documents they submitted showing that Sandaro failed to furnish or erect a scaffold so as to protect McDonnell from an elevation-related risk in violation of Labor Law § 240(1) and that the violation was a substantial cause of McDonnell's injuries").

Quizhpi v S. Queens Boys & Girls Club, Inc., 166 AD3d 683, 684 [2d Dept 2018][24] (where plaintiff testified that "he had just walked to the area where he was to begin removing asbestos when **the portion of the roof on which he was standing collapsed**, causing him to fall into the second floor of the building and sustain injuries," and where the foreman disputed that insofar as he claimed "that the plaintiff had begun removing asbestos prior to falling through the roof," **plaintiff was entitled to summary judgment under Labor Law § 240** inasmuch **as "plaintiff demonstrated, prima facie, that the need for safety devices to protect him from an elevation-related hazard occasioned by removing asbestos from the roof of a building was foreseeable"** and "defendant failed to raise a triable issue of fact in opposition").

Rapalo v MJRB Kings Highway Realty, LLC, 163 AD3d 1023 [2d Dept 2018] (where "plaintiff allegedly was injured **when a plank on a scaffold he was erecting broke**, causing him to fall approximately 30 feet," **defendant's "contention** that the **plaintiff was the sole proximate cause of the accident** because **the scaffold from which he fell was one which he himself was constructing** is **without merit**" and "Supreme Court **should have granted 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)").

Jarama v 902 Liberty Ave. Hous. Dev. Fund Corp., 161 AD3d 691 [1st Dept 2018] (where plaintiff, a mason, "was **standing on a pipe scaffold** when **a large masonry stone fell onto the scaffold**, damaging its 'bicycle,' which was holding up the wooden planks and **causing the planks to collapse from under plaintiff's feet**" and **causing plaintiff to fall "35 feet to the ground below," plaintiff was entitled to summary judgment** under Labor Law § 240 since he "established, prima facie, that he was engaged in an activity falling within the statute, and that **defendants failed to provide him proper safety equipment, either in the form of a scaffold that could withstand the force of a falling masonry stone** … a hoist to aid in safely lifting and maneuvering the heavy stones … something to which plaintiff could safely hook his harness in order to avoid falling … or any other appropriate safety device … [and] further demonstrated that defendants' failure to provide an appropriate safety device was the proximate cause of the accident").

[24] Disclosure: I represented the plaintiff-respondent in the case.

Giancola v Yale Club of New York City, 161 AD3d 695 [1st Dept 2018] (where it was undisputed that "the **particle board covering an escape hatch** on top of the elevator car where plaintiff was required to work … **collapse[d] when traversed by him**," it was **immaterial** for purposes of Labor Law § 240 **whether the event was "foreseeable"**; "since plaintiff's work exposed him to such risks, he was required to be provided with adequate safety devices in compliance with Labor Law § 240(1)").

B. Summary Judgment Because No Safety Device Was Provided

Escobar Camacho v Ironclad Artists Inc., 174 AD3d 426 [1st Dept 2019] (where **plaintiff fell from a scaffold**, it was "undisputed that **the scaffold he was supplied with and directed to use lacked guard rails** and that he fell off when the scaffold tipped," and plaintiff "was **not provided with any other safety devices**," Supreme Court **correctly granted plaintiff's motion for partial summary judgment**; "Contrary to defendants' claim, **the alleged failure to unlock the wheels does not raise an issue of fact**").

Reyes v Bruckner Plaza Shopping Center LLC, 173 AD3d 570 [1st Dept 2019] (where plaintiff "**fell off the roof of a building** while installing metallic roof edging called 'gravel stops,'" **plaintiff "established prima facie violation of Labor Law § 240(1)** through his testimony and the affidavit and testimony of his co-worker Alfonso Perez, **establishing that no safety devices were provided for their use at the job site**" and "defendants failed to raise an issue of fact as to whether plaintiff, by recalcitrantly refusing to use safety equipment that had been provided to him, was the sole cause of the accident").

Martinez-Gonzalez v 56 West 75th Street, LLC, 172 AD3d 616, 617 [1st Dept 2019] (where it was "undisputed that **the scaffold he [plaintiff] was supplied with and directed to use lacked railings**, and that **he fell off when the scaffold tipped as one wheel broke through the floor** on which it was standing," **such "establishe[d] prima facie a violation of Labor Law § 240(1)**" and "[p]laintiff was **not required to show that the scaffold was defective**").

Espinoza v Fowler-Daley Owners, Inc., 171 AD3d 480 [1st Dept 2019] (where plaintiff, who presumably fell, "established prima facie that Fowler **failed to provide equipment such as harnesses and tie-off points for safety lines**, which plaintiff had specifically requested on and prior to the day of his accident, in order to give proper protection to individuals involved in pointing its building," plaintiff was properly granted partial summary judgment under Labor Law § 240).

Padilla v Park Plaza Owners Corp., 165 AD3d 1272, 1275 [2d Dept 2018] (where the building defendants hired plaintiff's employer to remove the oil from a temporary oil tank and then clean the tank, and where that required plaintiff to climb to the top of the tank, and where "**plaintiff submitted evidence that he fell from a 12-to 16-foot high surface, and that he had not been provided with safety devices to protect him from such a fall**," plaintiff was entitled "to judgment as a matter of law on the issue of liability on the Labor Law § 240(1) cause of action").

Morocho v Blvd. Gardens Owners Corp., 165 AD3d 778, 778 [2d Dept 2018] ("**plaintiff met his prima facie burden** of demonstrating a violation of Labor Law § 240(1) and that this violation was a proximate cause of his injuries, **through his uncontradicted deposition testimony that he fell from a scaffold that did not have safety railings** and that he was not provided with a safety device to prevent him from falling").

Hong-Bao Ren v Gioia St. Marks, LLC, 163 AD3d 494 [1st Dept 2018] (where "[p]laintiff was **crouching on top of a ventilator**, which he had secured to a ceiling beam, and was in the **process of attempting to remove the ventilator by attaching to it a 60 pound derrick rig** when **the ventilator tilted and became detached from the wall, causing plaintiff to fall to the ground**," where plaintiff had been provided with an A-frame ladder but testified "that **it was 'impossible to perform his job if I stood on the ladder**,'" and where defendant failed to rebut that assertion, "**plaintiff is entitled to summary judgment** on his Labor Law § 240(1) claim because he was **not provided with a proper safety device during the demolition project**").

Provens v Ben-Fall Dev., LLC, 163 AD3d 1496 [4th Dept 2018] (where plaintiff established **he had been instructed to work on a pitched roof on which toe boards had already been installed**, and where there was "**no dispute that the toe boards detached** from the roof while plaintiff was working, **causing him to fall and sustain injuries**," "[t]he **failure of that safety device constituted a violation of Labor Law § 240(1) as a matter of law**" and was "**at minimum, 'a contributing cause** of [plaintiff's] falls,'" with the consequence that "**plaintiff's alleged failure to utilize other safety devices available on the job site**, including his alleged failure to reinstall the toe boards with additional supporting roof jacks, **raises no more than an issue of contributory negligence**").

Villanueva v 114 Fifth Ave. Assoc. LLC, 162 AD3d 404 [1st Dept 2018] (where plaintiff "and three other workers were **attempting to load a 500-pound steel I-beam into an internal freight elevator** at a construction site in order to transport it from the 18th floor to the ground floor," where the elevator had "an eight foot ceiling, while the beam was 12 feet long," and where the workers "were attempting to stand the beam on its end" when "**the beam fell down half a foot onto plaintiff's shoulder**," plaintiff "established his entitlement to judgment as a matter of law on the issue of liability on the § 240(1) claim" inasmuch as the half-foot drop was "not de minimis, given the I-beam's weight and since the hazard was one directly flowing from the application of the force of gravity to a person" and inasmuch as "**defendants failed to provide an adequate safety device to protect him**, and … such violation was a proximate cause of the accident").

Marulanda v Vance Assoc., LLC, 160 AD3d 711 [2d Dept 2018] (where plaintiff "allegedly sustained personal injuries when he **fell from a scaffold** while engaged in demolition work at a building owned by the defendant third-party plaintiff," "Supreme Court should have granted the plaintiff's motion for summary judgment on the issue of liability on the Labor Law § 240(1) cause of action" since plaintiff proved "that he was injured when he **fell from a scaffold that lacked safety rails on the sides**, and that he was **not provided with a safety device to prevent him from falling**").

Conlon v Carnegie Hall Socy., Inc., 159 AD3d 655 [1st Dept 2018] (where plaintiff "**tripped on an extension cord** and fell down the stairs," "**[b]ecause the stairway was an elevated surface on which plaintiff was required to work, and also the sole means of access** to his work area, it constituted a safety device within the meaning of the statute … as well as an elevated work platform that required provision of an adequate safety device … **Under either theory, it is clear that plaintiff's fall was the direct result of absence of an adequate safety device**, and thus, plaintiffs are entitled to partial summary judgment on the section 240(1) cause of action. That plaintiff tripped on an extension cord does not take the case out of the ambit of Labor Law § 240(1)").

Gomes v Pearson Capital Partners LLC, 159 AD3d 480 [1st Dept 2018] (**plaintiff "established his entitlement to judgment** as a matter of law on the issue of liability on his Labor Law § 2490(1) claim" where it was "**undisputed that the subject scaffold did not have railings, toe boards, or cross-bracing**, and there was **no place for plaintiff to tie off his safety harness**"; further that "plaintiff testified that the accident occurred when he was on the scaffold, tripped on a block, and fell backward, off the scaffold to the ground, and his worker's compensation claim also provides that he slipped and fell while on the scaffold" such was "sufficient to establish that the violation was a proximate cause of the injury").

Miller v 177 Ninth Ave. Condominium, 158 AD3d 467, 467 [1st Dept 2018] (where **a 300-pound laundry bin fell and struck plaintiff** while plaintiff and a coworker were emptying it, and where plaintiffs "established that the accident was proximately caused by **the undisputed absence of safety devices affording adequate protection** against the elevation-related risks that the injured plaintiff faced as he and another laborer hoisted 300-pound laundry bin to empty the debris within it into a dumpster" **plaintiffs were properly granted summary judgment**).

Gonzalez v Paramount Group, Inc., 157 AD3d 427, 428 [1st Dept 2018] (where plaintiff "was injured when, while making an opening in a concrete wall for HVAC ductwork to be installed, **cinderblocks above the opening fell and struck his knee," defendant's "testimony and expert opinion that a safety device was neither necessary nor customary**" was "'**insufficient to establish the absence of a Labor Law § 240(1) violation**'" and avoid summary judgment; "[u]nlike in *O'Brien*, the experts here do not differ as to whether a safety device that was provided was adequate, but rather differ as to whether a safety device was required at all").

Smiley v Allgaier Constr. Corp., 162 AD3d 1481 [4th Dept 2018] (where **plaintiff testified** that he and a coworker "were **[manually] lifting a heavy motor approximately four feet onto the deck of a scissor lift**" and that **the motor fell** and **plaintiff tried to change his grip**, where **the coworker "testified that he had performed work on 30 or 40 such doors** and had manually lifted the motor onto a scissor lift every time," but where **the foreman "who was not on location** on the date of the injury, **testified that he had performed work on 'over a thousand' such doors**," **and that he "found it 'hard to believe' that hoists, blocks, pulleys, ropes, or other safety devices were not available on site," plaintiffs failed to establish entitlement to summary judgment** on their § 240 claim "inasmuch as their evidentiary submissions created

issues of fact 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").

Carlton v City of New York, 161 AD3d 930 [2d Dept 2018] (where plaintiff and a co-worker were in the process of installing an approximately 80 pound weld neck flange about 16 feet above ground level, where they returned to ground level to obtain an additional tool they needed to complete the work, and where **the tack welds holding the flange in place gave way**, with the result that **the flange fell and struck plaintiff, "neither the plaintiffs nor the defendants established their prima facie entitlement to judgment** as a matter of law with respect to the Labor Law § 240(1) cause of action" inasmuch as there were "**triable issues of fact** as to **whether the defendants were obligated to provide appropriate safety devices of the kind enumerated in Labor Law § 240(1) to secure the flange** and whether the flange fell due to the absence or inadequacy of an enumerated safety device" because **while it was "true that no safety device such as a sling was provided**, the **injured plaintiff testified at his deposition that two tack welds should have been sufficient to secure the flange**").

Weitzel v State, 160 AD3d 1394 [4th Dept 2018] (where claimant was sandblasting from aluminum **scaffolding that lacked guardrails**, but claimant **had been provided with a safety harness that he had failed to tie off**, claimant's "**own evidentiary submissions create an issue of fact whether his conduct was the sole proximate cause** of the accident"; "Contrary to claimant's contention, the decision of the Court of Appeals in *Bland v. Manocherian*, 66 N.Y.2d 452 … (1985) does not require the presence of guardrails on scaffolding whether another adequate safety device is made available").

Garbett v Wappingers Cent. School Dist., 160 AD3d 812 [2d Dept 2018] (where workers were disassembling a boiler in order to fix a leak, where the workers were then moving each heavy section to the ground for the plaintiff to inspect, and where there was **conflicting evidence whether boiler sections require securing when they are detached from each other or whether a chain fall device was required for the undertaking**, Supreme Court also properly concluded that triable issues of fact exist with respect to proximate cause).

C. Summary Judgment Granted Or Denied For Improper "Placement" Of A Device (*e.g.*, Unsecured Ladder)

DeSerio v City of New York, 171 AD3d 867 [2d Dept 2019] (where plaintiff "allegedly was injured when an **extension ladder he had ascended slipped out from under him**, causing him to fall approximately 20 feet to the ground," while "'[a] fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240(1),' **liability will be imposed** when **the evidence shows 'that the subject ladder was … inadequately secured** and that … **the failure to secure the ladder was a substantial factor in causing the plaintiff's injuries**'" and "Supreme Court should have granted that branch of the plaintiff's motion which was for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1)").

Salinas v 64 Jefferson Apartments, LLC, 170 AD3d 1216, 1222-1223 [2d Dept 2019] ("**plaintiff made a prima facie showing of entitlement to judgment** as a matter of law on the issue of liability on the Labor Law § 240(1) cause of action, by **submitting evidence that the ladder on which he was standing moved for no apparent reason, causing him to fall** … the deposition testimony of the plaintiff's coworker implying that, after the accident, the plaintiff might have told the coworker that the plaintiff had set the ladder up on top of a drop cloth, even if true, would render the plaintiff only contributorily negligent, a defense not available under Labor Law § 240(1)").

Vicuna v Vista Woods, LLC, 168 AD3d 1124 [2d Dept 2019] (where plaintiff "was performing roofing work on a newly-constructed house" when "**the ladder on which he was working shifted for no apparent reason, causing him to fall**," **Supreme Court correctly granted "plaintiff's motion for summary judgment** on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1)").

Cabrera v Arrow Steel Window Corp., 163 AD3d 758 [2d Dept 2018] (plaintiff "made a prima facie showing of entitlement to judgment as a matter of law through his deposition testimony, which demonstrated that **the ladder on which he was working moved for no apparent reason**, causing him to fall").

Nolan v Port Auth. of New York and New Jersey, 162 AD3d 488 [1st Dept 2018] (**plaintiff "made a prima facie showing of entitlement to partial summary judgment** on the issue of liability on his Labor Law § 240(1) claim with his testimony that **the makeshift ladder on which he was descending** after detaching a crane cable from the top of an eight-foot C-box **slid out from under him**" and **the co-worker's affidavit** stating that he "'**observed [plaintiff]** fall from the ladder after he **appeared to have 'missed' the last step'" did not "raise a triable issue** as to whether plaintiff was the sole proximate cause of the accident, as it **[did] not refute plaintiff's assertion that the ladder slid out from beneath him**").

Tuzzolino v Consol. Edison Co. of New York, 160 AD3d 568 [1st Dept 2018] (where plaintiff **established prima facie a violation of Labor Law § 240(1)** through his testimony that he was caused to fall when **the unsecured ladder on which he was standing suddenly slipped out from under him**, defendant "failed to raise an issue of fact as to whether plaintiff was the sole proximate cause of the accident" inasmuch as, (a) there "is no evidence in the record that there were other readily available safety devices that would have been adequate for plaintiff's work," (b) "defendant's expert's opinion that the accident was caused by plaintiff's misuse of the ladder was entirely speculative, since it was based on his visit to the accident site almost two years after the accident occurred," and, (c) the co-worker's affidavit to the effect that "plaintiff disregarded specific instructions not to use the ladder or do the work he was performing at the time of the accident" "conflicts with his deposition testimony on this issue" and thus "creates only a feigned issue of fact").

Merino v Cont. Towers Condominium, 159 AD3d 471 [1st Dept 2018] ("the court should have granted plaintiff's cross motion, as the evidence establishes that **plaintiff slipped or fell from an unsecured ladder upon which he was working because it moved** … [t]he **testimony of**

plaintiff's coworker that plaintiff stated he slipped was 'not inconsistent with plaintiff's version that he slipped after the ladder moved'").

Pena v Jane H. Goldman Residuary Tr. No. 1, 158 AD3d 565 [1st Dept 2018] (where plaintiff testified "that he was injured when the **unsecured and damaged ladder upon which he was working wobbled**, causing him to fall," **defendant's "submission of an ambiguous affidavit from plaintiff's supervisor"** wherein **the supervisor "provided only vague references to other available ladders**, without addressing plaintiff's testimony that other workers were using those ladders" was "**insufficient to rebut plaintiff's prima facie showing**").

Gonzalez v 1225 Ogden Deli Grocery Corp., 158 AD3d 582, 583 [1st Dept 2018] (where the **plaintiff-painter said that "[t]he deli owner supplied plaintiff with an A-frame ladder**, which the **owner opened up and placed at the door**" and plaintiff further testified that "[a]pproximately 25 minutes after plaintiff began painting, **the ladder shifted 'from side to side' and fell to the ground**, causing plaintiff to fall," "**[p]laintiff's fall from an unsecured ladder establishes a violation of the statute** … for which defendant property owner is liable, even if the tenant contracted for the work without the owner's knowledge").

Rom v Eurostruct, Inc., 158 AD3d 570, 570 [1st Dept 2018] ("**[p]laintiff established his entitlement to partial summary judgment** on the Labor Law § 240(1) claim through his testimony that he was **caused to fall to the ground when the unsecured ladder on which he was standing suddenly shifted and kicked out** from underneath him"; defendants did not raise an issue of fact since "**[n]one of [the] coworkers who provided affidavits actually witnessed plaintiff fall** from the ladder, and **they did not contradict his testimony that the ladder suddenly moved**").

Sochan v Mueller, 162 AD3d 1621 [4th Dept 2018] (where "the ladder used by plaintiff was **the top half of an extension ladder that lacked any rubber feet** and belonged to defendants," "plaintiff's employer prohibited its employees from using customers' ladders or ladders without rubber feet," "**plaintiff had a stepladder and an extension ladder in his work truck**, which he had driven to defendants' property," and plaintiff was injured "when **the ladder that he used to access a loft storage area 'kick[ed] out' from under him**," defendants' submissions, "upon which plaintiffs relied in support of their cross motion, **raised triable issues of fact whether plaintiffs 'own conduct** … was **the sole proximate cause of his accident**").

Yao Zong Wu v Zhen Jia Yang, 161 AD3d 813 [2d Dept 2018] (where plaintiff **testified that he "felt the ladder shake; then the ladder leaned and he fell to his right**, causing him to fall to the ground" but "**he did not know what caused the ladder to shake and lean**," and where he further "testified that he had used this ladder in the past, and had noticed nothing defective or broken about the ladder," the "**plaintiff's own submissions demonstrated that there are triable issues of fact** as to how this accident occurred and it cannot be concluded, as a matter of law, that the alleged failure to provide the plaintiff with proper protection proximately caused his injuries"; however, it was error to grant defendants summary judgment since "defendants failed to demonstrate as a matter of law that the ladder provided proper protection, or that the plaintiff was the sole proximate cause of his injuries").

Bonczar v Am. Multi-Cinema, Inc., 158 AD3d 1114, 1115 [4th Dept 2018] (by 3 to 2 vote: where **the ladder's wobbling allegedly caused plaintiff to fall** but "**[p]laintiff did not know why the ladder wobbled or shifted**, and he acknowledged that he might not have checked the positioning of the ladder or the locking mechanism, despite having been aware of the need to do so," there was "'**a plausible view of the evidence**—enough to raise a fact question—that there was **no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident**'").[25]

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[25] The dissenters would have ruled:

> The fact that plaintiff could not identify why the ladder shifted does not undermine his entitlement to partial summary judgment because a plaintiff who falls from a ladder that "malfunction[s] for no apparent reason" is entitled to "a presumption that the ladder … was not good enough to afford proper protection" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 289 n. 8, 771 N.Y.S.2d 484, 803 N.E.2d 757 [2003]; *see O'Brien v Port Auth. of N.Y. & N.J.*, 29 N.Y.3d 27, 33, 52 N.Y.S.3d 68, 74 N.E.3d 307 [2017]).
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> * * *
>
> The majority's reliance on *Blake* is misplaced. The injured worker in that case sustained his injuries when the upper portion of his extension ladder retracted, and he testified at trial that he was not sure whether he had locked the extension clips, i.e., equipment meant to hold the upper portion of the ladder in place (*id.* at 283-284, 771 N.Y.S.2d 484, 803 N.E.2d 757). Based on the injured worker's uncertainty and the fact that the accident occurred in the very manner that the extension clips were meant to prevent, it was logical for the jury to infer both that he had failed to lock the clips and that his negligence in that regard was the sole proximate cause of his injuries (*see id.* at 291, 771 N.Y.S.2d 484, 803 N.E.2d 757; *see generally Schneider v Kings Hwy. Hosp. Ctr.*, 67 N.Y.2d 743, 744, 500 N.Y.S.2d 95, 490 N.E.2d 1221 [1986]). Here, given that an A-frame ladder can wobble or shift for various reasons unrelated to its positioning or locking mechanism, and even for no apparent reason (*see Alvarez v Vingsan L.P.*, 150 A.D.3d 1177, 1179, 57 N.Y.S.3d 160 [2d Dept 2017]), we conclude that plaintiff's deposition testimony does not support a nonspeculative inference that the sole proximate cause of his injuries was his alleged failure to check the positioning of the ladder or whether it was locked into place (*see generally Bombard v Christian Missionary Alliance of Syracuse*, 292 A.D.2d 830, 831, 739 N.Y.S.2d 516 [4th Dept 2002].

158 AD3d at 1116-1117, Dissent.

D. Summary Judgment Because Safety/Elevation Device Was "Inappropriate" Or "Inadequate," Or Denied Because That Issue Was Triable, Or Granted To Defendant Because The Device Was Clearly Not Inappropriate Or Inadequate

Nieto v CLDN NY LLC, 170 AD3d 431, 431-432 [1st Dept 2019] (where plaintiff "was **forced**" **by circumstances to leave his ladder** and perform part of the work "by **standing on display cases approximately 20 feet high**," and where he lost his balance and fell while attempting to return to the ladder, plaintiff was entitled to summary judgment "since **the ladder was an inadequate safety device for the work being performed**" and "[w]hether the ladder shook prior to his fall or during that period in time when he was attempting to recover his balance is of no moment").

Keerdoja v Legacy Yards Tenant, LLC, 166 AD3d 418, 418 [1st Dept 2018] (where "**a metal shim plate affixed to a steel column, that was being installed as part of a temporary truss system, suddenly detached and hit [plaintiff] in the head**," "**[t]he tack welds used to secure the metal shim plate to the column were 'safety devices'** for the purposes of Labor Law § 240(1) because they were intended to be a temporary measure to keep the shim plate attached to the column during installation … at which time the plates would be permanently bolted into place," and **the accident thus occurred "'because of the inadequacy of a safety device** … [that was] put in place as to give proper protection for' plaintiff, entitling him to partial summary judgment [internal quotations omitted]").

Flores v Metro. Transportation Auth., 164 AD3d 418, 419 [1st Dept 2018] (where "**plaintiff fell off a flatbed truck** after **a load of steel beams**, without tag lines, was hoisted above him by a crane, and **began to swing towards him**," "[t]he risk of the hoisted load of beams with no tag lines triggered the protections set forth in Labor Law § 240(1)" and "**[t]he motion court erred in denying plaintiff's motion for partial summary judgment** on his Labor Law § 240(1) claim" inasmuch as **plaintiff "established that the accident was proximately caused by defendants' failure to provide safety devices necessary to ensure protection from the gravity-related risks** posed by the work he was engaged in, in violation of Labor Law § 240(1)").

Provens v Ben-Fall Dev., LLC, 163 AD3d 1496 [4th Dept 2018] ("'[T]he **question** of **whether [a] device provided proper protection** within the meaning of Labor Law § 240(1) is **ordinarily a question of fact, <u>except</u>** in those instances **where the unrefuted evidence** establishes that **the device collapsed, slipped or otherwise failed to perform** its [intended] function of supporting the worker and his or her materials'").

Munzon v. Victor at Fifth, LLC, 161 AD3d 1183 [2d Dept 2018] (where plaintiff **fell through a partially demolished floor** while helping a coworker move a heavy beam, where plaintiff **detached his harness from the cable safety line "because the safety line was not long enough** to allow him to reach his coworker," and where the two workers had been moving the beam "in the manner in which they had been instructed by their employer," **plaintiff was properly**

granted summary judgment under Labor Law § 240 because he fell when and because he "was **not provided with adequate safety equipment to prevent him from falling**").

Greenwood v Whitney Museum of Am. Art, 161 AD3d 425 [1st Dept 2018] (where plaintiff "sustained injuries during construction of a building when a **piece of scrap metal fell on him**," where "[t]he piece of metal was being used by his co-worker, who was welding steel about 30 feet above on a lift, as a 'dunnage' to secure a 'fire blanket' to prevent sparks from igniting objects in surrounding areas," and where "plaintiff was 'fire watching,' which required him to remove flammable objects and suppress any fires started by errant sparks," the "**court correctly granted plaintiff partial summary judgment** on his Labor Law § 240(1) claim inasmuch as the record establishes that plaintiff's injury was **the proximate result of the failure to take adequate steps** to **secure the piece of scrap metal from falling from the height at which it was being used**").

Dirschneider v Rolex Realty Co. LLC, 157 AD3d 538, 539-540 [1st Dept 2018] (where plaintiff **fell "while helping to transport a 600-pound, 14-foot-long steel I-beam down a staircase**," "plaintiff was **entitled to summary judgment**" under Labor Law § 240 because "[t]he **record establishes a failure to provide plaintiff and his coworker with devices offering adequate protection against the gravity-related risks of moving an extremely heavy object** down a staircase, leading to the workers' loss of control over the object's descent and plaintiff's injuries").

Houston v State, 171 AD3d 1145 [2d Dept 2019] (where "claimant was injured when **iron posts that were suspended by a crane operated by a fellow employee fell and struck the claimant** on the head," where "**claimant testified … that he secured the subject posts using a 3/8th-inch choker** for loading onto the crane," and "**opined that the crane operator must have moved the load quickly or in a manner that caused the posts to become loose**," where the **crane operator "testified … that he lifted the load slowly and vertically** and, nevertheless, the posts slipped from the choker and fell," and where "claimants did not submit expert testimony or affidavits in support of their motion for summary judgment," "**claimants failed to establish their prima facie entitlement to judgment as a matter of law**" inasmuch as the "evidence submitted by the claimants was **insufficient to establish that the posts fell due to the absence or inadequacy of an enumerated safety device**, and the claimants further failed to eliminate all triable issues of fact as to whether the claimant's conduct was the sole proximate cause of the accident").

Orellana v 7 West 34th Street, LLC, 173 AD3d 886 [2d Dept 2019] (where "plaintiff was standing on an eight-foot-high A-frame ladder and **using an electric saw to cut brackets which held an air duct to the ceiling**" when he "allegedly fell from the ladder and sustained severe injuries," **plaintiff "failed to demonstrate, prima facie, that the subject ladder** was **an inadequate safety device** for the work in which he was engaged at the time of his alleged accident" inasmuch as "**[t]he mere fact that the plaintiff fell from a ladder** does not, in and of itself, establish that proper protection was not provided"; likewise, "**defendants failed to establish their prima facie entitlement to judgment as a matter of law**" by **means of an expert's affidavit** stating that **the subject ladder "was so constructed, place and operated as**

to give proper protection" particularly because **the opinion was "conclusory and unsupported by evidence** in the record").

Radeljic v Certified of N.Y., Inc., 161 AD3d 588 [1st Dept 2018] (where plaintiff fell into an elevator shaft, there were "**[i]ssues of fact** as to **whether the injured plaintiff's own conduct** was **the sole proximate cause of his accident**" where there was "**conflicting evidence … whether the [available safety] harness would have allowed plaintiff to reach and perform his work**" and "conflicting statements about who was responsible for removing a plywood barricade positioned in front of the elevator shaft opening" and "as to whether plaintiff, a foreman who had the authority to order his subordinate who was present at the time of the accident to replace the barricade, was the sole proximate cause of his accident").

Loretta v Split Dev. Corp., 168 AD3d 823, 826 [2d Dept 2019] (where **plaintiff fell from a ladder** but **Supreme Court denied his motion for summary judgment** and the **jury thereafter returned a defendant's verdict**, "[t]he jury could have [fairly] credited [plaintiff's] deposition and trial testimony that he did not remember if he was twisting the vertical pipe at the time of the accident, as well as the trial testimony of the plaintiff's engineering expert that, if the ladder did not topple over as Loretta was twisting the vertical pipe, the expert's opinion that the ladder was an inadequate safety device would be different, to **rationally conclude** that the **plaintiffs did not meet their burden of demonstrating that the ladder was an inadequate safety device**").

Mitchell v City of New York, 169 AD3d 505, 505 [1st Dept 2019] ("[t]here is no viable Labor Law § 240(1) claim where, as here, '**plaintiff simply lost his footing while [descending] a properly secured, non-defective extension ladder** that did not malfunction' [citation omitted]").

Pacheco v Recio, 168 AD3d 867 [2d Dept 2019] (where "plaintiff alleged that he fell as he stood on the third rung of a six-foot metal A-frame ladder while holding a small piece of sheetrock in one hand," and **where "plaintiff fell because he lost his balance"** and "**the ladder from which the plaintiff fell was not defective or inadequate and that the ladder did not otherwise fail to provide protection**," the **motion court correctly granted defendant summary judgment** with respect to the plaintiff's Labor Law § 240 claim).

E. Material Issues Of Fact Precluding Summary Judgment

Lozada v St. Patrick's RC Church, 2019 NY Slip Op 05971 [2d Dept July 31, 2019] (where **plaintiff alleged** that the **ladder** on which he was standing **was unsecured**, that it **shifted when he reached to grab some wires**, and that "he **grabbed onto a hole in the wall and stabilized the ladder, but sustained severe injuries to his back** in the process," but where a "**coworker testified** that **he was standing at the bottom of the ladder, holding it, when he felt the ladder jolt**," "[w]hether the ladder was being stabilized at the time of the accident **presents a triable issue of fact**" inasmuch as "'[t]he mere fact that a plaintiff fell from a ladder does not, in and of itself, establish that proper protection was not provided'").

Davies v. Simon Property Group, Inc., 2019 NY Slip Op 05955 [2d Dept July 31, 2019] (where **plaintiff claimed** that an **inadequately secured piece of plywood caused him and his cart to fall** into "**a three-foot wide and three-foot deep hole** or trench," but where "**two other witnesses testified** at their depositions that **there was no hole or trench underneath the plywood**," the "**conflicting testimony**" "regarding whether the plywood was, under the circumstances, the functional equivalent of a scaffold meant to prevent the plaintiff from falling into a three-foot-deep hole or trench" **raised triable issues of fact**).

Vasquez-Tineo v 1764-1766 Westchester Ave., LLC, 171 AD3d 605 [1st Dept 2019] (although "[p]laintiff established entitlement to judgment as a matter of law by his testimony that he fell from an unstable ladder that collapsed while he was painting," "**defendants submitted evidence**, including testimony of a supervisor of the job site, that **raised triable issues of fact as to the circumstances surrounding the accident, including what ladder plaintiff was using when he fell**").

Guerrero v 115 Cent. Park W. Corp., 168 AD3d 408 [1st Dept 2019] (where, on the one hand, "**plaintiff testified that the scaffolding on which he was standing moved from side-to-side, causing his leg to fall into a gap** between the scaffolding and the adjacent building," but, on the other hand, "**plaintiff did not tell his foreman about his accident on the day that it occurred**, and **plaintiff's foreman testified that when plaintiff did report the accident the next day, plaintiff said that he was injured while lifting equipment**, but did not mention the scaffold," "**[s]ummary judgment was properly denied** because triable issues of fact exist as to whether plaintiff Hector Guerrero's accident occurred in the manner in which he alleged").

Caminiti v Extell W. 57th St. LLC, 166 AD3d 440, 440-441 [1st Dept 2018] (while plaintiff "made a prima facie showing of entitlement to judgment as a matter of law on the Labor Law § 240(1) claim by presenting decedent's statement that **he was working on a ladder when it started to move**, and when he tried to stabilize the ladder, it tipped and struck him in the chest" and **was "not 'required to present further evidence that the ladder was defective** [citation omitted],'" **defendant raised a triable issue by presenting proof**, proof that included statements decedent allegedly made to a co-worker and also included in the medical records, **to the effect that decedent never fell and instead descended from the ladder due to chest pains**).

Giannas v 100 3rd Ave. Corp., 166 AD3d 853, 855 [2d Dept 2018] (summary judgment was "not appropriate" where there was "**a triable issue of fact** regarding **whether the accident was caused by the shifting of the scaffold or by the plaintiff tripping while entering the building from the scaffold** and through the window").

Zalewski v MH Residential 1, LLC, 163 AD3d 900 [2d Dept 2018] (where plaintiff **claimed when deposed "that he was injured when he fell from a ladder**" but "also **admitted that he told his treating physicians at the hospital** that he was injured when he **tripped and fell on the sidewalk**," "**plaintiff failed to meet his prima facie burden for summary judgment** on the cause of action alleging a violation of Labor Law § 240(1)" inasmuch as it was not "'the court's function on a motion for summary judgment'" to assess the plaintiff's credibility).

Martin v Niagara Falls Bridge Commn., 162 AD3d 1604 [4th Dept 2018] (by **3 to 2 vote**: where "the **bridge scaffolding sheet** that [plaintiff] was detaching from underlying support cables **tipped, causing him to fall approximately 25 to 30 feet** before landing on a steel box beam," where the plaintiff's **employer purportedly "had a policy that the workers on the platform were required to be tied off 100 percent of the time**" [Dissent], and where defendants urged that "**a variety of safety devices [was available] for plaintiff' use**, including harnesses, lanyards, retractable lanyards, ropes, rope grabs, 'choker[s]' and fall arrest cables" and also that "[t]he safety equipment was kept in a trailer on the work site and was available to the workers and, as the foreperson, plaintiff was responsible for the safety of all workers" [Dissent], there were nonetheless **triable issues of fact** inasmuch as, **(1) plaintiff testified that the six-foot lanyard given to him "was too short to permit plaintiff to reach the final clip** anchoring the bridge scaffolding sheet," **(2) defendants "failed to establish as a matter of law that an *adequate* safety device was present** that would have prevented plaintiff 'from harm directly flowing from the application of the force of gravity to … [his] person,'" and, **(3) plaintiff "testified that his on-site supervisor pushed him to hurry** and, although there was purportedly a rule that the workers on the bridge scaffolding platform were required to be tied off 100 percent of the time, '[n]obody follow[ed] it'").

Santos v Condo 124 LLC, 161 AD3d 650 [1st Dept 2018] (by **3 to 1 vote**: where **plaintiff claimed** that the **scaffolding floor "was missing some of the planks**," and that he was thereby caused to **fall "10 to 12 feet onto the pipes of the scaffold's lower level**," but where **two witnesses said** that they observed the scaffold "immediately following the accident," and "**[t]here was nothing about the wooden planking that appeared out of the ordinary**," and where the latter testimony was consistent with hearsay proof that could be properly considered since it was "not the only evidence submitted in opposition," there were "**conflicting versions of the accident**," including whether plaintiff fell to the ground or just tripped and fell into the crossbracing, which precluded grant of summary judgment to plaintiff).[26]

Maman v Marx Realty & Improvement Co., Inc., 161 AD3d 558 [1st Dept 2018] (where plaintiff "fell through an opening in the floor of a building under construction," "**[a] fall through an unguarded opening in the floor** of a construction site **constitutes a violation** of Labor Law § 240(1) **only where a safety device adequate to prevent such a fall was not provided**" and there was **here a triable issue "whether static lines were in place for him to safely tie off**").

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[26] While noting that the defense "seized" on plaintiff's testimony that the scaffold was "missing wood" and tried to create a discrepancy with post-accident testimony that the scaffold was not "missing wood," the dissent in ***Santos*** said that plaintiff was carrying a 400-500 load and walking backwards when he fell and that plaintiff merely assumed that the scaffold flooring was "missing wood." In the dissent's view, "[e]ven if the tower scaffold was not 'missing wood,' summary judgment should have been granted to plaintiffs because 'there [was] no view of the evidence at trial to support a finding that the absence of safety devices was not a proximate cause of the injuries'" in this case in which "the only *competent* evidence" established that plaintiff "fell from a significant elevation differential."

Galvez v Columbus 95th St. LLC, 161 AD3d 530 [1st Dept 2018] (where plaintiff was "**ascending to the top of a building on a motorized suspended scaffold**," where plaintiff and his co-worker "**had to press their backs against the wall and use their legs to push the scaffold out" in order to clear a concrete beam**, and where **plaintiff thereby "injured his lower back**," "**neither side is entitled to summary judgment**, because **an issue of fact** exists as to whether plaintiff's negligence was the sole proximate cause of his injuries" inasmuch as "**[t]he testimony of plaintiff and his foreman conflict as to whether plaintiff had been instructed to push off the scaffold in the manner described**").

McCue v Cablevision Sys. Corp., 160 AD3d 595 [1st Dept 2018] (where plaintiff **allegedly** sustained injuries "when he **fell from a utility pole while attempting to troubleshoot a cable installation activation** that did not work," "Supreme Court correctly determined that **issues of fact exist as to how the accident occurred**" inasmuch as "**the individual who performed that activation testified that plaintiff was not present**, and he could not recall any problems with the activation").

Hobbs v MTA Capital Constr., 159 AD3d 544 [1st Dept 2018] (where plaintiff "testified that he **fell from a fixed, job-made access ladder** when the **edge of the rung** on which he was stepping **suddenly splintered and he fell**," "**defendants raised triable issues of fact** through the **affidavits of other workers on the site** who stated that **they observed the ladder after the accident** and **found that no rungs were damaged or broken**").

Nieves v Trustees of Columbia Univ. in City of New York, 158 AD3d 464, 464 [1st Dept 2018] (where "[p]laintiff testified that she was injured when, **while standing on a scaffold** and constructing a wall, she **fell from the scaffold to another platform several feet below**" but **defendants "submitted an affidavit from plaintiff's foreman in which he stated that when he responded to the accident scene, he found plaintiff sitting on the scaffold platform on which she had been working** and she had to be carried down" and the "accident reports also state that following the accident, plaintiff was found sitting on top of the scaffold," **triable issues of fact** warranted the denial of plaintiff's motion).

Gutierrez v Harco Consultants Corp., 157 AD3d 537, 538 [1st Dept 2018] ("**plaintiff was not entitled to summary judgment** as to liability on the claim under § 240(1) because the **records of his medical treatment create an issue of fact** as to **whether his injury was incurred in the manner described in his testimony**").

F. Immaterial Factual Issues That Did Not Preclude The Grant of Summary Judgment

Ajche v Park Ave. Plaza Owner, LLC, 171 AD3d 411 [1st Dept 2019] (where **plaintiff, who had "no recollection" of the accident**, somehow "**sustained injuries while insulating air-conditioning ducts in the kitchen ceiling** of a restaurant under construction," where **plaintiff nonetheless claimed "he fell because the A-frame ladder on which he was working 'moved,' based on what his foreman had allegedly told his wife"** and where **the foreman "testified**

that plaintiff fell from a scaffold, as he saw plaintiff on the scaffold when he went to get coffee, and found him lying on the floor near the scaffold when he returned," plaintiff "demonstrated entitlement to partial summary judgment on the issue of liability on his Labor Law § 240(1) claim"; "**[a]lthough the conflicting testimony raised an issue of fact as to whether plaintiff fell off a ladder or a scaffold," "under either version of the accident, his fall was caused by an inadequate safety device for his job**, and none of the defendants raised a triable issue of fact"; regarding "the ladder version," where plaintiff "testified that, immediately before the fall, he was standing on the second to the last rung up, with his hands over his head toward the duct, which he could barely reach," such would "establish[] prima facie that the ladder did not provide proper protection for plaintiff"; regarding "the scaffold version," the scaffold's lack of guardrails would establish liability).

Burns v Marcellus Lanes, Inc., 169 AD3d 1457, 1458 [4th Dept 2019] (where plaintiff was injured "while removing snow and ice from the roof of a building owned by defendant after he **fell from the bucket of a backhoe being used to lift him to the roof," "plaintiff is entitled to summary judgment irrespective of whether his injuries were caused by the fall itself or by being struck by the backhoe** in the moments immediately following the fall … Here, the safety equipment provided to plaintiff did not prevent him from falling; thus, the core objective of Labor Law § 240(1) was not met").

Barrios v 19-19 24th Ave. Co., LLC, 169 AD3d 747, 748-749 [2d Dept 2019] (where plaintiff was **injured "when a differential block and chain fell onto his head** as he and his coworkers were preparing a hoisting apparatus to remove and replace a broken roll-up gate on the defendant's premises," "the **defendants are liable whether the plaintiff's coworker accidentally dropped the differential while preparing to use the hoisting apparatus to remove the old roll-up gate, or the differential fell because it was inadequately secured** … Accordingly, the plaintiff was entitled to summary judgment on the issue of liability on the Labor Law § 240(1) cause of action").

Cashbamba v 1056 Bedford LLC, 168 AD3d 638, 639 [1st Dept 2019] (where it was **undisputed "that plaintiff fell from the seventh floor to the sixth floor of the building on which he was working**, a distance of approximately nine feet," and where it was **also "undisputed that there were no safety harnesses or other safety devices** for plaintiff to use," **the fact that "'the parties offered different versions of plaintiff's accident makes no difference with respect to defendants' liability under Labor Law § 240(1)**,'" and this was so even though "the motion court properly denied the cross motion of defendants/-third-party plaintiffs on the Labor Law §§ 241(6), 200, and common-law negligence claims, since there are triable issues of fact as to exactly how, where and why the underlying incident occurred").

Poulin v Ultimate Homes, Inc., 166 AD3d 667, 668-670 [2d Dept 2018] (where plaintiff "alleged that he was injured at a residential construction site when he **fell through the opening of an unfinished stairwell into the basement** of the premises," Supreme Court properly granted plaintiff summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1); "**[r]egardless of the precise manner in which the accident occurred**, a

defendant is not absolved from liability where, as here, a plaintiff's injuries are at least partially attributable to the defendant's failure to provide protection as mandated by the statute").

Cooper v Delliveneri, 166 AD3d 1152 [3d Dept 2018] (where **plaintiff was working from "a makeshift elevated platform"** that he fashioned "from his A-frame ladder and a scaffolding plank known as a pick, running the pick between a run of the ladder and the top landing of the staircase," where he was using the platform to install "siding above a staircase running along the side of the building," where **he built the makeshift platform because "the lift would not fit in the area, he was not provided with a traditional scaffold** and he **could not have used a 'ladder jack' scaffold in the area due to both the equipment being in use elsewhere and the location of the staircase,"** where plaintiff's expert "opined that the unsecured makeshift platform was unsafe and that defendant violated Labor Law § 240(1) by failing to furnish adequate safety equipment, such as a proper scaffold and a safety harness," and **where defendant opposed the motion "by arguing that [there were] inconsistencies in plaintiff's account,"** "Supreme Court properly awarded plaintiff summary judgment on his Labor Law § 240(1) claim" inasmuch as **the variations in plaintiff's accounts "did not suggest 'that plaintiff's fall and injuries were caused by anything other than the unsecured [pick and] ladder or that plaintiff's own conduct was the sole proximate cause of the accident'"**).[27]

White v 31-01 Steinway, LLC, 165 AD3d 449, 451-452 [1st Dept 2018] (where plaintiff fell from a ladder while installing a sign, where plaintiff had "set up the ladder parallel to the building and straddled atop the ladder, one foot on each side, to perform his work" "[b]ecause the sidewalk was congested with pedestrian traffic," where plaintiff thereafter lost his balance and began to fall, and when he then "**jumped off the ladder to avoid falling with the ladder**," "plaintiff established, prima facie, that his accident was caused by Express's and the Steinway defendants' failure to provide an adequate safety device to prevent plaintiff from falling off the ladder, in violation of Labor Law § 240(1), and defendants failed to raise an issue of fact as to whether plaintiff was the sole proximate cause of the accident" inasmuch as "there is **no dispute that the ladder was unsecured and that no other safety devices were provided to plaintiff**" and "defendants failed to show that plaintiff was a recalcitrant worker as they did not establish that he was specifically instructed to use a particular safety device other than the ladder and that he refused to do so"; "**[t]o the extent there are any differences in plaintiff's and Kavelski's testimonies as to how the accident occurred, such differences fail to raise an issue as to whether plaintiff was the sole proximate cause of the accident**" inasmuch as the ladder was not secured and there were no other safety devices under either version).

Makkieh v Judlau Contr. Inc., 162 AD3d 468 [1st Dept 2018] (where plaintiff "was injured when **the nylon sling attaching a one-to-two ton steel plate to an excavator snapped, causing**

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[27] The dissenter in ***Cooper*** felt that "various statements made by plaintiff raise[d] a question of fact as to how the accident actually occurred, i.e., whether he fell off a ladder or a makeshift pick and ladder platform" (166 AD3d at 1154). The majority was convinced by plaintiff's explanation "that he had not told defendant and others about a pick resting on the ladder because there was not 'much point in' providing that detail to people who lacked construction experience and did not know what a pick was" (*id.*).

the heavy plate to fall to the ground, bounce, and sever the pole of a nearby street sign," where **the sign was thereby "propelled toward plaintiff**, hitting his right forearm and causing him serious personal injuries," and where "photographs taken immediately before the accident show that the steel plate was **about two or three feet above the ground**," "[d]efendants' efforts to cast doubt on the specific device used to attach the steel plate to the excavator [were] irrelevant and fail[ed] to raise an issue of fact"; "**[r]egardless of whether Judlau used a nylon sling, a metal sling, or any other device** to attach the steel plate to the excavator, **it failed to provide 'proper protection'"** and plaintiff was entitled to summary judgment under Labor Law § 240).

Plywacz v 85 Broad St. LLC, 159 AD3d 543 [1st Dept 2018] (where plaintiff was **standing on a ladder and gripping a suction cup**, where **the suction cup came loose**, and where **that caused the ladder to wobble and plaintiff to fall**, plaintiff was **properly granted partial summary judgment** and it was "**irrelevant** whether plaintiff initially **lost his balance before or after the ladder wobbled** because it is uncontested that the precipitating cause of both was that the suction cup that he had affixed to the panel and gripped to pull the panel into place came loose" and "**[u]nder either scenario, the ladder failed to remain steady** under plaintiff's weight as he performed his work").

G. Unwitnessed Or Witnessed-Only-By-Plaintiff Accidents

Burhmaster v CRM Rental Mgt., Inc., 166 AD3d 1130, 1131-1133 [3d Dept 2018] (where the plaintiff-roofer "**fell from the roof** of a two-story building while he was performing emergency repairs on a windy day," and where the proof established "that **no safety devices were in use to prevent workers from falling**," "[a]lthough the other worker who was on the roof apparently did not see plaintiff's fall, **the fact that an accident is unwitnessed does not bar summary judgment on a Labor Law § 240(1) claim 'where, as here, there are no bona fide issues of fact with respect to how it occurred'** [citation omitted] … **[the defendants'] argument that the accident could not have happened in the way that plaintiff described and that he must have fallen in some other, unspecified manner was not only speculative but irrelevant**").

Passos v Noble Constr. Group, LLC, 169 AD3d 706, 708 [2d Dept 2019] (where plaintiff's proof established that he was **struck "by an unsecured four-by-eight-foot plywood sheet** that fell from the first floor ceiling onto the plaintiff as he was walking underneath," that "**one of the defendants' witnesses, who did not witness the accident, testified at his deposition that the plywood sheet 'most likely' could not remain in the ceiling unsupported by vertical posts**," such **did not render the accident described by plaintiff "impossible"**).

Nava-Juarez v Mosholu Fieldston Realty, LLC, 167 AD3d 511, 513 [1st Dept 2018] ("[p]laintiff established his prima facie entitlement to partial summary judgment on his section 240(1) claim through his testimony that he fell and was injured when **the ladder from which he was working shifted suddenly** and the affidavit of a coworker who witnessed the accident and averred that plaintiff was painting the exterior facade of defendant's tavern when his ladder shifted, causing plaintiff to fall"; the "**mistranslated statement in the C-3 report**" that **plaintiff fell down "stairs" did not raise an issue of fact** inasmuch as "**the Spanish word 'escalera'**

may be translated as either 'stairs' or 'ladder'" and the building, being a single story, had no stairs).

Rroku v W. Rac Contr. Corp., 164 AD3d 1176, 1176-1177 [1st Dept 2018] (where plaintiff testified "that, as he was climbing down a six-foot scaffold, **the scaffold wobbled, causing him to fall to the floor**," such "establishes prima facie defendants' liability under Labor Law § 240(1)" and "**[t]he fact that plaintiff was the only witness to his accident does not preclude summary judgment in his favor**, since nothing in the record controverts his account of the accident or calls his credibility into question").

Concepcion v 333 Seventh LLC, 162 AD3d 493, 494 [1st Dept 2018] (where **plaintiff "fell from a six-foot A-frame ladder" when the ladder moved**, "[p]artial summary judgment on the issue of liability was properly granted in favor of plaintiff"; "**[t]hat plaintiff is the sole witness to the accident does not preclude summary judgment in his favor where nothing in the record contradicts his account or raises an issue of fact** as to his credibility" and "any failure on plaintiff's part to ensure that his coworker had properly set up the ladder would, at most, constitute comparative negligence, a defense inapplicable to a Labor Law § 240(1) cause of action").

Gonzalez v 1225 Ogden Deli Grocery Corp., 158 AD3d 582, 583 [1st Dept 2018] ("fall from an unsecured ladder establishes a violation of the statute … for which defendant property owner is liable, even if the tenant contracted for the work without the owner's knowledge … **Defendant's argument that summary judgment should be denied because the accident was unwitnessed is similarly unpersuasive**").

Serrano v TED Gen. Contr., 157 AD3d 474, 474 [1st Dept 2018][28] (where plaintiff "was injured when, during the course of moving sheetrock into a building, he stood on top of a **sidewalk shed that broke beneath him**, causing him to fall to the sidewalk below," "the motion court correctly determined that **these facts demonstrated plaintiffs' prima facie entitlement to summary judgment**" but "erred in finding that [defendant] EAS raised a triable issue of fact" inasmuch as "defendant EAS's expert report was purely speculative in that it was not based on an examination of the sidewalk shed at the time of the accident" and "**[t]hat no witness other than plaintiff testified as to the occurrence of the accident does not bar judgment in his favor**").

[28] Disclosure: I represented the plaintiffs on the appeal.

H. Other Failures To Raise A Bona Fide Issue Of Fact

Cuevas v Baruti Constr. Corp., 164 AD3d 447 [1st Dept 2018] (where plaintiff testified that he and his four co-workers were instructed to lower a roof cutting machine weighing between 200 and 500 pounds lowering it "from the roof of the building on which they were working to the ground about 10 feet below," where **plaintiff's team was purportedly "instructed to lift the machine over a six-inch parapet wall on the roof and let it fall onto insulating material on the ground level, guided by nothing more than a rope tended to by coworkers on the ground,"** where plaintiff testified that **the machine dropped and "crushed plaintiff's thumb against the wall as it fell to the ground,"** where **three of plaintiff's co-workers testified to the same effect**, where **defendant opposed the motion with a witness affidavit that suggested but did not quite state that the injury had instead occurred while the workers "were wheeling the machine across the roof**," and where **plaintiff responded with a "clarifying" affidavit wherein the same witness supported plaintiff's claims**, the **motion court properly granted plaintiff summary judgment** under Labor Law § 240, particularly since the witness's clarifying affidavit was also consistent with an unsworn handwritten statement he gave one month after the accident occurred; the court added: "[w]e have recognized the distinction in Labor Law § 240(1) cases between contradictory evidence and evidence that is subject to explanation in granting partial summary judgment on liability to a plaintiff … Veras's three statements, when taken together and along with those of the three other eyewitnesses and that of plaintiff, provided a detailed and consistent recounting of the accident as having occurred during the lowering of the machine").

I. Defense Motions For Summary Judgment

Beraun Soller v Dehan, 173 AD3d 803 [2d Dept 2019] (where plaintiff, an automobile mechanic, was using an electrical saw to cut the sheetrock in the ceiling and where "**the electrical saw**, which allegedly was an improper and dangerous piece of equipment for the task at hand, **struck something and 'kicked back,'** injuring the plaintiff," **Supreme Court correctly granted the defendants' motion to dismiss the plaintiffs' claims under Labor Law §§ 240 and 241** inasmuch as "**plaintiff did not allege that his injuries were the result of an elevation-related risk, or of the violation of any provision of the Industrial Code**").

J. Allegedly Premature Motions

Whether Plaintiffs' Motion For Summary Judgment Under Labor Law § 240 Was "Premature" — *Somereve v Plaza Constr. Corp.*, 31 NY3d 936 [2018], *rev'g* 136 AD3d 537 [1st Dept 2016].

The curious part of the Court of Appeals' memorandum ruling is not what the Court said but instead what it did not say. But that becomes an issue only if one reads the dueling opinions rendered by the Appellate Division.

Appellate Division Majority: According to the Appellate Division majority, plaintiff was operating a prime mover (like a small forklift). He was in the process of hoisting a load of bricks onto a scaffold 5½ to 6 feet high when "the prime mover flipped forward and plaintiff was ejected off the back of the machine and onto the concrete floor" (136 AD3d at 537-538).

At least, that was what plaintiff said. Plaintiff's story was supported by the project superintendent who did not see the accident but said that plaintiff told him at the scene the prime mover threw him and that he "flew over the handlebars" of the machine (*id.* at 538).

Defendant subpoenaed two other people who had been at the site but plaintiffs moved for summary judgment before they could be deposed. Defendant argued, amongst other things, that the motion was premature since the two witnesses had not yet been deposed.

The Appellate Division majority rejected that argument on the grounds that, (a) defendant "offered nothing more than speculation about" what the witnesses' testimony would be, and, (b) nothing that they might say could, in any event, defeat plaintiffs' motion for summary judgment.

Regarding the latter point, the majority noted that defendant advanced two alternative theories: (1) "that the prime mover, which plaintiff himself loaded, may have been carrying too much weight," and, (2) "that the bricks on the prime mover may have come into contact with the scaffold as plaintiff was raising the load, thus causing the prime mover to tip forward" (*id.* at 538-539). But, as the majority saw it, plaintiff should prevail in either case. "[I]f the prime mover pitched forward due to the force of gravity, it failed to offer adequate protection and Labor Law § 240(1) applies" (*id*. at 538). If, on the other hand, "the accident occurred because either the prime mover or scaffold could not support the weight of the brick load, the accident also resulted from the application of the force of gravity to the load during the hoisting operation, and Labor Law § 240(1) applies" (*id*.). And assuming arguendo that plaintiff himself was negligent in overloading the prime mover or in negligently lowering the pallet, it would still remain that "the failure to provide a proper hoisting device to protect plaintiff violated Labor Law § 240(1)" (*id*. at 540).

As for the different question of whether the accident was sufficiently elevation-related to trigger the application of Labor Law § 240, the majority charged that the dissent understated matters in characterizing the accident as an "alighting" accident inasmuch as plaintiff was literally catapulted into the air:

> The dissent also fails to properly characterize the nature of plaintiff's alleged accident. Plaintiff did not simply "f[a]ll from the platform of the prime mover situated eight inches off the floor," as the dissent states. Similarly, plaintiff was not simply "alighting" from the prime mover. The testimony in the record shows instead that the prime mover tipped forward, with a resulting "catapult-type effect" on plaintiff. The prime mover then ejected plaintiff upward, causing him to hit the ductwork or the ceiling before he was "slammed" onto the concrete floor of the site. Certainly, it is appropriate to characterize this sequence of events as a gravity-related accident (*see Potter*, 71 A.D.3d at 1566, 900 N.Y.S.2d 207).

136 AD3d at 539.

Dissent: The dissenters would have denied plaintiff's motion on three different grounds:

> (1) the evidence *already in the case* raised "a factual issue as to whether plaintiff's injuries were caused solely by his own negligent operation of the machine" inasmuch as "no defect in the machine he used to lift a pallet of bricks onto a scaffold is identified" and "plaintiff could not give an explanation as to how the incident occurred" (136 AD3d at 540);
>
> (2) the motion was premature because there were "at least two identified witnesses to the occurrence who were subpoenaed but have not yet been deposed and are in a position to shed light on how it occurred" (*id*.); and,
>
> (3) the accident itself did not come within the statute because "[p]laintiff's fall from the platform of the prime mover situated eight inches off the floor" — which was how the dissenters characterized the accident — "hardly represents 'a risk arising from a physically significant elevation differential' … let alone one of the 'extraordinary elevation risks envisioned by Labor Law § 240(1)'" (*id*. at 544).

Regarding the elevation-relatedness issue, the dissenters said:

> … in reaching its conclusion that the accident was "gravity-related" and thus summary judgment to plaintiff was warranted, the majority stresses that plaintiff was "ejected" from the prime mover by a "catapult-type effect" and was then "slammed" on to the concrete floor of the site. However, this aspect of the accident is not dispositive and a focus on it evades the more relevant issues concerning whether plaintiff was the sole proximate cause of the accident. Instead, the proper focus should be on the evidence of *how* the accident occurred, which, at the very least, raises the possibility that plaintiff was ejected from the prime mover solely because he negligently raised the mover's forks into the scaffold, causing the mover to pitch forward.

136 AD3d at 546.

Court of Appeals' Reversal: The Court of Appeals provided exactly one sentence of explanation for its unanimous reversal, stating:

> Here, where there is insufficient evidence concerning how the accident occurred, the requested discovery could aid in establishing what happened, and the note of issue was not due to be filed for another six months, summary judgment was prematurely granted (*see Groves v. Land's End Hous. Co.*, 80 N.Y.2d 978, 980, 592 N.Y.S.2d 643, 607 N.E.2d 790 [1992]).

Comment: Obviously, we can draw the conclusion that a summary judgment motion may be premature if there is discovery outstanding and it is uncertain how the accident occurred. But what, if anything, are we to make of the fact that the Court said nothing at all about elevation-relatedness?

Consider: the plaintiffs' best case scenario was that plaintiff was, as he claimed, catapulted when the prime mover flipped forward. If even that would have been insufficient to establish elevation-relatedness, there would be no point in remanding and no point in wasting the parties' time and courts' time with further discovery and further motion practice.

So are we to infer that the court impliedly ruled or assumed that the case would come within the statute if the facts *were* as plaintiffs claimed?

Rutherford v Brooklyn Navy Yard Dev. Corp., 2019 NY Slip Op 06008 [2d Dept July 31, 2019] (where defendant Monadnock's **motion for summary judgment** "was **made before a preliminary conference was held, before any written discovery was exchanged**, and **before any depositions were taken**," and where "the plaintiff and Brooklyn Navy Yard Development established that discovery with respect to several relevant issues raised by Monadnock [not identified in the opinion] in its motion, some of which were exclusively within the knowledge of Monadnock, was necessary to oppose Monadnock's motion," **Supreme Court correctly denied the motion as premature**).

Yiming Zhou v 828 Hamilton, Inc., 173 AD3d 943 [2d Dept 2019] (where plaintiff, who "ordinarily worked as a salesman at a kitchen plumbing supply center," "**allegedly was instructed to run thermostat cable wiring through a wall** on the second floor of the subject building," and where **plaintiff** "**allegedly stepped on a thin, unsecured piece of styrofoam** covering a rectangular duct opening in the floor, and **the styrofoam broke underneath him**, causing him to **fall through the hole approximately 15 feet to the building's first floor**," **plaintiff's motion for summary judgment was not premature** inasmuch as "defendants failed to demonstrate how further discovery might reveal or lead to relevant evidence, or that facts essential to oppose the motion were exclusively within the plaintiff's control").

Espinoza v Fowler-Daley Owners, Inc., 171 AD3d 480 [1st Dept 2019] (if defendant "needed to conduct additional nonparty depositions in order to successfully oppose the [plaintiff's summary judgment] motion, then it **should have either deposed those witnesses during the nearly two years that discovery was open in this case or moved to vacate the note of issue** on that basis"; it "'cannot cite [its] own inaction as justification to deny' plaintiff's summary judgment motion [citation omitted]").

K. Evidentiary Issues Concerning Party Admissions, Accident Reports, And/Or OSHA Findings

Clause v Globe Metallurgical, Inc., 160 AD3d 1463 [4th Dept 2018] (where **defendant's answer "merely admitted** that it **entered into a contract** with plaintiff's employer **for the performance** at defendant's facility of **certain undefined 'construction work,'" such did not**

constitute an admission that the subject work fell within the ambit of Labor Law § 240 since "construction work" "is not an enumerated activity").

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 NY2d 132, 134 [1993] (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 eve though 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 NY2d 918, 919-920 [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 NY2d 555, 563 [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, 81 NY2d 921 [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 NY2d 833 [1996] (where plaintiff was injured while standing on a perfectly fine ladder … because it had been set up and **placed on "gunk"** … **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 Hous. Services of New York City, Inc., 1 NY3d 280 [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 NY3d 35, 36 [2004] (the "recalcitrant" worker who was **told to use a safety line and "chose to disregard those instructions**," and whose recovery was thus barred).

Montgomery v Fed. Express Corp., 4 NY3d 805 [2005] (the plaintiff who **intentionally jumped**, sustaining injury; recovery barred).

Robinson v E. Med. Ctr., LP, 6 NY3d 550, 553–555 [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. *Gallagher*

Gallagher v New York Post, 14 NY3d 83, 88 [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").

D. The Court Of Appeals' Post-*Gallagher* Rulings

(1) Sole Proximate Cause And The "Plaintiff Wasn't The Only Fool" Issue — *Barreto v Metro. Transp. Auth.*, 25 NY3d 426 [2015].

Where plaintiff was an asbestos handler who **fell through an uncovered manhole**, and where defendants urged that plaintiff's conduct was the sole proximate cause of the accident because he had disregarded his supervisor's instructions by dismantling the enclosure that surrounded the manhole before the cover was replaced, were defendants entitled to summary judgment? Alternatively, was plaintiff entitled to summary judgment under Labor Law § 240?

The Court of Appeals split three ways.

Majority: Per an opinion by Judge Pigott, the majority ruled:

> (1) Plaintiff met his burden as a summary judgment movant "of establishing the absence of an adequate safety device through the submission of the deposition testimony of IMS's president, Joseph Mazzurco, who testified that there should have been a guard rail system around three sides of the open manhole while the containment enclosure was being dismantled";

(2) Although it was true that the accident would not have occurred had plaintiff not dismantled the enclosure before the manhole cover had been replaced, plaintiff's conduct was not the *sole* proximate cause of the accident inasmuch as,

(a) it was undisputed "that it took at least two PAL workers to move the manhole cover (given its weight)," and,

(b) the fact that the lights had been turned off prior to disassembly of the containment enclosure was itself a cause of the accident.

Dissent #1: Judge Stein, joined by Judge Abdus-Salaam, dissented in part, concluding that neither side should have been granted summary judgment.

In their view, there was "at least a question of fact regarding whether defendants provided plaintiff with 'proper protection' by furnishing (or failing to furnish) him with an adequate safety device," especially since safety consultant IMS — not plaintiff and his co-workers — "was charged with the responsibility to ensure that the manhole was covered."

But there was also an issue of fact "regarding whether plaintiff's conduct was the sole proximate cause of his accident" inasmuch as the "conflicting testimony concerning whether the area surrounding the manhole was illuminated at the time of the accident" raised "a triable issue as to whether plaintiff could or should have observed that the manhole cover was missing when he fell."

Dissent #2: Judge Read, dissenting alone, would have granted defendants summary judgment on plaintiff's Labor Law § 240 claim inasmuch as "plaintiff did not wait for the manhole to be covered, as he had on previous occasions and as he knew he was supposed to do" and "offered no explanation for his safety lapse, or for his assumption that the manhole must have been covered even though he admittedly was not advised by his supervisor that this was the case."

Further, while IMS's president said that there should have been a guard rail system, he "did not testify as a safety expert" and "he cited no state or federal regulation that compels this." Also, the guard rail system made "no sense because the manhole was supposed to be covered *before* the PAL workers began to disassemble the enclosure."

Judge Read additionally reasoned that "[p]laintiff was never told to replace the manhole cover by himself, and whether it took two or more of the PAL workers in the five-person crew to replace the manhole cover is irrelevant." Further, even if it was dark, which Judge Read found "hard to believe," such did not "explain why plaintiff proceeded to disassemble the enclosure without receiving the 'okay' from his supervisor, which he testified that he had waited for in the past."

Flowers v Harborcenter Dev., LLC, 155 AD3d 1633 [4th Dept 2017] (where plaintiff was "**attempting to move a bundle of steel rebar to another location** on the subject construction site," the bundle was **being lifted and moved by a crane**, and "plaintiff was using the radio to communicate with the tower crane operator and to direct the rebar's placement" when the bundle fell and struck plaintiff, "**plaintiff's actions were not the sole proximate cause** of his injuries" inasmuch as "the record establishes that **plaintiff was not alone in rigging the rebar bundle**

and transporting it to a different area of the construction site, and thus plaintiff's conduct could not be the sole proximate cause of his injuries'").

(2) Alleged Defense That The Worker Was Solely At Fault For Not *Building* A Better Scaffold Or Other Elevation Device — *Batista v Manhattanville Coll.*, 28 NY3d 1093 [2016], *mod'g* 138 AD3d 572 [1st Dept 2016].

Neither the Appellate Division nor the Court of Appeals provided a great deal of detail concerning the facts. They provided even less information as to the grounds of their respective, and very different, rulings.

Apparently, plaintiff fell when and because **one of the subject scaffold planks broke**. The asserted defense was that plaintiff himself was negligent and the sole proximate cause of the accident because **he purportedly "disregarded instructions to use only pine planks for flooring on the scaffold he was constructing** … or otherwise knew that only pine planks were to be used for flooring" (138 AD3d at 572).

That made sense to the Appellate Division, which said that "[t]he record precludes summary judgment on the Labor Law § 240(1) claim" inasmuch as there were issues of fact "whether more pine planks were readily available to him either at the site," whether plaintiff was told or knew to use them, and whether "plaintiff was responsible for checking the planks at the site for knots and whether he used one with a knot in it, which he should not have used, for flooring" (138 AD3d at 572).

Held: The Court of Appeals modified on section 500.11 review, ruling that plaintiff was entitled to summary judgment since "**[d]efendants failed to raise a triable issue of fact** whether the plaintiff was the sole proximate cause of his accident" (28 NY3d at 1094). The Court cited its ruling in ***Barreto***, 25 NY3d 426, but provided no further explanation for the modification, which was effectively a reversal.

Commentary: Why did the defense claims not constitute a legal viable "sole proximate cause" defense? The Court of Appeals did not say, so the explanation that follows is mine alone and should be taken with however large a grain of salt the reader deems appropriate.

There is a difference, I think, between blaming the accident upon the plaintiff's failure to utilize an available safety device and blaming plaintiff for his or her negligence in constructing the subject ladder or scaffold. The latter argument seeks to shift the contractor's duty to provide "proper protection" to the worker himself or herself, which contradicts the legislative intent to "protect workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident." ***Zimmer v Chemung County Performing Arts, Inc.***, 65 NY2d 513, 520 [1985].

(3) Whether Worker Was Solely At Fault For Not *Building* Or *Using* A Better Ramp — *Valente v Lend Lease (US) Const. LMB, Inc.*, 29 NY3d 1104 [2017], *rev'g* 143 AD3d 625 [1st Dept 2016].

Although one would not know it from the Court of Appeals' short memorandum opinion rendered on section 500.11 review, the plaintiff slipped on grease while walking "on planks that he was using as a makeshift ramp to descend five feet from the top of a building to a scaffold" (143 AD3d at 625).

Although this is not clear from the almost as terse Appellate Division ruling, (1) plaintiff had built the ramp himself, and, (2) he did not fall off the side of the ramp and instead slid down to the bottom.

Plaintiff moved for summary judgment under Labor Law § 240[1]. Apart from aruging that the accident had not involved an elevation-related risk within the meaning of the statute, defendants contended that plaintiff was solely at fault for, (a) not using an already existent and purportedly available ramp, and, (b) for failing to note that the boards he used in constructing the "makeshift" ramp were greasy and, as a result, slippery.

Appellate Division: The Appellate Division unanimously rejected both of the defendants' contentions and instead affirmed the grant of partial summary judgment in the plaintiff's favor. Regarding the sole proximate cause defense, the Court said:

> Defendants failed to raise an issue of fact as to whether plaintiff was the sole proximate cause of his accident because he chose to use the planks instead of using a ramp that he knew was available or constructing a proper ramp from material that was readily available on site. Affidavits and other testimonial evidence demonstrate that the ramp that was available was not long enough to reach the scaffold and that plaintiff did not have time to build a ramp before meeting the crane that was approaching to assist in dismantling the scaffold (*see Miranda v. NYC Partnership Hous. Dev. Fund Co., Inc.*, 122 A.D.3d 445, 996 N.Y.S.2d 256 [1st Dept. 2014]).

143 AD3d at 625-626.

Held: The Court of Appeals said that it "agree[d] with the Appellate Division that the fall of Frank Valente (plaintiff) was the result of an elevation-related risk for which Labor Law § 240(1) provides protection," but further ruled that there was an issue of fact whether plaintiff was the sole proximate cause of the accident. The latter ruling was in its entirety as follows:

> Viewing the facts in the light most favorable to defendants, as we must (*see generally Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012]), we conclude that plaintiff's foreman arguably provided conflicting accounts of whether plaintiff had "adequate safety devices available," whether "he knew both that they were available and that he was expected to use them," whether "he chose for no good reason not to do so," and

whether "had he not made that choice he would not have been injured" (*Cahill*, 4 N.Y.3d at 40, 790 N.Y.S.2d 74, 823 N.E.2d 439).

Emphasis added.

Note: Neither the parties nor any of the courts specifically addressed whether the worker can be saddled with the responsibility of **constructing** his or her own safety device, or, put differently, whether plaintiff could be deemed solely at fault if it were true that there was no existent ramp that could reach the scaffolding to which plaintiff was assigned. (Defendants claimed, *inter alia*, that there was a "readily available" existent ramp.)

E. The Present Tense: *Gallagher* And *Blake* Issues

1. *Gallagher* Issues

(a) Whether Elevating Device Was "Readily Available"

Lord v Whelan and Curry Constr. Services, Inc., 166 AD3d 1496, 1497 [4th Dept 2018] (where plaintiff "fell through a roof while working on a demolition project," plaintiff was properly granted summary judgment, "**defendants failed to raise an issue of fact whether plaintiff's own negligence was the 'sole proximate cause'** of his injuries, **in particular, whether safety harnesses 'were readily available at the work site**, albeit not in the immediate vicinity of the accident'" [*citing* ***Gallagher***, 14 NY3d 83, 88 (2010)]).

Gillett v City of New York, 165 AD3d 1064, 1064-1065 [2d Dept 2018] (where plaintiff, a journeyman carpenter, purportedly **fell from an A-frame ladder when it slid out while using it in the closed position**, the motion court erred in granting defendants summary judgment since "**'[a] worker's decision to use an A-frame ladder in the closed position is not a per se reason to declare him the sole proximate cause of an accident** [citation omitted]'" and "**defendants failed to eliminate all triable issues as to whether the ladder could have been placed in a manner that would have allowed the plaintiff to safely perform the work**" and **also failed to** "**establish that the plaintiff used the ladder in such a manner without the tacit approval of his supervisor**").

Gordon v City of New York, 164 AD3d 1110, 1111 [1st Dept 2018] ("plaintiffs were entitled to summary judgment on the issue of liability on the § 240(1) claim as against the MTA"; that an **engineer "merely testified that there 'may or may not have been platforms available to tie the ladder to'" did not raise a sole proximate cause defense**).

(b) Defendant Failed To Prove That The Worker Knew The Device Was Available And Knew That He Or She Was Expected To Use It

Dos Santos v State, 169 AD3d 1328, 1328-1329 [3d Dept 2019] (where claimant "was working on a deck that was temporarily suspended under the upper deck of a bridge" when "he **sustained a fractured ankle after his right foot backed into an opening in the temporary deck**," and where "[t]he opening measured approximately 1 foot by 12 feet and was partially covered by a board," and **where defendant argued that claimant could have and should have covered the opening with a board, the defense failed irrespective of "the availability of boards"** inasmuch as there was "**no evidence in the record that claimant received any instruction or directive that would establish that he knew that he was responsible for either covering any openings**, or requesting that they be covered by coworkers, before beginning work").

Goya v Longwood Hous. Dev. Fund Co., Inc., 167 AD3d 402, 403 [1st Dept 2018] (where plaintiff was injured while climbing a fire escape, the fire escape was a "safety device" within the meaning of Labor Law § 240(1) inasmuch as it "was specifically used 'to provide access to different elevation levels for the worker and his materials'" and "**the record does not permit the conclusion that this plaintiff was the sole proximate cause of his injuries, or, that there was another, readily available ladder or safety device, that plaintiff unreasonably chose not to use**").

Rapalo v MJRB Kings Highway Realty, LLC, 163 AD3d 1023 [2d Dept 2018] (where "plaintiff allegedly was injured **when a plank on a scaffold he was erecting broke**, causing him to fall approximately 30 feet," **defendant's contention "that the plaintiff's failure to use a safety harness was the sole proximate cause of his accident" was unavailing** since there was "**no evidence that the plaintiff was informed as to where the harnesses were kept** and that he was **instructed in their use**"; also, **defendant's "contention that the plaintiff was the sole proximate cause of the accident because the scaffold from which he fell was one which he himself was constructing is without merit**").

Gericitano v Brookfield Properties OLP Co. LLC, 157 AD3d 622 [1st Dept 2018] (plaintiff "established prima facie his entitlement to the protections of Labor Law § 240(1) by submitting evidence that he was injured when a corner of an electrical transformer weighing hundreds of pounds and suspended from a ceiling shifted downward and struck him on the head as he was standing on a ladder working on it and that he had not been provided with any safety devices adequate to his task"; while "**plaintiff's foreman testified that he had given specific instructions to his workers about using wooden delivery pallets to prop up the transformer** at the corner being worked on," that testimony was unavailing since **the foreman "conceded that he did not know whether plaintiff was standing near enough to him to have heard these instructions**," "[p]laintiff's coworker testified that there were no readily available safety devices to assist him and plaintiff in their task," and defendants "submitted no evidence" that the foreman's "improvised method was a suitable safety device").

(c) Defendant Failed To Prove That Plaintiff Did As He Or She Did For "No Good Reason"

Wicks v Leemilt's Petroleum, Inc., 103 AD3d 793, 794-795 [2d Dept 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").

(d) Defendant Failed To Prove Some Combination Of The Above

Garbett v Wappingers Cent. School Dist., 160 AD3d 812 [2d Dept 2018] (where workers were **disassembling a boiler** in order to fix a leak, "Supreme Court properly determined that Wappingers failed to raise a triable issue of fact as to whether the plaintiff was a recalcitrant worker, since it offered **no evidence indicating that he was provided with certain safety devices, that such devices were readily available for his use, and that the plaintiff was specifically instructed to use such devices but chose for no good reason** to disregard those instructions").

Jarzabek v Schafer Mews Hous. Dev. Fund Corp., 160 AD3d 412 [1st Dept 2018] (where plaintiff **had been provided an A-frame ladder** that morning which was in the basement of the building and **instead used a "makeshift" ladder**, but "the parties **cite no evidence contradicting plaintiff's testimony that he could not use it** [the good ladder] **to access the slab because the ground was covered in dirt, debris, and rocks**," "plaintiff's decision to use the makeshift ladder that his coworkers were also allegedly using was not the sole proximate cause of the accident **where he was never instructed not to use it**"; "Moreover, **where no proper safety device was provided**, the **fact that his boots may have been untied or that he may have been descending the makeshift ladder backwards** was not the sole proximate cause of his accident").

(e) Plaintiff's Conduct Was Not The "Sole Proximate Cause" Of The Accident

Rapalo v MJRB Kings Highway Realty, LLC, 163 AD3d 1023 [2d Dept 2018] (where "plaintiff allegedly was injured **when a plank on a scaffold he was erecting broke**, causing him to fall approximately 30 feet," **defendant's contention "that the plaintiff's failure to use a safety harness was the sole proximate cause of his accident" was unavailing** since there was "**no evidence that the plaintiff was informed as to where the harnesses were kept** and that he was **instructed in their use**"; also, **defendant's "contention that the plaintiff was the sole proximate cause of the accident because the scaffold from which he fell was one which he himself was constructing is without merit**").

(f) Defense Established As A Matter Of Law, Or Triable

Jones v City of New York, 166 AD3d 739, 740-741 [2d Dept 2018] (where the plaintiff-ironworker **climbed a "ship's ladder"** which led up to the roof of a school building, where he did so "in order to replace a missing bolt on that ladder where the top rung met the side of the ladder," and **where the top rung came loose as he grabbed it, causing him to fall**, "**plaintiffs failed to establish their prima facie entitlement to judgment as a matter of law** on their Labor Law § 240(1) cause of action" inasmuch as **plaintiff knew the ladder was missing a bolt** and **admitted** "**there were other ladders and pipe scaffolding available to use at the jobsite**," creating an issue whether there was a violation of Labor Law § 240(1) or whether plaintiff's actions were instead the sole proximate cause of the accident).

Sochan v Mueller, 162 AD3d 1621 [4th Dept 2018] (where "the **ladder used by plaintiff was the top half of an extension ladder** that **lacked any rubber feet** and belonged to defendants," "plaintiff's **employer prohibited its employees from using customers' ladders or ladders without rubber feet**," "**plaintiff had a stepladder and an extension ladder in his work truck**, which he had driven to defendants' property," and plaintiff was **injured "when the ladder that he used to access a loft storage area 'kick[ed] out' from under him**," defendants' submissions, "upon which plaintiffs relied in support of their cross motion, **raised triable issues of fact** whether plaintiffs 'own conduct … was the sole proximate cause of his accident").

Martin v Niagara Falls Bridge Commn., 162 AD3d 1604 [4th Dept 2018] (by **3 to 2 vote**: where "the **bridge scaffolding sheet that [plaintiff] was detaching** from underlying support cables **tipped, causing him to fall approximately 25 to 30 feet** before landing on a steel box beam," where the plaintiff's **employer purportedly "had a policy that the workers on the platform were required to be tied off 100 percent of the time**" [Dissent], and where **defendants urged that "a variety of safety devices for plaintiff' use, including harnesses**, lanyards, retractable lanyards, ropes, rope grabs, 'choker[s]' and fall arrest cables" were available and also that "**[t]he safety equipment was kept in a trailer on the work site and was available to the workers** and, as the foreperson, plaintiff was responsible for the safety of all workers" [Dissent], there were nonetheless **triable issues of fact** inasmuch as, **(1) plaintiff testified that the six-foot lanyard** given to him "**was too short** to permit plaintiff to reach the

final clip anchoring the bridge scaffolding sheet," **(2) defendants "failed to establish as a matter of law that an *adequate* safety device was present** that would have prevented plaintiff 'from harm directly flowing from the application of the force of gravity to … [his] person,'" and, **(3) plaintiff "testified that his on-site supervisor pushed him to hurry** and, although there was purportedly a rule that the workers on the bridge scaffolding platform were required to be tied off 100 percent of the time, '[n]obody follow[ed] it'").

Lorde v Margaret Tietz Nursing and Rehabilitation Ctr., 162 AD3d 878 [2d Dept 2018] (where **plaintiff claimed** that he **stood on an inverted bucket to reach the ceiling** "because **the other ladders in the dining room were in use**," but where plaintiff "also testified that **he could not recall how many ladders were in the dining room** at the time of his accident … **that he did not know if there were more than six ladders available at the job site**," and that "he **did not leave the dining room area to look for a ladder**, "plaintiff's testimony **failed to eliminate all triable issues of fact** as to whether there were ladders available at the job site at the time of the accident, and whether the plaintiff's decision to stand on the bucket was the sole proximate cause of his injury").

Weitzel v State, 160 AD3d 1394 [4th Dept 2018] (where claimant was **sandblasting from aluminum scaffolding that lacked guardrails**, but claimant **had been provided with a safety harness that he had failed to tie off**, claimant's "own evidentiary submissions create **an issue of fact** whether his conduct was the sole proximate cause of the accident"; "Contrary to claimant's contention, the decision of the Court of Appeals in *Bland v. Manocherian*, 66 N.Y.2d 452 … (1985) **does not require the presence of guardrails on scaffolding whether another adequate safety device is made available**").

Colon v Metro. Transportation Auth., 159 AD3d 450 [1st Dept 2018] (where plaintiff "fell from a makeshift platform" while "wearing a vest and lanyard" and **had not attached "himself to the available lifeline,"** there were "**questions of fact** on this record concerning **whether it was feasible or even practical** for Colon to have attached himself to the lifeline or whether another safety device was required and whether it was provided").

Radeljic v Certified of N.Y., Inc., 161 AD3d 588 [1st Dept 2018] (where plaintiff fell into an elevator shaft, there were "**[i]ssues of fact** as to whether the injured plaintiff's own conduct was the sole proximate cause of his accident" where there was "**conflicting evidence … whether the [available safety] harness would have allowed plaintiff to reach and perform his work**" and "**conflicting statements about who was responsible for removing a plywood barricade positioned in front of the elevator shaft opening**" and "as to **whether plaintiff, a foreman** who had the authority to order his subordinate who was present at the time of the accident to replace the barricade, **was the sole proximate cause of his accident**"; "[t]o establish the defense of sole proximate cause, **defendant was not required to show that plaintiff received an instruction about** using the harness **immediately before commencing the work** in question **or on the same day** as the accident").

Guaman v City of New York, 158 AD3d 492, 492 [1st Dept 2018] ("**[d]efendants established prima facie** that **plaintiff's decedent** was the **sole proximate cause** of his accident with

evidence that **a harness and safety rope system was in place on the roof**, that the decedent **had been instructed to remain tied off at all times** while on the roof, and that he **could not have reached the skylight through which he fell if he had remained tied off**"; "plaintiff offered nothing more than speculation that the decedent unhooked his harness to reach the lift that transported workers to and from the roof or that the system of harness, lanyard, and safety rope failed").

2. *Blake* Issues

(a) Defense Rejected Because The Worker Was Instructed To Do As He Or She Did, Or Had No Choice In The Matter

Vucetic v NYU Langone Medical Center, 173 AD3d 527 [1st Dept 2019] (where "plaintiff Ante Vucetic was injured when the A-frame ladder he was using to perform insulation work collapsed beneath him, causing him to fall to the ground," "at the time of his fall, **plaintiff was following his foreman's instructions** and **thus, he was not the sole proximate cause** of the accident").

Allington v Templeton Found., 167 AD3d 1437, 1438 [4th Dept 2018] (where plaintiff sustained injuries "when **the ladder** he had been using to access the roof of a work site **'kicked out' from underneath him**," where **the ladder "consisted of only the top half of an extension ladder and lacked any feet,"** and where "the **record establishes that plaintiff used this ladder 'pursuant to the directions and example of his supervisor** [citation omitted]," **defendant** "**failed to raise a triable issue** of fact whether plaintiff was the sole proximate cause of the accident or a recalcitrant worker").

Munzon v Victor at Fifth, LLC, 161 AD3d 1183 [2d Dept 2018] (where plaintiff **fell through a partially demolished floor** while helping a coworker move a heavy beam, where plaintiff **detached his harness from the cable safety line "because the safety line was not long enough** to allow him to reach his coworker," and where the two workers **had been moving the beam "in the manner in which they had been instructed by their employer**," **plaintiff was properly granted summary judgment** under Labor Law § 240 because he fell when and because he "was not provided with adequate safety equipment to prevent him from falling").

(b) Defense Rejected Because Conduct Was "Mere Comparative Negligence," Or Occurred Under Emergency Circumstances

Orellana v 7 West 34th Street, LLC, 173 AD3d 886 [2d Dept 2019] (where "plaintiff was **standing on an eight-foot-high A-frame ladder** and **using an electric saw to cut brackets** which held an air duct to the ceiling" when he "allegedly **fell from the ladder** and sustained severe injuries," defendants "**failed to demonstrate**, prima facie, that the plaintiff's conduct was the sole proximate cause of his fall because **he allegedly failed to use scaffolding that was readily available at the job site**" and/or that "**he allegedly improperly positioned the ladder**"

and/or that he "**did not demand that his foreman provide scaffolding**," and Supreme Court erred in stating that "the contributory negligence, if any, of the plaintiff must go to a jury" inasmuch as "**[c]omparative negligence is not a defense** to the strict liability of the statute").

Salinas v 64 Jefferson Apartments, LLC, 170 AD3d 1216, 1222 [2d Dept 2019] ("[t]he sole proximate cause defense applies where the plaintiff, acting as a 'recalcitrant worker,' misused an otherwise proper safety device, chose to use an inadequate safety device when proper devices were readily available, or failed to use any device when proper devices were available"; that **plaintiff purportedly set the ladder on top of a drop cloth**, even if true, **would render the plaintiff only contributorily negligent**").

Makkieh v Judlau Contr. Inc., 162 AD3d 468 [1st Dept 2018] (where plaintiff "was injured when the **nylon sling** attaching a one-to-two ton steel plate to an excavator **snapped, causing the heavy plate to fall to the ground**, bounce, and sever the pole of a nearby street sign," where the sign was thereby "propelled toward plaintiff, hitting his right forearm and causing him serious personal injuries," and where "photographs taken immediately before the accident show that the steel plate was about two or three feet above the ground," defendants efforts to blame plaintiff were "unavailing" inasmuch as "**plaintiff had no involvement in attaching the steel plate to the excavator**" and "**[i]n any event … any contributory negligence by plaintiff would not provide Judlau a defense** to labor Law § 240(1) liability").

(c) Defense Rejected: Because Worker Should Not Be Required To Engage In Conduct That Would Have Been Violative of Law

Anderson v MSG Holdings, L.P., 146 AD3d 401, 402-403 [1st Dept 2017] (where plaintiff "was wearing a harness but he was not tied off, because there was no place tie off," where defendant argued that plaintiff "was the sole proximate cause of his injury" inasmuch as he "was instructed to comply with OSHA subpart M, which requires the use of a safety device for work at an elevation of six feet or higher while installing prefabricated concrete panels, and that he refused to attach the harness that was provided," where the record demonstrated "that the only place to tie off to was below the level of plaintiff's feet" and "plaintiff's only option was to tie off to the inserts in the most recently placed panels behind him, below his feet," and where the latter choice would have been violative of subpart M, "**refusing to tie off to an anchorage point that is inconsistent with OSHA regulations does not make plaintiff the sole proximate cause**, and comparative negligence is not a defense to a Labor Law § 240(1) claim"; further, that defendants' witnesses "later claimed in affidavits that plaintiff could have tied off to a raker beam above his head" was of "no moment" "inasmuch as there is no evidence in the record that plaintiff was ever instructed or knew to use such points to tie off").

(d) Defense Rejected: Worker's Conduct Was Not The Sole Proximate Cause Of The Accident

Escobar Camacho v Ironclad Artists Inc., 174 AD3d 426, 426 [1st Dept 2019] (where plaintiff fell from a scaffold, it was "**undisputed that the scaffold he was supplied** with and directed to use **lacked guard rails** and that he fell off when the scaffold tipped," and plaintiff "was not provided with any other safety devices," Supreme Court correctly granted plaintiff's motion for partial summary judgment; "Contrary to defendants' claim, **the alleged failure to unlock the wheels does not raise an issue of fact**").

Mora v Wythe and Kent Realty LLC, 171 AD3d 426 [1st Dept 2019] (since "[p]laintiff's deposition testimony establishes that **a proximate cause of his injury was the unsecured scaffold planks which tipped when he stepped on them** … contrary to defendants' contention, **plaintiff was not the sole proximate cause of his accident** and we reject defendant's recalcitrant worker defense").

Urquiza v Park and 76th St., Inc., 172 AD3d 518, 519 [1st Dept 2019] ("**[d]ecedent's action in standing on the radiator casing in front of the open window** to accomplish his work [during a "rainstorm"] **was not the sole proximate cause of his accident as he was not provided proper safety devices for working next to the open window**").

Nolan v Port Auth. of New York and New Jersey, 162 AD3d 488 [1st Dept 2018]] (plaintiff "made a prima facie showing of entitlement to partial summary judgment on the issue of liability on his Labor Law § 240(1) claim with his testimony that the **makeshift ladder** on which he was descending after detaching a crane cable from the top of an eight-foot C-box **slid out from under him**" and the **co-worker's affidavit** stating that he "'**observed [plaintiff] fall from the ladder after he appeared to have 'missed' the last step'" did not "raise a triable issue** as to whether plaintiff was the sole proximate cause of the accident, as it [did] not refute plaintiff's assertion that the ladder slid out from beneath him").

Plywacz v 85 Broad St. LLC, 159 AD3d 543 [1st Dept 2018] (where plaintiff was standing on a ladder and gripping a suction cup, where the suction cup came loose, and where that caused the ladder to wobble and plaintiff to fall, plaintiff was properly granted partial summary judgment and "**even if plaintiff gripped the suction cup incorrectly**, causing it to come loose, any **such misuse of the suction cup was not the sole proximate cause of the accident where the unsecured ladder moved**").

Fraser v City of New York, 158 AD3d 428, 428 [1st Dept 2018] ("[t]he record does not support defendants' argument that plaintiff was the sole proximate cause of the accident or was a recalcitrant worker since **a proximate cause of his accident was the failure of the chain fall to adequately support the load that spun down and struck him**, knocking him from the beam on which he was working to the ground below").

(e) Defense Rejected On Other Grounds

Reyes v Bruckner Plaza Shopping Center LLC, 173 AD3d 570 [1st Dept 2019] (where plaintiff "**fell off the roof of a building** while installing metallic roof edging called 'gravel stops,'" plaintiff "established prima facie violation of Labor Law § 240(1) through his testimony and the affidavit and testimony of his co-worker Alfonso Perez, establishing that **no safety devices were provided** for their use at the job site" and "**defendants failed to raise an issue of fact** as to whether plaintiff, by recalcitrantly refusing to use safety equipment that had been provided to him, was **the sole cause of the accident**").

Valdez v Turner Constr. Co., 171 AD3d 836 [2d Dept 2019] (where plaintiff was allegedly "performing landscaping on the fifth-floor roof of the property" and was "in the process of **detaching a bag of soil that weighed at least 2,500 pounds from a crane** that had hoisted the bag up to the fifth-floor roof," **where the crane then lifted "causing the straps connecting the bag to the crane to catch the plaintiff's hand and lift him off the roof,"** and where plaintiff fell to the roof when he freed his hand, plaintiff was properly granted summary judgment inasmuch as "**[t]he deposition testimony of the plaintiff's coworker failed to demonstrate** that Labor Law § 240(1) had not been violated or **that the plaintiff failed to follow instructions that had been given to him regarding detaching** the bags of soil from the crane" and **defendant** "**thus failed to raise a triable issue of fact** as to whether the plaintiff's actions were the sole proximate cause of the accident").

Nieto v CLDN NY LLC, 170 AD3d 431, 431-432 [1st Dept 2019] (where plaintiff "was forced" by circumstances to leave his ladder and perform part of the work "by standing on display cases approximately 20 feet high," and where he lost his balance and fell while attempting to return to the ladder, **plaintiff's conduct was not the sole proximate cause of his accident "since plaintiff's stance was necessary to perform the work"**).

White v 31-01 Steinway, LLC, 165 AD3d 449, 452 [1st Dept 2018] (where plaintiff fell from a ladder while installing a sign, **where plaintiff had "set up the ladder parallel to the building and straddled atop the ladder, one foot on each side, to perform his work" "[b]ecause the sidewalk was congested with pedestrian traffic,"** where plaintiff thereafter lost his balance and began to fall, and when he then "jumped off the ladder to avoid falling with the ladder," "plaintiff established, prima facie, that his accident was caused by Express's and the Steinway defendants' failure to provide an adequate safety device to prevent plaintiff from falling off the ladder, in violation of Labor Law § 240(1), and **defendants failed to raise an issue of fact as to whether plaintiff was the sole proximate cause of the accident"** inasmuch as "**there is no dispute that the ladder was unsecured and that no other safety devices were provided to plaintiff**" and "defendants failed to show that plaintiff was a recalcitrant worker as **they did not establish that he was specifically instructed to use a particular safety device other than the ladder and that he refused to do so**," the defense expert's affidavit did not "raise an issue as to whether plaintiff was the sole proximate cause of the accident because the expert merely attempted to shift proximate cause of the accident to plaintiff for the way in which plaintiff set up the ladder and stated, in a conclusory fashion, that nothing about the ladder was defective"; "[m]oreover, **the expert's statement that plaintiff could have set up the ladder a different**

way is belied by plaintiff's testimony that the ladder could not be set up any other way because of the pedestrian traffic in the area where plaintiff was performing his work").

(f) Defense Deemed Viable Or Triable

Gelvez v Tower 111, LLC, 166 AD3d 547, 547 [1st Dept 2018] (where plaintiff "was injured when **a cinder block wall that he was demolishing collapsed onto the scaffold** on which he was working, **knocking the scaffold over**," "**[t]riable issues of fact** exist as to whether plaintiff was instructed to demolish the wall from top to bottom, and **whether any decision by plaintiff to work from the bottom up, in contravention of an explicit instruction** or in contravention of his training or common knowledge, **was the sole proximate cause of the accident**").

Gelvez v Columbus 95th St. LLC., 161 AD3d 530 [1st Dept 2018] (where plaintiff was "**ascending to the top of a building on a motorized suspended scaffold**," where plaintiff and his co-worker "**had to press their backs against the wall** and **use their legs to push the scaffold out**" in order to clear a concrete beam, and where **plaintiff thereby "injured his lower back**," "neither side is entitled to summary judgment, because **an issue of fact exists** as to whether **plaintiff's negligence was the sole proximate cause of his injuries**" inasmuch as "[t]he testimony of plaintiff and his foreman conflict as to whether plaintiff had been instructed to push off the scaffold in the manner described").

Bonczar v Am.Multi-Cinema, Inc., 158 AD3d 1114, 1115 [4th Dept 2018] (by **3 to 2 vote**: where the **ladder's wobbling allegedly caused plaintiff to fall** but "[p]laintiff **did not know why the ladder wobbled or shifted**, and he acknowledged that he **might not have checked the positioning of the ladder** or the locking mechanism, despite having been aware of the need to do so," there was "'**a plausible view** of the evidence—enough to raise a fact question—that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident'").[29]

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[29] The dissenters in ***Bonczar*** would have ruled:

> The fact that plaintiff could not identify why the ladder shifted does not undermine his entitlement to partial summary judgment because a plaintiff who falls from a ladder that "malfunction[s] for no apparent reason" is entitled to "a presumption that the ladder … was not good enough to afford proper protection" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 289 n. 8, 771 N.Y.S.2d 484, 803 N.E.2d 757 [2003]; *see O'Brien v Port Auth. of N.Y. & N.J.*, 29 N.Y.3d 27, 33, 52 N.Y.S.3d 68, 74 N.E.3d 307 [2017]).
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> * * *
>
> The majority's reliance on *Blake* is misplaced. The injured worker in that case sustained his injuries when the upper portion of his extension ladder retracted, and he testified at trial that he was not sure whether he had locked the extension clips,

Cross v Noble Ellenburg Windpark, LLC, 157 AD3d 457, 458 [1st Dept 2018] (where **plaintiff "fell due to a chain catching his foot"** while he was "**attaching lifting lugs to a wind turbine base tower** so it could be hoisted off its trailer and onto a concrete foundation," "**question of fact exist** as to whether plaintiff was the sole proximate cause of his accident").

Kipp v Marinus Homes, Inc., 162 AD3d 1673 [4th Dept 2018] (by **4 to 1 vote**, where **plaintiff** fell because he **personally placed the subject ladder too far from the work area** and was thereby caused to lose balance and fall when he pulled "on the soffit and [got] less resistance than expected," where **plaintiff claimed that the ladder "could not be placed directly below his work site**" but **defendants "submitted photographs and a video recording from their safety expert** that **depicted the expert placing the ladder directly under the work site** and standing on it," and where this was "the **rare case** where there are **no allegations that the ladder tilted, tipped, shifted, moved, or otherwise failed**," plaintiff's own negligence was the "sole proximate cause" of his accident — just as in ***Blake***, 1 NY3d 280, 288 [2003]; the majority "reject[ed] plaintiff's contention … that he cannot be the sole proximate cause of his own injuries in the absence of egregious misconduct or intentional misuse of the safety equipment").

Luna v 4300 Crescent, LLC, 174 AD3d 881 [2d Dept 2019] (where plaintiff "was **injured while attempting to move a mortar buggy down a ramp** during the construction of a new building," and where the **jury returned a verdict in the defendants' favor**, "there was **a valid line of reasoning and permissible inferences** which could have led a rational jury to conclude that the **injured plaintiff's own conduct in attempting to move the mortar buggy without assistance**,

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> i.e., equipment meant to hold the upper portion of the ladder in place (*id.* at 283-284, 771 N.Y.S.2d 484, 803 N.E.2d 757). Based on the injured worker's uncertainty and the fact that the accident occurred in the very manner that the extension clips were meant to prevent, it was logical for the jury to infer both that he had failed to lock the clips and that his negligence in that regard was the sole proximate cause of his injuries (*see id.* at 291, 771 N.Y.S.2d 484, 803 N.E.2d 757; *see generally Schneider v Kings Hwy. Hosp. Ctr.*, 67 N.Y.2d 743, 744, 500 N.Y.S.2d 95, 490 N.E.2d 1221 [1986]). Here, given that an A-frame ladder can wobble or shift for various reasons unrelated to its positioning or locking mechanism, and even for no apparent reason (*see Alvarez v Vingsan L.P.*, 150 A.D.3d 1177, 1179, 57 N.Y.S.3d 160 [2d Dept 2017]), we conclude that plaintiff's deposition testimony does not support a nonspeculative inference that the sole proximate cause of his injuries was his alleged failure to check the positioning of the ladder or whether it was locked into place (*see generally Bombard v Christian Missionary Alliance of Syracuse*, 292 A.D.2d 830, 831, 739 N.Y.S.2d 516 [4th Dept 2002].

158 AD3d at 1116-1117, Dissent, emphasis added.

rather than any violation of Labor Law § 240(1), **was the sole proximate cause** of his alleged injuries").[30]

Biaca-Neto v Boston Road II Hous. Dev. Fund Corp., 2019 NY Slip Op 06142 [1st Dept August 13, 2019] (by **3 to 2 vote**: where, according to the majority, **plaintiff could have safely descended from the subject scaffold via a scaffold staircase or via a hoist**, where he **instead tried to exit by climbing onto the scaffold's frame and then entering through a window cut-out**, where **the "short-cut"** which plaintiff tried to utilize **had been** "**prohibited** specifically because it presented dangers that were outside the scope of the assigned tasks, and alternative, safe, modes of access and egress were available," and where according to the proof the majority deemed credible **plaintiff "popped" his shoulder in the process** of exiting the scaffold, "[p]laintiff's decision to climb onto a beam seven feet above the platform to enter an interior location where he was not working by a means he conceded he knew was inappropriate, when the obvious, safe and compliant means of egress was the scaffold's stairway, which he himself had assembled, **did not implicate Labor Law § 240**" and such was particularly so since there was no "evidence of any demonstrable defect in the scaffold itself or that plaintiff's alleged injuries were related to unavailable safety devices, the pertinent factors for determining Labor Law § 240 liability").[31]

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[30] The Court impliedly rejected the thesis that the fact that a worker was "attempting to move the buggy without assistance" could itself constitute a statutory violation.

[31] It should be noted that the two dissenters stridently disagreed both with the majority's construction of the proof and with the majority's legal conclusion.

Regarding the facts, the majority said:

> Plaintiff was injured while on the scaffold on September 3, 2014. His account as to how this occurred changed over time, and his version on appeal is refuted by both documentary and testimonial evidence.
>
> * * *
>
> Andrade testified that plaintiff related to him after the incident that when he reached up to hold onto a bar on the scaffold with the intent of climbing through the window cut-out, he pulled his right shoulder out of its socket, but that plaintiff had not claimed to have fallen.
>
> * * *
>
> Plaintiff's subsequent theory before the motion court was that he climbed onto the scaffold frame in order to enter the building through the window cut-out and that he fell backwards and suffered injuries to his spine and shoulders, eventually requiring spinal fusion and incapacitating him from work. Plaintiff gave this version of the accident during his deposition.

* * *

> **Plaintiff's deposition testimony that his injuries were caused by a fall is contradicted by his earlier statements made to coworkers immediately after the incident and recorded in various reports of the accident** including the accident report, emergency room report and plaintiff's workers' compensation form.
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> * * *
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> To the extent plaintiff attempts to construct a counter narrative of how he sustained his injury, I reject it. Plaintiff's new contradictory testimony should not be considered in deciding this summary judgment motion.

Emphasis added.

In contrast, the dissenters wrote:

> **The majority implicitly finds that unsworn statements given by plaintiff, transcribed by others into English, a language plaintiff did not speak, that set forth a version of the accident different from the account plaintiff gave at his deposition, are sufficient to find plaintiff wholly unbelievable**. According to the majority, these discrepancies warrant summary judgment in defendants' favor. In so holding, the majority gives little weight to the affidavit by a coworker who was the only eyewitness to the accident and who supports plaintiff's only sworn account of his fall. While inconsistencies in plaintiff's other unsworn reports of the accident might provide grist for cross-examination, it is for the jury, not this Court, to resolve these inconsistencies.

Emphasis added.

Regarding whether the plaintiff would have a viable Labor Law § 240 cause of action were the facts as he claimed them to be, the majority wrote that the defendants had no duty to "anticipate that a worker will disobey instructions and … undertake to provide additional precautions to safely facilitate the prohibited conduct" and that "**[p]laintiff stepped outside of his assigned work when he unhooked his safety harness and climbed up on the scaffold frame to enter through the window opening in violation of work rules**, for the sake of saving the few minutes that would be expended by using the safe and proper access devices" and that such was so even if he was then "following another worker."

The dissenters responded that the majority's pronouncements "**ignore[d] the evidence in the record that workers on this job site used the scaffold to go through window cut-outs** to enter the interior of the building and that the scaffold was clearly inadequate for that purpose,"

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

A. Nature Of Liability, The Elements to Be Proven

Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494, 505 [1993] (plaintiff **must prove** violation of a **"concrete" regulation** that was a substantial factor in causing the accident).

Rizzuto v L.A. Wenger Contr. Co., Inc., 91 NY2d 343, 350 [1998] (liability is **imposed "vicariously"**).

Nostrom v A.W. Chesterton Co., 15 NY3d 502 [2010] (the regulation **must generally come from Part 23** of the Industrial Code).

Yaucan v Hawthorne Vil., LLC, 155 AD3d 924 [2d Dept 2017] ("[t]o sustain a cause of action pursuant to Labor Law § 241(6), a **plaintiff must demonstrate** that his or her injuries were **proximately caused by a violation of an Industrial Code regulation** that is applicable to the circumstances of the accident").

Siguencia v City of New York, 138 AD3d 605 [1st Dept 2016] ("The City concedes that the court improperly dismissed the Labor Law §§ 240 and 241 claims on the ground that the City was an out-of-possession landlord, since **the statutes impose liability on property owners without regard to the owner's degree of supervision or control** over the premises").

B. Pleading And Disclosure

Simmons v City of New York, 165 AD3d 725, 728-729 [2d Dept 2018] (where the plaintiff-plumber was allegedly "injured while moving an air compressor, weighing in excess of 600 pounds" when he and his co-workers removed it from its crate, placed it on the blades of a pallet jack, and then pushed and pulled the pallet jack until it ultimately struck some debris which "caused the pallet jack to stop short and the compressor to roll off the pallet jack and onto the plaintiff's ankle," "**although the plaintiff alleged a violation of 12 NYCRR 23-2.2(d) for the first time in opposition to the defendants' 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**" and "**defendants failed to demonstrate that 12 NYCRR 2.3-2.2(d) was inapplicable** under the circumstances, that the regulation was

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that "[i]t is not necessary that the scaffold be defective for plaintiff to recover under Labor Law § 240(1)," and that it was sufficient to raise triable issues of fact "that the scaffold was inadequate to provide safe ingress into the building's interior through the window cut-outs, a purpose for which the record shows it was used by workers on this job site." They added that, despite what the majority said, there was "**no evidence from defendants' witnesses that the workers on the site were instructed not to enter the building from the window openings**."

applicable but not violated, or that a violation of the regulation was not a proximate cause of the plaintiff's injuries").

C. Defendant's Burden On Moving For Summary Judgment

Provens v Ben-Fall Dev., LLC, 163 AD3d 1496 [4th Dept 2018] (where **defendant never established** that **plaintiff had "failed to establish with any specificity which section of the Industrial Code [d]efendants allegedly violated**," "the **burden never shifted** to plaintiffs to address their claim of regulatory violations").

Sochan v Mueller, 162 AD3d 1621 [4th Dept 2018] (where "the ladder used by plaintiff was the top half of an extension ladder that lacked any rubber feet and belonged to defendants," "[t]o the extent that plaintiffs alleged that defendants violated 12 NYCRR 23-1.21(b)(3)(i), (iv) and (4)(ii), we conclude that **defendants failed to establish as a matter of law** that **those regulations were not violated or that any violation of those regulations was not a proximate cause of the accident**").

Robinson v Sprague Washington Sq., LLC, 158 AD3d 1318 [4th Dept 2018] (where plaintiff "was injured when he was attempting to install a door frame in an exterior doorway" when **a steel lintel that weighed 50 pounds fell on his head**, the motion court erred in dismissing plaintiff's claim under **12 NYCRR 23-1.8[c][1]** inasmuch as the **defendants "failed to establish as a matter of law that plaintiff was not working in an 'area where there [was] a danger of being struck by falling objects or materials** or **where the hazard of head bumping exist[ed]'**").

D. Construction Of The Regulations

Construction Of The Regulatory Term "Forms" … Again — The Decision in *Morris v Pavarini Const.*, 22 NY3d 668 [2014], *aff'g* 98 AD3d 841 [1st Dept 2012].

12 NYCRR § 23-3.2(a) states:

> Forms … shall be structurally safe and shall be properly braced or tied together so as to maintain position and shape.

The parties differed as to what the word "forms" meant in the context of the regulation. Defendants, who had not presented expert opinion on the issue, argued in their summary judgment papers that "forms" meant *completed* forms. Because the object that fell on plaintiff was purportedly not a completed form — it was merely one side of an as-yet uncompleted form — the regulation was inapplicable, or so defendants argued. Plaintiff, relying on the affidavit of an engineer, urged the opposite position and maintained that "[t]he metal concrete forms could

have been tied together via wood or straps or both to secure the metal forms to each other and provide stability."

The matter came before the Court of Appeals back in 2007 and the Court of Appeals unanimously ruled, per a decision by Judge Smith, that it *could not tell* which construction of the regulation was correct in the absence of further evidence regarding the feasibility of the alternative interpretations. ***Morris v Pavarini Const.***, 9 NY3d 47 [2007]. The Court ruled that there are times, and this case was one such time, when the court may *need* expert testimony in order to resolve the *legal* question of what a regulatory standard means:

> The interpretation of the regulation presents a question of law, but the meaning of specialized terms in such a regulation is a question on which a court must sometimes hear evidence before making its determination.

Morris, 9 NY3d at 51.

The Court accordingly remitted the matter to Supreme Court "for proceedings consistent with this opinion."

This is that same case, having made its way back to the Court of Appeals seven years later.

Held: The Court ruled by 6 to 1 vote that the regulation could "sensibly" be applied to uncompleted forms, and that plaintiff was entitled to summary judgment.

On the appeal, defendants again argued, this time based upon their own expert opinion, that the requirement that forms "shall be properly braced or tied together to maintain position and shape" could not "sensibly be applied to one side of a form standing on its own because it has no shape to maintain." Yet, defendants' expert admitted "that the first side of a form that is put up, called the back component of the form, could be braced in order to prevent it from falling, and that braces can be installed when the back wall is raised."

In resolving the issue in plaintiff's favor, the majority ruled,

> The expert testimony supports the conclusion that the language of 12 NYCRR 23–2.2(a) can sensibly be applied to other than a completed form, and may apply to a wall component. Therefore, the Appellate Division properly reversed Supreme Court's order, and moreover, did not abuse its discretion as a matter of law by granting summary judgment to plaintiff.

In other words, it was enough that the plaintiff's broader construction was "sensible." Plaintiff was not obligated to show that his construction of the regulation was the *only* sensible construction. This was because,

> Interpreting the regulation as defendants suggest would result in diminished protections for workers during the assembly of forms, as compared with the concrete pouring process stage of the work, a reading of the regulation that runs counter to its text and undermines the legislative intent to ensure worker safety.

Dissent: In dissent, Judge Pigott reasoned that it was "of no moment that both parties' experts agreed that a form 'wall' should be braced before the form is completed to ensure that it does not tip over during the process of constructing the form."

The issue was "not whether such bracing *should* be used to support a form "wall," or whether such bracing *could* be utilized as such support but, rather, whether section 23-2.2(a) was designed to address the bracing of a form wall in the first place [emphasis in original]."

In his view, that was not the case here since the uncompleted forms were not "forms" at all until they were completed.

St. Louis v Town of N. Elba, 16 NY3d 411, 416 [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").

E. Plaintiffs' Motions for Summary Judgment

Toussaint v Port Auth. of New York and New Jersey, 174 AD3d 42, 44-46 [1st Dept 2019][32] (by **3 to 2 vote**: where **12 NYCRR 23-9.1[a]** stated that "**[n]o person other than a trained and competent operator designated by the employer shall operate a power buggy**," and where **plaintiff was injured** when **an operating engineer who was neither trained nor designated to operate the subject buggy drove it into the plaintiff-worker** while the unauthorized driver was **apparently engaged in "horseplay,"** "[w]e have held that **similarly worded provisions of the Industrial Code are sufficiently specific to support a Labor Law § 241(6) claim**" [citing cases] and "**[w]e grant plaintiff's request to search the record and award him summary judgment on the Labor Law § 241(6) claim** as there are no disputed issues of fact as to defendant's liability for the violation of 12 NYCRR 23-9.9(a)"; "[t]he dissent's concern that we are exposing a defendant to liability for injury caused by a power buggy operated by an unauthorized person is misplaced" inasmuch as, (a) "the Court of Appeals has reiterated that, while the duty imposed by Labor Law § 240(6) may be 'onerous[,] … 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'" [citation omitted], and, (b) "liability under Labor Law § 241(6) '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'").

Cutaia v Bd. of Managers of 160/170 Varick St. Condominium, 172 AD3d 424, 425-426 [1st Dept 2019] (where **plaintiff fell from a ladder by virtue of contacting a live wire and receiving a shock**, defendants did not "challenge the court's finding that **plaintiff is entitled to partial summary judgment on his Section 241(6) claim** based on evidence that **defendants**

[32] Disclosure: I represented the plaintiff on the appeal.

violated Industrial Code provisions requiring an employer to, inter alia, **inspect electrical sources, undertake measures and provide appropriate protective wear** to insulate workers against live electrical sources, and post proper warning signs of nearby electrical hazards" per 12 NYCRR 23-1.13[b][3], [4]; "[w]hether plaintiff was at all at fault for the accident must await the trial on damages").

Haynes v Boricua Vil. Hous. Dev. Fund Co., Inc., 170 AD3d 509, 510 [1st Dept 2019] (where "[p]laintiff's deposition testimony and an affidavit by his supervisor, Maldonado, who did not witness the accident but arrived at the scene shortly thereafter, indicated that plaintiff was performing his assigned tasks of installing pins in a drop ceiling using a Hilti gun when **he received an electrical shock, and that exposed, uncapped electrical wiring was seen hanging from the ceiling in the vicinity of where plaintiff was working**," and where plaintiff's co-worker "further averred that after plaintiff's accident he observed electricians, who were working in the building, arriving at the accident site and capping the exposed wires," the **fact that** "**[t]he owner of plaintiff's employer**" claimed that "he **saw no exposed wiring** or any other signs of anything unusual" **did not suffice to raise an issue of fact** since he "**also testified that he came onto the scene 20 to 30 minutes after the accident**"; the **motion court correctly granted plaintiff partial summary judgment** based on **Labor Law § 241(6)** and **12 NYCRR 23-1.13[b][3] and [4]**).

Sanchez v 404 Park Partners, LP, 168 AD3d 491, 492 [1st Dept 2019] (where **plaintiff** "**fell through an opening in the floor** where he was working in a building undergoing construction and landed on the floor below," **defendants were** "**liable** for plaintiff's injuries under Labor Law § 241(6), because, contrary to their contention, **plaintiff established that the Industrial Code** provisions on which is claim is predicated—**12 NYCRR 23-1.7(b)(1)(i), (ii), and (iii)—were violated** and that the **violations were a proximate cause of his accident**").

Quizhpi v S. Queens Boys & Girls Club, Inc., 166 AD3d 683, 685 [2d Dept 2018][33] (where plaintiff testified "he had just walked to the area where he was to begin removing asbestos when the portion of the roof on which he was standing collapsed, causing him to fall into the second floor of the building and sustain injuries," where plaintiff "argue[d] that the defendant violated section **23-3.3(c) and (l)** of the Industrial Code, which apply to certain situations involving demolition work," "**[c]ontrary to the defendant's contention, the plaintiff demonstrated that he was engaged in demolition work** within the meaning of the Industrial Code at the time of the accident, and the defendant failed to raise a triable issue of fact in opposition … Accordingly, **we agree with the Supreme Court's determination granting that branch of the plaintiff's motion which was for summary judgment on the issue of liability on so much of the complaint as alleged a violation of Labor Law § 241(6)** insofar as asserted against the defendant, regardless of the existence of issues of fact as to the plaintiff's comparative negligence" [citing ***Rodriguez v. City of New York***, 31 NY3d 312 [2018]).

Morocho v Blvd. Gardens Owners Corp., 165 AD3d 778, 778-779 [2d Dept 2018] ("plaintiff met his prima facie burden with respect to his Labor Law § 241(6) cause of action by

[33] Disclosure: I represented the plaintiff-respondent in the case.

establishing that **the scaffold was a movable scaffold that lacked safety railings** in **violation of 12 NYCRR 23–5.18(b)**").

Allington v Templeton Found., 167 AD3d 1437, 1438-1439 [4th Dept 2018] (where plaintiff sustained injuries "when the **ladder he had been using to access the roof of a work site 'kicked out'** from underneath him," where **the ladder** "**consisted of only the top half of an extension ladder** and **lacked any feet**," and where "the record establishes that plaintiff **used this ladder 'pursuant to the directions and example of his supervisor** [citation omitted]," **plaintiffs were "entitled to partial summary judgment on their Labor Law § 241(6) cause of action** against Bassett to the extent that this cause of action is based on a violation of **12 NYCRR 23-1.21(b)(3)(iv)**" inasmuch as "[e]vidence of the deterioration or absence of a ladder's feet is sufficient to establish a prima facie violation of this regulation"; the proof also established "a prima facie violation of **12 NYCRR 23-1.21(b)(4)(ii)** … but plaintiffs failed to move for summary judgment on this ground").

Sawczyszyn v New York Univ., 158 AD3d 510, 512 [1st Dept 2018] (where plaintiff "was allegedly **injured in the course of rolling a four-wheeled cart filled with about 100 to 200 pounds of materials** over an **unsecured, makeshift plywood ramp** which bridged an approximately five- or six-inch gap between a truck bed to a loading dock," and where plaintiff "admitted that the **vertical distance** from the surface of the truck bed to the surface of the dock was **about 8 to 12 inches**," plaintiff was entitled to summary judgment under **12 NYCRR 1.22[b][3]**, which **requires ramps to be "substantially constructed and securely braced and supported**"; the court rejected as "conclusory" or "without merit" the defendant's claims that the ramp "was not intended to be used by any types of equipment enumerated in the regulation," that "the work did not require a ramp," and that the regulation was "inapplicable to a temporary ramp").

Luciano v New York City Hous. Auth., 157 AD3d 617 [1st Dept 2018] ("[p]laintiff's testimony that he **slipped on water on the floor of the stairwell** where he was working establishes prima facie a violation of Labor Law § 241(6) predicated on **Industrial Code § 23-1.7(d)**" which **entitled him to partial summary judgment** even though "**an issue of fact exists as to negligence on plaintiff's part**" inasmuch as plaintiff "testified that, as he entered the stairwell, he was looking up to determine the location of the box through which he was to run cable, and that, while carrying a ladder in one hand, he attempted to descend the staircase without looking at the stairs or the landing in front of him").

Contreras v 3335 Decatur Ave. Corp., 173 AD3d 496, 497 [1st Dept 2019] (where "plaintiff testified that he was given a hand-held grinder from which the safety guard had been removed by his employer to install an over-sized disc blade," and where plaintiff claimed that he "was then instructed to use this grinder to cut concrete, over his objections, and was injured when the grinder got stuck, kicked back, knocked him to the ground, and cut into his foot," "**[w]e decline plaintiff's request to search the record** and **grant him partial summary judgment** [under Labor Law § 241[6] and 12 NYCRR § 23-1.5(c)(3)] since **issues of fact exist as to whether the safety guard could have prevented his injuries**").

Lord v Whelan and Curry Constr. Services, Inc., 166 AD3d 1496, 1497 [4th Dept 2018] (motion court **erred in sua sponte granting plaintiff summary judgment on Labor Law § 241(6) since defendants lacked opportunity to respond** … none of which really mattered since the court affirmed the grant of summary judgment on Labor Law § 240).

F. "Integral To The Work" Defense

O'Sullivan v IDI Const. Co., Inc., 7 NY3d 805, 806 [2006] (**conditions that were "integral to the work"** were, for that reason, **not violative of the regulations**).

Mitchell v Caton on the Park, LLC, 167 AD3d 865, 866 [2d Dept 2018] (where the plaintiff-carpenter "allegedly was injured while working at a construction site when **his pants leg caught on a part of a rebar** that had been left sticking out of concrete, causing him to trip and fall," **recovery could not be premised** on **12 NYCRR 23-1.7[e]** inasmuch as **that provision** "**has no application where the object that caused the plaintiff's injury** was **an integral part of the work being performed**").

Savlas v City of New York, 167 AD3d 546, 547 [1st Dept 2018] (where "plaintiff tripped and **fell over one of several steel plates** covering openings into a lower level of a project building," "[t]he motion court **correctly dismissed the Labor Law § 241(6) claim** premised on a violation of Industrial Code … **§ 23-1.7(e)(2)**, because **the plates were not scattered materials or debris, but an integral part of the construction**").

Saginor v Friars 50th St. Garage, Inc., 166 AD3d 529 [1st Dept 2018] (without detailing facts: plaintiff's "**trip and fall**, allegedly caused by a violation of Industrial Code §§ 23-1.7(e)(1) and (2), did not support his Labor Law § 241(6) claim, inasmuch as **the allegedly hazardous condition was integral to the work plaintiff was to perform at the time he was injured**").

Martin v Niagara Falls Bridge Commn., 162 AD3d 1604 [4th Dept 2018] (where "the bridge scaffolding sheet that [plaintiff] was detaching from underlying support cables tipped, causing him to fall approximately 25 to 30 feet before landing on a steel box beam," and where **12 NYCRR 23-5.1[c][2]** stated that "[e]very scaffold shall be provided with **adequate horizontal and diagonal bracing** to prevent any later movement," the motion court "properly determined that it would be '**impractical and contrary to the very work at hand**' to **apply that regulation to a scaffold that is in the process of being dismantled**").

Jones v City of New York, 166 AD3d 739, 741 [2d Dept 2018] (where the plaintiff-ironworker **climbed a "ship's ladder"** which led up to the roof of a school building, where he did so "in order to replace a missing bolt on that ladder where the top rung met the side of the ladder," and **where the top rung came loose as he grabbed it, causing him to fall**, while plaintiff met their prima facie burden of proving that **12 NYCRR 23-1.21[b][1] and [3]** were violated "**defendants raised triable issues of fact as to whether the ladder was an integral part of the work** which was being performed and therefore not subject to the cited regulations … and whether the injured plaintiff's conduct was the sole proximate cause of the accident").

Rossi v 140 W. JV Mgr. LLC, 171 AD3d 668 [1st Dept 2019] (where plaintiff "**tripped and fell over construction debris at the work site**," "[t]he **area where plaintiff fell was, by definition, a passageway**, as he tripped over Vanquish's demolition debris along the only route he could take to return to his work area with a ladder" and the area "where plaintiff was required to pass in the course of his work" also came "within the definition of a working area," thus establishing violations of **12 NYCRR 23-1.7[e][1]** and **23-1.7[e][2] as a matter of law** inasmuch as "[t]he debris, consisting of cables from elevator shaft demolition, **was not inherent in, or an integral part of, the work** … but rather constituted an accumulation of debris from which Vanquish was required to keep work areas free").

G. Sole Proximate Cause Defense

Roque v 475 Bldg. Co., LLC, 171 AD3d 543 [1st Dept 2019] (where plaintiff "was injured when, while in the process of demolishing a sidewalk bridge at premises owned by defendants, **a nail he was attempting to remove with a hammer struck him in the eye**," and where **12 NYCRR 23-1.8[a]** states that eye protection equipment "suitable for the hazard involved shall be provided for and shall be used by all persons … while engaged in any … operation which may endanger the eye, "[t]he issue of **whether demolishing a sidewalk bridge and removing nails are activities covered by 12 NYCRR 23-1.8(a) is an issue of fact" as is the question of "whether plaintiff was the sole proximate cause of his injury**").

Radeljic v Certified of N.Y., Inc., 161 AD3d 588 [1st Dept 2018] (where plaintiff fell into an elevator shaft and there were "**conflicting evidence** … **whether the [available safety] harness would have allowed plaintiff to reach and perform his work**" and "**conflicting statements** about **who was responsible for removing a plywood barricade** positioned in front of the elevator shaft opening" and "as to whether **plaintiff, a foreman** who had the authority to order his subordinate who was present at the time of the accident to replace the barricade, was the sole proximate cause of his accident," there were **factual issues** concerning the alleged violations of **12 NYCRR 23-1.7(b)(1)** and **12 NYCRR 23-1.7(e)**).

H. Whether Particular Regulations Are Applicable And Sufficiently "Concrete"

1. Defendant Prevails At Least In Part As A Matter Of Law

Biaca-Neto v Boston Road II Hous. Dev. Fund Corp., 2019 NY Slip Op 06142 [1st Dept August 13, 2019] (where plaintiff **tried to exit from a scaffold by climbing on the frame** and then entering the building through a window cut-out, **the case did not implicate the "slippery condition" provisions** of **12 NYCRR 23-1.7[d]** inasmuch as "**structural crossbars** which simply hold the scaffold together **are not working surfaces required for standing or walking**").

Robles v Taconic Management Co., LLC, 173 AD3d 1089 [2d Dept 2019] (where plaintiff, "a laborer who was transporting demolished materials onto a freight elevator, allegedly sustained injuries when he was struck on the head by a closing vertical elevator door," defendants "demonstrated, prima facie, that the specific safety regulation that the plaintiff claims was violated, **12 NYCRR 23-7.1**, was **not sufficiently specific** to support the cause of action").

Turgeon v Vassar Coll., 172 AD3d 1134, 1135 [2d Dept 2019] (where "plaintiff was assisting a mason … to replace tiles or stones on the western façade of Rockefeller Hall at the third-floor level," the **mason's removal of tile caused three others to start falling**, plaintiff "reached out with his left hand to push them back in" and **the falling tiles** "**severed his right thumb**," defendants established their prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 241(6) cause of action premised on alleged violations of **12 NYCRR 23-3.2** and **23-3.3[c]** inasmuch as **plaintiff was not engaged in "demolition," 12 NYCRR 23-1.33[a]** since that "**does not apply to workers on a construction site**," and **12 NYCRR 23-1.18** since "**the lack of a sidewalk shed was not the proximate cause of the plaintiff's injuries**, as the plaintiff was in a lift at the third-floor level of the building at the time of the accident").

Djuric v City of New York, 172 AD3d 456, 456-457 [1st Dept 2019] (**12 NYCRR 23-1.7[a][1]** was **inapplicable** "because **plaintiff was not injured by debris** that may have been falling from a ceiling demolition, but **instead, from a fixture of the building which dislodged**"; **12 NYCRR 23-3.2[b]** was "**also inapplicable** because it **pertains to protecting the stability of adjacent structures**, not the stability of the building or structure allegedly being demolished").

Weaver v Gotham Constr. Co. LLC, 171 AD3d 427 [1st Dept 2019] (where plaintiff "testified that at one moment he was reaching toward the control panel of the motorized hydraulic drill lift he was operating and the next he was pinned to the wall by the drill" and "**expressly denied that he had lost his footing**," **defendants thus** "**established prima facie** that Industrial Code **(12 NYCRR) § 23-1.7(d)** (slipping hazards) **and (e)** (tripping hazards), on which plaintiff relies, **are inapplicable** to this case and that therefore the Labor Law § 241(6) [cause of action] fails").

Monfredo v Arnell Constr. Corp., 171 AD3d 600 [1st Dept 2019] ("plaintiffs' Labor Law § 241(6) claim pursuant to **Industrial Code § 23-5.3(e)** is not viable, as the record shows that **the scaffold in question was not elevated more than seven feet** (12 NYCRR 23-5.1[j][1]").

Channer v ABAX Inc., 169 AD3d 758, 760 [2d Dept 2019] (where plaintiff, an asbestos inspector, "accessed a scaffold on the outside of the school by stepping onto a milk crate that was beneath a window on the second floor of the school and climbing through the window" and the accident "occurred when the plaintiff climbed back through the window, stepped onto the milk crate, and fell," "**defendant demonstrated its prima facie entitlement to judgment as a matter of law** … by presenting evidence that **it did not place a milk crate beside the window and that it had no knowledge that the plaintiff was using this device to access the scaffold**" but "**plaintiff raised a triable issue of fact by presenting evidence** that **the defendant provided the milk crate, that it was a common practice among its employees to obtain access to the scaffold by using the milk crate**, and that the plaintiff was not instructed to obtain access to the scaffold by another method, such as by using eth scaffold's stairs").

Mitchell v City of New York, 169 AD3d 505, 505 [1st Dept 2019] (where plaintiff **simply lost his footing while descending a properly secured ladder**, "inasmuch as the ladder **was placed in compliance** with **12 NYCRR 23-1.21(b)(4)(i)**, dismissal of the Labor Law § 241(6) claim was warranted").

Sikorjak v City of New York, 168 AD3d 778, 779-781 [2d Dept 2019] (where plaintiff was "demolishing a concrete wall at the St. George Staten Island Ferry Terminal" when "**his left pants leg caught on fire** after sparks were emitted from a gas-powered handheld saw that he was using to cut through a steel reinforcing bar," where a **jury** "**returned a verdict finding that the City defendants and Conti violated Industrial Code … § 112-18(c)(1)(iii)**, which requires that '**there shall be at least one approved extinguisher for each 2500 square feet** of floor area so located that a person shall not have to travel more than 50 feet to reach the nearest extinguisher,'" and where **the jury further found that "such negligence was not a substantial factor in causing the plaintiff's injuries,"** "**we agree** with the **Supreme Court's determination to deny that branch of the plaintiff's motion** which was, in effect, pursuant to CPLR 4404(a) **to set aside the verdict as contrary to the weight of the evidence** and for a new trial … [inasmuch as] the issues of negligence and proximate causes were not inextricably interwoven, and the jury's determination that the City defendants and Conti were negligent but that their negligence was not a proximate cause of the plaintiff's injuries was supported by a fair interpretation of the evidence").

Quigley v Port Auth. of New York, 168 AD3d 65, 67 [1st Dept 2018] (where plaintiff "was injured when he **slipped on a pile of snow-covered pipes** located directly outside the entrance door of his employer's work site shanty," **the area was not a "passageway" within the meaning of 12 NYCRR 23-1.7[e][1]**, inasmuch as "**[a] 'passageway'** is **commonly defined and understood to be 'a typically long narrow way connecting parts of a building'**" and the term thus "**pertains to an interior or internal way of passage inside a building**").

Canty v 133 E. 79th St., LLC, 167 AD3d 548, 548-549 [1st Dept 2018] (where **plaintiff** "**was searching for a tool in his employer's gang box** when **the lid of the gang box fell and closed on his left hand**," and where plaintiff claimed "that a Spieler employee had carelessly knocked the lid over when the employee lifted open the lid of a Spieler gang box, which was 'back to back' with his employer's gang box, due to overcrowding in the work area," **12 NYCRR 23-1.5[c][3] was inapplicable** and plaintiff's Labor Law § 241[6] claim was "properly dismissed").

Wiley v Marjam Supply Co., Inc., 166 AD3d 1106, 1109 [3d Dept 2018] (where the plaintiff-worker was walking across the second floor when sheetrock that had been "stacked on its long side on the ground" fell and struck plaintiff's ankle, and where "the **sheetrock was stored in the corner of a second-floor room** and **did not 'obstruct any passageway, walkway, stairway or other thoroughfare'** (quoting **12 NYCRR 23-2.1[a][1])**," "Supreme Court did not err in dismissing the Labor Law § 241(6) cause of action").

Grosskopf v Beechwood Org., 166 AD3d 860, 861 [2d Dept 2018] (where "plaintiff allegedly was injured when he **slipped and fell on snow and ice on a grassy lawn** in front of a townhouse

in a residential complex that was under construction," defendants established that **12 NYCRR 23-1.7[d] and [e]** were **inapplicable** "because **the accident did not occur on a passageway or in a work area**").

Moura v City of New York, 165 AD3d 434, 434-435 [1st Dept 2018] (where "plaintiff's employer was hired to erect, move, and adjust rolling scaffolding to facilitate B & H's inspection of the Manhattan Bridge," and where **plaintiff stepped into a hole** and thus sustained injury, "**[t]he Labor Law § 241(6) claim** predicated on a violation of **Industrial Code § 23–1.7(b)(1)(i)** was **properly dismissed** because the area into which the injured plaintiff fell **did not constitute a hazardous opening within the meaning of that provision**").

Simmons v City of New York, 165 AD3d 725, 728-729 [2d Dept 2018] (where the plaintiff-plumber was allegedly "injured while moving an air compressor, weighing in excess of 600 pounds" when he and his co-workers removed it from its crate, placed it on the blades of a pallet jack, and then pushed and pulled the pallet jack until it ultimately struck some debris which "caused the pallet jack to stop short and the compressor to roll off the pallet jack and onto the plaintiff's ankle," defendants were entitled to dismissal of "so much of the Labor Law § 241(6) cause of action as was premised upon violations of **12 NYCRR 23-1.7(e), 23-1.27(a), 23-1.28(a) and 23-2.1(a)**" inasmuch as "defendants established, prima facie, that **these cited regulations** alleged to have been violated **were either inapplicable under the circumstances or lack the specificity required** to qualify for predicate liability under Labor Law § 241(6)").

Flores v Metro. Transportation Auth., 164 AD3d 418, 419 [1st Dept 2018] (where "plaintiff fell off a flatbed truck after a load of steel beams, without tag lines, was hoisted above him by a crane, and began to swing towards him," the **motion court** "**correctly dismissed the Labor Law § 241(6) claim** based on an alleged violation of **12 NYCRR 23-6.1(h)** because **that section does not apply to 'cranes'**" [not that plaintiff cared much, having prevailed on Labor Law § 240]).

Vita v New York Law School, 163 AD3d 605 [2d Dept 2018] (where plaintiff alleged that "he was **carrying a 60-pound pallet in one hand a box of filters in the other**, and as he was walking across the room" "he **tripped over a condensate pipe that was attached to an HVAC unit** in a mechanical room," Supreme Court properly dismissed the plaintiff's claims under Labor Law § 241[6] inasmuch as **12 NYCRR 23-1.7(e)(2) was "inapplicable** because the subject pipe did not constitute dirt, debris, scattered tools, materials, or sharp projections" and "**12 NYCRR 23-1.7(e)(2)** has no application if an objection that a plaintiff trips over is permanent and an integral part of what was being constructed").

Gargan v Palatella Saros Builders Group, Inc., 162 AD3d 988 [2d Dept 2018] (where plaintiff "was delivering three or four bundles of molding and trim material to the construction site," where his "**path was blocked by a half-full dumpster and a stack of empty pallets**," and where he "**decided to move the pallets by flipping them" and was injured while trying to do so**, "the evidence submitted by the defendant established, prima facie, that the area where the injured plaintiff allegedly was injured **did not constitute a 'passageway' within the meaning of 12 NYCRR 23-1.7(e)(1)**, and that there was **no evidence of any tripping or slipping**

hazards within the meaning of 12 NYCRR 23-1.7(d) and (e)" and "that **12 NYCRR 23-2.1(a)(1) is not applicable** under the circumstances of this case").

Sochan v Mueller, 162 AD3d 1621 [4th Dept 2018] (where "the ladder used by plaintiff was the top half of an extension ladder that lacked any rubber feet and belonged to defendants," **12 NYCRR 23-1.21[a]** was "**not sufficiently specific** to support a Labor Law § 241(6) cause of action").

Smiley v Allgaier Constr. Corp., 162 AD3d 1481 [4th Dept 2018] (where plaintiff testified that he and a coworker "were **[manually] lifting a heavy motor** approximately four feet onto the deck of a scissor lift" and that the motor fell and plaintiff tried to change his grip, the motion court "erred in denying that part of [defendant's] cross motion with respect to the Labor Law § 241(6) claim, which is premised on the alleged violation of **12 NYCRR 23-1.7(f)**," inasmuch as "**[t]hat regulation applies to stairways, ramps or runways**, and the undisputed evidence establishes that **the accident 'did not involve [plaintiff] ascending or descending to a different level'**").

Jackson v Hunter Roberts Constr. Group, LLC, 161 AD3d 666 [1st Dept 2018] (where plaintiff "and a coworker were carrying a water main pipe when he **lost his balance upon stepping on a makeshift ramp that 'bowed,'**" and where "[t]he weight of the pipe caused them to fall and, as plaintiff was trying to push or eject the pipe from his shoulder to prevent it from landing on him, the pipe struck either a cart or a column, retracted back and struck him in the leg," **12 NYCRR § 23-1.5(c)(1) and (2)** were "**too general** to serve as Labor Law § 241(6) predicates" and **12 NYCRR § 23-1.5(c)(3) was "inapplicable**, as **the ramp does not constitute a 'safety device,' 'safeguard,' or 'equipment' as used in the provision**").

Maracle v Autoplace Infiniti, Inc., 161 AD3d 1524 [4th Dept 2018] (where plaintiff, who worked for a sign maintenance and alteration company, **stood on and slipped from a rock** while "attempting to remove letters and fascia from a sign," "the rock was **not a 'scaffold' for purposes of section 23-5.2**," "**subdivisions (d) and (e) of section 23-1.7 [were] inapplicable** to the facts of this case inasmuch as plaintiff **did not allege that the rock was slippery or that he tripped on the rock**," and "plaintiff was **not engaged in '[d]emolition work' [12 NYCRR 23-1.4(b)(16)]** and … the **rock cannot be considered 'accumulated debris or piled materials'** [**12 NYCRR 23-3.3(1)**]").

Yao Zong Wu v Zhen Jia Yang, 161 AD3d 813 [2d Dept 2018] (where plaintiff testified that he "**felt the ladder shake; then the ladder leaned and he fell** to his right, causing him to fall to the ground" but "**he did not know what caused the ladder to shake and lean**," and where he further "testified that he had used this ladder in the past, and had noticed nothing defective or broken about the ladder," the "plaintiff's own submissions demonstrated that there are triable issues of fact as to how this accident occurred and it cannot be concluded, as a matter of law, that the alleged failure to provide the plaintiff with proper protection proximately caused his injuries" but "defendants established as a matter of law that the alleged violation [of **22 NYCRR 23-1.21(b)**, setting forth certain minimum standards for ladder construction and maintenance] was **not a proximate cause** of the plaintiff's accident").

Santos v Condo 124 LLC, 161 AD3d 650 [1st Dept 2018] (by **3 to 1 vote**: where plaintiff claimed that the scaffolding floor "was **missing some of the planks**," and that he was thereby caused to fall "10 to 12 feet onto the pipes of the scaffold's lower level," the motion court "properly dismissed the section 241(6) claim predicated on **12 NYCRR 23-5.1(j)** and **23-5.3(e)** as **inapplicable to the facts of this case** because **at no time did Santos claim that he was caused** to **fall due to inadequate railings**").

Galvez v Columbus 95th St. LLC, 161 AD3d 530 [1st Dept 2018] (where plaintiff was "ascending to the top of a building on a motorized suspended scaffold," where plaintiff and his co-worker "**had to press their backs against the wall and use their legs to push the scaffold out**" in order to clear a concrete beam, and where plaintiff thereby "**injured his lower back**," "**12 NYCRR § 23-5.8(c)(1)**, which is concerned with the **horizontal displacement** of suspended scaffold platforms" was "**inapplicable to the facts of this case**").

Marl v Liro Engineers, Inc., 159 AD3d 688 [2d Dept 2018] (where plaintiffs "alleged that they were exposed to, and injured by, **toxic substances in the soil** which they were excavating in connection with the construction project, and that they were not provided with proper protective equipment," "Supreme Court properly denied that branch of the plaintiffs' cross motion which was for leave to amend the bill of particulars to allege a violation of **12 NYCRR 23-1.7(g)** in support of the Labor Law § 241(6) cause of action" inasmuch as "this Industrial Code section **refers to the atmosphere of unventilated confined areas** where dangerous air contaminants are present or where there is an insufficient oxygen supply, it is inapplicable under the circumstances here").

Colon v Metro. Transportation Auth., 159 AD3d 450 [1st Dept 2018] (where plaintiff "**fell from a makeshift platform**" while "wearing a vest and lanyard" and **had not attached "himself to the available lifeline**," plaintiff's own testimony "demonstrate[d] that a violation of this Industrial Code section **[12 NYCRR 23-1.7(e)(2)] was not a factor** in his accident").

Sawczyszyn v New York Univ., 158 AD3d 510, 511-512 [1st Dept 2018] (where plaintiff "was allegedly **injured in the course of rolling a four-wheeled cart filled with about 100 to 200 pounds of materials** over an **unsecured, makeshift plywood ramp** which bridged an approximately five- or six-inch gap between a truck bed to a loading dock," and where plaintiff "admitted that the vertical distance from the surface of the truck bed to the surface of the dock was about 8 to 12 inches," plaintiff could not rely upon **12 NYCRR 23-1.7[f]** inasmuch as "the ramp from the truck bed to the dock, covering a vertical distance of about one foot or less, '**did not provide access to an above- or below-ground working area** within the meaning of the regulation'").

Cross v Noble Ellenburg Windpark, LLC, 157 AD3d 457, 458 [1st Dept 2018] (where plaintiff "**fell due to a chain catching his foot**," the "motion court correctly dismissed plaintiff's Labor Law § 241(6) claim" inasmuch as, (1) **23-1.7(d) was not implicated** since plaintiff did not fall U to U, (2) **plaintiff "fell from a tractor trailer, and not in a passageway, rendering Industrial Code § 23-1.7(e)(1) inapplicable**," and, (3) "[t]he metal bars welded to the trailer's body for use

as a ladder or stairway to the trailer's top were **not a '[s]ingle ladder[]' subject to Industrial Code § 23-1.21(c)**").

2. Plaintiffs' Claims Are At Least In Part Viable Or Triable

Winters v Uniland Development Corporation, 174 AD3d 1293 [4th Dept 2019] (where **12 NYCRR-1.13[b][4]** stated "**[n]o employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit** that **he may contact such circuit** in the course of his work **unless** the employee is **protected against electric shock** by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means," where **12 NYCRR 23-3.2[a][2]** said that **electric lines must be "shut off and capped** or otherwise sealed" before any demolition begins, where **12 NYCRR 23-3.2[a][3]** said that during the course of demolition **electrical lines "shall be protected with substantial coverings** or shall be so relocated as to protect them from damage and to afford protection to any person,'" and where the plaintiff-electrician cut into a wire in order to "determine the voltage of the wires" and thus received an electrical shock, **defendants "failed to meet their initial burden of establishing that they 'did not violate the regulations**, that the regulations are not applicable to the facts of this case, or that such violation was not a proximate cause of the accident' [citation omitted]").

Davies v Simon Property Group, Inc., 174 AD3d 850 [2d Dept 2019] (where plaintiff claimed that **an inadequately secured piece of plywood caused him and his cart to fall** into "**a three-foot wide and three-foot deep hole** or trench," but where "two other witnesses testified at their depositions that there was no hole or trench underneath the plywood," the provisions of **12 NYCRR 23-1.22(b) set forth "specific standards of conduct** sufficient to support a Labor Law § 241(6) cause of action" **but "the conflicting deposition testimony** … **raised a triable issue of fact** as to whether there was insufficient bracing under the plywood").

Mendez v Vardaris Tech, Inc., 173 AD3d 1004 [2d Dept 2019] (where plaintiff, "a foreman … was supervising the removal of asbestos-containing material from a classroom ceiling … when a **light fixture fell from the ceiling and struck him** on the head," where plaintiff claimed violations of **12 NYCRR §§ 23-3.3[b][3] and 23-3.3[c]**, where the **former** provided that "[w]alls, chimneys and **other parts of any building or other structure shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration**," and where the **latter** requires "**continuing inspections against hazards which are created by the progress of the demolition work** itself," **the cited provisions were "sufficiently specific** to support a cause of action under Labor Law § 241(6)" and "**defendant failed to demonstrate, prima facie, that these regulations were inapplicable** to the facts of this case, that the regulations were applicable but not violated, or that the alleged violation of these regulations was not a proximate cause of the accident"; in particular, "the defendant failed to establish, prima facie, that the hazard which allegedly caused the accident arose from the actual performance of the work, and not structural instability caused by the progress of the demolition").

Contreras v 3335 Decatur Avenue Corp., 173 AD3d 496, 497 [1st Dept 2019] (where "plaintiff testified that he was **given a hand-held grinder from which the safety guard had been removed** by his employer to install an over-sized disc blade," and where plaintiff claimed that he "was **then instructed to use this grinder to cut concrete, over his objections**, and was **injured when the grinder got stuck**, kicked back, knocked him to the ground, and cut into his foot," plaintiff's testimony raised "**a triable issue of fact** as to **whether defendant breached its nondelegable duty** 'to provide reasonable and adequate protection and safety' to plaintiff" inasmuch as **12 NYCRR § 25-1.5[c][3]**, which provides that "**[a]ll safety devices, safeguards and equipment** in use **shall be kept sound and operable**, and **shall be immediately repaired or restored** or immediately removed from the job site if damaged," "**applie[d]**" and **was "sufficiently specific** to support a section 241(6) claim").

Toussaint v Port Auth. of New York and New Jersey, 174 AD3d 42, 44-45 [1st Dept 2019][34] (by **3 to 2 vote**: where **12 NYCRR 23-9.9[a]** stated that "**[n]o person other than a trained and competent operator designated by the employer shall operate a power buggy**," and where **plaintiff was injured when an operating engineer who was neither trained nor designated to operate the subject buggy drove it into the plaintiff-worker** while the **unauthorized driver was apparently engaged in "horseplay," "[w]e have held that similarly worded provisions of the Industrial Code** are **sufficiently specific to support a Labor Law § 241(6) claim**" [citing cases] and "[w]e grant plaintiff's request to search the record and award him summary judgment on the Labor Law § 241(6) claim as there are no disputed issues of fact as to defendant's liability for the violation of 12 NYCRR 23-9.9(a)").

Bellucia v CF 620, 2019 172 AD3d 520, 522-523 [1st Dept 2019][35] (where "a **manually operated freight elevator** in a building undergoing construction **dropped suddenly from the fourth floor to the basement** while carrying plaintiff Joseph Marandola, and other individuals working on the project, causing injuries," and where plaintiffs moved for summary judgment based upon the owner's alleged violation of **12 NYCRR 23-1.7[f]** [requiring "stairways ramps or runways" as the means of access to work levels], "**[i]ssues of fact** exist as to **whether CF620 was negligent** and **whether any such negligence was a proximate cause of the accident**").

Urquiza v Park and 76th St., Inc., 172 AD3d 518, 518-519 [1st Dept 2019] (there were **issues of fact** concerning the alleged violation of **12 NYCRR 23-1.7[d]** concerning "**whether a slippery condition existed in violation of that Industrial Code provision** where decedent was working while **standing on an unsecured plywood board atop the radiator casing next to an open window during a rainstorm**").

DeMercurio v 605 W. 42nd Owner LLC, 172 AD3d 467, 467 [1st Dept 2019] (where plaintiff "**allegedly slipped and fell on protective brown paper that had been installed on the floor of an apartment unit under construction**" and plaintiff testified "that **the paper was slippery because it was on top of a cleaning agent called 'green dust,'** which was used to prevent dust

[34] Disclosure: I represented the plaintiff on the appeal.

[35] Disclosure: I represented one of the (many) plaintiff-respondents in ***Bellucia***.

from rising into the air while that company was sweeping" "**[t]he motion court improperly dismissed plaintiff's Labor Law § 241(6) claim** predicated on **Industrial Code (12 NYCRR) § 23-1.7(d)**" inasmuch as "**[t]he alleged presence of green dust on the floor created a triable issue as to whether a 'foreign substance' created a slippery condition** on the floor, in violation of this Code section, and whether such condition caused plaintiff's accident").

Valdez v Turner Constr. Co., 171 AD3d 836 [2d Dept 2019] (where plaintiff was allegedly "performing landscaping on the fifth-floor roof of the property" and was "in the process of detaching a bag of soil that weighed at least 2,500 pounds from a crane that had hoisted the bag up to the fifth-floor roof," where the crane then lifted "causing the straps connecting the bag to the crane to catch the plaintiff's hand and lift him off the roof," and where plaintiff fell to the roof when he freed his hand, "**plaintiff's deposition testimony that his hand became caught when the crane began to hoist** and that **the crane pulled him several feet off the roof** while his hand was caught established that the crane hoisted, or otherwise traveled, while the plaintiff was attached to the load, in violation of **12 NYCRR 23-8.1(f)(5)**, and that this violation caused his injuries").

Lundy v Austein, 170 AD3d 703, 704-705 [2d Dept 2019] (where plaintiff, whose "work consisted primarily of filling trash bags with debris from the basement and then placing those bags at the roadside," "**allegedly was injured when he stepped into an uncovered drain hole** at the bottom of the stairway outside the basement door," **defendants** "**failed to show that the plaintiff's alleged injury did not result from the presence of a tripping hazard** in the passageway he traversed, in violation of **12 NYCRR 23-1.7(e)**").

Moscati v Consol. Edison Co. of New York, Inc., 168 AD3d 717, 718-719 [2d Dept 2019] (where "plaintiff was **operating an excavator** to remove from a creek bed pieces of timber that had previously formed a bulkhead," and where "**the excavator slid or tipped into the creek**," "**Con Ed did not demonstrate**, prima facie, that **Industrial Code § 23-4.2(c)**, which **requires supervision for certain excavation work**, was **inapplicable** here … [or] that this regulation was not violated"; Con Ed **also** "**did not demonstrate**, prima facie, that Industrial Code **§§ 23–4.2(a) and 23–4.4(a)**, which require, inter alia, proper footing for certain work using excavators and similar equipment, **were inapplicable here**, or that these regulations were not violated," it "**also did not demonstrate**, prima facie, that **Industrial Code §§ 23–9.4(c), and 23–9.5(a)**, which require, inter alia, the use of shoring and/or temporary sheeting for certain excavation work, were inapplicable here, or that these regulations were not violated").

Quigley v Port Auth. of New York, 168 AD3d 65, 67 [1st Dept 2018] (where **plaintiff** "was injured when he **slipped on a pile of snow-covered pipes** located directly outside the entrance door of his employer's work site shanty," "[t]he Labor Law § 241(6) claim predicated on a violation of **12 NYCRR 23-1.7[d] should not have been dismissed** because there was **an issue of fact as to whether the accident occurred in a walkway**" and there were "**conflicting accounts** of **whether the pipes were located in a manner that impeded ingress and egress into the shanty**"; additionally, there was a **triable issue whether the place in issue was a "working area"** within the meaning of **12 NYCRR 23-1.7[e][2]**, and **another issue whether**

the pipes which **allegedly impeded ingress and egress were safely stored pursuant to 12 NYCRR 23-2.1[a][1]**).

Padilla v Park Plaza Owners Corp., 165 AD3d 1272, 1275 [2d Dept 2018] (where the building defendants hired plaintiff's employer to remove the oil from a temporary oil tank and then clean the tank, where that required plaintiff to climb to the top of the tank, and where "plaintiff submitted evidence that he fell from a 12-to 16-foot high surface, and that he had not been provided with safety devices to protect him from such a fall," the motion court should have denied the motions for summary judgment dismissing the Labor Law § 241(6) cause of action predicated on **12 NYCRR 23-1.7[d]** since **defendants** "**failed to establish, prima facie, that a slippery condition on the oil tank was not a proximate cause** of the plaintiff's fall").

Moura v City of New York, 165 AD3d 434, 434-435 [1st Dept 2018] (where "plaintiff's employer was hired to erect, move, and adjust rolling scaffolding to facilitate B & H's inspection of the Manhattan Bridge," and where **plaintiff stepped into a hole** and thus sustained injury, "**[t]he section 241(6) claim predicated on a violation of Industrial Code § 23–1.30** was properly sustained because there is **an issue of fact** as to **whether the light at the accident site … was adequate**").

Bocanegra v Chest Realty Corp., 169 AD3d 750, 751-752 [2d Dept 2019] (where plaintiff, an asbestos worker, testified that she "**slipped and fell on a patch of ice in the hallway**" as "she was proceeding to the nearly lunch area," "[t]he jury could have credited the plaintiff's trial testimony that she slipped on a large patch of ice on the floor of **a building that did not have heating on a cold January day**, and therefore, **rationally conclude that 'someone within the chain of the construction project was negligent** in not exercising reasonable care, or acting within a reasonable time, to prevent or remediate the hazard, and that plaintiff's slipping, falling and subsequent injury proximately resulted from such negligence'" [*quoting* ***Rizzuto***]).[36]

Douglas v Sherwood 48 Assoc., 162 AD3d 498 [1st Dept 2018] (where plaintiff "was injured while pulling a mobile scaffold with both hands, when she **stepped backwards and her left heel fell into one of the estimated 12-inch deep trenches** in the concrete flooring, and a wheel of the scaffold dropped onto her foot," there were "factual issues as to whether the injury to plaintiff's left leg was proximately caused by defendants' violation of **12 NYCRR 23-5.18(h)**, which provides, inter alia, that '[manually-propelled] [s]caffolds shall be moved only on level floors or equivalent surfaces free from obstructions and openings'").

Sochan v Mueller, 162 AD3d 1621 [4th Dept 2018] (where "the ladder used by plaintiff was the **top half of an extension ladder that lacked any rubber feet** and belonged to defendants," "**12 NYCRR 23-1.21(c)**, which concerns single ladders, **applies to this case** inasmuch as the ladder being used by defendant was being used as a single ladder").

[36] I imagine that liability was premised on 12 NYCRR 23-1.7[d] ("Slipping hazards"), but the decision does not say.

Sochan, 162 AD3d 1621 ("[c]ontrary to defendants' contention with respect to the Labor Law § 241(6) cause of action, they failed to establish as a matter of law that they did not violate **12 NYCRR 23-1.7(f)**, which concerns **vertical passages**" inasmuch as, (1) "[t]hat regulation is **sufficiently specific to support a Labor Law § 241(6) cause of action**," and, (2) "plaintiff was 'injured in the process of accessing' the elevated loft area" since "the loft area constitutes a working level above ground even if it was generally used for only storage").

Maman v Marx Realty & Improvement Co., Inc., 161 AD3d 558 [1st Dept 2018] (where plaintiff "**fell through an opening in the floor of a building under construction**" and there was a **triable issue** "**whether static lines were in place for him to safely tie off**," there was **thereby an issue of fact** "whether any violation of Labor Law § 241(6) based on **12 NYCRR 23-1.7(b)(1)** was a proximate cause of plaintiff's accident").

Salerno v Diocese of Buffalo, N.Y., 161 AD3d 1522 [4th Dept 2018] (where "plaintiff was ordered to operate a '**Bobcat skid-loader**,' which had **a safety bar that lowered onto the operator's lap**" and "the **safety bar allegedly fell and struck him**" as "plaintiff raised the safety bar to exit the machine," "the court properly denied [defendants'] motion with respect to the section 241(6) claim insofar as it alleged a violation of **12 NYCRR 23-9.2(a)** because there are **triable issues of fact** whether **plaintiff's employer had actual notice of a structural defect or unsafe condition regarding the safety bar**" and the motion court also "erred in granting defendants' motion with respect to the section 241(6) claim insofar as it alleges a violation of **12 NYCRR 23-1.5(c)(3)** because **that regulation is sufficiently specific** to support a claim under section 241(6)").

Carlton v City of New York, 161 AD3d 930 [2d Dept 2018] (where plaintiff and a co-worker were in the process of installing an approximately 80 pound weld neck flange about 16 feet above ground level, where they returned to ground level to obtain an additional tool they needed to complete the work, and where the tack welds holding the flange in place gave way, with the result that the flange fell and struck plaintiff, and where it was **undisputed both that plaintiff had been "instructed to wear his hard hat on site"** and that "**his hard hat could not be worn with his welding shield**," there was "**a triable issue of fact** as to **whether providing the injured plaintiff with a safety hat that could not be worn with his welding shield satisfied the defendants' duty** to provide the injured plaintiff with '**an approved safety hat**,' and summary judgment dismissing the Labor Law § 241(6) cause of action insofar as it was predicated upon an alleged violation of **12 NYCRR 23-1.8(c)(1)** was not warranted").

Rodriguez v 250 Park Ave., LLC, 161 AD3d 906 [2d Dept 2018] (where plaintiff, who was an elevator mechanic, was "working inside an enclosed concrete crawl space underneath the elevator motor room" and "he tripped and his left arm was injured when it was caught inside a pulley system called a sheave that had been activated when his assistant began to operate the elevator," and where **plaintiff alleged** that there was a **tripping hazard violative of 23-1.7[e][1]** and also the **guarding of the machine was violative of 23-1.12[e] and [6]**, defendants **failed to demonstrate that 23-1.7[e][1] "lacked the requisite specificity** to support a Labor Law § 241(6) cause of action," "also **failed to demonstrate, prima facie, that this Industrial Code provision was inapplicable** to the facts of this case," were **wrong in contending that 23-**

1.12[e] and [6] was not "sufficiently specific to support a Labor Law § 241(6) cause of action," and "[d]espite the defendants' contention that the elevator sheave was protected by virtue of its location [*see* 12 NYCRR 23-1.12[e]) inside the secondary [*see* 12 NYCRR 23-1.12[g]), the plaintiff, through his expert, raised a triable issue of fact regarding the adequacy of this form of protection with respect to an elevator mechanic performing work inside the secondary").

Greenwood v Whitney Museum of Am. Art, 161 AD3d 425 [1st Dept 2018] (where plaintiff "sustained injuries during construction of a building **when a piece of scrap metal fell on him**," where "[t]he piece of metal was being used by his co-worker, who was welding steel about 30 feet above o a lift, as a 'dunnage' to secure a 'fire blanket' to prevent sparks from igniting objects in surrounding areas," and where "plaintiff was 'firewatching,' which required him to remove flammable objects and suppress any fires started by errant sparks," "**[t]riable issues of fact** preclude partial summary judgment on the Labor Law § 241(6) claim" inasmuch as, **(a) 12 NYCRR § 23-2.5(a)** required "**placement of planks in shafts 'not more than two stories or 30 feet**, whichever is less, above the level where persons are working,'" and, **(b) there were "[q]uestions of fact"** "**whether the piece of steel fell from 'more than two stories or 30 feet,'** and whether the placement of planks would be antithetical to plaintiff's work by, for example, obstructing his view, or increasing the risk of fires caused by sparks").

Tuzzolino v Consol. Edison Co. of New York, 160 AD3d 568 [1st Dept 2018] (where plaintiff established prima facie a violation of Labor Law § 240(1) through his testimony that he was caused to fall when **the unsecured ladder on which he was standing suddenly slipped out** from under him, "[s]ummary dismissal of the Labor Law § 241(6) claim predicated on an alleged violation of Industrial Code **(12 NYCRR) § 23-1.21(b)(4)(ii)** is precluded by an issue of fact as to **whether the accident was caused by a wet condition of the floor** at the time that the ladder slipped out from underneath plaintiff").

Licata v AB Green Gansevoort, LLC, 158 AD3d 487, 489 [1st Dept 2018] (where as **plaintiff "stepped backwards off the ladder** on which he had been working, **his left foot got 'caught … like sandwiched' in an unmarked and uncovered hole** in the floor" and plaintiff "twisted backwards, injuring his knee, but stopped himself from falling to the ground by placing a hand out," where plaintiff said "There was garbage all over the floor … I don't know if it was covering the hole or not … Like I said there was a lot of stuff on the floor," and where plaintiff relied on **12 NYCRR 23-1.7[e][2]**, stating, "The parts of floors, platforms and similar areas where persons work or pass **shall be kept free from accumulations of dirt and debris** and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed," **the regulation was "sufficiently specific to sustain a claim under Labor Law § 241(6)**" and the **fact that "plaintiff could not state with certainty whether or not the garbage and debris actually covered the hole" did not preclude the jury from concluding there was a violation** since "when [plaintiff's] extensive deposition testimony is viewed in its entirety, an inference may be drawn that strewn garbage and debris obscured his view of the floor and hid the hole from him, even if it did not actually cover it, thereby creating a hazardous condition").

VII. Standards Governing Recovery Under Labor Law § 200

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

Rizzuto v L.A. Wenger Contr. Co., Inc., 91 NY2d 343, 352 [1998].

Beraun Soller v Dehan, 173 AD3d 803 [2d Dept 2019] ("Labor Law § 200 essentially '**codifies landowners' and general contractors' common-law duty to maintain a safe workplace**' [internal quotation marks omitted]").

Prevost v One City Block LLC, 155 AD3d 531 [1st Dept 2017] ("[s]ection 200 of the Labor Law is a **codification of the common-law duty imposed upon an owner or general contractor** to provide construction site workers with **a safe place to work** [except, however, it is not actually limited to construction workers]").

B. Where Plaintiff Contends That The Subject Accident Was Caused By The Alleged Negligence Of The Contractors ("The Means And Methods Of The Work")

1. Where the accident was caused by the "means and methods" of the work, plaintiff must prove that the defendant had **actual or constructive notice of the subject condition or work practice <u>and</u>** that the defendant **exercised control over the means and methods of the work in issue**.

E.g., ***Melendez v 778 Park Ave. Bldg. Corp.***, 153 AD3d 700 [2d Dept 2017] (where "plaintiff was building the platform portion of the scaffold by placing wooden planks on top of steel I-beams when he stepped onto an unsecured wooden plank, allegedly causing him to fall," "the defendants' submissions demonstrated, prima facie, that **AMG did not have the authority to control, direct, or supervise the method or manner in which the work was performed**" and was thus entitled to dismissal of the Labor Law § 200 and common-law negligence causes of action); ***Gjeka v Iron Horse Transp., Inc.***, 151 AD3d 463 [1st Dept 2017] (where plaintiff was **assigned to direct traffic "around an unguarded trench** in the road **measuring approximately five to eight feet deep**, which was being excavated to allow new sewer lines," where there was no **safety railing or other device** around the trench and where he was struck by a truck "traveling about 25 or 30 miles per hour" and thus fell into the trench, the motion court "**properly dismissed the Labor Law § 200 and common-law negligence** claims as against **[owner] LLC**, since the evidence showed that LLC's representative **merely oversaw the progress and safety of the work performed in the nearby building involved with this construction project**, and **did not supervise the safety of the work being performed in the road**").

2. Further, where the accident arose from the means and methods of the work, it is insufficient that the defendant had ultimate control over the site, as is basically true of every site

owner and general contractor. Rather, the plaintiff must show that the defendant exercised control over **the manner in which the injury-producing task was performed**.

Chavez-Lezama v Kun Gao, 173 AD3d 826 [2d Dept 2019] (where defendant Kun Gao "proffered evidence establishing that he was the owner of a one- or two-family dwelling who **did not direct or control the work** being performed," and where "[t]he affidavit submitted by the plaintiff failed to specify Gao as the individual who supervised or controlled the work," and where plaintiff's claim under Labor Law § 200 related to the allegedly negligent manner in which the work was performed [i.e., the "**means and methods**" of the work], "**Gao established his prima facie entitlement to judgment as a matter of law** dismissing the Labor Law § 200 and common-law negligence causes of action against him, and the plaintiff failed to raise a triable issue of fact in opposition"); ***Wiley v Marjam Supply Co., Inc.***, 166 AD3d 1106, 1109 [3d Dept 2018] (where the plaintiff-worker was walking across the second floor when sheetrock that had been "stacked on its long side on the ground" fell and struck plaintiff's ankle, and **where GC Libolt "submitted evidence that it did not control or give instructions on how to stack the sheetrock,"** "**Libolt's retention of general supervisory control or the mere presence of Libolt's superintendent on the site does not suffice to show that it exerted the requisite control to be held liable** … Accordingly, Supreme Court properly dismissed the Labor Law § 200 and common-law negligence claims against Libolt"); ***Bund v Higgins***, 162 AD3d 1738 [4th Dept 2018] ("**although defendants acted as general contractors** on the construction of their home by obtaining the necessary permits, purchasing roofing materials, and hiring contractors to perform the construction work, **defendants met their initial burden of demonstrating that they did not supervise or control the method or manner of plaintiff's work**" and were thus entitled to dismissal of plaintiff's Labor Law § 200 claim in this case in which "'the alleged defect or dangerous condition arises from the contractor's methods'"); ***Calvert v Duggan & Duggan Gen. Contr., Inc.***, 159 AD3d 1490 [4th Dept 2018] (where plaintiff sustained injuries "when a **coworker ran over him with a skid steer** while they were performing landscaping work in preparation for the opening of an entertainment complex," the **general contractor could not be held liable** "inasmuch as the record establishes that plaintiff's accident **resulted from the manner in which the work was performed by the coworker**, and not from a defective condition on the premises"); *see also* ***Villanueva v 114 Fifth Ave. Assoc. LLC***, 162 AD3d 404 [1st Dept 2018] (notwithstanding that **defendant Structure Tone's contract with plaintiff's employer** gave it "**the ability to stop work if [it] observed an unsafe condition**," such was "'**insufficient to raise a triable issue of fact** with respect to whether [Structure Tone] **exercised the requisite degree of supervision and control over the work being performed to sustain a claim under Labor Law § 200** or for common-law negligence'" where, as here, the accident arose from the means and methods of the work).

3. However, plaintiff can prevail if there are triable issues as to the defendant's control over the work.

Beraun Soller v Dehan, 173 AD3d 803 [2d Dept 2019] (where plaintiff, an automobile mechanic, was using an electrical saw to cut the sheetrock in the ceiling and where "the electrical saw, which allegedly was in improper and dangerous piece of equipment for the task at hand, struck something and 'kicked back,' injuring the plaintiff," "Supreme Court should have denied

those branches of the moving defendants' motion which were to dismiss the Labor Law § 200 and common-law negligence causes of action insofar as asserted against them" inasmuch as **plaintiff offered proof that defendant Rapaport**, "whom he [plaintiff] knew as the 'contractor,' **directed [him] … to move an overhead light from one place in the ceiling to another** and **told him to use an electrical saw to cut the sheetrock in the ceiling**," thus indicating that there was **at the least a factual issue as to whether defendants had the authority to direct and control the means and methods of the work**); ***Rajkumar v Lal***, 170 AD3d 761, 762-763 [2d Dept 2019] (where **defendant testified** "that after telling the plaintiff which [tree] branch he wanted the plaintiff to cut, **he left the premises and was not present when the plaintiff was injured**," and where **plaintiff testified "that Lal was actually present, told him how to go about cutting the tree branch, and actually participated in the work,"** there **was a triable issue** whether defendant "had the authority to supervise or control the means and methods in which the plaintiff performed his work"); ***Channer v ABAX Inc.***, 169 AD3d 758, 760 [2d Dept 2019] (where plaintiff "**accessed a scaffold on the outside of the school by stepping onto a milk crate that was beneath a window on the second floor** of the school and climbing through the window" and the accident "occurred when the plaintiff climbed back through the window, stepped on to the milk crate, and fell," "**defendant established its prima facie entitlement to judgment** as a matter of law dismissing the causes of action alleging common-law negligence and a violation of Labor Law § 200 **by presenting evidence that it did not provide the milk crate and had no notice that ATC's employees were obtaining access to the scaffold through the window**," but "**plaintiff raised a triable issue of fact by testifying at his deposition that the milk crate was set up by the defendant, and that both he and the defendant's employees used the milk crate to access the scaffold**"); ***Doskotch v Pisocki***, 168 AD3d 1174, 1175, 1176 [3d Dept 2019] (where **plaintiff** "**fell from a ladder** while climbing to the roof of defendant's rental property to inspect a chimney that needed repairs," and where **the defendant-owner was also the plaintiff's mother**, there were "**triable issues of fact as to defendant's supervision and control**" that "preclude[d] the dismissal of the causes of action alleging common-law negligence and violations of Labor Law § 200"; while, on the one hand, defendant said "that she did not supervise plaintiff's work and did not tell him how to use the ladder, **her own testimony establishes that the ladder belonged to her and that she put it in place** – allegedly on uneven ground – **without plaintiff's participation**, directed him to use the ladder, and told him what to do in inspecting the chimney"); ***Sanchez v 404 Park Partners, LP***, 168 AD3d 491, 492-493 [1st Dept 2019] (where plaintiff "fell through an opening in the floor where he was working in a building undergoing construction and landed on the floor below," the motion court "correctly denied 404 Park [owner's] and Sciame's [GC's] motion for summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against Sciame, because **issues of fact exist as to whether Sciame breached its duty to provide the construction workers with a safe place to work**" since its "**contract with 404 Park delegated to Sciame the sole responsibility for, and control over, the means and methods of construction at the project site**" and "**Cord's foreman testified that he and a Sciame employee decided to use plywood boards with cleats** to cover openings in the floor, **instead of nailing the boards to the floor**"); ***McDonnell v Sandaro Realty, Inc.***, 165 AD3d 1090, 1094 [2d Dept 2018] (where there was **conflicting proof** as to **whether the GC directed plaintiff to use the scaffold which broke, Supreme Court correctly denied the GC's motion** for dismissal of the plaintiff's Labor Law § 200 claim); ***Rohr v Dewald***, 162 AD3d 1528 [4th Dept

2018] (where plaintiff "was injured while guiding a **concrete pump hose that was attached to a truck owned and operated by defendant Pumpcrete Corporation**" when "[a]n obstruction formed in the pump hose, causing wet concrete to suddenly be ejected from the hose and knocking plaintiff off of the scaffolding upon which he was standing," and where plaintiff charged that defendant had negligently caused the accident, Pumpcrete was "not entitled to summary judgment dismissing the negligence cause of action against it because **the conflicting expert opinions with respect to that cause of action create triable issues of fact**"); ***Wellington v Christa Constr. LLC***, 161 AD3d 1278 [3d Dept 2018] (where plaintiff, a mason, was working at ground level, where defendant Tower, the roofing subcontractor, had placed an approximately 25-pound tire iron on the roof with the intent of using it "as a support for a safety warning barrier to alert workers that they were near the edge," where the wind was so gusty that no employees were working on the roof at the time, and wind evidently blew the tire iron off the roof such that it fell and struck the plaintiff, the court rejected "Tower's argument that plaintiffs' claims against it pursuant to Labor Law §§ 200 and 240(1) lacked merit inasmuch as the activity that brought about the accident was "**brought about by Tower's placement of the tire rim in its own work area**—the roof—for use in furtherance of its own activities").

4. It is the defendant's burden on its summary judgment motion to make a prima facie showing that it lacked the requisite control over the work or, alternatively, that it lacked notice of the dangerous work practice or condition.

Davies v Simon Property Group, Inc., 174 AD3d 850 [2d Dept 2019] (where plaintiff claimed that an **inadequately secured piece of plywood** caused him and his cart to **fall into "a three-foot wide and three-foot deep hole** or trench," but where "**two other witnesses testified** at their depositions that **there was no hole or trench** underneath the plywood," defendants "**failed to meet their prima facie burden of demonstrating that Howell lacked the authority to supervise or control** the performance of the plaintiff's work" and also "**failed to meet their prima facie burden of demonstrating a lack of constructive notice** of the alleged dangerous condition of the plywood" inasmuch as there was proof that "the plywood **had been in place for 'a couple of weeks'** before the plaintiff's accident"); ***Stiegman v Barden & Robeson Corporation***, 162 AD3d 1694 [4th Dept 2018] (where plaintiff was injured "when the staircase leading to the basement of a home under construction collapsed," and **defendant "was the self-proclaimed 'project manager'** and 'supplier of material' for the home construction," **defendant "'failed to eliminate triable issues of fact whether it had control over the work site** and **[created or had] actual or constructive notice of the dangerous condition** that allegedly caused plaintiff's injuries'"); ***Poalacin v. Mall Properties, Inc.***, 155 AD3d 900 [2d Dept 2017] (where plaintiff's testimony established that his co-workers were using all but one of the ladders at the site and that the only ladder available for his use was missing two of its rubber feet and was also missing the lowest rung, "defendant **failed to establish that they did not have the authority to supervise or control the means and methods of the work** performed by the plaintiff").

5. If the defendant meets that burden, and plaintiff fails to raise an issue of fact, defendant will be granted summary judgment.

Turgeon v Vassar Coll., 172 AD3d 1134, 1136 [2d Dept 2019] (where "plaintiff was assisting a mason … to replace tiles or stones on the western façade of Rockefeller Hall at the third-floor level," the mason's removal of tile caused three others to start falling, plaintiff "reached out with his left hand to push them back in" and the falling tiles "severed his right thumb," **defendant** "**established their prima facie entitlement to judgment as a matter of law** dismissing the causes of action to recover damages for violation of Labor Law § 200 and for common-law negligence" inasmuch as "[c]ontrary to the plaintiff's contentions … **the accident did not arise from a dangerous or defective premises condition but from the method and manner of the work** … [and **defendants**] **established that they did not exercise supervision or control over the performance of the work giving rise to the accident**"); ***Weaver v Gotham Constr. Co. LLC***, 171 AD3d 427 [1st Dept 2019] (where plaintiff "testified that at one moment he was reaching toward the control panel of the motorized hydraulic drill lift he was operating and the next he was pinned to the wall by the drill," **defendants** "**established prima facie that they did not control the method and means of the work** that plaintiff was performing when he was injured and that **therefore they cannot be held liable under Labor Law § 200 or for common-law negligence**"); ***Lundy v Austein***, 170 AD3d 703, 704-705 [2d Dept 2019] (where plaintiff, whose "work consisted primarily of filling trash bags with debris from the basement and then placing those bags at the roadside," "allegedly was injured when he **stepped into an uncovered drain hole at the bottom of the stairway outside the basement door**," and where plaintiffs' bill of particulars "referenced the alleged uncovered drain hole and inadequate lighting" as alleged causes of the accident, **defendants were properly granted summary judgment** since **their** "**evidence demonstrating that they neither created nor had actual or constructive notice of either of these purported defects**" and, additionally, "that Servpro provided emergency lighting for the work area due to a blackout in the neighborhood following the storm, and that they did not have the authority to supervise or control either the placement of the lighting or the means and methods of the plaintiff's work"); ***Sikorjak v City of New York***, 168 AD3d 778, 779-780 [2d Dept 2019] (where plaintiff was "demolishing a concrete wall at the St. George Staten Island Ferry Terminal" when "his left pants leg caught on fire after sparks were emitted from a gas-powered handheld saw that he was using to cut through a steel reinforcing bar," and where the jury concluded that defendants were 60% at fault for plaintiff's injuries, "**[t]he City defendants and Conti established their prima facie entitlement to judgment as a matter of law** dismissing the common-law negligence and Labor Law § 200 causes of action insofar as asserted against them **by demonstrating that the subject accident was caused by the means and methods of the plaintiff's work**, that the plaintiff's work was directed and controlled by his employer, and that they had no authority to exercise supervisory control over his work"); ***Anderson v Natl. Grid USA Serv. Co.***, 166 AD3d 1513, 1513-1514 [4th Dept 2018] (where plaintiff, "a cable and internet service technician … **fell off the roof of a detached garage** … while attempting to access a utility pole owned by [defendants] in order to perform an internet reconnection for a residential customer," and where **plaintiff was on the roof in the first place because he had "determined that he could not obtain ground-level access to the utility pole** … because … the path to the pole was blocked by a locked gate on the property and plaintiff was purportedly unable to contact the property owner to unlock the gate," "**defendants established that the wires hanging above the roof of the garage did not, as alleged by plaintiff, constitute a 'tripping and walking hazard'** along an area of the property leading to the work site; instead, **the alleged defect arose from plaintiff's method of performing the**

work by foregoing appropriate, authorized means of obtaining access to the utility pole and deciding to traverse the pitched roof of the garage over which the wires hung"); ***Canty v 133 E. 79th St., LLC***, 167 AD3d 548, 548-549 [1st Dept 2018] (where plaintiff "was searching for a tool in his employer's gang box when the lid of the gang box fell and closed on his left hand," and **where plaintiff claimed "that a Spieler employee had carelessly knocked the lid over when the employee lifted open the lid of a Spieler gang box**, which was 'back to back' with his employer's gang box, due to overcrowding in the work area," "**[t]he facts implicate only the means and methods of work liability standards** of Labor Law § 200" and "**[t]he testimony established that [general contractor] 133 East did not have supervisory control over the placement or utilization of the gang boxes**"); ***Allington v Templeton Found.***, 167 AD3d 1437, 1439 [4th Dept 2018] (where plaintiff sustained injuries "when **the ladder** he had been using to access the roof of a work site **'kicked out' from underneath him**," where **the ladder** "**consisted of only the top half of an extension ladder and lacked any feet**," and **where** "**the record establishes that plaintiff used this ladder 'pursuant to the directions and example of his supervisor** [citation omitted]," **defendant** "**established that it lacked the authority to supervise and control the performance of plaintiff's work** and **thus it cannot be held liable for a violation of Labor Law § 200**"); ***Cutrona v Plaza Constr.***, 166 AD3d 941, 941-942 [2d Dept 2018] (where plaintiff "allegedly was injured while working at the project as he was drilling holes through a plywood floor and the **drill he was using 'bound up' causing it to twist and fracture his hand**," "**defendants established their prima facie entitlement to judgment as a matter of law** by demonstrating that **they did not provide the equipment at issue and did not have the authority to supervise or control the performance of the work**"; "plaintiff's conclusory contention that he believed the equipment was provided by Plaza Construction is insufficient to raise a triable issue of fact in opposition"); ***Poulin v Ultimate Homes, Inc.***, 166 AD3d 667, 670-673 [2d Dept 2018] (where plaintiff "alleged that he was injured at a residential construction site when he **fell through the opening of an unfinished stairwell into the basement of the premises**," where the GC's lead carpenter "testified at his deposition that **a railing previously placed around the stairwell opening was specifically removed so that the drywall installers could access the area in order to do their work**," and where there was proof that **the GC then gave plaintiff "no instructions as to where to work, what equipment to use, or the manner in which they should do their work**," **the GC thus** "**established, prima facie**, that the **accident did not arise from a dangerous or defective premises** condition **but from the method and manner of the work**" inasmuch as "the accident arose solely from the method and manner in which the plaintiff and Jean-Guy Fortin [plaintiff's boss] covered the opening" and **the GC** "**did not exercise supervision or control over the performance of the work giving rise to the plaintiff's injury**")[37]; ***Naupari v Murray***, 163 AD3d 401 [1st Dept 2018] (where plaintiff was injured while painting and/or plastering an individually owned condominium, and where the accident "arose out of the means and manner of his work," the motion court **properly dismissed plaintiff's common-law negligence claims** against **(a) defendant FAI, "an architectural firm without supervisory authority"** that "did not direct or control the work or activities other than providing architectural and design services," and, **(b) defendant Rose, a property manager** that "did not have authority to supervise and control the

[37] This was a rare 3 to 2 Second Department ruling, meaning the initial panel had split two to two.

work that plaintiff was performing"); ***Gargan v Palatella Saros Builders Group, Inc***., 162 AD3d 988 [2d Dept 2018] (where plaintiff "was delivering three or four bundles of molding and trim material to the construction site," where his "**path was blocked by a half-full dumpster and a stack of empty pallets**," and where he "**decided to move the pallets by flipping them**" and was injured while trying to do so, the **injury "did not result from a physical defect at the construction site"** and the fact that **defendant lacked "the authority to supervise or control the injured plaintiff's work"** thus dictated dismissal of the plaintiff's Labor Law § 200 claim); ***Galvez v Columbus 95th St. LLC***, 161 AD3d 530 [1st Dept 2018] (where plaintiff was "ascending to the top of a building on a motorized suspended scaffold," where plaintiff and his co-worker "had to press their backs against the wall and use their legs to push the scaffold out" in order to clear a concrete beam, and where plaintiff thereby "injured his lower back," **defendant Pinnacle, "which supplied the suspended scaffold" was "entitled to summary judgment dismissing the Labor Law § 200 and common-law negligence** claims … because the evidence **fails to show either that it had notice of dangerous or defective condition on the work site or that it controlled the means and methods of plaintiff's work**"); ***Bautista v. Archdiocese of New York***, 164 AD3d 450 [1st Dept 2018] ("[t]he Labor Law § 200 and common-law negligence claims should be dismissed because plaintiff's fall from scaffolding **involved the means and methods of his work, which were supervised and controlled solely by his employer**").

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

1. Where the accident was caused by a premises defect, plaintiff need only show that the defendant, **(1) had sufficient control *over the area*** to correct the condition or take other appropriate steps, and, **(2) caused or had actual or constructive notice *of the defect***.

Forman v Carrier Corp., 97 NYS3d 920, 921 [4th Dept 2019] ("Inasmuch as plaintiff alleges that a defective condition on the premises caused the accident, **defendant had the initial burden of establishing that it did not create the defective condition or have actual or constructive notice of it in order to demonstrate its entitlement to summary judgment on those causes of action** … **Because defendant failed to meet its burden, the court properly denied its motion** with respect to the common-law negligence and Labor Law § 200 causes of action"); ***Honeyman v Curiosity Works, Inc.***, 154 AD3d 820 [2d Dept 2017] ("[w]here, as here, the injured plaintiff's accident arose not from the manner in which the work was performed, but rather from **an allegedly dangerous condition at the work site**, liability for a violation of Labor Law § 200 will be imposed if the general contractor **had control over the work site and either created the dangerous condition or had actual or constructive notice of it**"); ***Mitchell v T. McElligott, Inc.***, 152 AD3d 928 [3d Dept 2017] (although defendant, a prime contractor, claimed otherwise, "we agree with Supreme Court that **issues of fact** exist as to **whether defendant maintained control over the main mechanical room** and **whether it had actual or constructive notice concerning the extension cords** that caused Mitchell to trip"); ***DeFelice v Seakco Const. Co., LLC***, 150 AD3d 677 [2d Dept 2017] ("[w]here a worker's injury arises out of **the condition of the premises**, liability may not be imposed unless 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'"); *see also* ***Parkhurst v Syracuse Regional Airport Auth.***, 165 AD3d 1631, 1632 [4th Dept 2018] (where **decedent** "**slipped and fell on plastic sheeting covering newly-laid carpet** after descending a ladder while performing drywall finishing work," "**[w]e reject defendants' contention that decedent's injuries resulted from his own methods of work rather than a dangerous condition at the work site**" inasmuch as "**the plastic sheeting was not placed there by decedent or his employer** … Thus, while the placement of the plastic sheeting may have been part of Hueber's method of work, it was not a part of decedent's method of work").

2. In particular, where the accident was caused by a premises defect, the plaintiff is ***not*** **required to show that the defendant exercised control over the manner in which it was performed**.

DeMercurio v 605 W. 42nd Owner LLC, 172 AD3d 467, 467-468 [1st Dept 2019] (where plaintiff "allegedly slipped and fell on protective brown paper that had been installed on the floor of an apartment unit under construction" and plaintiff testified "that **the paper was slippery because it was on top of a cleaning agent called 'green dust,'** which was used to prevent dust from rising into the air while that company was sweeping," "**[p]laintiff's Labor Law § 200 and common-law negligence claims should** … **be reinstated as the court should not have analyzed plaintiff's accident under the manner and means standard, but should instead have applied the dangerous condition standard**" inasmuch as "**[t]he green dust was a dangerous condition that existed prior to plaintiff's arrival at the job site**," "**was not part of the work plaintiff was performing**," and **defendants** "**failed to demonstrate the absence of actual or constructive notice of the hazardous condition**"); ***Moura v City of New York***, 165 AD3d 434, 435 [1st Dept 2018] (where "plaintiff's employer was hired to erect, move, and adjust rolling scaffolding to facilitate B & H's inspection of the Manhattan Bridge," and where plaintiff stepped into a hole and thus sustained injury, "**Labor Law § 200 and common-law negligence liability cannot be imposed upon B & H premised on the methods and means of the work because it merely exercised general supervisory authority over the injured plaintiff's work**" but "**there are issues of fact sufficient to support Labor Law § 200 and negligence claims as against B & H predicated on the dangerous condition of the premises**" inasmuch as "**[e]vidence showed that the hole, combined with the alleged inadequate lighting, was a dangerous condition created by B & H** when its inspectors removed lighting originally given to the injured plaintiff and his coworkers").

3. Further, a finding of constructive notice may follow where the defendant had a duty to inspect and the condition existed for such length of time that it *would have been discovered* in the exercise of reasonable care.

Pereira v New School, 148 AD3d 410 [1st Dept 2017] (where plaintiff "slipped on wet discarded concrete that was deposited on a piece of plywood on which he was walking, at the end of a passageway, causing his left foot to become entangled with two bundles of rebar protruding from under the plywood," "**defendants failed to establish that they lacked constructive notice of the dangerous condition** that caused plaintiff's injury, **since they submitted no evidence of the**

cleaning schedule for the work site or when the site had last been inspected before the accident"); ***Hall v Queensbury Union Free School Dist.***, 147 AD3d 1249 [3d Dept 2017] (where defendants proffered the deposition testimony of defense employees who "responded to the scene shortly after plaintiff sustained the injury and consistently and unequivocally testified that the lights were on and functioning in the stairwell when they arrived" and also that "they did not have any difficulty seeing in the stairwell," and where **plaintiff countered with, *inter alia*, "the sworn affidavit of a coworker, who asserted that he had descended the stairwell on the morning** of the accident and **noticed that 'the light at the bottom of the stairwell was not working'** and that, as a result, he 'could not tell when [he] reached the bottom' of the stairs," the proof "viewed in the light most favorable to plaintiff, presented triable issues of fact as to the sufficiency of the lighting in the stairwell and **whether defendants had constructive notice of the alleged inadequate lighting**"); ***Grabowski v Bd. of Managers of Avonova Condominium***, 147 AD3d 913 [2d Dept 2017] (where "defendants submitted, inter alia, the deposition testimony of the plaintiff, in which he stated that for up to 10 days prior to the accident, he observed that **the place where the concrete eventually collapsed had 'lines … indicating the breaking points**,'" **defendants' own submissions** thus "**raised an issue of fact** as to whether the allegedly dangerous condition **was visible and apparent and existed for a sufficient length** of time prior to the plaintiff's fall to permit them to discover and remedy it … Accordingly, the branch of the defendants' motion which was for summary judgment dismissing the cause of action alleging common-law negligence was properly denied regardless of the sufficiency of the plaintiff's opposition papers").

4. It follows from this that a defendant seeking summary judgment with regard to a premises defect must make a prima facie showing that it lacked control over the subject area or that it did not cause the condition and lacked both actual or constructive notice of the condition.

Daeira v Genting New York, LLC, 173 AD3d 831 [2d Dept 2019], *mod'g* 51 Misc.3d 1216(A) [Sup Ct 2016] (where liability was premised upon **an allegedly dangerous site condition** [plaintiff fell through a glass floor to the ground below], defendant DBA "did not demonstrate its prima facie entitlement to judgment as a matter of law dismissing the common-law negligence cause of action insofar as asserted against it" inasmuch as it "**did not establish as a matter of law** that it **lacked the authority to exercise supervision and control over the work**, that it **lacked the authority to control the work site**, that it **lacked actual or constructive notice of the alleged dangerous condition**, that its negligence, if any, was not a proximate cause of the accident, or that the injured plaintiff's actions were the sole proximate cause of his accident"; NYRA's summary judgment should have been denied for essentially the same reasons); ***Haynes v Boricua Vil. Hous. Dev. Fund Co., Inc.***, 170 AD3d 509, 511 [1st Dept 2019] (where "[p]laintiff's deposition testimony and an affidavit by his supervisor, Maldonado, who did not witness the accident but arrived at the scene shortly thereafter, indicated that plaintiff was performing his assigned tasks of installing pins in a drop ceiling using a Hilti gun when **he received an electrical shock, and that exposed, uncapped electrical wiring was seen hanging from the ceiling in the vicinity of where plaintiff was working**," and where plaintiff's co-worker "further averred that after plaintiff's accident he observed electricians, who were working in the building, arriving at the accident site and capping the exposed wires," the **motion court** "**properly denied [GC] Knickerbocker's motion** for summary judgment dismissing the Labor

Law § 200 and common-law negligence claims as against it" **since there were issues of fact** "w**hether Knickerbocker had actual or constructive notice of a defective condition** on the premises that proximately caused plaintiff's injuries"); ***Savlas v City of New York***, 167 AD3d 546, 548 [1st Dept 2018] (where "**plaintiff tripped and fell over one of several steel plates covering openings** into a lower level of a project building," **the City, which owned the site, "failed to demonstrate that its employees neither created nor had actual or constructive notice of the alleged dangerous condition** of the steel plates and that therefore the Labor Law § 200 and common-law negligence claims should be dismissed against it" and "[t]he City's alternative arguments, that the alleged height differential between the floor and the plate was de minimis … and that the alleged defect was open and obvious and not actionable as a matter of law, are unavailing"); ***Wass v County of Nassau***, 166 AD3d 1052, 1053 [2d Dept 2018] (where plaintiff "allegedly was injured when he **received an electrical shock during the course of replacing a burnt-out 1,00-watt metal halide light bulb** on a catwalk suspended above the ice rink at Nassau Coliseum" and where defendants moved for summary judgment based upon an expert's affidavit, Supreme Court **should have denied the motion** inasmuch as the **defense expert's affidavit "was speculative, conclusory, and lacked a proper foundation"** in that "the expert tested the light fixture approximately 2 1/2 years after the incident, and **there was no showing that the light fixture was in the same condition as it was on the date of the accident**"; "[m]oreover, the defendant's expert failed to explain what his testing involved, or to include any empirical data or relevant industry standards to support his conclusions"); ***Vita v New York Law School***, 163 AD3d 605 [2d Dept 2018] (where plaintiff alleged that "he was carrying a 60-pound pallet in one hand a box of filters in the other, and as he was walking across the room" "he **tripped over a condensate pipe that was attached to an HVAC unit** in a mechanical room," Supreme Court should have denied the owner's motion for summary judgment since it "did not submit any evidence to show that it did not create the condition and that it lacked actual or constructive notice of the allegedly dangerous condition on its premises" but Supreme Court properly granted summary judgment to a subcontractor which proved "that it never had control over the work site"); ***Douglas v Sherwood 48 Assoc.***, 162 AD3d 498 [1st Dept 2018] (where plaintiff "was injured while pulling a mobile scaffold with both hands, when she **stepped backwards and her left heel fell into one of the estimated 12-inch deep trenches in the concrete flooring**, and a wheel of the scaffold dropped onto her foot," "[s]ummary dismissal of the Labor Law § 200 and common-law negligence claims [was] precluded by testimony and photographic evidence that **raises triable issues of fact** as to whether defendants [whose role at the site was not specified in the Court's opinion] **were obligated to maintain the safety of the premises** … were negligent in doing so, and had actual or constructive knowledge of the uncovered trenches in the concrete flooring where several trades were working at the time of plaintiff's accident"); ***Giancola v Yale Club of New York City***, 161 AD3d 695 [1st Dept 2018] (where it was undisputed that "the **particle board covering an escape hatch** on top of the elevator car where plaintiff was required to work … **collapse[d] when traversed** by him," the motion court "properly denied plaintiff's cross motion on the common-law negligence and Labor Law § 200 claims" inasmuch as "**[t]he record present[ed] triable issues as to whether defendant had notice that the escape hatch cover, which was comprised of particle board, posed a hazard and whether it was defendant's employees that caused this hazardous condition**").

5. If, however, the defendant meets that burden, it can obtain summary judgment.

Mendez v Vardaris Tech, Inc., 173 AD3d 1004 [2d Dept 2019] (where plaintiff, "a foreman … was supervising the removal of asbestos-containing material from a classroom ceiling … when a **light fixture fell from the ceiling** and struck him on the head," "**defendant established, prima facie, that it did not create the allegedly dangerous condition involving the light fixture, or have actual or constructive notice of such condition**" and it was **therefore entitled to summary judgment** "dismissing the causes of action to recover damages for a violation of Labor Law § 200 and for common-law negligence"); ***Djuric v City of New York***, 172 AD3d 456, 457 [1st Dept 2019] (where a **pipe saddle detached from an overhead ceiling pipe** assembly and struck plaintiff, "**[p]laintiffs' claims of common-law negligence and Labor Law § 200 were** … **properly dismissed**" inasmuch as defendants "made a prima facie showing **of lack of notice of any problem with pipe saddles** through the testimony of the construction manager's representative who regularly walked the site and saw no evidence of the alleged condition, and the evidence that there were no complaints or prior similar incidents at the property" and the condition "was latent, such that the construction manager's representative's inspections would not have alerted it to the potential hazard of the object becoming dislodged and falling"); ***Simmons v City of New York***, 165 AD3d 725, 728 [2d Dept 2018] (where the plaintiff-plumber was allegedly "injured while moving an air compressor, weighing in excess of 600 pounds" when he and his co-workers removed it from its crate, placed it on the blades of a pallet jack, and then **pushed and pulled the pallet jack until it ultimately struck some debris** which "caused the pallet jack to stop short and the compressor to roll off the pallet jack and onto the plaintiff's ankle," **the City defendants**, as owners of the work site, "**established, prima facie, that they did not create or have actual or constructive notice of the alleged dangerous condition**" and "plaintiff failed to raise a triable issue of fact"); ***Santos v Condo 124 LLC***, 161 AD3d 650 [1st Dept 2018] (where plaintiff claimed that the **scaffolding floor "was missing some of the planks,"** and that he was thereby caused to fall "10 to 12 feet onto the pipes of the scaffold's lower level," the motion court "properly dismissed the common-law negligence and Labor Law § 200 claims" inasmuch as "**defendants did not create the hole into which Santos fell, nor did they have actual or constructive knowledge of its existence**" and there was also "**no evidence that defendants exercised any control over the choices made by Santos's employer**"); ***Dirschneider v Rolex Realty Co. LLC***, 157 AD3d 538, 539 [1st Dept 2018] (where plaintiff tripped and fell "while helping to transport a 600-pound, 14-foot-long steel I-beam down a staircase," "the Labor Law § 200 and common-law negligence claims should be dismissed as against Rolex" since **Rolex was "an out-of-possession landlord with a right of re-entry to maintain and repair**, was **not involved with the project and was not on site and thus that it had no actual notice of the dangerous conditions**" and Rolex **could not "be held liable under a theory of constructive notice because the dangerous conditions did not constitute significant structural or design defects that violated specific safety statutes**"); ***Bradley v HWA 1290 III LLC***, 157 AD3d 627 [1st Dept 2018] (by **3 to 2 vote**: where **decedent was electrocuted** "as a result of **coming into contact with a transformer** while servicing a malfunction in one of the building's elevators," **liability could not be premised on the allegedly inadequate lighting** inasmuch as, (1) DOB's **post-accident inspection deemed the lighting "code compliant"** and there was purportedly no proof to the contrary, and, (2) it was purportedly **speculation to suppose that inadequate lighting was a factor** in causing the

accident; also, the fact that ANSI required a cover could not support liability since, (a) "the Environmental Testing Labs, an independent tester/certifier of products in the elevator industry, certified the elevator control cabinet as complying with the ANSI requirements," (b) the subject ANSI standard "has not been adopted by or incorporated into New York City's elevator code and ANSI itself is not a statute, ordinance or regulation," and, (c) defendant's expert said that "the recognized custom in the elevator industry for the building owners and their elevator consultants [was] to look to the New York City Department of Buildings …. for concluding the safety of the design of elevator equipment in service in NYC" and "NYCDOB approved the installation and found no problems with its design"); ***Marl v Liro Engineers, Inc.***, 159 AD3d 688 [2d Dept 2018] (where plaintiffs "alleged that they were **exposed to, and injured by, toxic substances in the soil which they were excavating in connection with the construction project**, and that they were not provided with proper protective equipment," **defendant Liro**, which was hired to perform engineering services, "established, prima facie, that it **lacked the authority to supervise the work to a sufficient degree to impose liability under a theory of common-law negligence or under Labor Law § 200**").

6. By contrast, plaintiff will rarely be entitled to summary judgment since, in contrast to Labor Law §§ 240 and 241, liability must ultimately be premised upon a finding that the defendant was negligent.

7. Plaintiff may, however, succeed in raising an issue of fact.

Simon v Granite Bldg. 2, LLC, 170 AD3d 1227, 1231 [2d Dept 2019] (where decedent and her husband "were hired to hang wallpaper in a newly constructed office building," they were "unable to enter the building through the front entrance," decedent consequently "drove the vehicle through an opening in a fence onto the upper deck of an adjacent parking garage that was still under construction," and **the vehicle there "slid on the ice until it reached the edge of the incomplete parking garage, broke through the steel cable guardrail system, and fell approximately 32 feet into an excavation pit in the location of the lower level of the garage"** thus causing decedent's death, the **trial court correctly declined to set aside the jury verdict finding the defendant-owner liable under common law and Labor Law § 200** and **such was so even if the storm was still in progress** inasmuch as "there were **other distinct and sufficient grounds, all of which were unrelated to the issue of the storm in progress … includ[ing] failing to ensure the fence to the parking garage under construction was closed, failing to have placed a barricade at the edge of the excavation pit, and allowing the drains to be taped closed causing the ice** on which plaintiff's vehicle slid to form").

Quigley v Port Auth. of New York, 168 AD3d 65, 67 [1st Dept 2018] (where plaintiff "was injured when he **slipped on a pile of snow-covered pipes** located **directly outside the entrance door of his employer's work site shanty**," the motion court "**properly denied defendants' motion** seeking dismissal of the common-law negligence and Labor Law § 200 claims because **they did not satisfy their initial burden of showing that they did not create or have knowledge of the dangerous condition that caused the accident**" inasmuch as "[t]he evidence did not establish who left the pipes in front of the shanty for several weeks prior to the accident,

and defendants did not provide any evidence to show the last time they inspected the work site"; further, the **defendants' argument that they lacked notice of the snow on the pipes ignored "testimony suggesting that the pipes themselves, and their placement adjacent to the shanty, was the dangerous condition that caused the accident"**).

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

Where plaintiff alleges that the accident was caused by faulty work methods *and* a premises defect, a defendant moving for summary judgment must negate the elements of both claims.

Reyes v Arco Wentworth Mgt. Corp., 83 AD3d 47, 50-53 [2d Dept 2011] (thorough discussion of standard); ***Robles v. Taconic Mgt. Co., LLC***, 173 AD3d 1089 [2d Dept 2019] (where plaintiff, "a laborer who was **transporting demolished materials onto a freight elevator**, allegedly sustained injuries when he was **struck on the head by a closing vertical elevator door**," and where plaintiff alleged that **owner 111 Chelsea and management company Taconic** "were liable because both entities **exercised supervisory control over the work** and failed to properly guard the freight elevators," **such allegation "involve[d] both a dangerous condition on the premises and the 'means and methods' of the work**," thus **requiring defendants "to address the evidence applicable to both liability standards**"; **defendants failed to bear their burden of proof** inasmuch as one of their representatives testified "that he would '[s]how [Waldorf employees] what pipes to take down and what electrical conduits to remove and make sure they are working in a safe manner'" and another witness said that "Taconic could directly give orders to the elevator operators, and would schedule which elevators would be used for which freight jobs"); ***Moscati v Consol. Edison Co. of New York, Inc.***, 168 AD3d 717, 720 [2d Dept 2019] (**when** "**'an accident is alleged to involve defects in both the premises and the equipment used at the work site, the 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'**"); ***Mitchell v Caton on the Park, LLC***, 167 AD3d 865, 866-867 [2d Dept 2018] (where the plaintiff-carpenter "allegedly was injured while working at a construction site when his pants leg caught on a part of a rebar that had been left sticking out of concrete, causing him to trip and fall," **liability could be based neither on the "means and methods" standard nor on the "premises defect" standard** inasmuch as **defendant proved "that it had no authority to supervise or control the performance of the plaintiff's work"** and **also proved "it did not have control over the work site and that it did not create or have notice of the allegedly dangerous condition**"); ***Kusayev v Sussex Apartments Assoc., LLC***, 163 AD3d 943 [2d Dept 2018] (where plaintiff, a delivery truck driver, allegedly was injured while delivering building materials to an apartment building, "**where, as here, 'an accident is alleged to involve defects in both the premises and the equipment used at the work site**, the 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**,'" but **defendants here established** that "Sussex **did not create or have actual or**

constructive notice of the alleged condition which caused the plaintiff's injury, **and that it did not supervise or control the means and methods of the plaintiff's work**").

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

Where defendant negligently provided plaintiff (or plaintiff's employer) a defective tool, liability will turn on whether the defendant created or had actual or constructive notice *of that defect*.

Jarzabek v Schafer Mews Hous. Dev. Fund Corp., 160 AD3d 412 [1st Dept 2018] ("because **issues of fact exist** regarding **whether Rocky's fabricated or was otherwise responsible for the makeshift ladder**, the court erred in granting its motion seeking dismissal of all claims as against it"); ***Hoa Lam v Sky Realty, Inc.***, 142 AD3d 1137, 1138 [2d Dept 2016] (where, as here, the **defendant was claimed to have provided the plaintiff-worker with a defective tool** [here, a handheld electric grinder] that caused the accident, such defendant "in moving for summary judgment … **must establish that it neither created the alleged danger or defect in the instrumentality nor had actual or constructive notice of the dangerous or defective condition**"; the defendants here failed to meet that burden); ***Ying Choy Chong v 457 W. 22nd St. Tenants Corp.***, 144 AD3d 591 [1st Dept 2016] (where plaintiff fell from a Baker's scaffold that lacked railings, "the court properly denied Bulson's motion insofar as it sought dismissal of plaintiff's Labor Law § 200 and common-law negligence claims, since Bulson provided the scaffold lacking safety rails").

F. Where Defendant Caused The Condition That Caused The Accident

Where defendant caused the condition that caused the accident and had control over the work or the area in issue, such is grounds for Labor Law § 200 liability.

Acox v Jeff Petroski & Sons, Inc., 172 AD3d 1886, 1888 [4th Dept 2019] (where decedent went to defendant's residence "as a precursor to the installation of window treatments" and fell into a hole which "a circular staircase was to be constructed," and where "[a]t the time decedent's body was found, the scaffold closest to the windows had been moved away from the wall, permitting access to two windows," there were **triable issues whether the dangerous condition was created by decedent or by the defendant-contractor**); ***Simmons v City of New York***, 165 AD3d 725, 728 [2d Dept 2018] (where the plaintiff-plumber was allegedly "injured while moving an air compressor, weighing in excess of 600 pounds" when he and his co-workers removed it from its crate, placed it on the blades of a pallet jack, and then pushed and pulled the pallet jack until it ultimately struck some debris which "caused the pallet jack to stop short and the compressor to roll off the pallet jack and onto the plaintiff's ankle," **Prismatic, the contractor which hired plaintiff's employer, "failed to eliminate triable issues of fact** as to **whether [it] created a dangerous condition on the floor which caused the pallet jack to stop short**" and "Supreme Court erred in granting that branch of the defendants' motion which was

for summary judgment dismissing the causes of action alleging a violation of Labor Law § 200 and common-law negligence insofar as asserted against Prismatic"); ***Muqattash v Choice One Pharm. Corp.***, 162 AD3d 499 [1st Dept 2018][38] (where the plaintiff-worker was **electrocuted**, the defendant-owner was not entitled to dismissal of the plaintiff's causes of action under Labor Law § 200 and common law negligence inasmuch as the **defendant "failed to establish that it did not create the defective condition that later caused the injured plaintiff's accident"** and the evidence showed that the **defendant "had the drop ceiling and electrical system where the accident occurred installed**, and that no one else performed work in the ceiling until the time of the accident"); ***Radeljic v Certified of N.Y., Inc.***, 161 AD3d 588 [1st Dept 2018] (where plaintiff **fell into an elevator shaft** and there was "conflicting evidence … whether the [available safety] harness would have allowed plaintiff to reach and perform his work" and "**conflicting statements about who was responsible for removing a plywood barricade** positioned in front of the elevator shaft opening" and "as to whether plaintiff, a foreman who had the authority to order his subordinate who was present at the time of the accident to replace the barricade, was the sole proximate cause of his accident," there were **issues of fact** concerning the Labor Law § 200 and common-law negligence claims," including "**whether plaintiff's accident was caused by a dangerous condition created by defendant or by the means or methods of plaintiff's or his employer's work**").

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

While courts have sometimes been careless in equating common law liability with Labor Law § 200 liability, I think that the better view is that a contractor or other party who did not control the premises or assume control over the plaintiff's work but who nonetheless negligently caused the subject accident is liable *only* under common law, *not* under Labor Law § 200.

Hill v Mid Is. Steel Corp., 164 AD3d 1425, 1426 [2d Dept 2018] (where **plaintiff was injured while using a telescoping lift** which the defendant-property owner **had borrowed from defendant Mid Island Steel Corp. (MIS)** [allegedly without MIS's permission], "MIS was not an owner, contractor, or agent with regard to the plaintiff's work" and **owed no duty under Labor Law § 200** but **the motion court should nonetheless have denied "that branch of MIS's motion which was for summary judgment dismissing the cause of action alleging common-law negligence**" inasmuch as "MIS failed to establish, prima facie, that the lift was not in a defective or dangerous condition"); ***Giannas v 100 3rd Ave. Corp.***, 166 AD3d 853, 856-857 [2d Dept 2018] (where one version of the subject accident attributed plaintiff's injuries to a shifting of the scaffold, and where "there was a **triable issue of fact regarding whether [contractor] Rockledge negligently installed the subject scaffold**," the **motion court correctly denied "that branch of Rockledge's motion which was for summary judgment dismissing the common-law negligence cause of action insofar as asserted against it**"); ***Stiegman v. Barden & Robeson Corporation***, 162 AD3d 1694 [4th Dept 2018] (where plaintiff was injured "when the **staircase** leading to the basement of a home under construction

[38] Disclosure: I represented the plaintiffs on the appeal.

collapsed," and "defendant **B&H Carpentry (B&H) was retained to frame the house, which included the installation of the subject basement staircase**," defendant was entitled to dismissal of plaintiff's Labor Law § 200 claim inasmuch as "**"[a] subcontractor[] without control of plaintiff's work or ongoing control of the area in which he was injured, cannot be held liable under Labor Law § 200"**" but "[c]ontrary to B&H's contention, however, **the court properly denied that part of its cross motion with respect to the common-law negligence cause of action**" since it "failed to meet its burden of establishing as a matter of law that it did not create the condition that caused plaintiff's injury"); ***Solecki v Oakwood Cemetery Assn.***, 158 AD3d 1088, 1089 [4th Dept 2018] (where the plaintiff, a **funeral director**, "went to the cemetery to make sure that the grave site was ready for a burial that was to take place that day" and **fell into the grave, Labor Law § 200 "does not apply where, as here, the plaintiff was 'not permitted or suffered to work on a building or structure at the accident site'"** but **the motion court erred "in granting those parts of defendants' respective motion and cross motion seeking summary judgment dismissing the common-law negligence claim"** inasmuch as it failed to establish as a matter of law "'that they did not exercise any supervisory control over the general condition of the premises or that they neither created nor had actual or constructive notice of the dangerous condition on the premises'" and, on the contrary, "it is undisputed that Wolcott dug the grave and placed plywood over it, thus creating and having actual notice of the condition that plaintiffs allege was dangerous").

That said, the damages would be precisely the same in either event.

H. Conditions Claimed To Be "Open And Obvious"

Grosskopf v Beechwood Org., 166 AD3d 860, 860 [2d Dept 2018] (where "plaintiff allegedly was injured when he **slipped and fell on snow and ice on a grassy lawn** in front of a townhouse in a residential complex that was under construction," "the defendants established their prima facie entitlement to judgment as a matter of law dismissing so much of the complaint as alleged a violation of Labor Law § 200 and common-law negligence by presenting evidence that **the snow and ice condition was open and obvious and was not inherently dangerous**").

Parkhurst v Syracuse Regional Airport Auth., 165 AD3d 1631, 1632 [4th Dept 2018] (where "slipped and fell on plastic sheeting covering newly-laid carpet after descending a ladder while performing drywall finishing work," "**[w]e reject defendants' further contention that the plastic sheeting constituted an open and obvious hazard** inherent in decedent's work" inasmuch as **that defense may apply to "an open and obvious hazard *inherent in the injury-producing work*"** and "'**here the defect complained of lies in the condition of the [floor] in question, not in the [drywall finishing] work [decedent] was assigned to perform**'").

DiSanto v Spahiu, 169 AD3d 861, 862-863 [2d Dept 2019] (where plaintiff testified there was "**an oily substance on the street in front of the subject construction site**" and that, upon returning to his truck, he was thus caused to slip and fall from the back of the truck, **defendant "demonstrated, prima facie, that the sand and dirt that was present on the subject construction site was an open and obvious condition** that was readily observable by the

reasonable use of one's senses, and which **was not inherently dangerous**" and "further demonstrated, prima facie, that the plaintiff was unable to identify the source of the materials on his boot, or the cause of his fall, without engaging in speculation").

I. Odds & Ends

Gutkaiss v Delaware Ave. Merchants Group, Inc., 173 AD3d 1327 [3d Dept 2019] (where defendant Delaware Avenue Merchants Group, Inc., a not-for-profit corporation, **hired plaintiff**, **an independent contractor**, to **wrap "strands of decorative LED lights around the light poles** located along a portion of Delaware Avenue for the purpose of creating a brighter appearance in the neighborhood," where plaintiff was also tasked "to replace light strands located on 36 light poles because many of the light bulbs had become inoperable," and where the defendant City of Albany owned the light poles and consented to the work in issue, the City was not entitled to governmental immunity for its allegedly negligent maintenance of the light poles inasmuch as "**[m]aintenance of streets and sidewalks is a proprietary function** for which a 'municipality is subject to suit under the ordinary rules of negligence applicable to nongovernmental parties [citation omitted]'").

Grasso v New York State Thruway Auth., 159 AD3d 674 [2d Dept 2018] (where claimants charged the State Thruway Authority with violation of Labor Law § 200 in failing to provide a safe place to work, "**contrary to NYSTA's contention, it is not shielded from liability by the governmental function immunity defense** … Here, NYSTA, **as the owner of real property**, including a landfill requiring remediation, **engaging in a highway construction project, was acting within a proprietary capacity** and was **thus subject to tort liability**").

Grasso, 159 AD3d 674 (where owner **NYSTA argued** "that it **could not be held liable for failing to remediate soil containing chemicals because the claimants' job was to remedy that very condition**," "**NYSTA failed to demonstrate**, prima facie, that the **claimants were injured from defective or hazardous conditions that were part of or inherent in the work they were performing** … In addition, the claimants raised a triable issue of fact as to whether their injuries were caused by a hazardous condition that they were not specifically hired to remediate").

Lopez v 6071 Enterprises, LLC, 159 AD3d 1092, 1094-1095 [3d Dept 2018] (that the corporate **defendant's two owners were also partial owners of OAC, the truck company that employed** plaintiff, **did not render defendant liable under Labor Law § 200** where "OAC and defendant were separate entities formed for distinct purposes and that their finances and assets were not commingled").

Dos Anjos v Palagonia, 165 AD3d 626, 627 [2d Dept 2018] (**defendants** "**met their prima facie burden for summary judgment** dismissing the causes of action alleging a violation of Labor Law § 200 and common-law negligence **by establishing that the plaintiff allegedly forced his way through a locked door** and that such conduct was the sole proximate cause of

the accident" **but** "**plaintiff raised a triable issue of fact** through his affidavit, **in which he claimed that the subject door was unlocked**").

VIII. Employment Issues

A. Collateral Estoppel

King v Malone Home Builders, Inc., 137 AD3d 1646, 1648-1649 [4th Dept 2016] (where the plaintiff applied for Workers' Compensation benefits, the **employer urged that plaintiff was Malone's special employee**, and **the ALJ determined that the special employee doctrine was inapplicable**, that **determination collaterally estopped defendant Malone from here contending it was plaintiff's special employer** inasmuch as that issue "was the issue directly addressed and resolved by the Workers' Compensation Board" and defendant there "appeared as a party, served a pleading and fully participated in the evidentiary hearing while represented by a duly authorized Workers' Compensation Board representative").

Guaman v 1963 Ryer Realty Corp., 127 AD3d 454, 456 [1st Dept 2015] ("the **valid and final decision of a Panel of the Workers' Compensation Board** that **AP was plaintiff's employer** at the time of the accident **bars AP from re-litigating the identical issue** in this proceeding" inasmuch as "AP had a full and fair opportunity to litigate this issue before the board").

Vera v Low Income Mktg. Corp., 145 AD3d 509 [1st Dept 2016] (where **the Workers' Compensation Board found that plaintiff was not an "employee" of the general contractor** and the **owner here argued that plaintiff was thus collaterally estopped from contending he was an "employee"** for purposes of the Labor Law, the argument lacked merit inasmuch as "[t]here was **no identity of issue** as to the material question of plaintiff's 'employment' at the site, given the different statutory definitions of 'employment' in the Labor Law and the Workers' Compensation Law").

B. "Alter Ego"

Salinas v 64 Jefferson Apartments, LLC, 170 AD3d 1216, 1218-1219 [2d Dept 2019] (where defendant's principal testified that **he and his wife controlled approximately 15 entities including the corporation that employed the plaintiff, such was insufficient as a matter of law to establish that defendant was the "alter ego" of plaintiff's employer**, Westchester Management, inasmuch as "the Bergmans have been careful to maintain the defendant and Westchester management as **separate and distinct from each other**" and, for example, "**defendant maintains its own bank account** separate from that of Westchester Management and **pays its own expenses, and separate Schedule Cs** are filed for each entity for tax purposes, albeit as part of the Bergmans' personal income tax return"; "'I to I [citation omitted]'").

Sanchez v 3180 Riverdale Realty, LLC, 163 AD3d 885 [2d Dept 2018] (although "[t]he protection against lawsuits brought by injured workers that is afforded to employers by Workers' Compensation Law §§ 11 and 29(6) also extends to entities that are alter egos of the entity that employs the injured workers," "**[a] defendant moving for summary judgment based on the exclusivity defense** of the Workers' Compensation Law under this theory **must show, prima facie, that it was the alter ego** of the plaintiff's employer" and defendant here "failed to make a prima facie showing either that the plaintiff's employer, B&B Construction, and the defendant operated as a single integrated entity, or that either company controlled the day-to-day operations of the other," **"'a mere showing that the entities are related is insufficient** where a defendant cannot demonstrate that one of the entities controls the day-to-day operations of the other'").

Guminiak v VGFC Realty II, LLC, 153 AD3d 681 [2d Dept 2017] (where **defendant claimed it was an alter ego of the plaintiff's employer**, "Supreme Court properly denied the appellant's motion" inasmuch as **defendant proved only "that it and A-Val Corp. were related entities**" but did not "demonstrate either that the appellant and A-Val Corp., the plaintiff's employer, operated as a single integrated entity, or that either company controlled the day-to-day operations of the other").

C. Special Employer

Salinas v 64 Jefferson Apartments, LLC, 170 AD3d 1216, 1220-1221 [2d Dept 2019] (plaintiff, who was employed by Westchester management, **established that he was not a "special employee" of the related corporation which owned the subject property** inasmuch as "[a]mong other things, the plaintiff submitted evidence that he and the employees of Westchester management are **paid by checks drawn on the account of Westchester Management**, irrespective of the property at which they are directed to work … that **the ladder and other equipment used by the plaintiff at the defendant's premises were owned by Westchester Management** … and **the management agreement between the defendant and Westchester Management requires Westchester Management to employ persons to maintain the property** where the plaintiff was injured, and to pay their salaries").

Robinson v Spragues Washington Sq., LLC, 158 AD3d 1318, 1320 [4th Dept 2018] (without detailing the pertinent proof: where defendant claimed "that plaintiff was a special employee of SWS and thus is barred by the exclusive remedy provisions of the Workers' Compensation Law from maintaining this action against SWS," the motion court "properly concluded that **triable issues of fact** remain **whether plaintiff was a special employee** of SWS on the project").

Dereveneaux v Hyundai Motor Am., 156 AD3d 758, 758 [2d Dept 2017] (without providing any facts: "defendant Trade Show Specialists Corp. … **made a prima facie showing of entitlement to summary judgment** dismissing the amended complaint insofar as asserted against it by establishing that the plaintiff was its special employee and, thus, was barred from seeking to recover damages for personal injuries against it by the Workers' Compensation Law").

Rodriguez v Columbia Pictures Indus., Inc., 156 AD3d 447 [1st Dept 2017] (where plaintiff was "injured while working on the set of a movie for which defendant was the production company," defendant "**demonstrated prima facie** that it is entitled to **benefit, as plaintiff's 'special employer,' from the exclusive remedy doctrine of the Workers' Compensation Law**" and was thereby entitled to summary judgment).

D. Joint Venturers

Cortes v Skanska USA Civ. Northeast, Inc., 154 AD3d 538 [1st Dept 2017] (where it was undisputed that **plaintiff's accident "occurred during the scope of his employment with Phoenix Constructors, a joint venture**, and that **defendant Skanska [was] a member of the joint venture**," plaintiff's exclusive remedy against Skanska was workers' compensation).

E. Employer's Failure To Procure Workers' Compensation

Poulin v Ultimate Homes, Inc., 166 AD3d 667, 674 [2d Dept 2018] (the GC's cross-claims against plaintiff's employer were "**not barred by Workers' Compensation Law § 11**" inasmuch as **plaintiff's employer** "**did not procure workers' compensation** on behalf of the plaintiff, and … plaintiff maintained his own workers' compensation policy").

IX. Third-Party Claims And Issues

A. Common-Law Indemnification

1. Lead Cases

Whether The Employer Of An Undocumented Alien Can Assert The Statutory Workers' Compensation Bar To Third-Party Claims For Contribution And Indemnification — *New York Hosp. Med. Ctr. of Queens v Microtech Contr. Corp.*, 22 NY3d 501 [2014].

In a Labor Law action, the issue, as framed by Judge Read for a unanimous Court, was whether an employer's shield from third-party claims for contribution and indemnification "are extinguished merely because its injured employee is an undocumented alien."

Back in ***Balbuena v IDR Realty LLC***, 6 NY3d 338 [2006], the Court held that an undocumented alien who sues in tort with respect to a workplace tort *can* generally assert a claim for lost income notwithstanding that he or she was working illegally.[39] The Court rejected the argument that such effectively permitted the employee to profit from his or her illegality.

[39] The caveat is that the claim is barred if the employee obtained the job by tendering false work authorization documents.

The same considerations, the Court said, here dictated rejection of the argument that enforcement of the workers' compensation bar was akin to aiding "the purpose of an illegal transaction."

McCarthy v Turner Const., Inc., 17 NY3d 369, 374-378 [2011] (necessary elements for recovery for common law indemnification: essentially that the party from whom indemnification is sought was negligent in causing the subject accident and that the party seeking recovery was not negligent in causing the accident).

Frank v Meadowlakes Dev. Corp., 6 NY3d 687 [2006] (interplay with CPLR Article 16).

Cunha v City of New York, 12 NY3d 504 [2009] (explains interplay with CPLR Article 16 and Workers' Compensation Law § 11).

N. Star Reins. Corp. v Cont. Ins. Co., 82 NY2d 281 [1993] (adopts anti-subrogation rule).

2. Recent Case Law

(a) Triable Issues

McDonnell v Sandaro Realty, Inc., 165 AD3d 1090, 1098 [2d Dept 2018] ("the Supreme Court **should have denied** those branches of the motions of Howell and J & R **which sought summary judgment on their common-law indemnification causes of action** and/or cross claims against each other" since they "**failed to establish, prima facie, on their respective motions not only that they were not negligent, but also that the other party was responsible for the negligence** that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the plaintiff's injury").

Poulin v Ultimate Homes, Inc., 166 AD3d 667, 673-675 [2d Dept 2018] (where plaintiff "alleged that he was injured at a residential construction site when he fell through the opening of an unfinished stairwell into the basement of the premises," **where the GC's lead carpenter** "**testified** at his deposition that **a railing previously placed around the stairwell opening was specifically removed so that the drywall installers could access the area** in order to do their work," "**Supreme Court should not have, in effect, sua sponte, directed dismissal of Ultimate's cross claims against [GC] Fortin** for common-law indemnification and contribution, which relief Fortin did not request in its motion papers").

(b) No Basis For Liability

Cashbamba v 1056 Bedford LLC, 168 AD3d 638, 639 [1st Dept 2019] ("the third-party claims for common-law indemnification and contribution [were] not viable" inasmuch as the record established "that **plaintiff did not sustain a 'grave injury'** as a result of his fall, since he was able to obtain a full time job at the beginning of 2017").

McDonnell v Sandaro Realty, Inc., 165 AD3d 1090, 1097 [2d Dept 2018] (Supreme Court **should have dismissed the common law indemnification** claims against plaintiff's employer where it was "established, prima facie, that **McDonnell did not sustain a grave injury within the meaning of Workers' Compensation Law § 11**, and no triable issue of fact was raised in opposition to that showing").

Provens v Ben-Fall Dev., LLC, 163 AD3d 1496 [4th Dept 2018] (where the parties seeking common law indemnification did not dispute the Court's finding that **the party it sued "was not actively negligent as a matter of law**," their **claim had to be dismissed** "regardless of whether they established their own freedom from negligence as a matter of law").

Licata v AB Green Gansevoort, LLC, 158 AD3d 487, 490 [1st Dept 2018] ("[t]he owner defendants are **not entitled to common-law indemnification** or contribution from contractors J.E.S. Plumbing, Orion, or Alfa, because there is **no evidence that the contractors were negligent**").

3. Indemnification Established

Rizo v 165 Eileen Way, LLC, 169 AD3d 943, 946-947 [2d Dept 2019] (where defendants "**demonstrated, prima facie, that any statutory liability** they faced under Labor Law §§ 240(1) and 241(6) **was vicarious**" and **that "Rosner directed, supervised, or controlled the work that gave rise to the plaintiff's alleged injuries,"** defendants were thus entitled **to common-law indemnification from Rosner**).

B. Contractual Indemnification

1. Indemnity Agreements Strictly Construed

Tonking v Port Auth. of New York and New Jersey, 3 NY3d 486, 490 [2004] (the contractual **right to indemnification must be unambiguous**).

Provens v Ben-Fall Dev., LLC, 163 AD3d 1496 [4th Dept 2018] (inasmuch as "'**a contract** assuming that **obligation [to indemnify] must be strictly construed** to avoid reading into it a duty which the parties did not intend to be assumed,'" and inasmuch as the contractual indemnification agreement was **ostensibly limited to "work for which defendants had a written agreement or record** that was contemporaneously executed with the execution of the Addendum," **the motion court "erred in denying that part of Sattora's cross motion seeking dismissal of the contractual indemnification** cross claim").

2. Oral Agreements To Indemnify

Flores v Lower E. Side Serv. Ctr., Inc., 4 NY3d 363 [2005] (oral agreement to indemnify; requirements of WCL § 11).

DiNovo v Bat Con, Inc., 117 AD3d 1130 [3d Dept 2014] (**although "even an unsigned contract may be enforceable for purposes of Workers' Compensation Law § 11,"** third-party plaintiff **failed to controvert the subcontractor's showing that "it did not receive the subcontract before plaintiff's accident**" and that "it **did not enter into the indemnification agreement or agree to its terms *before* plaintiff's accident**").

3. Potential Limitations Arising From General Obligations Law § 5-322.1

Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co., 89 NY2d 786 [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").

Brooks v Judlau Contr., Inc., 11 NY3d 204 [2008] (but a contract requiring indemnification "to the fullest extent permitted by law" is deemed to *comply* with GOL § 5-322.1).

Giannas v 100 3rd Ave. Corp., 166 AD3d 853, 857 [2d Dept 2018] (inasmuch as "'**[a] party seeking contractual indemnification must prove itself free from negligence**, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor,'" and inasmuch as "**there was a triable issue of fact regarding whether [contractor] Rockledge negligently installed the subject scaffold**," **Rockledge was not entitled to summary judgment on its cross claim for contractual indemnification**).

McDonnell v Sandaro Realty, Inc., 165 AD3d 1090, 1096-1097 [2d Dept 2018] (although GC Howell's contracts contained "broad indemnity provisions that state that, to the maximum extent permitted by law, the subcontractor will indemnify Howell, the owner, and all additional insureds and indemnitees for damages … 'but only to the extent that such claim, damage or loss is *not caused by the negligence of the Owner and/or Contractor*,'" **there were nonetheless issues as to whether the GC was itself negligent, thus precluding grant of contractual indemnification at this time**).

Sullivan v New York Athletic Club, 162 AD3d 955 [2d Dept 2018] (where Labor Law §§ 240 and 241[6] were inapplicable and the plaintiff's only viable cause of action against the GC was premised on the GC's negligence, **the GC's claims for contractual indemnification had to be dismissed "except insofar as those causes of action sought defense costs"** inasmuch as the **GC could not "seek contractual indemnification for its own negligence**").

Marulanda v Vance Assoc., LLC, 160 AD3d 711 [2d Dept 2018] (where **defendant was "liable to the plaintiff under Labor Law § 240(1) based solely upon its status as the owner** of the premises" and there was "no evidence that the defendant was negligent, or that it directed, controlled, or supervised the manner in which the plaintiff performed his work," **defendant's claim for contractual indemnification** was **not barred by General Obligations Law § 5-322.1**).

4. Not All Indemnification Provisions Are Equal

Not all indemnification provisions are equal. Some provide indemnification only for the contractor's negligence, while others (in fact, most) broadly apply to all liability arising from the contractor's work.

(a) Narrowly Drafted Provisions, Requiring Proof Of Negligence

Savlas v City of New York, 167 AD3d 546, 547 [1st Dept 2018] (where "**plaintiff tripped and fell over one of several steel plates** covering openings into a lower level of a project building," the motion court "**correctly dismissed all claims against CSM for contractual indemnification** because there is **no evidence that CSM was negligent in the performance of its contract with URS-MP so as to trigger the indemnification clause**").

Licata v AB Green Gansevoort, LLC, 158 AD3d 487, 490-491 [1st Dept 2018] ("[b]ecause Alfa was not negligent, and because **its sub-subcontract required it to defend the owner defendants only from damages arising from Alfa's work *and* caused by Alfa's negligence**, the owner defendants **are not entitled to contractual indemnification from Alfa**," but the **result was different for J.E.S. Plumbing and Orion** since, **(a) their contracts required them to indemnify the owner defendants in much broader circumstances** which "could be triggered even in the absence of negligence by either of them" and "J.E.S. Plumbing and Orion failed to establish that the pipes on the floor in the vicinity of the accident, as alleged by plaintiff, were not their property and did not result from their work").

Poalacin v. Mall Properties, Inc., 155 AD3d 900 [2d Dept 2017] (where "the Mall defendants' cross claim against Weather Champions for contractual indemnification was **based on a contract between Weather Champions and James Hunt**, pursuant to which **Weather Champions agreed**, inter alia, to indemnify James **Hunt if Weather Champions or one of its subcontractors was negligent**," "[i]nasmuch as the Mall defendants **failed to establish that Weather Champions or APCO was negligent** as a matter of law in connection with the accident, the Mall defendants failed to establish their prima facie entitlement to judgment as a matter of law on their cross claim for contractual indemnification against Weather Champions").

(b) Broad Indemnity Provisions, Requiring Only That The Claim Arose From The Work

Allington v Templeton Found., 167 AD3d 1437, 1440-1441 [4th Dept 2018] (where **the indemnity provision broadly obligated the subcontractor to indemnify** the owner "**against each and every claim, demand, damage, expense, loss, liability and suit or other action arising out of any injury, including death, to persons … *occasioned in any way by* … the breakage or malfunctioning of any tools, supplies, scaffolding or other equipment**, similar or dissimilar to the foregoing, used by or furnished to SUBCONTRACTOR, its sub-subcontractors, or sub-subcontractors' agents or employees,'" **such included the subject accident** in which **plaintiff fell from a broken ladder** inasmuch as "[a]n act or omission that 'occasion[s]' a claim is an act or omission that is 'a direct *or indirect* cause' thereof [quoting Merriam-Webster]").

Ajche v Park Ave. Plaza Owner, LLC, 171 AD3d 411 [1st Dept 2019] (where the **contract required "CPM to indemnify 53rd Street from any 'claim arising out of, in connection with, or as a consequence of the performance or nonperformance of [CPM's] or any Subcontractor's Work**," and where the accident arose from the work of a subcontractor which CPM did not retain but CPM "oversaw and coordinated the entire project," **53rd Street was "entitled to contractual indemnification from CPM**").

Hong-Bao Ren v Gioia St. Marks, LLC, 163 AD3d 494 [1st Dept 2018] (where the **subject provision** said "**Tenant agrees to indemnify and hold Landlord free and harmless from any claim of damage or injury** occurring or arising to any person or persons or property on, **in or about the demised premises or the sidewalk in front of same caused by the Tenant**," such provision "**[did] not require a finding of negligence on the part of the tenant** before it is triggered" and it did not inasmuch as it was "clear from the contractual language at issue that the landlord, Gioia, intended to be indemnified by the tenant, Eight Oranges, for any 'damage or injury occurring or arising to any person' on the property, that is caused by the tenant").

Wilk v Columbia Univ., 150 AD3d 502 [1st Dept 2017] ("Columbia and Bovis are **entitled to summary judgment** on their contractual indemnification claim against ACT, based on paragraph seven of ACT's contract with Breeze, **which provides for indemnification for claims arising out of ACT's work even if ACT is not negligent**").

De Souza v Empire Tr. Mix, Inc., 155 AD3d 605 [2d Dept 2017] ("LIC **demonstrated its prima facie entitlement to judgment** as a matter of law … by submitting, inter alia, the construction management agreement, which included an **express indemnification clause** in favor of LIC, as the owner … plaintiff's alleged **injuries resulted from the performance of work contemplated by the construction management agreement**, and McGowan's responsibilities under that agreement encompassed the plaintiff's work … LIC **also established**, prima facie, that **it was not negligent**").

5. Retroactive Effect

Zalewski v MH Residential 1, LLC, 163 AD3d 900 [2d Dept 2018] (where the **agreement to indemnify was signed after the subject accident** and the third-party **plaintiff "failed to eliminate triable issues of fact** as to **whether the parties intended the indemnification provision to apply retroactively**," its motion for summary judgment "should have been denied without regard to the sufficiency of [the] opposition papers" inasmuch as "'**an indemnification agreement executed by a party after the plaintiff's accident occurred will not be applied retroactively** in the **absence of evidence that the agreement was made as of a date prior to the occurrence of the accident and that the parties intended the agreement to apply as of that date**'").

6. Triable Issues

Fedrich v Granite Bldg. 2, LLC, 165 AD3d 754, 768 [2d Dept 2018] (where plaintiff, a fire marshal, "allegedly was injured while in the process of conducting an inspection of the fire alarm and sprinkler systems at an office building under construction" when he "tripped on a pile of construction debris as he was walking from an electric room situated on the uppermost level of an underground parking garage where he had been inspecting the heat sensors and sprinkler heads," and **third-party defendant STAT "demonstrated its prima facie entitlement to judgment as a matter of law** dismissing Granite's contractual indemnification third third-party cause of action and Kulka's contractual indemnification cross claim against STAT by **submitting evidence** that, during the course of the construction, the trade contractors were piling their debris on the floor of the subject building, which was then removed by laborers employed by and/or under the supervision of Granite and Kulka" — **in other words, that the parties suing for contractual indemnification were themselves negligent** — but the motion court correctly denied STAT's motion for dismissal of the contribution claims against it).

Rizo v 165 Eileen Way, LLC, 169 AD3d 943, 946 [2d Dept 2019] (where the contract governing construction of the law firm offices provided for contractual indemnification, and where there was "**a triable issue of fact** as to **whether the soundproofing work arose out of the law firm construction project**, which had otherwise been completed months earlier, or was independent of it," Supreme Court correctly denied the motion for summary judgment on the cross claim based on contractual indemnification).

Valdez v Turner Constr. Co., 171 AD3d 836 [2d Dept 2019] (where plaintiff was allegedly "performing landscaping on the fifth-floor roof of the property" and was "in the process of detaching a bag of soil that weighed at least 2,500 pounds from a crane that had hoisted the bag up to the fifth-floor roof," where the crane then lifted "causing the straps connecting the bag to the crane to catch the plaintiff's hand and lift him off the roof," and where plaintiff fell to the roof when he freed his hand, **Supreme Court correctly denied Turner's motion** for summary judgment **on its claim for contractual indemnification** inasmuch as its "**submissions failed to eliminate triable issues of fact as to whether Turner was free from negligence** in the happening of the plaintiff's accident" but "that branch of their motion which was for summary

judgment on Skidmore's cross claim against KJC for contractual indemnification should have been granted" inasmuch as Skidmore was free from negligence).

7. Entitlement To Indemnification As A Matter of Law

Martinez-Gonzalez v 56 West 75th Street, LLC, 172 AD3d 616, 617 [1st Dept 2019] (where plaintiff's employer "**signed an agreement** in connection with the renovation work, which clearly and unambiguously obligated it to defend and indemnify 56 West and Brusco for any personal injury claims resulting therefrom," and **where those two defendants "had no involvement in plaintiff's work**, and their liability to plaintiff was strictly vicarious," "**defendants are entitled to contractual indemnification**").

Sanchez v 404 Park Partners, LP, 168 AD3d 491, 493 [1st Dept 2019] ("**Sciame should have been awarded conditional full contractual indemnification** from United, i.e., subject to the determination of its liability to plaintiff on the common-law negligence and Labor Law § 200 claims" as "**Sciame's subcontract with United contemplates full indemnification if Sciame is held vicariously liable by reason of statute** and partial indemnification if Sciame is found to have been negligent").

Jarzabek v Schafer Mews Hous. Dev. Fund Corp., 160 AD3d 412 [1st Dept 2018] (where plaintiff fell from a "makeshift" ladder, "[s]ince there is no dispute that plaintiff was supervised and directed solely by his employer, Demand, which provided him with materials and equipment, **the Owner Defendants were not negligent** in the happening of the accident … and thus, **the motion court correctly granted summary judgment on their claim against Demand for contractual indemnification**").

8. Odds & Ends

Ajche v Park Ave. Plaza Owner, LLC, 171 AD3d 411 [1st Dept 2019] (where "CPM had purchased insurance policies naming Park as an additional insured demonstrates its intent to indemnify Park" and CPM "acknowledged, in opposition to Park's motion for summary judgment, that the indemnification clause [was] enforceable [by Park]," **the record thus established a right to indemnification even though the signature line of the indemnity agreement was blank** inasmuch as "'**an unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound** [*quoting* ***Flores***, 4 NY3d 363, 369 [2005]'").

Burhmaster v CRM Rental Mgt., Inc., 166 AD3d 1130, 1134-1135 [3d Dept 2018] (where subcontractor Young had **agreed** "**to indemnify Mercer for injury claims arising from the performance of the subcontracted roofing work to the extent that they may be shown to have been caused by negligent acts or omissions on the part of Young or by Jablonski Construction** as Young's subcontractor," but where **Young argued that the provision was inapplicable because the repair work that led to the accident was purportedly outside the**

scope of the contract, "the parties' conduct manifested their mutual intent to depart from the contractual requirement for written modification of the scope of work," that **they had thus expanded the scope of the work**, and that **Young was accordingly obligated to indemnify Mercer under the contract**).

Hong-Bao Ren v Gioia St. Marks, LLC, 163 AD3d 494 [1st Dept 2018] ("**conditional summary judgment** is appropriate here even when judgment has yet to be rendered or paid in the main action, 'since it **serves the interest of justice and judicial economy** in **affording the indemnitee 'the earliest possible determination** as to the extent to which he may expect to be reimbursed'").

Lamela v Verticon, Ltd., 162 AD3d 1268 [3d Dept 2018] (where plaintiff's "were injured when an unsecured wall collapsed and knocked over an extended scissors lift that they were using to perform demolition work," and where "the governing construction contract contained a provision by which Lamela expressly agreed to indemnify Verticon and Satin against 'any and all suits, actions, claims, debts, demands, damages, liquidated damages, consequential damages, liabilities … and expenses of whatsoever kind or nature … arising from the use or operation by [Lamela] of construction equipment, tools, scaffolding or facilities furnished to [Lamela] to perform this [w]ork,'" **the indemnification clause applied irrespective of the fact that Lamela itself owned the subject scissors lift**).