



# STATE OF NEW YORK CONSTRUCTION LAW COMPENDIUM

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## I. GENERAL DUTY

Labor Law § 200 was enacted to codify the common law duty of owners and general contractors to protect the health and safety “of all persons employed therein or lawfully frequenting such places.” In order for an individual to recover under the safe work place doctrine, the actual injury must be connected with the workplace, the plaintiff must show that the owner or contractor controlled the area or had notice of the defective condition.

The definition of “workplace” or “worksite” within the Labor Law is given broad interpretation. It is not limited to the area where the actual construction is being performed, but includes adjacent areas such as passageways or walkways to and from the work area. It should be noted that § 200, as well as other sections of the Labor Law, apply to those persons employed on the premises or “lawfully frequenting” the premises, but do not protect volunteers. See *McNulty v. Executive Kitchens*, 294 A.D.2d 411, 742 N.Y.S.2d 354 (2d Dep’t 2002), *Lipsker v 650 Crown Equities, LLC*, 81 A.D.3d 789, 790 (N.Y. App. Div. 2d Dep’t 2011).

## II. RESPONSIBILITY

Liability will be imposed upon a landowner under Labor Law § 200 only where the plaintiff’s injuries were sustained as the result of a dangerous condition at the work site, rather than as the result of the manner in which the work was performed, and then only if the landowner exercised supervision and control over the work performed at the site or had actual or constructive notice of the unsafe condition causing the accident. *Begor v. Mid-Hudson Hardwoods, Inc.*, 301 A.D.2d 550, 754 N.Y.S.2d 57 (2d Dep’t 2002). In general, unless the owner exercises control of the jobsite, the responsibility for job safety lies with the general contractor and its subcontractors.

### A. Control

As a general rule, an owner is not liable for a contractor’s negligence and an owner and a contractor are not liable for a subcontractor’s negligence. *Dawson v. Diesel Construction Co.*, 51 A.D.2d 397, 381 N.Y.S.2d 808 (1st Dep’t 1976). However, an owner or contractor may be found liable if they exercise “control” or “supervision” over the negligent party. “It is settled law that where the alleged defect or dangerous condition arises from the contractor’s method and the owner [general contractor or their agent] exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under section 200 of the Labor Law.” *Lombardi v. Stout*, 80 N.Y.2d 290, 604 N.E.2d 117, 590 N.Y.S.2d 55 (1992).

In *Lombardi*, a landmark case pertaining to Labor Law § 200, plaintiff fell from a ladder while cutting a tree limb but could not recover from a property owner under common law or § 200. The accident was not caused by a dangerous condition on the premises but rather by the manner in which the removal of the tree limb was undertaken and there was no evidence that the property owner exercised supervisory control or had any input into how the limb was to be removed.

The fact that the general contractor agreed in its contract to “supervise” the work is not, by itself, sufficient to establish that the general contractor actually supervised or controlled the work. *DeSimone v. Structure Tone*, 306 A.D.2d 90 (1st Dep’t 2003). However, the existence of such an undertaking may create an issue of fact as to control, even where the general contractor disclaims actual supervision of the subcontractors.

The Court of Appeals has stated that a plaintiff cannot recover in negligence or pursuant to Labor Law § 200 if no triable issue of fact exists that the defendant “control[ed] the activity bringing about the injury to enable it to avoid or correct an unsafe condition” *O’Sullivan v. IDI Constr. Co., Inc.*, 2006 N.Y. LEXIS 2137, 2006 N.Y.Slip.Op. 6344 (2006)(citing *Russin v. Picciano*, 54 N.Y.2d 311, 429 N.E.2d 805, 445 N.Y.S.2d 127 (1981)).

## B. Condition

A Labor Law § 200 claim is not absolute and in order to be found responsible for negligently failing to provide a safe place to work, an owner or contractor must have either actual notice or constructive notice of the dangerous condition which caused the accident. *Tkach v. City of New York*, 278 A.D.2d 227, 717 N.Y.S.2d 290 (2d Dep’t 2000). Even knowledge of a dangerous condition is insufficient to impose liability if the condition did not cause the accident. See *Blanco v. Oliveri*, 304 A.D.2d. 599 (2d Dep’t 2003). Similar to Lombardi, no liability will attach to an owner or general contractor under § 200 where the defect or dangerous condition arises from the contractor’s or subcontractor’s methods and the owner or general contractor exercises no supervisory control over the operation. *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993). However, an owner cannot escape all liability by attempting to blind him/herself from the obvious. Owners have a duty to make reasonable inspections to detect defects and the failure to do so can constitute negligence only if such an inspection would have disclosed the defect. *Lee v. Bethel First Pentecostal Church*, 304 A.D.2d 798 (2d Dep’t 2003).

## C. Open & Obvious Defect

The courts have consistently held that a party potentially liable under Labor Law § 200 or for common law negligence “has no duty to protect workers against a condition that may be readily observed.” *Krempa v. F&B Constr.*, 233 A.D.2d 918 (4th Dep’t 1996). However, the fact that a dangerous condition is open and obvious does not negate the duty to maintain the premises in a reasonably safe condition, but rather, bears only on the injured person’s comparative fault. *Bax v. Allstate Health Care, Inc.*, 26 A.D.3d 861, 863 (4th Dep’t 2006).

In an action against a landowner by a subcontractor’s employee who was injured when he fell from a catwalk, the court found that the catwalk, equipped with no handrail or other safety device, was an open and obvious defect. *Brezinski v. Olympia & York Water Street Co.*, 218 A.D.2d 633, 631 N.Y.S.2d 24 (1st Dep’t 1995). The court held that the “landowner is under no duty to warn a worker or his employer of dangers and conditions that are open and obvious, either pursuant to Labor Law section 200 or the common law principals it codifies.”

### III. PROTECTED PERSONS

The Court of Appeals found in *Mordkofsky v. V.C.V. Development Corp.*, 76 N.Y.2d 573, 563 N.E.2d 263, 561 N.Y.S.2d 892 (1990) that the purchaser of a home being custom built, who was injured while inspecting the progress of work, was not entitled to the protection of construction safety statutes under Labor Law § 200 and § 241.

Although the Court opined that the Labor Law statutes should be read expansively, it found that the intent of the Labor Law was to protect a special class of persons for whose benefit liability was imposed upon contractors, owners and their agents. *Id.* at 894. Since plaintiff was not an “employee” or “employed” at the site and was not a “mechanic, working man or laborer working for another for hire”, nor “permitted or suffered to work” at the place of the occurrence, he was not considered to have been within the class of persons afforded the protection of Labor Law § 200 and § 241. *Id.* at 895. *See also Spaulding v. S.H.S. Bay Ridge LLC*, 305 A.D.2d. 400 (2d Dep’t 2003).

Soon thereafter, the Court of Appeals expanded the interpretation of Labor Law § 200. In *Jock v. Fein*, 80 N.Y.2d 965 (1992), the Court found that Labor Law § 200 was not limited to construction work and did not exclude employees engaged in normal manufacturing processes.

In the *Jock* case, plaintiff fell from an upright steel mold that he was preparing during his customary occupational work of fabricating a septic tank. Labor Law § 200 required all machinery equipment and devices in such places, to be “placed, operated, guarded and lighted as to provide reasonable and adequate protection to all such persons.” *Id.* at 880.

### LABOR LAW SECTION 240(1)

#### I. WHO IS LIABLE

##### A. Generally

Labor Law § 240(1) requires an owner, contractor or agent to furnish or erect adequate safety devices to protect workers from hazards associated with elevated risks when performing certain work on a structure or building. Section 240(1) imposes liability in the first instance, regardless of control, supervision, or direction of the work. *See Allen v. Cloutier Construction Corp.*, 44 N.Y.2d 290 (1978). However, owners of one and two family dwellings who contract for and do not direct or control the contractor’s work are exempt from liability in the first instance. *Zangiacomì v. Hood*, 193 A.D.2d 188, 193 (1st Dep’t 1993).

##### 1. Owners

The New York courts broadly interpret “owners” to provide protection for the class of workers protected under Labor Law § 240(1). Owners in fee of land and title or record owners, including owners who lease their property are subject to liability under Labor Law § 240(1).

*See Gordon v. Eastern Railway Supply, Inc. et al.*, 82 N.Y.2d 555 (1993) (discussed below). However, the term of “owner” has not been limited to titleholder, it has been held to encompass a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for its benefit. *See Copertino v. Ward*, 100 A.D.2d 565 (2d Dep’t 1984) (where defendant, as an easement holder, had a property interest in the excavation site where plaintiff was injured and contracted with plaintiff’s employer to receive a benefit on his property, Court held that defendant was an owner).

In *Gordon*, the Court of Appeals dealt with the issue of whether the defendant was an owner for purpose of § 240(1) liability. *See id.* at 555. There, the plaintiff, an employee of Ebenezer Railway Supply, Inc., fell off a ladder that was leaning against the side of a railroad car he was cleaning. The railroad car was owned by GATX Capital Corp. and Ebenezer was the contractor performing the work for GATX. Eastern Railway Supply, Inc. owned the sand house in which the cleaning was performed and the property upon which the accident occurred. Eastern had leased the property to Ebenezer. Eastern argued that it could not be considered an owner for § 240(1) purposes because it leased the property where the accident took place to Ebenezer and that it did not contract to have the work performed for its benefit. The Court disagreed with Eastern and held that liability rests upon the fact of ownership and since the property actually belonged to Eastern, the fact that they leased it to Ebenezer did not affect its status as owner. In interpreting § 240(1), the Court reasoned that this statute imposes duties on “all ... owners” and as such, it intended to include owners in fee, even though the property might be leased to another. *Id.*

In *Coleman v. City of New York*, 91 N.Y.2d 821 (1997), the Court of Appeals held that the City was an “owner” for Labor Law § 240(1) purposes. There, the plaintiff, a structure maintainer for the New York City Transit Authority, was injured while performing repair work when he fell through a canopy attached to an elevated train station. The station was owned by the City of New York. In opposition to plaintiff’s motion for summary judgment against the City as owner, the City argued that it lacked any responsibility to protect Authority employees working on the transit system because of the statutory scheme creating the Authority and establishing itself as lessor and the Authority as lessee. The Court of Appeals disagreed, holding that the City was absolutely liable as owner, regardless of its status as a lessor.

The Court’s decision in *Coleman* follows its earlier holding in *Adimey v. Erie County Indus. Dev. Agency*, 89 N.Y.2d 836 (1996), where the Court had an opportunity to review a “sale and lease back” transaction involving the Erie County Industrial Development Agency. There, the Court found that the Industrial Agency was still an owner despite the fact that they had leased the property back to the plaintiff’s employer in a tax benefit arrangement. The Court of Appeals reversed the Fourth Department and upheld the dissent which found that where the public entity owned the land, they accept the advantages and disadvantages associated with that ownership, including liability under Labor Law § 240(1).

In *Ampolini v. Long Island Lighting Co.*, 589 N.Y.S.2d 76 (2d Dep’t 1992), the owner of the property that allowed a food service trailer to operate on its premises was found to be an owner when a worker was injured while repairing the roof of the trailer. The court held that while

LILCO did not own the trailer, it derived a benefit from its presence and should be considered an owner for the purposes of Labor Law § 240(1).

A contract vendee has been found to be an owner where he had access to the premises and had contracted to have the work performed and a record title holder was found to be an owner where the certificate of title had been transferred to a municipality for financing purposes and not for a genuine transfer of ownership. *See Vigliotti v. Executive Land Corp.*, 186 A.D.2d 646, 588 N.Y.S.2d 430 (2d Dep't 1992). Wholly owned subsidiaries of the "owner" may be found to owners themselves where they contract for the work. *See Clute v. Ellis Hospital*, 585 N.Y.S.2d 140 (3d Dep't 1992). Additionally, under Labor Law § 240, a tenant who contracts for construction, repair, renovation, etc., steps into the shoes of an owner for the purposes of liability. *See Gliemi v. Toys "R" Us, Inc.*, 62 N.Y.2d 664 (1994).

Similarly, both the First and Third Departments have held that building owners were not strictly liable under the Labor Law for work they did not contract for or know about. In *Marchese v. Grossarth*, 232 A.D.2d 924, 648 N.Y.S.2d 810 (3d Dep't 1996), lv. denied, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997) (still followed in the Third Department, *see Benamati v. McSkimming*, 8 A.D.3d 815 (3d Dep't 2004)), the defendant owned a three-unit apartment building. One of his tenants arranged for the installation of cable television in her apartment by the third-party defendant-plaintiff's employer. As he installed the cable, plaintiff fell from a ladder that he had placed on the building's exterior wall. In support of his motion, the defendant affirmed that he was the only person with authority to grant permission for cable installation and that he had not given it and no one had asked for it. He stated that he was unaware that anyone had been to the building to install cable television. The Third Department dismissed plaintiff's § 240(1) claim because plaintiff's company had been hired without the knowledge or consent of the defendant. The Third Department relied upon this holding and dismissed plaintiff's § 240(1) claim in *Ogden v. City of Hudson Industrial Development Agency*, 277 A.D.2d 794, 716 N.Y.S.2d 745 (3d Dep't 2000). In the First Department case, *Brown v. Christopher Street Owners Corp.*, 211 A.D.2d 441, 620 N.Y.S.2d 374 (1st Dep't 1995), *aff'd*, 87 N.Y.2d 938, 641 N.Y.S.2d 221 (1996), a proprietary tenant and shareholder of a cooperative apartment hired plaintiff to clean her windows. As he cleaned them, he slipped off a ledge and fell three stories into the courtyard. Plaintiff sued the owner of the multiple dwelling and its managing agent. The First Department noted that the tenant hired plaintiff without the consent or knowledge of the owner or managing agent. Because there was no evidence that the tenant acted as an agent of the owner or its managing agent, the First Department held that plaintiff "failed to assert any ground to impose liability upon these two defendants." *Id.*, 620 N.Y.S.2d at 375. The First Department relied upon *Brown* in several subsequent decisions. *See Webb v. 444 Central Park Owners, Inc.*, 248 A.D.2d 175, 669 N.Y.S.2d 574 (1st Dep't 1998) and *Ceballos v. Kaufman*, 249 A.D.2d 40, 671 N.Y.S.2d 229 (1st Dep't 1998).

The Second Department, however, in similar circumstances found the owner and the owner's agent "absolutely liable under Labor Law §240(1) once the plaintiff established that a violation thereof occurred on their premises, and that it proximately caused his injuries". *Pineda v. 79 Barrow Street Owners Corp.*, 297 A.D.2d 634, 747 N.Y.S.2d 236 (2d Dep't 2002); *see also Otero v. Cablevision of N.Y.*, 297 A.D.2d 632, 634 (2d Dep't 2002) (As a matter of law, a building's

owners and managers were strictly liable pursuant to Labor Law § 240(1) even though they did not contract for, permit or suffer the injured party to work on the property).

In *Abbatiello v. Lancaster Studio Assoc.*, 3 NY3d 46 (2004), the Court of Appeals held that a building owner was not subject to liability under §240 for injuries sustained by a cable technician performing work on its property without its knowledge or consent. The Court found that §240 was not intended to protect workers who have no nexus whatsoever to the owner. In addition, the Court noted Public Service Law 228 which specifically prohibits a landlord from interfering with the installation of cable television facilities upon its property.

In *Morales v. D&A Food Service*, 10 N.Y.3d 911 (2008), a plaintiff sought to recover against a property owner after falling from a ladder while working at the property. The work was requested by the tenant, and the lease required the tenant to inform the owner before engaging in any structural alterations - which the tenant failed to do. Despite the fact that the owner had no knowledge of the work, the Court nevertheless awarded plaintiff summary judgment under §240. In doing so the Court has effectively limited *Abbatiello* to its facts.

## 2. Contractors

It has been held that not all “contractors” are subject to the non-delegable duty contemplated by Labor Law § 240(1). In *Russin v. Picciano*, 54 N.Y.2d 311 (1981), it was made clear by the Court of Appeals that the “contractor” contemplated in the 1969 amendment to § 240 was the “general contractor” or one to whom the general contractor’s duty was delegated. In *Russin*, the plaintiff sued three “prime” contractors who had no direct contact with the general contractor. The plaintiff, an employee of the general contractor sought to impose § 240 liability on those “primes.” The Court held that the plaintiff’s accident arose out of activity that was strictly within the purview of the general contractor’s duties and the prime contractors had no ability to direct or control the activity. Therefore, they were not liable under § 240.

Moreover, in *Kelly v. LeMoyne College, et al.*, 606 N.Y.S.2d 376 (3d Dep’t 1993), the Appellate Division held that the key criterion in ascertaining Labor Law § 240(1) liability is not whether the party charged with the violation actually exercised control over the work, but rather whether he or she had the right to do so. Accordingly, the court found that there was an issue of fact as to whether the subcontractor had the authority to direct or control plaintiff’s work, as an employee of the contractor hired to install a roof at LeMoyne College.

In *Griffin v. MWF Development Corp., et al.*, 273 A.D.2d 907 (4th Dep’t 2000), the court held that a construction manager who was authorized to select various contractors and to supervise and control their work was liable under Labor Law § 240(1).

Similarly, in *Grueter, et al. v. Leher McGovern Bovis, Inc.*, 707 N.Y.S.2d 625 (1st Dep’t 2000), the construction manager was held liable under § 240 where it actively supervised safety at the work site and had the authority to correct the unsafe conditions.

## 3. Agents

In order to be held liable under § 240 as an agent of a general contractor or owner, one must be empowered with the same ability to direct, supervise and control the work being done. Although the duties imposed on general contractors and owners under § 240 are non-delegable, the duties themselves may, in fact, be delegated to other contractors or persons on the job. While this does not relieve the general contractor or owner of his responsibility, it does place a further burden on this “agent” to follow the dictates of Labor Law § 240 or suffer its consequences. Once this designation as “agent” occurs, that agent faces the same “non-delegable” duty to ensure compliance. See *McGlynn v. Brooklyn Hospital*, 209 A.D.2d 486 (2d Dep’t 1994).

Indeed, a question of fact can often exist with regard to whether an entity had the “authority” to direct and control the work. Thus, in *Hoffmiester v. Oak Tree Homes*, 615 N.Y.S.2d 176 (4th Dep’t 1994), a manufacturer of modular homes was denied summary judgment because it had hired the plaintiff’s employer, a contractor, to place the modular home on its foundation. The court found there to be a question of fact as to the manufacturer’s authority to direct the work of the contractor. In *Santos v. American Museum of Natural History*, 589 N.Y.S.2d 520 (2 Dep’t 1992), the museum leased the premises from the City of New York and had a contract that allowed it to do maintenance work. The City hired a separate company to do renovation work. The museum was found not to be an agent of the owner because it had no right to direct or control the renovation work.

In May 2005, the Court of Appeals in *Walls v. Turner Constr. Co.*, 4 N.Y.3d 861 (N.Y. 2005) held that a construction manager, while technically not a general contractor, could be liable under § 240 of the Labor Law, where its actions at the site made it the owner’s agent. In that case, the Court found that Turner had a broad responsibility under a contractual obligation to monitor the work of other contractors and that the label of general contractor versus construction manager was not determinative given the: (1) specific contractual terms created in agency; (2) the absence of a general contractor; (3) Turner’s duty to oversee the construction site and trade contractor; and (4) Turner’s acknowledgment that it had authority to control activities at the work site and to stop unsafe work practices.

Therefore, if the entity sued does not fall within these classifications (owner, general contractor or agent), the statute will not be applicable to it. See *Noah v. 270 Lafayette Associates*, 649 N.Y.S.2d 419 (1st Dep’t 1996). The seller and/or supplier of the allegedly defective scaffold cannot be liable under Labor Law Section § 240. (Although, it may be liable under other theories). So too, the lending of equipment does not transform one into an “agent” for the purposes of this statute absent the authority to direct or control the work. See *Kobee v. Almeter Barry Construction*, 655 N.Y.S.2d 222 (4th Dep’t 1997).

## B. Exceptions

Labor Law § 240(1) specifically carves out an exception for owners of one and two family dwellings who contract for but do not control work performed on their premises. In addition, § 240(1) expressly exempts from liability professional engineers and architects who do not direct or control the injury producing work.

## 1. Owners of One and Two Family Dwellings

The recent case of *Bartoo v. Buell*, 87 N.Y.2d 362, 662 N.E.2d 1068, 639 N.Y.S.2d 778 (1996) gives a good background on the history and reasons for the exemption found in Labor Law § 240 for owners of one and two family dwellings. Under the same theory of “those in the best position to ensure safety,” the Court of Appeals found that the owners of one and two family dwellings who do not direct or control construction work at their homes are in no better position to see to a job safety than the workers they hire.

In *Bartoo*, the Court looked at two different occurrences, one involving Bartoo and another involving *Anderson*, a case decided the same day. Bartoo had a barn on his property in Allegheny County, which was fifty feet from his residence. In it, he stored his own personal property and he also leased space in the barn to other individuals who stored their golf carts there. Bartoo was injured when he was fixing the roof of that barn. In *Anderson*, the defendant ran a day care center out of her one-family home and plaintiff was injured while constructing a bedroom and a sliding glass door.

The Court applied a “site and purpose” test that had been outlined earlier by the Court in *Canon v. Putnam*, 563 N.Y.S.2d 16 (1990). The court found that neither defendants were subject to the absolute liability of Labor Law § 240. A balancing test must be employed in order to see whether the owner is engaging in primarily residential or commercial activities in the ownership of the property and in the work being performed and whether the dwelling is “more accurately considered a commercial enterprise”. Where, however, the homeowner uses the dwelling exclusively for commercial purposes, as in *Van Amerogan v. Donnini*, 78 N.Y.2d 880, 577 N.E.2d 1035, 573 N.Y.S.2d 443 (1991), the exemption will be lost. Thus, a real estate developer who purchases a one-family home for a later resale would not be entitled to the exemption. *Morelock v. Danbrod Realty*, 203 A.D.2d 733, 610 N.Y.S.2d 657 (3d Dep’t 1994). However, where a multiple dwelling was being renovated to be used as a one or two family home, the Court of Appeals allowed the owner to take advantage of the exemptions. *Stejskal v. Simmons*, 3 N.Y.3d 628, 390 A.D.2d 853, 765 N.Y.S.2d 886 (2004).

In *Hook v. Quattrociocchi*, 231 A.D.2d 882, 647 N.Y.S.2d 881 (4th Dep’t 1996) the court was faced with a factual situation that had additional commercial aspects to it than did the Court of Appeals in *Bartoo*. Despite the fact that the work was done on premises that were to become a bed and breakfast, the court found that “any commercial benefit” was secondary to the substantial residential purpose served by fixing the leaking roof. The issue turned on the fact that the plaintiffs utilized the house as their primary residence as well as a bed and breakfast.

In *Muniz v. Church of Our Lady of Mount Carmel*, 655 N.Y.S.2d 38 (1st Dep’t 1997), the church was granted the statutory exemption where the worker involved was replacing windows at the church rectory (the residence of the parish priests) because the work was related to the residential nature of the building rather than the church related work associated with it.

Additionally, where the homeowner engages in significant direction or control of the work, as in *Rellyea v. Bushneck*, 208 A.D.2d 1077, 617 N.Y.S.2d 558 (3 Dep’t 1994), the exemption does not apply. The phrase “direct and control” in the one or two family dwelling exception

has been defined to refer to situations where the owner supervises the manner and method of the work, can order changes in the specifications, reviews progress and details of the job with the contractor and/or provides the equipment for the work. *See Rodas v. Weissberg*, 261 A.D.2d 465, 690 N.Y.S.2d 116 (2d Dep't 1999).

In *Chowdhury v. Rodriguez*, 57 A.D.3d 121, 867 N.Y.S.2d 123 (2d Dep't 2008), the Appellate Division, Second Department ruled that a homeowner's involvement in approving the aesthetics and general quality of the work reflected typical homeowner interest in the work, and did not constitute the sufficient direction or control necessary to overcome the homeowner's exemption from liability.

Furthermore, it is important to note that the homeowner exception does not relieve contractors working on one or two family dwellings of Labor Law liability. *See Feltt v. Owens*, 247 A.D.2d 689, 668 N.Y.S.2d 757 (3d Dep't 1998); *Slettene v. Ginsberg*, 257 A.D.2d 656, 684 N.Y.S.2d 296 (2d Dep't 1999).

## 2. Professional Engineers, Architects and Land Architects

In accordance with the express statutory provisions of § 240, the courts have declined to extend liability for injuries to workers at a construction site to architects or engineers, unless actual negligence or supervision or control is established against them. *See Becker v. Tallamy, Van Kuren, Gertis & Assocs.*, 221 A.D.2d 1014, 634 N.Y.S.2d 282 (4th Dep't 1995). Thus, absent express contractual language imposing responsibility to provide a safe place for workers themselves or the public, courts will not find professional engineers and architects liable for job site injuries. *See Domenech v. Associated Engineers*, 257 A.D.2d 1014, 683 N.Y.S.2d 67 (1st Dep't 1999).

In *Zolotar v. Krupinski*, 36 A.D.3d 802, 828 N.Y.S.2d 484 (2d Dep't 2007), the Appellate Division, Second Department ruled that an architect was not liable to a worker who fell from a roof while changing an air-handler. The air-handler had been removed so the architect could perform testing. Even though the architect had supervised the workers to ensure general compliance with his specifications, he had not directed them how to perform the injury-producing work, and as a result the court held him to be not liable for the injury.

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## II. WHO IS PROTECTED

Plaintiff must be employed and working in the furtherance of erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.

### A. Employed

The plaintiff must be employed. Plaintiff must demonstrate that they were permitted to work on a building or structure and that they were hired by someone, whether it be the contractor, owner or an agent of either. Therefore, where one is merely a volunteer, they will not be given § 240 protection. In *D'Argenio v. Village of Homer*, 202 A.D.2d 883, 609 N.Y.S.2d 9 (3d Dep't 1994), an inmate injured while participating in a community service release program was found to be a volunteer and not an employee for the purposes of the statute.

The issue of whether a plaintiff is employed may often be difficult to resolve. In *Sequin v. Massena Aluminum Recovery*, 229 A.D.2d 839, 645 N.Y.S.2d 630 (3d Dep't 1996), the plaintiff, an independent contractor came to an agreement on price and the scope of the work contemplated. The plaintiff went to the property to estimate the cost of materials and while doing so fell from the roof of the building. The defendant claimed that he had not authorized plaintiff to go to the building and make the estimates. The Third Department found this to be unavailing and found that the plaintiff was entitled to the protection of the statute because an agreement to do the work had already been reached. See also *Marchese v. Grossarth*, 232 A.D.2d 924, 648 N.Y.S.2d 810 (3d Dep't 1996) (where tenant of the apartment building hired a cable installer without the knowledge of the owner of the building, court found that when the installer fell from a ladder in the building, he was not an "employee" of the owner and the tenant could not be seen as an "agent" of the owner for 240 purposes).

However, in a commercial setting, the Third Department held that an owner couldn't complain that he was unaware of his tenants' hiring of a contractor in order to avoid liability under § 240. All that must be shown is that the individual was "employed". See *Lawyer v. Rotterdam Ventures, Inc.*, 204 A.D.2d 878, 612 N.Y.S.2d 682 (3d Dep't 1994).

### B. Working in the Furtherance Of

The Court of Appeals in *Martinez v. City of New York*, 93 N.Y.2d 322, 712 N.E.2d 689, 690 N.Y.S.2d 524 (1999) rejected the long held standard that tasks deemed "necessary and incidental" to one of the enumerated items (which will be discussed in more detail below) falls under the protection afforded by the statute. The plaintiff in *Martinez* was an environmental inspector hired during the design phase of an asbestos abatement project to locate, identify and catalog asbestos for removal from school buildings. Plaintiff was injured when he fell from a desk while trying to reach a pipe above a closet. The Court of Appeals affirmed the Appellate Court denial of 240(1) summary judgment since plaintiff was not injured during "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure". To hold otherwise, they found, would enlarge the statute beyond its Legislative intent. See *Adams v. Pfizer*, 293 A.D.2d 291, 740 N.Y.S.2d 315 (1st Dept. 2002) (where worker fell from a motorized scaffold on his employer's premises while constructing a mock-up for subsequent

renovation, the court found that plaintiff was not involved in "construction" work within the meaning of the statute); See also *Adair v. Bestek Lighting & Staging Corp.*, 298 A.D.2d 153, 748 N.Y.S.2d 362 (1st Dep't. 2002) (plaintiff's fall from a "man-lift" while focusing overhead lights was not protected activity within the statute since construction work on the stage was complete and the lights were fully installed).

In *Prats v The Port Authority of New York and New Jersey*, 100 N.Y.2d 878 (2003) worker fell from a ladder while helping another worker inspecting equipment while carrying out a contract requiring the leveling of floors, laying of concrete, and rebuilding of walls to replace large air filtering systems in a large office building. The Court of Appeals held the work was not easily distinguishable from other parts of the construction project. The inspection was not in anticipation of the contract work, nor did it occur after the work was done. The worker's activity fell within the protections of N.Y. Lab. Law §240(1) because of (1) the worker's position as a mechanic who routinely undertook an activity specifically protected under the statute, (2) his employment with a company engaged in a contract to carry out an activity protected under the statute, and (3) his participation in a protected activity during the specific project and at the same site where the injury occurred. It was not pragmatic or consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the worker's work. He was engaged in a process involving the building's alteration, and his work went beyond mere maintenance.

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

### 1. Erection

Erection of structure or building is a protected activity under § 240. This activity is self-evident and has not generated many debates.

### 2. Demolition

Demolition is also a relatively uncomplicated word. However, in *Sabovic v. The State of New York*, 229 A.D.2d 586, 645 N.Y.S.2d 860 (2d Dep't 1996), where a wall collapse was involved, the court held that even though the collapse was part of a demolition project, if the wall is at the same level as the work site the plaintiff is on, it is not considered a falling object for the purposes of § 240. Thus, the statute did not apply.

### 3. Repairing

The protection afforded pursuant to § 240 extends to workers performing repair work and not merely routine maintenance. See *Greenwood v. Shearson Lehman*, 238 A.D.2d 311, 656 N.Y.S.2d 295 (2d Dep't 1997) (where plaintiff was injured while searching for a ceiling leak in

an area of a building that was not under construction, the court held that plaintiff's work was routine maintenance and dismissed the § 240 claim).

In determining whether the work being performed constitutes repairs or routine maintenance, it has been held that the paramount issue is whether the item being worked on was inoperable or malfunctioning prior to the commencement of the work. See *Craft v. Clark Trading Corp.*, 257 A.D.2d 886, 684 N.Y.S.2d 48 (3d Dep't 1999). Thus, changing of a light bulb itself is not "repairing of a building or structure. See *Smith v. Shell Oil*, 85 N.Y.2d 1000, 645 N.E.2d 1210, 630 N.Y.S.2d 962 (1995).

However, in *Piccione v. 1165 Park Ave., Inc.*, 177 Misc.2d 1037, 677 N.Y.S.2d 891 (Sup. Ct. N.Y. Cty. 1998), plaintiff's work on a fluorescent light fixture performed from a ladder, which involved replacing the ballast and sockets, disconnecting the wires, stripping them, entailed more than merely changing a light bulb and constituted repairs within the meaning of § 240. In *Thompson v. 1701 Corp.*, 51 A.D.3d 904 (2d Dept 2008), the Appellate Division, Second Department ruled that a plaintiff could not recover under §240 after falling off a ladder while changing a screw in a "door-closer". The work was considered to be only routine maintenance, and hence not a protected activity.

#### 4. Altering

The Court of Appeals has held that "altering" within the meaning of §240(1), requires making a significant change to the configuration or composition of a building or structure. See *Joblon v. Solow*, 91 N.Y.2d 457, 695 N.E.2d 237, 672 N.Y.S.2d 286 (1998). In *Joblon*, the Court determined that plaintiff's work, which required him to stand on a ladder to hang an electrical clock on a wall, was more than routine maintenance. The facts demonstrated that plaintiff was required to bring an electrical power supply capable of supporting the clock, by extending the wiring within the utility room and chiseling a hole through a concrete wall. As such, the work was more than a simple routine activity and significant enough to fall within the statute.

Following *Joblon*, the court in *DiGiulo v. Migliore*, 258 A.D.2d 903, 685 N.Y.S.2d 379 (4th Dep't 1999), held that plaintiff, who was injured when he fell from a ladder while turning a satellite dish assembly and running cable into the building to connect it to the receiver, was engaged in "altering" a building or structure.

However, in *Downes v. Boom Studio, Inc.*, 248 A.D.2d 150, 669 N.Y.S.2d 569 (1st Dep't 1998), the court found that a photographer's assistant who fell from a ladder while adjusting a backdrop was not engaged in altering a building or structure. Similarly, in *Czaska v. Lenn Lease Limited*, 251 A.D.2d 965, 674 N.Y.S.2d 559 (4th Dep't 1998), the court found that insulating windows by stapling sheets of plastic over them was routine maintenance and not altering a building or structure.

It has also been held that installation or transfer of cable wire onto a utility pole, which is considered a structure, constitutes an alteration. See *Dedario v. New York Telephone Co.*, 62

A.D.2d 1001, 557 N.Y.S.2d 794 (2d Dep't 1990); *Tauriello v. New York Telephone Co.*, 199 A.D.2d 377, 605 N.Y.S.2d 373 (2d Dep't 1993).

## 5. Cleaning

Cleaning of a building or structure, which is covered under Labor Law § 240, has been defined by the courts to require more than “truly domestic” routine household cleaning. See *Chapman v. International Business Machines Corp.*, 253 A.D.2d 123, 686 N.Y.S.2d 888 (3d Dep't, 1999). In *Brown v. Christopher Street Owners Corp.*, 88 N.Y.2d 875, 663 N.E.2d 1251, 645 N.Y.S.2d 449 (1996), the Court of Appeals held that a self-employed window washer, hired solely by apartment tenant, to clean windows as part of domestic cleaning was not engaged in an activity covered by § 240, unlike the case of a large, nonresidential structure such as a school. See also *Cruz v. Bridge Harbor*, 249 A.D.2d 44, 671 N.Y.S.2d 72 (1st Dep't 1998) citing *Terry v. Young*, 168 A.D.2d 399, 563 N.Y.S.2d 408 (1st Dept 1990) (cleaning windows as a new condominium complex is not routine household cleaning and thus covered by § 240).

Removal of snow and ice from a roof has also been held to constitute a form of cleaning, and thus, a worker injured when he fell from a roof while attempting to remove accumulated snow and ice was entitled to the protection of the scaffolding law. See *Nephew v. Barcomb*, 260 A.D.2d 821, 688 N.Y.S.2d 751 (3d Dept 1999); see also *Chapman v. International Business Machines Corp.*, 253 A.D.2d 123, 686 N.Y.S.2d 888 (3d Dep't, 1999) (janitorial employee who fell from a collapsed table while cleaning overhead light fixtures in conference room of commercial building was “cleaning” a building within meaning of scaffolding statute, even though no construction or renovation work was occurring); *Vasey v. Pyramid Co. of Buffalo*, 258 A.D.2d 906, 685 N.Y.S.2d 362 (4th Dep't 1999) (injuries sustained by worker, who was dusting and cleaning mini-ledges and bulkheads in shopping mall at height of approximately 35 to 40 feet, when he accidentally maneuvered manlift or “knuckleboom” he was operating onto a decorative tree grate, causing lit to tip over and worker to crash to floor, resulted from fall from height while engaged in activity of cleaning a building, and thus came within scope of § 240).

## 6. Painting in a Construction or Renovation Setting

It is not merely the act of painting which is afforded protection under § 240, but also the work intimately associated with the actual painting. See *Livecchi v. Eastman Kodak Co.*, 258 A.D.2d 916, 685 N.Y.S.2d 515 (4th Dept 1999) (worker established violation of scaffolding law in connection with his fall from ladder while preparing room for painting; as a matter of law, the ladder did not provide proper protection, and evidence established violation of scaffolding law was a proximate cause of accident); *Serpe v. Eyriz productions, Inc.*, 243 A.D.2d 375, 663 N.Y.S.2d 542 (1st Dep't 1997) (ceiling painter who fell through unprotected hold in the floor was covered by § 240 despite the fact that the actual work he was performing did not involve an elevated risk).

## 7. Pointing as in Bricks and Masonry Work

Under §240, the term, “pointing”, has not generated much confusion.

### C. Building or Structure

The courts have interpreted the terms “building” or “structure” quite liberally. The Court of Appeals has defined building or structure as “any production or piece of work artificially built up or composed of parts joined together in some definite manner.” See *Lewis-Moors v. Contel of N.Y.*, 78 N.Y.2d 942, 573 N.E.2d 636, 573 N.Y.S.2d 636 (1991) quoting *Caddy v. International R.T. Co.*, 195 N.Y. 415 (1909). Rich Stadium was found to be a structure as was a stage erected inside in it for a rock concert. See *Seemueller v. County of Erie*, 202 A.D.2d 1052, 609 N.Y.S.2d 462 (4th Dep’t 1994). A utility pole is a structure within the meaning of § 240. See *Dedario v. New York Telephone Co.*, 62 A.D.2d 1001, 557 N.Y.S.2d 794 (2d Dep’t 1990); *Tauriello v. New York Telephone Co.*, 199 A.D.2d 377, 605 N.Y.S.2d 373 (2d Dep’t 1993).

In *Lombardi v. Stout*, 80 N.Y.2d 290, 604 N.E.2d 117, 590 N.Y.S.2d 55 (1992), the Court of Appeals found that while a tree in of itself is not a structure, an expansive reading of the statute allowed protection for a worker performing a tree removal operation as a part of home improvement renovations.

Other structures have included a railroad car, as in *Gordon v. Eastern Railway Supply, Inc.*, 82 N.Y.S.2d 555, 626 N.E.2d 912, 606 N.Y.S.2d 127 (1993), a ship’s 200 pound hot water pump in *Skowe v. Jones, Lang & Wooton Corp.*, 240 A.D.2d 194, 657 N.Y.S.2d 709 (1st Dep’t 1997), and a Concorde aircraft was considered a structure for the purposes of § 240 in *Rooney v. Port Authority*, 875 F.Supp. 253 (S.D.N.Y. 1995).

### III. GRAVITY RELATED RISK

It has become clear that the worker must be involved in some “gravity related risk” in order to be found protected by Labor Law § 240. Labor Law § 240(1) provides, in pertinent part:

All contractors and owners . . . shall furnish or erect, or cause to be furnished or erected . . . scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

All of the devices listed under the §240(1) are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the work is positioned and the higher level of the materials being hoisted or secured. See *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 583 N.E.2d 932, 577 N.Y.S.2d 219, (1991) (holding that § 240(1) does not apply where plaintiff fell into a 12-inch ditch and was injured by heated industrial oil). In short, it is well settled that the statute is intended to protect against a particular type of hazard, either falling from a height or being struck by an object that was improperly secured. *Id.*

To date, the courts have been asked to deal repeatedly with the issue of whether the plaintiff’s injury is a direct result of the forces of gravity and falls within §240(1). See *Jacome, et al. v. State of New York*, 266 A.D.2d 345, 698 N.Y.S.2d 320 (2d Dep’t 1999) (where plaintiff was

injured by steel plates which fell from a truck he was unloading, the court held that the task of unloading a truck was not an elevation related risk); *Rubino v. Fisher Reese W.P. Assoc., et al.*, 243 A.D.2d 620, 663 N.Y.S.2d 237 (2d Dep't 1997) (plaintiff was lifting material via a hoist, the hoist tipped and hit him the leg, the court held that §240(1) did not apply); *Rose v. Servidone, Inc.*, 268 A.D.2d 516, 702 N.Y.S.2d 603 (2d Dep't 2000) (stepping down from a truck onto unlevelled ground littered with dirt, rocks, blacktop, and concrete from a road under reconstruction does not involve the elevation-related risks contemplated in § 240(1)).

Here, it is clear that plaintiff fell from a height and sustained injuries, however, the issue turns upon whether the safety device that the defendant provided the plaintiff with, as required by § 240(1), served its function.

In *Narducci et al., v. Manhasset Bay Associates et al.*, 96 N.Y.2d 259, 750 N.E.2d 1085, 727 N.Y.S.2d 37 (2001), the court held that the object had to have been related to risk inherent in elevation at which material was secured. Mere fact that falling objects caused injuries was insufficient for claim. The plaintiff while on a ladder was working on damaged windows from a fire and was struck by falling glass not related to work being done. A plaintiff must show that the object fell, while being hoisted or secured, due to the absence or inadequacy of a safety device described in the statute. There must be a failure to use necessary and adequate hoisting or securing devices. Here the glass that fell on the plaintiff was not a material being hoisted or a load that required securing thus Labor Law § 240 (1) does not apply. The falling glass was a general hazard of the workplace.

The types of devices which § 240(1) prescribes are: scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices. The Court of Appeals has noted:

Some of the enumerated devices (e.g., “scaffolding” and “ladders”), it is evident, are for the use or protection of persons in gaining access to or working at sites where elevation poses a risk. Other listed devices (e.g., “hoists”, “blocks”, “braces”, “irons”, and “stays”) are used as well for lifting or securing loads and materials employed in the work.

*Rocovich*, 78 N.Y.2d at 513-514. Accordingly, § 240 liability will not be found where the plaintiff is working at a height and is provided with a safety device, such as a scaffold, which prevents the plaintiff from falling, or where the plaintiff, lifting a load, is supplied with a hoist, preventing him from being struck by falling objects.

The above ruling in *Narducci* has been complicated by *Outar v. City of New York*, 289 A.D.2d 671, 730 N.Y.S.2d 138 (2d Dept 2001), wherein the Appellate Division, Second Department ruled on a case where a subway worker was struck by an unsecured dolly which had fallen off a 5-foot wall adjacent to the worksite. Although the dolly was not being hoisted or secured at the time of the accident, the court held that the height differential was sufficient to implicate the special protections of the Scaffold law, and the court granted the plaintiff summary judgment. (See also *Quattrocchi v. Sciame Construction*, 11 N.Y.3d 757, 896 N.E.2d 75 (2008), holding that falling object liability under §240 is not limited to cases in which the falling object was in the process of being hoisted or secured.)

In the case of *Buckley v. Columbia Grammar*, 44 A.D.3d 263, 841 N.Y.S.2d 249 (1st Dept 2007), the Appellate Division, First Department attempted to explain the above by holding that in order for the Scaffold law to apply, there must be a significant inherent risk attributable to an elevation differential. To conclude that an object requires securing, the court ruled it is essential that the object present a foreseeable elevation risk in light of the work being undertaken.

The Court of Appeals has not found § 240(1) liability where a safety device has served its objective. For example, in *Ross v. Curtis-Palmer Hydro-Electric Co., et al.*, 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993), the plaintiff, performing work at an elevation, was provided with a scaffold. In order to complete his welding job without falling, he had to sit on the scaffold in a contorted position and subsequently sustained back injuries. Despite the fact that the plaintiff requested a ladder to avoid working in such a position and he was told to complete his job using the scaffold, the Court nevertheless held that the scaffold served its core function, as it prevented him from falling from a height. Thus, § 240(1) was inapplicable.

Additionally, in *Melber v. 6333 Main Street*, 91 N.Y.2d 759, 698 N.E.2d 933, 676 N.Y.S.2d 104 (1998), where the plaintiff fell from a height as he was performing work, the Court held that the plaintiff did not have a § 240(1) claim. There, the plaintiff utilized stilts to install metal studs in the top of a drywall. As he was walking down the corridor to obtain tools, he tripped over an electrical conduit protruding from an unfinished hall. Similar to the reasoning in *Ross*, the Court stated that the stilts allowed plaintiff to complete his work safely at a height, since he did not fall as he was installing the metal studs. It noted that had the stilts failed while plaintiff was installing the metal studs in the top of the drywall, a different case would have been presented.

Two recent Court of Appeals cases, *Marvin v. Korean Air*, 3 N.Y.3d 654, 816 N.E.2d 564, 782 N.Y.S.2d 692 (2004), and *Toefer v. Long Island Railroad*, 4 N.Y.3d 399, 828 N.E.2d 614 (2005), decided in April 2005, both dismissed claims under Labor Law §240 regarding workers on a flatbed truck surface. *Toefer* was struck by a wooden lever and propelled off the side of a truck and *Marvin* caught his leg in a safety strap as he was preparing to descend from the flatbed of the truck.

Furthermore, in *Keavey v. New York State Dormitory Auth.*, 6 N.Y.3d 859, 849 N.E.2d 945, 816 N.Y.S.2d 722 (2006), the Court of Appeals held that “[t]he act of falling into a five- to six-inch gap between insulation boards, which were stacked eight-feet tall, is not a gravity related accident encompassed by Labor Law § 240(1).” *Id.*

The Court found the situations in which the plaintiffs were injured were such that the plaintiffs were “exposed to the usual and ordinary risks of construction site, and not the extraordinary elevation risks envisioned by Labor Law §240”. The Court did however caution that the distance between the work platform (flatbed truck) and the ground was relevant and “no one would expect the worker to come down without a ladder or other safety device from a work platform that was 10 feet high”.

In *Berg v. Albany Ladder Company*, 10 N.Y.3d 902, 891 N.E.2d 723 (2008), the Court of Appeals held that the scaffold law did not apply where a worker was standing in the back of a truck on several bundles of trusses. The trusses were about 10 feet off the ground, and toppled to the ground injuring the plaintiff. The court stated that the plaintiff could not recover absent proof that his fall resulted from the lack of a safety device.

In the case of *Cohen v. Memorial Sloan Kettering*, 11 N.Y.3d 823, 897 N.E.2d 1059 (2008), the Court of Appeals held that two pipes protruding from a wall was not a risk that brought about a need for a ladder, but was a usual and ordinary danger at a construction site. As a result the Court dismissed the plaintiff's §240 claims.

In *Gonzalez v. Turner Construction*, 29 A.D.3d 630, 815 N.Y.S.2d 179 (2 Dept 2006), the Appellate Division, Second Department, ruled that where a worker was pulled forward into a beam while "shifting" an 800-foot rope with two other workers below, his injuries were not the type of injuries contemplated by §240.

In *McCarthy v. Turner Construction*, 52 A.D.3d 333 (1st Dept 2008), the Appellate Division, First Department held that where a plaintiff fell off an unsecured ladder, the plaintiff was not required to show that the ladder was defective in any way. It was sufficient to show that adequate safety devices were not present to prevent the ladder from slipping.

#### IV. DEFENSES

##### A. Recalcitrant Worker

The recalcitrant worker defense, which is the result of case law, holds in essence that the absolute liability protection ordinarily provided by § 240 does not extend to a worker who knowingly disregards instructions by deliberately refusing to use an available safety device. See *Jastrzebski v. No. Shore School Dist.*, 223 A.D.2d 677, 637 N.Y.S.2d 439 (2d Dep't 1996) (plaintiff held to be a recalcitrant worker where he fell off a ladder while affixing plywood to a school wall and the evidence showed that he refused to use scaffolding that had been provided for him, contrary to a direct order given to him by his supervisor). While an injured worker's negligence is not a defense to a Labor law § 240(1) claim, the recalcitrant worker defense may allow a defendant to escape liability, under the statute, where intentional stubborn conduct of the worker regarding use, misuse or non-use of the equipment results in his injuries. See *Peterson v. Barry, Bette & Led Duke, Inc.*, 171 Misc.2d 346, 659 N.Y.S.2d 376 (Sup. Ct. Monroe Cty. 1996) citing *Smith v. Hooker Chemical & Plastics Corp.*, 89 A.D.2d 361, 455 N.Y.S.2d 446 (4th Dep't 1982).

The defense does not apply where a worker has not been provided with adequate and safe equipment. See *Stolt v. General Foods Corp.*, 81 N.Y.2d 918, 613 N.E.2d 556, 597 N.Y.S.2d 650 (1993). A defendant must establish that proper equipment was readily available and provided for the worker's use. See *Clark v. 345 East 52 Street Owners*, 245 A.D.2d 410, 666 N.Y.S.2d 207 (2d Dep't 1997) (proper ladders available just 15 feet away). Such refusal can be implied from a worker's conduct and not just from his words. See *Vona v. St. Peter's Hospital*, 223 A.D.2d 903, 636 N.Y.S.2d 218 (3d Dep't 1996).

Furthermore, a simple instruction by an owner, contractor or agent to be careful and avoid unsafe practices is not sufficient to support a recalcitrant worker defense. See *Garcia v. 1122 East 180 Street Corp.*, 250 A.D.2d 550, 675 N.Y.S.2d 2 (1st Dep't 1998). The longstanding rule had been that an immediate instruction to use a particular safety device is required. *Cahill v. Triboro Bridge and Tunnel Authority*, 4 A.D.3d 236 (1st Dept 2004).

However, in December 2004, the Court of appeals in reviewing the *Cahill* decision (4 N.Y.3d 35) dismissed the plaintiff's claim under §240 of the Labor Law where the employer made available adequate safety devices and the employee had been instructed to use them even though the instructions were given several weeks before the accident occurred. This is a departure from the large body of case law requiring an immediate instruction.

#### B. Proximate Cause

It is well established that a plaintiff need not establish any actual negligence on the part of an owner, contractor, or their agent to obtain liability under § 240(1) of the Labor Law. See *Haines v. New York Telephone Co.*, 46 N.Y.2d 132, 385 N.E.2d 601, 412 N.Y.S.2d 863 (1978). However, plaintiff must establish that there was in fact a violation (a failure to provide proper protection) and that the violation was the proximate cause of the accident. See *Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513, 482 N.E.2d 898, 492 N.Y.S.2d 102 (1985); see also *Woods v. Gonzales*, 295 A.D.2d 602, 744 N.Y.S.2d 867 (2d Dept. 2002) (question as to whether cause of accident was plaintiff placing structurally sound ladder on wet, sloping grass); and *Glazik v. City of New York*, 306 A.D.2d 516, 761 N.Y.S.2d 863 (2 Dept. 2003) (question of fact concerning plaintiff's fall from a sloped ramp while passing pallets to co-worker).

Thus, if the responsible party failed to provide plaintiff with an adequate safety device, but that device was not the cause of plaintiff's accident, the plaintiff will be unable to establish a proximate cause between the violation of the statute and his injury. See *Zimmer*, 65 N.Y.2d at 513.

The New York Court of Appeals in *Weininger v. Hagerdown*, 91 N.Y.2d 958, 672 N.Y.S.2d 840 (1998), found that there was an issue of fact as to whether the failure of the safety device was the proximate cause of plaintiff's fall from the ladder. The underlying facts of the case, found in the record on appeal, were that the plaintiff had one foot on the brace of the A frame ladder a few minutes before the accident. In *Meade v. Rock-McGraw, Inc.*, 760 N.Y.S.2d 39 (1st Dept. 2003), a question of proximate cause precluded summary judgment to the plaintiff who fell from a ladder he admittedly used in the closed position. The Court of Appeals has granted leave to appeal.

The case of *Blake v. Neighborhood Housing Services of New York City*, 1 N.Y.3d 280, 803 N.E.2d 757, 771 N.Y.S.2d 484 was decided by the New York Court of Appeals on December 23, 2003, reaffirming the principle that a plaintiff will not be entitled to the protections of Labor Law §240 where the plaintiff's own actions are the sole proximate cause of the accident.

The Court went through a thorough analysis of various principles that apply to the Labor Law as well as an extensive review of the history of the Labor Law.

## UNDERLYING FACTS

Plaintiff set up his own extension ladder at the job site. He testified that the ladder had rubber shoes, was in proper working condition, stable and steady. As the plaintiff began scraping rust from a window, the upper portion of the ladder retracted and the plaintiff suffered an injury.

## TRIAL

The jury was presented with the question “Was the ladder used by plaintiff, Rupert Blake, so constructed, operated as to give proper protection to plaintiff”? The jury responded “yes”. The trial Judge interpreted this “yes” as meaning “leading to the inescapable conclusion that the accident happened not because the ladder malfunctioned or was defective or improperly placed, but solely because of plaintiff’s own negligence in the way he used it.”

In the Blake decision, the New York Court of Appeals found that the Pattern Jury Instruction §2:217 was the appropriate charge for a Labor Law §240 case. Specifically, the last sentence of that charge reads as follows:

“If you conclude that the plaintiff’s action was the only substantial factor in bringing about the injury, you will find for the defendant on this issue.”

New York Court of Appeals agreed with this trial Court analysis, that if the ladder was constructed and operated as to give proper protection then clearly the sole proximate cause of the accident was the plaintiff’s actions.

The Blake Court also makes very clear that not every fall from a ladder or scaffold will give rise to a Labor Law §240 claim. The Court re-emphasized the point that there must be not only a violation of Labor Law §240 but that that said violation must be a substantial factor in causing the accident.

The Blake Court gave a road map to the defendants with respect to what is necessary in order to defeat plaintiff’s motion for summary judgment and raise triable issues of fact. This road map is found in footnote no. 10 of the decision. Specifically, the language of the decision is as follows:

“Thus if a statutory violation is a proximate cause of an injury the plaintiff cannot be solely to blame for it. Conversely if the plaintiff is solely to blame for the injury it necessarily means that there has been no statutory violation. That is what we held in *Weininger*, a holding the Appellate Division has consistently understood and applied. (Footnote no. 10).”

In the case of *Montgomery, Jr. v. Federal Express Co, et al.*, 4 N.Y.3d 805, 828 N.E.2d 592,

795 N.Y.S.2d 490 (2005), the New York Court of Appeals held where an elevator repairman chose to access the elevator motor room by climbing on an inverted bucket instead of going to retrieve a ladder which was readily available on the job site, that the repairman's actions were the sole and proximate cause of his injury and that he should not be entitled to recover under New York Labor Law §240(1). The Court of Appeals agreed with the Appellate Division's determination that the "normal and logical response" of the plaintiff should have been to go and get a ladder rather than attempt to climb into the motor room using a bucket.

In the case of *Robinson v. East Medical Center, LP et al.*, 6 N.Y.3d 550, 847 N.E.2d 1162, 814 N.Y.S.2d 589 (2006), the New York Court of Appeals affirmed the decision of the Appellate Court dismissing the plaintiff's complaint finding that the plaintiff's own actions were the sole proximate cause of his injuries as a matter of law and as such, the plaintiff was not entitled to recover under New York Labor Law §240(1). The underlying facts of the case, found in the record on appeal, were that the plaintiff, a journeyman plumber, fell from the top rung of a six-foot ladder where eight-foot ladders were readily available on the job site. The plaintiff used a six foot ladder to complete a repair which he knew required an eight foot ladder, instead of using an eight foot ladder which was readily available on the job site. Instead, the plaintiff chose to stand on the top rung of the six foot ladder to access the work.

In *Gittleson v. Cool Wind Ventilation*, 46 A.D.3d 855, 848 N.Y.S.2d 709 (2 Dept 2007), the Appellate Division, Second Department, held that where a plaintiff's injuries were caused by the plaintiff choosing to use an improperly-placed, unsecured ladder (rather than the one he had brought himself), the plaintiff could not recover, because his actions were the sole proximate cause of his injury.

In the case of *Weinberg v. Alpine Improvements*, 48 A.D.3d 915, 851 N.Y.S.2d 692 (3d Dept 2008), the Appellate Division, Third Department, held that a plaintiff could not recover where a slippery condition on the soles of his own boots were the cause of his fall from a ladder. In *Torres v. Mazzone Administrative*, 46 A.D.3d 1040, 848 N.Y.S.2d 381 (3d Dept 2007), the Appellate Division, Third Department held that a maintenance worker's conduct in opting to use an alternate piece of equipment out of convenience, rather than the otherwise adequate safety device provided to him by his supervisor was the sole proximate cause of his injuries, and precluded a claim under §240.

## LABOR LAW SECTION 241(6)

### I. OVERVIEW

Labor Law § 241 imposes a nondelegable duty on owners, general contractors and their agents to provide a safe and reasonable job site to those persons lawfully present. Subsection 6 of Labor Law § 241 further defines and expands the "general" contractor and owner's duty as follows:

All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully

frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

The purpose of this section was to enhance the safety practices of building construction sites by requiring compliance with Rule 23 of the New York State Industrial Code entitled Protection In Construction, Demolition and Excavation Operations. In order to trigger liability under Labor Law § 241(6) there must be a violation of an administrative regulation (Industrial Code) which mandates compliance with a “concrete specification”. Regulations dealing with general safety standards are not a sufficient predicate for liability under this section. *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993).

Section 241(6) imposes the ultimate liability for non-compliance with safety standards upon owners, contractors and their agents irrespective of their control or supervision over a construction site. If these parties hire subcontractors to perform the work, they will still be liable to the plaintiff in the first instance even if they do not control the methods and manner of the work. The reasoning behind this is that construction work is “inherently dangerous”, and as such, the owners and contractors must be held accountable for any injuries caused during this hazardous activity. This is meant to induce owners and contractors to ensure that only financially responsible and safety conscious subcontractors are engaged in the work. In *Rizzuto v. L.A.Wenger Cont. Co., Inc.*, 91 N.Y.2d 343, 693 N.E.2d 1068, 670 N.Y.S.2d 816 (1998), the Court of Appeals held that notice of the condition which violates Rule 23 is not required since vicarious liability is not dependent on the defendant’s personal capability to prevent or cure the dangerous condition. See also *Ziegler-Bonds v. Structure Tone*, 245 A.D.2d 80, 664 N.Y.S.2d 799 (1st Dept. 1997).

Unlike § 240(1) of the Labor Law, § 241(6) does not impose absolute liability from a violation. There still must be a determination as to whether the safety measures employed at the site were “reasonable and adequate” under the circumstances. Comparative negligence is still an available defense. A violation of an Industrial Code regulation does not impose absolute liability, but is only some evidence of failure to use reasonable care. Additionally, where plaintiff is not actually engaged in construction work at the time of the accident there is some support for denying the protection of § 241(6). See *Young v. J.M. Moran Properties, Inc.*, 259 A.D.2d 1037, 688 N.Y.S.2d 354 (4th Dept. 1999).

Finally, although an OSHA violation may be used as evidence of negligence in support of a Labor Law § 200 claim, the violation cannot be used as evidence of a § 241(6) cause of action. *Schiulaz v. Arnell Const. Corp.*, 261 A.D.2d 247, 690 N.Y.S.2d 226 (1st Dept. 1999).

## II. SPECIFIC INDUSTRIAL CODE REGULATIONS

*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993) held that because the statute imposes a nondelegable duty, a clear distinction must be drawn between general and specific commands. In *Ross*, plaintiff attempted to establish a claim under § 241(6) alleging a violation of Industrial Code section 23-1.25(d) which requires a

scaffold to be “of such kind and quality as... operations would require in order to provide safe working conditions”. The Court gave thoughtful analysis to Industrial Code regulations employing such terms as adequate, effective, equal, necessary, proper, safe, sufficient, etc. in deciding that claimed failures to meet such standards would not give rise to a claim for damages under § 241(6). Because the duty imposed by the statute is nondelegable the court was not inclined to permit liability for such violations of those code sections invoking “general descriptive terms” as set forth in 12 NYCRR 23-1.4(a).

Since the Court of Appeals decided *Ross* in 1993, courts have closely examined the various Industrial Code sections to see whether they are general safety provisions or they are specific enough to allow a worker to make out a claim under Labor Law § 241(6). The section most often encountered is 23-1.7 entitled “Protection from General Hazards”. This section contains eight subheadings for different hazards, including (a) overhead hazards, (b) falling hazards, (c) drowning hazards, (f) vertical passage, (g) air-contaminated or oxygen deficient work areas and (h) corrosive substances. The following constitutes current case law concerning applicability of the Industrial Code section allegedly violated:

A. 12 NYCRR 23-1.7 and its Subsections

23-1.7 *Heizman v. Long Island Lighting Co.*, 251 A.D.2d 289, 674 N.Y.S.2d 59 (2 Dept. 1998). Not applicable where plaintiff was allegedly injured when his foot became entangled in some brush at the base of a pole he was getting ready to ascend.

23-1.7(a) *Amato v. State*, 241 A.D.2d 400, 660 N.Y.S.2d 576 (2 Dept. 1997). Although sufficiently specific, provision governing overhead hazards was not applicable where there was no evidence that plaintiff was injured in area where workers were “normally exposed to falling objects” and where overhead work was not primary focus of worksite.

23-1.7(b) *Williams v. G.H. Development and Construction Co., Inc.*, 250 A.D.2d 959, 672 N.Y.S.2d 937 (3d Dept. 1998) requiring all stairwell openings on construction sites to be covered or protected by safety railings, provides a basis for liability under Labor Law § 241(6).

Within 23-1.7, the most frequently seen Subsections are (d) Slipping hazards; and (e)

Tripping and other hazards

23-1.7(d) *Gielow v. Rosa Coplon Home*, 251 A.D.2d 970, 674 N.Y.S.2d 551 (4th Dept. 1998) was not applicable because plaintiff did not slip on a foreign substance but rather muddy ground that had been exposed to the elements.

23-1.7(e) *O'Sullivan v. IDI Constr. Co., Inc.*, 2006 N.Y. LEXIS 2137 (2006) held that the plaintiff's Labor Law § 241(6) cause of action, based on 12 NYCRR 23-1.7 (e)(1) and (2), failed because the electrical pipe or conduit that plaintiff tripped over was an integral part of the construction.

*Morra v. White*, 276 A.D.2d 536, 714 N.Y.S.2d 510 (2d Dept. 2000) did not apply to plaintiff's fall on snow and ice while walking across an open lot at a construction site as it was not considered a walkway or passageway.

*Moses v. Pinazo*, 265 A.D.2d 391, 697 N.Y.S.2d 66 (2d Dept. 1999). Both (d) and (e) were inapplicable when plaintiff attempted to cross a floor covered with glue during installation of a new tile floor. The glue could not be considered debris or any other obstruction but an integral part of the re-tiling process.

The Courts have also cited examples where the alleged defect is not an integral part of the floor. In the case of *Cottone v. Dormitory Authority*, 225 A.D.2d 1032, 639 N.Y.S.2d 768 (4th Dept. 1996), a plank was placed on the ground and subsequently became covered with water and mud. The Court found that the water and mud that caused plaintiff to slip were not integral parts of the walkway. There is a strong dissent in *Cottone* which notes that the plaintiff's employer asked for the plank to be placed on the ground because the ground was muddy from drizzle. It is noted that if nothing had been placed on the ground, § 241(6) would not have applied.

A divided First Department looked even more closely at the distinctions of 23-1.7(e) in the matter of *Lenard v. 1251 Ams. Assocs.*, 241 A.D.2d 391, 660 N.Y.S.2d 416 (1st Dept. 1997). The plaintiff was walking in an open area under renovation. Plaintiff tripped on a half moon shaped doorstep that was between three-quarters and one and a half inches in height that was secured to the concrete floor and was the same color as the floor. The Court found that 23-1.7(e)(2) applied in a couple of instances. First, they found the doorstep to be a "sharp projection", and the fact that the doorstep was left when the walls and doors were dismantled constituted "debris". The dissent would have dismissed the § 241(6) claim, arguing that the doorstep was neither debris nor a sharp projection.

The Fourth Department in *Rothschild v. Faber Homes, Inc.*, 247 A.D.2d 889, 668 N.Y.S.2d 793 (4th Dep. 1998) held that an ongoing storm was no exception to a claim based on 23-1.7(d) finding defendants still had a duty under § 241(6) to remove snow and ice during construction. "We cannot presume that the Commissioner intended to absolve owners and general contractors who choose to continue construction during inclement weather of their responsibility to remove snow and ice." *Id.* at 890, 891.

## B. Other Regulations

23-1.5 - General responsibility of employers - *Basile v. ICF Kaiser Engrs. Corp.*, 227 A.D.2d 959, 643 N.Y.S.2d 854 (4th Dept. 1996). Plaintiff slipped and fell on a stack of pipes but this general standard of care was insufficient to invoke liability under § 241(6).

Courts have dismissed cases based on § 23-1.5 stating that it is an insufficient basis upon which to predicate Labor Law § 241(6) liability. *Maday v. Gabe's Contr., LLC*, 20 A.D.3d 513, 797 N.Y.S.2d 914 (2d Dept. 2005).

23-1.8(a) - Personal protective equipment; Eye protection - *McByrne v. Ambassador Constr. Co.*, 290 A.D.2d 243, 736 N.Y.S.2d 17 (1st Dept. 2002) which requires "approved eye protection equipment", allowed plaintiff's § 241(6) claim to stand where plaintiff electrician was struck in the eye by a wire.

23-1.8(c)(4) - Personal protective equipment; Protective apparel; Protection from corrosive substances - *Creamer v. Amsterdam High School*, 241 A.D.2d 589, 659 N.Y.S.2d 560 (3rd Dept. 1997). The provision requiring appropriate protective equipment where an employee is required to use or handle corrosive substances is sufficiently specific and applies to plaintiff injured while handling heated asphalt. However, in the same case it should be noted that 23-1.7(e)(2) did not apply as the hot asphalt, which caused plaintiff to slip, was considered an integral part of the work surface.

23-1.15 - Safety railing - *Mazzu v. Benderson Development Co., Inc.*, 224 A.D.2d 1009, 637 N.Y.S.2d 540 (4th Dept. 1996) along with 23-1.7(b)(1), governing safety railings and hazardous opening respectively were found to be sufficiently specific to support plaintiff's claim after he fell into an unguarded pool during a building renovation project.

23-1.16, 23-1.17 and 23-1.24 - Safety belts, harnesses, tail lines and lifelines; Life nets; Work on roofs - *Bennion v. Goodyear Tire & Rubber Co.*, 229 A.D.2d 1003, 645 N.Y.S.2d 195 (4th Dept. 1996). None of the aforementioned provisions applied; at the time of his fall, plaintiff was not required to wear a safety belt or utilizing a life net and the accident did not involve a fall from the roof.

23-1.21(b)(1) - Ladders and ladderways; General requirements for ladders; Strength - *Santamaria v. 1125 Park Ave. Corp.*, 249 A.D.2d 16, 670 N.Y.S.2d 844 (1st Dept. 1998) does provide basis for liability under Labor Law § 241(6) where ladder plaintiff fell from did not comply with minimum strength standard specified in regulation.

This section did not apply where the sledgehammer did not fall from a floor, platform or scaffold. The regulation provides in relevant part that "[m]aterial and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge." *Mahoney v. Madeira Assoc.*, 2006 NY Slip Op. 6997 (4th Dept. 2006).

23-1.21(e)(3) Ladders and ladderways; Stepladders; Stepladder footing - *Enderlin v. Herbert Indus. Insulation, Inc.*, 224 A.D.2d 1020, 638 N.Y.S.2d 262 (4th Dept. 1996) requiring that stepladders be steadied by a person or secured against swaying was found to be specific enough to support a § 241(6) claim. However, plaintiff failed to show the ladder ever moved rendering the alleged violation inapplicable to the facts of the case. Plaintiff lost his balance and twisted his back but never fell.

A permanently affixed ladder from which plaintiff fell, which was the only means of gaining access to his elevated work site, was a "device" within the meaning of Labor Law § 240(1). *Crimi v. Neves Assocs.*, 306 A.D.2d 152, 761 N.Y.S.2d 186 (1st Dept. 2003).

23-1.30 - Illumination - Herman v. St. John's Episcopal, 242 A.D.2d 316, 678 N.Y.S.2d 635 (2d Dept. 1997) requiring "illumination sufficient for safe working conditions" is sufficiently specific to support a claim but found to be inapplicable to plaintiff's case when he failed to establish that the lighting where his accident occurred was poor.

23-2.1(a)(1): a loading dock is not a "passageway, walkway, stairway, or other thoroughfare" – Barrios v. Boston Pops, 2008 NY Slip Op 07579.

23-6.1(d): A freight elevator is not a "material hoist" as contemplated by the code – Barrios v. Boston Pops, 2008 NY Slip Op 07579.

In sum, when determining if the Industrial Code regulations relied on by plaintiff support a § 241(6) cause of action you must consider 1) is the cited code specific enough to meet the requirements established by Ross, and 2) is the cited code applicable to the facts of the case. For additional examples of code sections and cases dealing with them see, PJI 2:216A.

### C. Demolition

Do not assume that because something is being demolished, the provisions under sub-part 23-3 apply.

§23-1.4(16): Demolition Work Defined – the work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment.

In Zuniga v. Stam Realty, 169 Misc.2d 1004, 647 N.Y.S.2d 426 (Sup. Ct. Queens Cnty. 1996), aff'd 245 A.D.2d 561, 666 N.Y.S.2d 515 (2d Dept 1997), a plaintiff was retained to gut the first floor of a retail building, including the removal of the interior walls and ceiling. On the date of the incident the plaintiff was asked to take down a glass storefront, and was injured while performing this work. The court held that the work plaintiff had been retained to perform did not qualify as demolition because it did not constitute total or partial demolition of a building as required by the definition. The court held that demolition necessitated the total or partial dismantling or razing of a building or structure, which anticipates more than mere painting, plastering, or removal of new sheetrock. According to the court, the code envisioned some structural change of the building, in whole or in part, or some interference with or alteration of the structural integrity of the building.

In Sparks v. Berger, 11 A.D.3d 601, 783 N.Y.S.2d 390 (2d Dept 2004), a plaintiff was removing a steel garage door track, which fell on his head injuring him. The courts held that §23 was inapplicable because "that provision concerns demolition work, which is distinct from the type of renovation work in which the plaintiff was involved."

In Quinlan v. City of New York, 293 A.D.2d 262, 739 N.Y.S.2d 706 (1st Dept 2002), a plaintiff was injured while patching a large hole which had been cut in the wall of an apartment under renovation. The court held that neither the creation of the hole in the wall nor plaintiff's attempt to repair it constituted demolition work.

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