



# STATE OF NEW YORK CONSTRUCTION LAW COMPENDIUM

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## LABOR LAW SECTION 240(1)

### I. WHO IS LIABLE

#### A. Generally

Labor Law § 240(1), which is commonly referred to as the “scaffold law”, imposes upon owners, contractors and their agents a non-delegable duty 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. *See generally Labor Law § 240(1); see also Fabrizi v. 1095 Ave. of the Ams., LLC*, 22 N.Y.3d 658 (2014); *Salazar v. Novalex Contr. Corp.*, 18 N.Y.3d 134 (2011); *Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d 1 (2011). This statute is “to be construed as liberally as may be” for the accomplishment of its purpose, which is to place the ultimate responsibility for safe construction practices on the owner and general contractor. *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513 (1991). As such, § 240(1) imposes absolute liability for a violation of the statute that proximately causes an injury. *Blake v. Neighborhood Hous. Serv. of N.Y.C., Inc.*, 1 N.Y.3d 280 (2003); *Rocovich*, 78 N.Y.2d at 513. The purpose of this statute is not to protect workers from routine workplace risks, but “from the pronounced risks arising from construction work site elevation differentials.” *Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 603 (2009); *Cohen v. Memorial Sloan-Kettering Cancer Ctr.*, 11 N.Y.3d 823 (2008).

#### 1. Owners

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.*, 82 N.Y.2d 555 (1993) (discussed below).

The term “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 Allan v. DHL Express (USA), Inc.*, 99 A.D.3d 828 (2d Dept. 2012) (finding the definition of an owner to include “a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit”); *see also Scaparo v. Village of Ilion*, 13 N.Y.3d 864 (2009) (paying for materials necessary for construction work to be performed on property not owned by defendant does not qualify the defendant as an owner of the property under the Labor Law); *Addonisio v. City of New York*, 112 A.D.3d 554 (1st Dept. 2013); *Copertino v. Ward*, 100 A.D.2d 565 (2d Dept. 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); *Farruggia v. Town of Penfield*, 119 A.D.3d 1320 (4th Dept. 2014) (holding that defendant Town not an “owner” as Town established that it did not own or have authority to control work performed at the site of plaintiff’s accident).

An owner of real property is not shielded from liability under Labor Law § 240(1) merely because it leases its property to another. In *Gordon*, the Court of Appeals dealt with the issue of whether the defendant was an owner for purpose of § 240(1) liability in this scenario. See *Gordon*, 82 N.Y.2d 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. Defendant owner, Eastern, argued that it could not be considered an owner for Labor Law § 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 and held that liability rests upon the fact of ownership and since the property actually belonged to Eastern, the fact that it leased it to Ebenezer did not affect its status as owner. In interpreting Labor Law § 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*; see also *Henningham v. Highbridge Comm. Hous. Dev. Fund Corp.*, 91 A.D.3d 521 (1st Dept. 2012) (holding that a defendant that merely owned the land but not the building in which the plaintiff was injured was responsible as an owner under Labor Law § 240(1) because it had the right and authority to control the work site); *Allan v. DHL Express (USA), Inc.*, 99 A.D.3d 828 (2d Dept. 2012) (“owner” includes a lessee who has the right or authority to control the work site, even if the lessee did not hire the general contractor); *Coleman v. City of New York*, 91 N.Y.2d 821 (1997) (finding the City of New York to be an “owner” under Labor Law § 240 regardless of its status as a lessor); *but see Costa v. State of New York*, 141 A.D.3d 43 (1st Dept. 2016) (holding that because the State of New York gave a public trust total authority over the a public park when it enacted legislation creating the trust, the State was no longer an owner under the Labor Law) .

In *Adimey v. Erie County*, 89 N.Y.2d 836 (1996), the Court of Appeals explained that an owner of land accepts the advantages and disadvantages associated with that ownership, including liability under Labor Law § 240(1). *Id.* (finding that the Erie County Industrial Development Agency was an owner despite leasing its property back to the plaintiff’s employer in a tax benefit arrangement).

For an owner to be found liable under section Labor Law § 240(1), plaintiff’s injury must occur on the owner’s property. In *St. John v. State of New York*, 124 A.D.3d 1399 (4th Dept. 2015), the Appellate Division, Fourth Department granted the State’s motion for summary judgment dismissing plaintiff’s Labor Law claims as against the State on the grounds that the State did not own the parking lot where plaintiff was injured and had no legal authority over the parking lot, which was located on private property and had been leased by the plaintiff’s employer.

When a building is divided such that it has multiple owners, each owner will not necessarily be liable under the Labor Law if a plaintiff is injured performing work on a portion of the building that does not benefit all owners. *Escobar v. GFC Fifth Ave. Owner, LLC*, 2013 N.Y. Slip Op 33226(U) (N.Y. Cty. Sup. Ct. Dec. 20, 2013) (citing *Copertino v. Ward*, 100 A.D.2d 565, 566 (2d Dept. 1984)). For example, in *Escobar*, Defendant GFC owned the retail space that was part of a hotel owned by St. Regis. The St. Regis owners contracted to have exterior façade work performed on the hotel. GFC did not contract to have this work performed nor did the work involve the façade adjacent to the retail space. Therefore, the court held that GFC was not an owner as defined by

the Labor Law in a lawsuit commenced by the plaintiff who was injured performing the façade work for St. Regis.

In *Ampolini v. Long Island Lighting Co.*, 186 A.D.2d 772 (2d Dept. 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 sale and lease-back transaction between a fee owner and a municipal industrial agency, however, is not a ‘genuine allocation of ownership’ for purposes of Labor Law § 240(1). *Adimey v. Erie County Indus. Dev. Agency*, 226 A.D.2d 1053 (4th Dep’t 1996); *see also Matter of 91st St. Crane Collapse Litig.*, 112 A.D.3d 477 (1st Dept. 2013) (finding that defendants established they were not owners under Labor Law § 240(1) where they had transferred ownership prior to the accident and neither retained nor exercised any ownership rights over the project).

Fundamental to the analysis of whether an entity is considered an owner under Labor Law § 240(1) is whether the protected activities (such as construction, excavation, demolition, etc.) are actually taking place on such property. In *Flores v. ERC Holding, LLC*, 87 A.D.3d 419 (1st Dept. 2011), the court held that the owner of the property where the plaintiff’s injury occurred was not a proper Labor Law defendant since the location of the injury was not where the active constructive site was located. *Id. cf. Gerrish v. 56 Leonard LLC*, 147 A.D.3d 511 (1st Dept. 2017) (distinguishing *Flores*).

Wholly owned subsidiaries of the “owner” may be found to be owners themselves where they contract for the work. *See Clute v. Ellis Hosp.*, 184 A.D.2d 942 (3rd Dept. 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 Glielmi v. Toys “R” Us, Inc.*, 62 N.Y.2d 664 (1984); *see also Nakis v. Apple Computer, Inc.*, 879 N.Y.S.2d 910 (1st Dept. 2009).

In the context of an out-of-possession owner, the Court of Appeals has instructed that an owner is liable for a violation of Labor Law § 240(1) even though the job was performed by an independent contractor over which it exercised no supervision or control. *Sanatass v. Consolidated Investing Co., Inc.*, 10 N.Y.3d 333, 340 (2008). The Court of Appeals essentially articulated a “bright line rule” indicating that Labor Law § 240(1) applied to “all owners regardless of whether the property was leased out and controlled by another entity or whether the owner had means to protect the worker.” *Id.* (citing *Coleman v. City of New York*, 91 N.Y.2d 821) (1997)). In *Sanatass*, the Court held that defendant may not escape strict liability as an owner based on its lack of notice or control over the work ordered by its tenant. *Id.* at 340. Owners that are not actually involved in construction can be held liable, “regardless of whether they exercise supervision or control over the work.” *Nazario v. 222 Broadway, LLC*, 135 A.D.3d 506 (1st Dept. 2016) (quoting *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 287) (2003)). The duties of an owner and contractor under Labor Law § 240(1) cannot be delegated. *Id.*

In *Brown v. Christopher Street Owners Corp.*, 211 A.D.2d 441 (1st Dept. 1995), aff'd, 87 N.Y.2d 938, (1996), a proprietary tenant and shareholder of a cooperative apartment hired plaintiff to clean her windows. As plaintiff cleaned them, he slipped off a ledge and fell three stories into the courtyard. Plaintiff sued the owner of the multiple unit 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." *Brown*, 211 A.D.2d at 442. The First Department relied upon *Brown* in several subsequent decisions. See *Webb v. 444 Central Park Owners, Inc.*, 248 A.D.2d 175 (1st Dept. 1998); see also *Ahmed v. Momart Discount Store, Ltd.*, 31 A.D.3d 307 (1st Dept. 2006).

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 St. Owners Corp.*, 297 A.D.2d 634 (2d Dept. 2002). *Otero v. Cablevision of N.Y.*, 297 A.D.2d 632, 634 (2d Dept. 2002) (finding that 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); *Vasquez v. C2 Dev. Corp.*, 105 A.D.3d 729 (2d Dept. 2013).

## 2. Contractors

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, an employee of the general contractor, sued three "prime" contractors who had no direct contact with the general contractor. The Court reasoned that since 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, the prime contractors were not liable under Labor Law § 240. *Id.*; See *Giovanniello v. E.W. Howell, Co., LLC*, 104 A.D.3d 812 (2d Dept. 2013) (prime contractor who was not in privity of contract with plaintiff's employer and who had not been otherwise delegated authority to supervise and control the plaintiff's work was not liable under the Labor Law); see also *Kilmetis v. Creative Pool & Spa, Inc.*, 74 A.D.3d 1289 (2d Dept. 2010) (dismissing plaintiff's Labor Law claims against defendant Creative Pool & Spa because even though Creative was listed as the contractor on the permits for the garage on which plaintiff was working when he was injured, evidence established that Creative only installed the owner's pool and did not have authority to supervise or control plaintiff's work).

Moreover, 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 or authority to do so. *Kelly v. LeMoyne College*, 199 A.D.2d 942 (3rd Dept. 1993); see *Weber v. Baccarat, Inc.*, 70 A.D.3d 487, 488 (1st Dept. 2010); *Larkin v. Sano-Rubin Constr. Co.*,



*Inc.*, 124 A.D.3d 1162 (3rd Dept. 2015) (defendant construction manager without "the authority to direct, supervise or control the work which brought about the injury" was not liable under Labor Law §240(1)); *Tuccillo v. Bovis Lend Lease, Inc.*, 101 A.D.3d 625 (1st Dept. 2012).

In *Griffin v. MWF Development Corp.*, 273 A.D.2d 907 (4th Dept. 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). See also *Walls v. Turner Constr. Co.*, 4 N.Y.3d 861 (2005) (holding that the manner in which the parties at the site are labeled [e.g., "general contractor," "construction manager," etc.] is not necessarily determinative but rather the key is the amount of control or authority defendant exercised over the work); *Larkin v. Sano-Rubin Constr. Co., Inc.*, 124 A.D.3d 1162 (3rd Dept. 2015); *Perez v. Hudson Design Architecture & Constr. Mgt., PLLC*, 121 A.D.3d 877 (2d Dept. 2014); *Rainer v. Gray-Line Dev. Co., LLC*, 117 A.D.3d 634 (1st Dept. 2014) (even though defendant Gotham's contract designated it as a construction manager, Gotham held sufficient authority to direct and control the work such that it could be held liable under the Labor Law).

Similarly, in *Grueter v. Leher McGovern Bovis, Inc.*, 272 A.D.2d 229 (1st Dept. 2000), the construction manager was held liable under Labor Law § 240 where it actively supervised safety at the work site and had the authority to correct the unsafe conditions. See also *Porta v. East 51st St. Dev. Co., LLC*, 2011 N.Y. App. Div. LEXIS 7137 (1st Dept. 2011); *Castellon v. Reinsberg*, 82 A.D.3d 635 (1st Dept. 2011) (finding issues of fact as to whether construction manager had sufficient control to render it a statutory agent for purposes of Labor Law § 240(1)); *Morales v. Spring Scaffolding, Inc.*, 24 A.D.3d 42, 46 (1st Dept. 2005); *Russin v. Picciano & Sons*, 54 N.Y.2d 311, 318 (1981); *Linkowski v. City of New York*, 33 A.D.3d 971 (2d Dept. 2006) (dismissal of Labor Law claims was warranted where evidence failed to show that construction manager exercised any supervisory role over the plaintiff's work); *Loiacano v. Lehrer McGovern Bovis, Inc.*, 270 A.D.2d 464 (2d Dept. 2000) (finding no statutory agency to impose Labor Law liability where the record contained no evidence that the construction manager directed or controlled the manner in which plaintiff carried out the work that produced the injury); *Delahaye v. Saint Anns Sch.*, 40 A.D.3d 679, 683 (2d Dept. 2007) (evidence that role of construction manager was only one of general supervision was insufficient to impose liability under the Labor Law).

### 3. Agents

In order to be held liable under Labor Law § 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 Labor Law § 240 are non-delegable, the duties themselves may, in fact, be delegated to other contractors or persons on the job. See *Johnson v. City of New York*, 120 A.D.3d 405 (1st Dept. 2014) (in denying defendant contractor's motion for summary judgment, the Court found that contractor serving as the "eyes and ears" of the owner at the project had authority to supervise and control the work); *Van Blerkom v. America Painting, LLC*, 120 A.D.3d 660 (2d Dept. 2014); *Tuccillo v. Bovis Lend Lease, Inc.*, 101 A.D.3d 625 (1st Dept. 2012); *Nascimento v. Bridgehampton Constr. Corp.*, 86 A.D.3d 189 (1st Dept. 2011). 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 Hosp.*, 209 A.D.2d 486 (2d Dept. 1994); see also *Samaroo v. Patmos Fifth Real Estate, Inc.*, 102 A.D.3d 944 (2d Dept. 2013); *Russo v. Hudson View Gardens, Inc.*, 91 A.D.3d 556 (1st Dept. 2012) (where defendant did not direct or control the means and methods of plaintiff’s work, or have notice of the unsafe condition, but where it was the managing agent of the premises, triable issues of fact existed as to whether defendant had the authority, pursuant to its agreement with the owner, to supervise and control plaintiff’s work for the purposes of liability under Labor Law § 240(1)); *Lopez v. Dagan*, 98 A.D.3d 436 (1st Dept. 2012) (holding defendant engineer was not an agent of the owner for purposes of liability under Labor Law § 240(1) where engineer’s contract with the owner provided that it did not have control over, and was not responsible for, ‘any construction means, methods, procedures, temporary structures or work...’); *McKenzie v. Cappelli Enters., Inc.*, 2012 N.Y. Misc. LEXIS 5498, \*5-7 (N.Y. Cty. Sup. Ct. Dec. 6, 2012) (parent company of subsidiary general contractor not an agent of general contractor for purposes of liability under the Labor Law); *Weber v. Baccarat, Inc.*, 70 A.D.3d 487 (1st Dept. 2010) (overlapping authority to supervise and control the work will not negate the statutory agency for liability under the Labor Law).

Indeed, a question of fact often exists regarding whether an entity had the “authority” to direct and control the work. Thus, in *Pacheco v. Kew Garden Hills Apt. Owners, Inc.*, 73 A.D.3d 578 (1st Dept. 2010), the general contractor delegated work to defendant Headson. Pursuant to Headson’s contract, it was authorized to supervise and control work delegated to it. Thus, when plaintiff was injured while performing work delegated to Headson, the Court denied Headson’s motion for summary judgment seeking dismissal of plaintiff’s Labor Law claims finding a question of fact as to whether Headson was a statutory agent of the general contractor. See also *Hoffmiester v. Oak Tree Homes*, 206 A.D.2d 920 (4th Dept. 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 and the court found there to be a question of fact as to the manufacturer’s authority to direct the work of the contractor); see also *Barreto v. Metropolitan Transp. Auth.*, 25 N.Y.3d 426, 434 (2015). In *Santos v. American Museum of Natural History*, 187 A.D.2d 420 (2d Dept. 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 Walls v. Turner Constr. Co.*, 4 N.Y.3d 861 (2005), the Court of Appeals held that a construction manager, while technically not a general contractor, could be liable under Labor Law § 240 where its actions at the site made it the owner’s agent. Specifically, the Court of Appeals 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 is not applicable to it. *See Noah v. 270 Lafayette Assoc.*, 233 A.D.2d 108 (1st Dept. 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); *see also Morales v. Federated Dep't Stores, Inc.*, 5 A.D.3d 744 (2d Dept. 2004). 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 Constr.*, 237 A.D.2d 969 (4th Dept. 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. *See Bartoo v. Buell*, 87 N.Y.2d 362 (1996) (the exemption applies if the work “directly relates to the residential use of the home” and such is so even if the “work also serves a commercial purpose”); *Landon v. Austin*, 88 A.D.3d 1127 (3rd Dept. 2011) (holding that purely commercial purpose of one-family residence precluded homeowner from relying upon homeowner’s exemption); *Batzin v. Ferrone*, 140 A.D.3d 1102 (2nd Dept. 2016) (renovating a residence for sale or resale qualifies as work being performed for a commercial purpose and defendant unable to avail itself of homeowner’s exemption). In addition, Labor Law § 240(1) expressly exempts from liability professional engineers and architects who do not direct or control the injury producing work. *See Wrobel v. Town of Pendleton*, 120 A.D.3d 963 (4th Dept. 2014).

### 1. Owners of One- and Two-Family Dwellings

The case of *Bartoo v. Buell*, 87 N.Y.2d 362 (1996) provides 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 job safety than the workers they hire. *See also Marcano v. Hailey Dev. Group, LLC*, 117 A.D.3d 518 (1st Dept. 2014) (homeowner’s exemption applicable where defendant homeowner determined the location of shower heads and certain other bathroom fixtures but did not direct the means and methods in which the work was to be performed); *Patino v. Drexler*, 116 A.D.3d 534 (1st Dept. 2014) (homeowner’s exemption applies to work performed on second residence used solely by family and guests for recreation); *Peck v. Szwarcberg*, 122 A.D.3d 1216 (3rd Dept. 2014); *Chambers v. Tom*, 95 A.D.3d 666 (1st Dept. 2012); *Castellanos v. United Cerebral Palsy Assn.*, 77 A.D.3d 879 (2d Dept. 2010) (dismissing claims under dwelling exemption when plaintiff failed to raise a triable issue of fact— as the property is one or two family residential property and the owners did not control work); *Ortega v. Puccia*, 57 A.D.3d 54 (2d Dept. 2008) (dismissing claims where defendants established that they were owners of a one or two family residential dwelling and did not direct or control the work).

In *Bartoo*, the Court looked at two different occurrences, one involving *Bartoo* and another involving *Anderson*, a case decided the same day. In *Bartoo*, plaintiff 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. Plaintiff 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 installing a sliding glass door.

The Court of Appeals applied a “site and purpose” test that had been outlined earlier in *Canon v. Putnam*, 76 N.Y.2d 644 (1990). The Court found that neither defendants were subject to the absolute liability of Labor Law § 240. A balancing test must be used 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.” *Id.*; see also *Farias v. Simon*, 122 A.D.3d 466, 467-68 (1st Dept. 2014); *Feilen v Christman*, 2016 N.Y. App. Div. LEXIS 235 (3d Dept. 2016); *Fawsett v. Stearns*, 142 A.D.3d 1377 (4th Dept. 2016). Where, however, the homeowner uses the dwelling exclusively for commercial purposes, as in *Van Amerogan v. Donnini*, 78 N.Y.2d 880 (1991), the exemption will be lost. See also *Truppi v. Busciglio*, 74 A.D.3d 1624 (3rd Dept. 2010). 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 (3rd Dept. 1994). However, where a multiple family 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 (2004).

In *Hook v. Quattrociochi*, 231 A.D.2d 882 (4th Dept. 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 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. However, where the commercial use of a property as a bed and breakfast surpasses sporadic residential use by the owners, the homeowner’s exemption will not apply. See *Bagley v. Moffett*, 107 A.D.3d 1358 (3rd Dept. 2013).

In *Muniz v. Church of Our Lady of Mount Carmel*, 238 A.D.2d 101 (1st Dept. 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.

However, where the homeowner engages in significant direction or control of the work, as in *Relyea v. Bushneck*, 208 A.D.2d 1077 (3rd Dept. 1994), the exemption does not apply. See also *Pavon v. Koral*, 113 A.D.3d 830 (2d Dept. 2014); *Rodriguez v. Hope Margulies Gany*, 82 A.D.3d 863 (2d Dept. 2011). 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 (2d Dept. 1999); *see also Orellana v. Dutcher Ave. Bldrs., Inc.*, 58 A.D.3d 612 (2d Dept. 2009); *Ferrero v. Best Modular Homes, Inc.*, 33 A.D.3d 847, 849 (2d Dept. 2006) ("The phrase 'direct and control' as used in those statutes 'is construed strictly and refers to the situation where the owner supervises the method and manner of the work'") (citation omitted).

Drawing a distinction, though, in *Chowdhury v. Rodriguez*, 57 A.D.3d 121 (2d Dept. 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. *See also Ruiz v. Walker*, 93 A.D.3d 838 (2d Dept. 2012) (since accident arose out of manner in which work was performed and defendant involvement was not more extensive than would be expected of a typical homeowner who hired a contractor to renovate his home, defendant homeowner was entitled to exemption); *Chambers v. Tom*, 95 A.D.3d 666 (1st Dept. 2012); *Bucklaew v. Walters*, 75 A.D.3d 1140 (4th Dept. 2010); *Marcano v. Hailey Dev. Group, LLC*, 117 A.D.3d 518 (1st Dept. 2014) (discussed above).

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 Gallagher v. Resnick*, 107 A.D.3d 942 (2d Dept. 2013); *see also Feltt v. Owens*, 247 A.D.2d 689 (3rd Dept. 1998); *Slettene v. Ginsberg*, 257 A.D.2d 656 (2d Dept. 1999).

## 2. Professional Engineers, Architects and Land Architects

In accordance with the express statutory provisions of Labor Law § 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 Wrobel v. Town of Pendleton*, 120 A.D.3d 963 (4th Dept. 2014); *Ferreira v. City of New York*, 85 A.D.3d 1103, 1105 (2d Dept. 2011); *Lopez v. Dagan*, 98 A.D.3d 436 (1st Dept. 2012); *Torres v. CTE Eng'rs, Inc.*, 13 A.D.3d 359 (2d Dept. 2004). 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 Eng'rs*, 257 A.D.2d 403 (1st Dept. 1999); *Lopez v. Dagan*, 98 A.D.3d 436 (1st Dept. 2012); *Hernandez v. Yonkers Contr. Co.*, 306 A.D.2d 379 (2d Dept. 2003) ("[I]t is well settled that liability for an injury sustained by a worker may not be imposed upon an engineer who was hired to assure compliance with construction plans and specifications, unless the engineer commits an affirmative act of negligence or such liability is imposed by a clear contractual provision").

*See Matter of East 91st St. Crane Collapse Litig.*, 119 A.D.3d 437 (1st Dept. 2014); *see also Harvey v. Sear-Brown Group*, 262 A.D.2d 1006 (4th Dept. 1999). In *Matter of East 91st Street Crane Collapse Litigation*, the court dismissed plaintiff's Labor Law claims as asserted against the Engineer even though the Engineer inspected the crane involved in plaintiff's accident nine days before the accident occurred. The Court explained that the inspection did not create any duty or authority to direct or control work at the project sufficient to hold the Engineer liable under the

Labor Law. *See Lopez v. Dagan*, 98 A.D.3d 436 (1st Dept. 2012) (“the engineer's contractual duty to visit the site ‘at periodic intervals’ to determine if construction was in accordance with plans and specifications, is insufficient by itself to hold the engineer liable under” Labor Law §240(1)).

In *Zolotar v. Krupinski*, 36 A.D.3d 802 (2d Dept. 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. *See Walker v. Metro-North Commuter R.R.*, 11 A.D.3d 339 (1st Dept. 2004) (holding that liability for plaintiff's injury may not be imposed on the project architect, since there is no evidence that it committed an affirmative act of negligence and there is no clear contractual provision creating an obligation explicitly running to and for the benefit of workers such as plaintiff).

## 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. Plaintiffs 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 Labor Law § 240 protection. In *D’Argenio v. Village of Homer*, 202 A.D.2d 883 (3rd Dept. 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 (3rd Dept. 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 argument unavailing and held that the plaintiff was entitled to the protection of the statute because an agreement to do the work had already been reached.

However, in a commercial setting, the Third Department held that an owner could not complain that he was unaware of his tenants’ hiring of a contractor to avoid liability under Labor Law § 240. All that must be shown is that the individual was hired by a contractor, an owner, or its agent. *See Lawyer v. Rotterdam Ventures, Inc.*, 204 A.D.2d 878 (3rd Dept. 1994).

In *Lopez v. La Fonda Boricua, Inc.*, 136 A.D.3d 588 (1st Dept. 2016), plaintiff's Labor Law § 240(1) claim survived summary judgment as defendant failed to establish that the plaintiff was a "volunteer" rather than an "employee" within the meaning of the statute. The court essentially drew a distinction between an employer offering services gratuitously versus a plaintiff-employee choosing to volunteer. In *Lopez*, it was plaintiff's employer who agreed to perform the work gratuitously.

## B. Working in the Furtherance Of

To obtain the extraordinary protections of Labor Law § 240(1), the task in which an injured employee was engaged must have been performed during "the erection, demolition, repairing, altering, painting, cleaning, or painting of a building or structure". *Quitizaca v. Tucchiarone*, 115 A.D.3d 924, 926 (2d Dept. 2014). The Court of Appeals in *Martinez v. City of New York*, 93 N.Y.2d 322 (1999) rejected the long held standard that tasks deemed "necessary and incidental" to one of the enumerated items fall 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's denial of Labor Law § 240(1) summary judgment since plaintiff was not injured during "erection, demolition, repairing, altering, painting, cleaning, or painting of a building or structure". To hold otherwise, they found, would enlarge the statute beyond its Legislative intent. *See Bish v. Odell Farms Partnership*, 119 A.D.3d 1337 (4th Dept. 2014) (plaintiff was not "engaged in construction work" when he was cleaning his cement truck on the owner's property); *Adams v. Pfizer*, 293 A.D.2d 291 (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 (1st Dept. 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); *Lopez v. 6071 Enters., LLC*, 2018 N.Y. App. Div. LEXIS 1353 (3rd Dept. 2018) (where worker was injured after falling from an open trailer while filling the trailer with scrap metal, the court found that plaintiff was not engaged in a protected activity, namely the altering or erecting of a structure, as required under the statute).

The question of whether a particular inspection falls within Labor Law § 240(1) must be determined on a case-by-case basis, depending on the context of the work. In *Prats v. Port Authority of N.Y. and N.J.*, 100 N.Y.2d 878 (2003) a worker fell from a ladder while helping another worker inspect equipment in accordance with 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 that 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 Labor 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.

### 1. Erection

Erection of structure or building is a protected activity under Labor Law § 240. This activity is self-evident and has not generated many debates. Because of this, the New York Court of Appeals has not defined the term. However, in *Hodges v. Boland's Excavating & Topsoil, Inc.*, 24 A.D.3d 1089 (3rd Dept. 2005), the court used the dictionary definition of the verb erect. That definition was "(1) to put up by the fitting together of materials or parts: build, (2) to fix in an upright position." See also *Allen v. City of New York*, 89 A.D.3d 406 (1st Dept. 2011); *Preston v APCH, Inc.*, 34 N.Y.3d 1136 (2020)(finding that decedent's work as a welder during the "normal manufacturing process" of fabricating rotor components for air preheaters did not involve "erection, demolition, repairing, altering, painting, cleaning or pointing" of a building or structure.)

### 2. Demolition

A plaintiff is not precluded from recovery under Labor Law § 240(1) simply because he and the pipes that struck him were on the same level. *Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d 1, 10 (2011). In *Wilinski*, plaintiff was struck by a falling piece of pipe erected next to where he was working while plaintiff performed demolition work. The court found Labor Law § 240(1) to be applicable because the distance traveled by the pipes before striking the plaintiff, though short, was not insignificant given the weight of the pipes and the force generated by the pipes in traveling a short distance.

### 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 (2d Dept. 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 (3rd Dept. 1999). Thus, the changing of a light bulb itself is not "repairing of a building or structure." See *Smith v. Shell Oil*, 85 N.Y.2d 1000 (1995).



However, in *Piccione v. 1165 Park Ave., Inc.*, 177 Misc. 2d 1037 (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, and stripping them, entailed more than merely changing a light bulb and constituted repairs within the meaning of Labor Law § 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 Labor Law § 240 after falling off a ladder while changing a screw in a "door-closer." The work was considered only routine maintenance, and hence not a protected activity.

#### 4. Altering

The Court of Appeals has held that "altering" within the meaning of Labor Law § 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 (1998); see also *Saint v. Syracuse Supply Co.*, 25 N.Y.3d 117 (2015). 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 (4th Dept. 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.

In *Kharie v. South Shore Record Management, Inc.*, 118 A.D.3d 955 (2d Dept. 2014), the court found that an employee dismantling shelving was engaged in both alteration and demolition. Because dismantling the shelves was a significant change, the employee's twelve-foot fall was covered under § 240(1). 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.*, 162 A.D.2d 1001 (4th Dept. 1990); *Tauriello v. New York Telephone Co.*, 199 A.D.2d 377 (2d Dept. 1993).

In *Downes v. Boom Studio, Inc.*, 248 A.D.2d 150 (1st Dept. 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 (4th Dept. 1998), the court found that insulating windows by stapling sheets of plastic over them was routine maintenance and not altering a building or structure.

In *Lannon v. 356 W. 44<sup>th</sup> St. Rest., Inc.*, 136 A.D.3d 528 (1st Dept. 2016), the First Department held that plaintiff, who was injured when he fell from a two-story building while installing flag holders on the exterior of defendants' building façade, was not engaged in a protected activity

under § 240(1) at the time of his injury. The court reasoned that the “cosmetic and nonstructural nature” of the work being performed by plaintiff did not constitute “altering” under the statute. The Second Department held in *Derosas v. Rosmarins Land Holdings, LLC*, 148 A.D.3d 988, 990 (2d Dept. 2017) that cutting and clearing a downed tree, even while doing so at an elevation, was not a covered activity and was outside the construction or renovation context.

## 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 (3rd Dept. 1999). In *Brown v. Christopher Street Owners Corp.*, 211 A.D.2d 441 (1st Dept. 1995), *lv. to reargue denied* 88 N.Y.2d 875 (1996), the First Department 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 Labor Law § 240, unlike the case of a large, nonresidential structure such as a school. See also *Cruz v. Bridge Harbor*, 249 A.D.2d 44 (1st Dept. 1998) (*citing Terry v. Young*, 168 A.D.2d 399 (1st Dept. 1990)) (cleaning windows as a new condominium complex is not routine household cleaning and thus covered by § 240).

In *Soto v. J Crew Inc.*, 21 N.Y.3d 562, 568 (2013), the court further clarified what constitutes “cleaning.” The court rejected the argument that Labor Law § 240 covers all cleaning in a commercial setting. Instead, it identified factors to determine whether a cleaning activity is covered. Specifically, the court stated “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 . . . . The presence or absence of any one is not necessarily dispositive if, viewed in totality, the remaining considerations militate in favor of placing the task in one category or the other.” Based on this, it found that routine maintenance on a 6-foot-high display shelf was not “cleaning.”

Removal of snow and ice from a roof has 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 (3rd Dept. 1999); see also *Chapman v. International Business Machines Corp.*, 253 A.D.2d 123 (3rd Dept. 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 (4th Dept. 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 Labor Law § 240). Conversely, the Second Department held in *Garcia v. Piazza*, 16 A.D.3d 547 (2d Dept. 2005), that a plaintiff who was on-site to install windows and siding and was injured clearing snow from a roof was not performing a covered activity necessary to his construction work at the building.

## 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 (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 (1st Dept. 1997) (painter who fell through unprotected hole in the floor was covered by Labor Law § 240 despite the fact that the actual work he was performing did not involve an elevated risk).

## C. Building or Structure

New York 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., Inc.*, 78 N.Y.2d 942 (1991) (quoting *Caddy v. Interborough Rapid Transit 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 (4th Dept. 1994). A utility pole is a structure within the meaning of § 240. See *Dedario v. New York Telephone Co.*, 162 A.D.2d 1001 (4th Dept. 1990); *Tauriello v. New York Telephone Co.*, 199 A.D.2d 377 (2d Dept. 1993); *Siliva v. New York Tel. Co.*, 267 A.D.2d 634 (3rd Dept. 1999); *Ciancio v. Woodlawn Cemetery Ass’n*, 249 A.D.2d 86 (1st Dept. 1998).

In *Lombardi v. Stout*, 80 N.Y.2d 290 (1992), the Court of Appeals found that while a tree in and 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. Subsequent cases interpreting *Lombardi* have limited its holding to situations where the tree removal is conducted in a non-construction, non-renovation context. See, e.g. *Gavin v. Long Island Lighting Co.*, 255 A.D.2d 551 (2d Dept. 1998); *Moreira v. Osvaldo J. Ponzio*, 131 A.D.3d 1025 (2d Dept. 2015). In *Moreira*, the plaintiff was afforded the protection of Labor Law following a fall that occurred during the removal of a tree from the roof of a building. The Court found that “the tree removal was the first step in the process of undertaking structural repairs to the building, and that the repairs could only be commenced by removing the tree from the roof.” *Id.* at 1027.

Other structures have included a railroad car, as in *Gordon v. Eastern Railway Supply, Inc.*, 82 N.Y.2d 555 (1993), a ship’s 200-pound hot water pump in *Skow v. Jones, Lang & Wootton Corp.*,

240 A.D.2d 194 (1st Dept. 1997), a Concorde aircraft was considered a structure for the purposes of Labor Law § 240 in *Rooney v. Port Authority*, 875 F. Supp. 253 (S.D.N.Y. 1995), and shelving in *Kharié v. South Shore Record Mgt., Inc.*, 118 A.D.3d 955 (2d Dept. 2014).

### III. GRAVITY RELATED RISK

It has become clear that the worker must be involved in some “gravity related risk” 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 Labor Law § 240(1) are mandated either because of (1) a difference between the elevation level of the required work and a lower level or (2) 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 (1991) (holding that Labor Law § 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.*

With respect to the types of safety devices which Labor Law § 240(1) requires, the Court of Appeals explained:

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, Labor Law § 240 liability will not be found where the plaintiff is working at a height and is provided with an adequate safety device, such as a scaffold, which prevents the plaintiff from falling, or where the plaintiff, lifting a load, is supplied with an appropriate hoist, preventing him from being struck by falling objects. Labor Law § 240(1) does not mean absolute liability for every worker that falls at a construction site or every object that falls on a worker. Liability under this statute is contingent on a statutory violation and proximate cause. *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d 280, 288 (2003).

For falling object cases, 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. *Narducci v. Manhasset Bay Associates, et al.*, 96 N.Y.2d 259 (2001) (finding that § 240(1) does not apply to a

situation where the falling glass that injured plaintiff was not related to the work being done and was not a material being hoisted or a load that required securing). Without a significant elevation differential, Labor Law § 240(1) does not apply, even if the injury is caused by the application of gravity on an object. *Christiansen v. Bonacio Constr., Inc.*, 129 A.D.3d 1156, 1158 (3d Dep't 2015); *Simmons v. City of New York*, 165 A.D.3d 725, 726 (2d Dep't 2018). To determine whether an elevation differential is significant or *de minimis*, the Court of Appeals considers the height differential, the weight of the falling object and the amount of force it was capable of generating. *Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 605 (2009); *Berberi v. Fifth Ave. Dev. Co.*, 866 N.Y.S.2d 90 (Bronx County Sup. Ct. 2008) ("It is well settled that Labor Law §240(1) is not applicable in cases where there is no appreciable height difference between the work site and the falling object."); *Outar v. City of New York*, 286 A.D.2d 671 (2d Dept. 2001) (granting summary judgment to plaintiff who was struck by an unsecured dolly, which had fallen off a 5-foot wall adjacent to the worksite because the height differential was sufficient to implicate the special protections of the Scaffold Law even though the dolly was not being hoisted or secured at the time of the accident); *Quattrocchi v. F. J. Sciame Construction, Co.*, 11 N.Y.3d 757 (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.)

To conclude that an object requires securing, it is essential that the object present a foreseeable elevation risk in light of the work being undertaken. *Buckley v. Columbia Grammar & Preparatory*, 44 A.D.3d 263 (1st Dept. 2007).

In *Matthews v. 400 Fifth Realty LLC*, 111 A.D.3d 405 (1st Dept. 2013), the court noted that "the Court of Appeals has stated that falling object liability . . . is not limited to cases in which the falling object is in the process of being hoisted or secured." In *Matthews*, the employee was injured when a metal grate fell on him while working in an elevator shaft. The claim was premised on the owner's failure to adequately secure the grates to prevent them from falling. The court overturned a trial court decision to the extent it was premised on the requirement that the object must fall while being hoisted or secured.

The Court of Appeals has found no liability under Labor Law § 240(1) where a safety device served its objective. For example, in *Ross v. Curtis-Palmer Hydro-Electric Co., et al.*, 81 N.Y.2d 494 (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, Labor Law § 240(1) was inapplicable. See also *Cardenas v. BBM Constr. Corp.*, 133 A.D.3d 626 (2d Dept. 2015) (Labor Law § 240(1) not applicable where plaintiff injured his back lifting a beam while standing upon a scaffold 14-15 feet high).

Additionally, in *Melber v. 6333 Main Street, Inc.*, 91 N.Y.2d 759 (1998), where the plaintiff fell from a height as he was performing work, the Court held that the plaintiff did not have a Labor Law § 240 claim. There, the plaintiff utilized stilts to install metal studs in 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.

Standing by its decision in *Melber*, the Court of Appeals recently explained that the relevant and proper inquiry is whether the hazard plaintiff encountered is a separate hazard completely unrelated to the height-related hazard that brought about the need for a safety device in the first place. *Nicometi v. Vineyards of Fredonia, LLC*, 25 N.Y.3d 90, 98 (2015) (finding that plaintiff's fall on ice while wearing stilts was not actionable under Labor Law § 240(1)); *Cohen v. Memorial Sloan-Kettering Cancer Ctr.*, 11 N.Y.3d 823 (2008) (explaining that two pipes protruding from a wall were not a risk that brought about a need for a ladder, but a usual and ordinary danger at a construction site).

Two additional Court of Appeals cases, *Marvin v. Korean Air, Inc.*, 2 A.D.3d 223 (2004) and *Toefer v. Long Island Railroad*, 4 N.Y.3d 399 (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. 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." *Toefer*, 4 N.Y.3d at 408-409. See also *Grabar v. Nichols, Long & Moore Constr. Corp.*, 2017 N.Y. App. Div. LEXIS 1080 (4th Dept. 2017).

To date, the courts have been asked to deal repeatedly with the issue of whether a plaintiff's injury is a direct result of the forces of gravity and falls within Labor Law § 240(1). See *Jacome v. State of New York*, 266 A.D.2d 345 (2d Dept. 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 (2d Dept. 1997) (plaintiff was lifting material via a hoist, the hoist tipped and hit his leg, the court held that § 240(1) did not apply since plaintiff neither fell from a height nor was struck by falling construction materials); *Sarata v. Metropolitan Transp. Auth.*, 2015 N.Y. App. Div. LEXIS 9671 (2d Dept. 2015) (granting summary judgment to plaintiff under Labor Law § 240(1) as the protective device provided, i.e. the safety netting, failed to provide the proper protection when a piece of concrete fell through an opening in the netting and struck plaintiff in the head).

A fall at a construction site does not, in and of itself, establish liability under Labor Law § 240(1). In *Keavey v. New York State Dormitory Auth.*, 6 N.Y.3d 859 (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-foot tall, is not a gravity related accident." *Id.*; *Pita v. Roosevelt Union Free Sch. Dist.*, 156

A.D.3d 833, 835 (2d Dept. 2017) (Labor Law § 240(1) does not apply because the three-foot-height differential between the two levels of the roof did not present the sort of elevation-related risk protected by that statute.”) In *Berg v. Albany Ladder Company, Inc.*, 10 N.Y.3d 902 (2008), the Court of Appeals held that the Scaffold Law did not apply where a worker was standing on 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 *Gonzalez v. Turner Construction, Co.*, 29 A.D.3d 630 (2d 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.

However, in *Treile v. Brooklyn Tillary, LLC*, 120 A.D.3d 1335 (2d Dept. 2014), the Appellate Division, Second Department found that Labor Law § 240(1) applied where an employee was unloading rebar from a flatbed. The employee and his coworkers were using crowbars to remove bundles of rebar from the truck by rolling them off of wooden planks. Allegedly, as a bundle began to fall, the weight shift caused one of the planks to catapult the employee 15 feet into the air. The truck bed was 4 to 5 feet above the ground. According to the court, given that rebar bundles weighed between 8,000 and 10,000 pounds, the 4 to 5-foot elevation was significant.

“[A] presumption in favor of plaintiff arises when a scaffold or ladder collapses or malfunctions ‘for no apparent reason’”. *Quattrocchi v. F. J. Sciame Construction, Co.*, 11 N.Y.3d 757 (1st Dept. 2007) (quoting *Blake*, 1 N.Y.S.3d at 289). “Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials.” *Nelson v. Ciba-Geigy*, 268 A.D.2d 570, 572 (2d Dept. 2000).

In *McCarthy v. Turner Construction, Inc.*, 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. See also *Nazario v. 222 Broadway, LLC*, 2016 N.Y. App. LEXIS 246 (1st Dept. 2016). Likewise, a temporary staircase at a construction site is considered a safety device under § 240(1) and thus, a fall down a temporary staircase is the type of elevation-related risk to which § 240(1) applies. *O’Brien v. Port Auth. Of N.Y. & N.J.*, 131 A.D.3d 823 (1st Dep. 2015).

#### IV. DEFENSES

##### A. Recalcitrant Worker

Under the recalcitrant worker defense, the absolute liability protection ordinarily provided by Labor Law § 240 does not extend to a worker who knowingly disregards instructions by deliberately refusing to use an available safety device. See *Jastrzebski v. North Shore School Dist.*, 223 A.D.2d 677 (2d Dept. 1996) (plaintiff held to be a recalcitrant worker where he fell from 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. To establish the recalcitrant worker defense, "the owner/contractor must demonstrate that a worker deliberately refused to employ safety devices available, visible and in place at the worksite." *Arey v. M. Dunn, Inc.*, 29 A.D.3d 1137, 1139 (3d 2006). For example, in *Vasquez v. GMD Shipyard Corp.*, 582 F.3d 293 (2d Cir. 2009), the Second Circuit Court of Appeals found an employee could not recover where he deliberately stepped off the provided ladder, "thus abandoning the device that was provided for his safety."

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 (1993). A defendant must establish that proper equipment was readily available and provided for the worker's use. See *Clark v. 345 East 52nd Street Owners*, 245 A.D.2d 410 (2d Dept. 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 (3d Dept. 1996) (Court felt that a jury could infer both the act of the defendant providing a safety device and the plaintiff's refusal to use it where there was circumstantial evidence that the ladder was within plain view of the plaintiff); *Cardona v New York City Hous. Auth.*, 61 N.Y.S.3d 13, 14 (1st Dept. 2017) ("Defendants' recalcitrant worker defense fails, since there is no indication that they instructed plaintiff to use a ladder or informed him that a ladder or other safety device was located at the sidewalk bridge.").

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 180th Street Corp.*, 250 A.D.2d 550 (1st Dept. 1998); *Fazekas v. Time Warner Cable, Inc.*, 132 A.D.3d 1401 (4th Dept. 2015) (worker's failure to follow owner's instructions and advice to stabilize ladder to keep it from slipping when standing on ladder to install cable services on owner's building did not preclude cable provider's liability under Labor Law § 240). In *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35 (2004), the Court of Appeals dismissed the plaintiff's claim under Labor Law § 240 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. On the other hand, in *Kristo v Board of Educ. of the City of N.Y.*, 134 A.D.3d 550 (1st Dept. 2015), the Appellate Division rejected defendants' recalcitrant worker defense because there was no evidence that plaintiff had been instructed on the day of his accident not to enter or use the cordoned-off area where the incident allegedly occurred.



## B. Proximate Cause

Plaintiff need not establish any actual negligence on the part of an owner, contractor, or their agent to obtain absolute liability under Labor Law § 240(1). *Blake v. Neighborhood Hous. Serv. of N.Y.C., Inc.*, 1 N.Y.3d 280 (2003). However, a 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 (1985); see also *Woods v. Gonzales*, 295 A.D.2d 602 (2d Dept. 2002) (question as to whether cause of accident was plaintiff placing structurally sound ladder on wet, sloping grass); *Glazik v. City of New York*, 306 A.D.2d 516 (2d 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 case of *Blake v. Neighborhood Housing Services of N.Y. City*, 1 N.Y.3d 280 (2003), reaffirmed the principle that a plaintiff is not entitled to the protections of Labor Law § 240 where the plaintiff's own actions are the sole proximate cause of the accident. In *Blake*, plaintiff set up his own extension ladder at the job site. Plaintiff 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. At the trial court level, the jury found that plaintiff was the sole proximate cause of the accident. The Court of Appeals affirmed the decision, holding 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 made 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 said violation must be a substantial factor in causing the accident. *Id.* at 291.

Likewise, in *Montgomery v. Federal Express Corp.*, 4 N.Y.3d 805 (2005), the Court of Appeals held that 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. *Id.* at 806.

In *Robinson v. East Medical Center, LP*, 6 N.Y.3d 550 (2006), the 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). Here, 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 that was readily available on the job site. Rather than using the taller ladder, the plaintiff chose to stand on the top rung of the six-foot ladder to access the work. *See also, Serrano v. Popovic*, 91 A.D.3d 626 (2d Dept. 2012)(plaintiff sole proximate cause of accident for plaintiff's failure to follow instructions and use readily available safety equipment); *Gittleson v. Cool Wind Ventilation, Corp.*, 46 A.D.3d 855, (2d Dept. 2007) (sole proximate cause where plaintiff chose to use an improperly placed, unsecured ladder to perform his job); *compare with Barreto v. Metropolitan Transp. Auth.*, 25 N.Y.3d 426 (2015) (Court of Appeals reverses Appellate Division and grants summary judgment in favor of plaintiff because of the absence of an adequate safety device to perform his work); *Howard v. Turner Constr. Co.*, 134 A.D.3d 523 (1st Dept. 2015) (Even though it was plaintiff's decision to lean ladder in a partially closed position against the wall, he was not sole proximate cause of accident as the evidence demonstrated that he had to set up the ladder in that manner because of work conditions); *Messina v City of New York*, 148 A.D.3d 493, 494 (1st Dept. 2017) (Defendants failed to raise a triable issue of fact whether plaintiff was the sole proximate cause of the accident since there is no testimony in the record as to whether there were other readily available, adequate safety devices at the accident site that plaintiff declined to use).

## **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."

To fall within the class of persons for which Labor Law § 241(6) was intended, a plaintiff's duties must be essential and integral to the progress of the construction, excavation or demolition project. *See Spadola v. 260/261 Madison Equities Corp.*, 19 A.D.3d 321, 323 (1st Dep't 2005); *Noah v. IBC Acquisition Corp.*, 262 A.D.2d 1037 (4th Dep't 1999). A worker who is employed at a location where construction, excavation or demolition is taking place, but whose responsibilities

are unrelated to the work is not entitled to protection under the statute. See *Calvert v. Duggan & Duggan Gen. Contr., Inc.*, 159 A.D.3d 1490 (4th Dep't 2018) (landscaping work adjacent to construction project not covered); *Moses v. Pinazo*, 265 A.D.2d 391, 392 (2d Dep't 1996) (hospital worker injured during hospital renovation project not covered); compare e.g., *Saint v. Syracuse Supply Co.*, 25 N.Y.3d 117, 129 (2015) (worker altering dimensions of a billboard involved in "construction work" under Industrial Code § 23-1.4(b)(13) and thus covered by section 241(6)).

Labor Law § 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. For the purposes § 241(6), the term "owner" encompasses the titleholder of a property, as well as "a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his or her benefit." *Berner v. Town of Cheektowaga*, 151 A.D.3d 1636 (4th Dept. 2017). The owner or general contractor is not synonymous with the prime contractor; the prime contractor for general construction (especially in State construction projects), has no authority over the other prime contractors, unless the prime contractor has delegated work in such a manner that it stands in the shoes of the owner or general contractor with the authority to supervise and control the work. *Knab v. Robertson*, 155 A.D.3d 1565 (4th Dept. 2017). In order to impose liability on a construction manager, the plaintiff must show that the defendant had the authority to exercise supervision and control over the work that brought about the injury so as to enable the defendant to avoid or correct an unsafe condition. *Lamar v Hill Intl., Inc.*, 153 A.D.3d 685 (2d Dept. 2017).

If these enumerated 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. See *Mugavero v. Windows By Hart, Inc.*, 69 A.D.3d 694 (2d Dept. 2010). 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 Contr. Co.*, 91 N.Y.2d 343 (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 (1st Dept. 1997).

Unlike section 240(1) of the Labor Law, section 241(6) does not impose absolute liability. The statute is not self-executing and requires a violation of an implementing regulation set forth in the Industrial Code. See *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 505 (1993); *Gregory v. General Electric Co.*, 131 A.D.2d 967 (3d Dept. 1987). Moreover, liability is only imposed under section 241(6) where the violation of the Industrial code was the proximate cause of the injury. *Rizzuto*, 91 N.Y.2d at 350.

Not every section of the Industrial Code, however, may serve as a predicate for liability. The regulations in the Industrial Code only impose an actionable duty pursuant to Labor Law § 241(6)

“where the regulation in question contains a specific, positive command.” *Nostrom v. A.W. Chesterton Co.*, 15 N.Y.3d 502, 506 (2010) (quoting *Morris v. Pavarini Constr.*, 9 N.Y.3d 47, 50 (2007)) (internal quotations omitted). There must be a violation of an Industrial Code section which mandates compliance with a “concrete specification.” Regulations dealing with general safety standards are not a sufficient predicate for liability under this section. *Ross*, 81 N.Y.2d at 505; *see also St. Louis v. North Elba*, 16 N.Y.3d 411 (2011); *Grabowski v. Bd. of Managers of Avonova Condo.*, 147 A.D.3d 913 (3d Dept. 2017).

Even where there is a violation of a qualifying Industrial Code section, there must also be a determination as to whether the safety measures employed at the site were “reasonable and adequate” under the circumstances. *See Nagel v. D & R Realty Corp.*, 99 N.Y.2d 98 (2002). Comparative negligence is an available defense.

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 Labor Law § 241(6) cause of action. *Schiulaz v. Arnell Const. Corp.*, 261 A.D.2d 247 (1st Dept. 1999); *see also Holly v. Chautauqua*, 63 A.D.3d 1558 (4th Dept. 2009) (reversed on other grounds).

## II. SPECIFIC INDUSTRIAL CODE REGULATIONS

*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494 (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 Labor Law § 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 Labor Law § 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). Provisions that merely reiterate general common-law standards and do not “mandat[e] compliance with concrete specifications” are not a basis for liability under § 241(6). *Ross*, 81 N.Y.2d 494. For example, sections 23-1.2 (setting forth findings of fact) and 23-1.5 (concerning general responsibility of employers) have are too general or not sufficiently specific to support a claim under § 241(6). *Stairs v. State St. Assocs., L. P.*, 206 A.D.2d 817, 818 (3d Dept. 1994); *Basile v. ICF Kaiser Eng'rs Corp.*, 643 N.Y.S.2d 854, 855 (4th Dept. 1996).

The section most often encountered is section 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, (d) slipping hazards, (e) tripping 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

**1.** 23-1.7 – Protections from General Hazards

In *Heizman v. Long Island Lighting Co.*, 251 A.D.2d 289 (2d Dept. 1998), the Second Department found that this industrial code section was 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. Further, this section is not applicable where the injury is caused by “an integral part of the work” – i.e., where the injury is caused by the very condition a plaintiff was charged with removing. *Barros v. Bette & Cring, LLC*, 129 A.D.3d 1279, 1280 (3d Dept. 2015).

The Court in *Brownell v. Blue Seal Feeds, Inc.*, 89 A.D.3d 1425 (4th Dept. 2011), held that the provision is inapplicable to a stack of rebar from which plaintiff fell, since the stack of rebar is not a working level above ground requiring a stairway, ramp or runway. *See also Pereira v. Quogue Field Club of Quogue*, 71 A.D.3d 1104 (2d Dept. 2010). Section 23-1.7 is not applicable where plaintiff was injured when he tried to use uncovered string-pull starter to start steamroller and his hand was pulled into rapidly moving pulley.

**2.** 23-1.7(a) – Overhead Hazards

In *Amato v. State*, 241 A.D.2d 400 (2d Dept. 1997), the Second Department held, although sufficiently specific, the 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.

The Fourth Department in *Timmons v. Barrett Paving Materials, Inc.*, 83 A.D.3d 1473 (4th Dept. 2011) held the provision to be inapplicable where there was no evidence that the area in which plaintiff was working was normally exposed to falling material or objects.

**3.** 23-1.7(b)(1) – Hazardous Openings

In *Williams v. G.H. Development and Construction Co., Inc.*, 250 A.D.2d 959 (3d Dept. 1998), the Third Department determined 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). The regulation applies to any opening which could result in a fall to a lower floor or more than 15 feet but is inapplicable to holes too small for a worker to fall through. *Alvia v. Teman Elec. Cont., Inc.*, 287 A.D.2d 421, 423 (2d Dept. 2001).

The Second Department in *Ramirez v. Metropolitan Transp. Auth.*, 106 A.D.3d 799 (2d Dept. 2013) held the provision requires that every hazardous opening be guarded by a substantial cover fastened in place or by a safety rail installed in compliance with the Industrial Code, inapplicable to accident occurring when plank in catwalk used over elevated subway track broke; Rule applies to hazardous openings, not elevated hazards.

The Court in *Harris v. Hueber-Breuer Const. Co., Inc.*, 67 A.D.3d 1351 (4th Dept. 2009) held that the provision is inapplicable where plaintiff was injured while attempting to descend multi-level scaffold with allegedly inadequate planking, since plaintiff did not fall into hazardous opening.

#### 4. 23-1.7(d) – Slipping Hazards

Within 23-1.7, the most frequently seen subsections are (d) Slipping hazards; and (e) Tripping and other hazards. In *Gielow v. Rosa Coplon Home*, 251 A.D.2d 970 (4th Dept. 1998), section 23-1.7(d) was not applicable because plaintiff did not slip on a foreign substance but rather muddy ground that had been exposed to the elements. In *Luciano v. New York City Hous. Auth.*, 157 A.D.3d 617 (1st Dept. 2017), water on the floor of the stairwell where plaintiff was working was a slipping hazard within the meaning of 23-1.7(d).

In *Jackson v. Heitman Funds/191 Colonie LLC*, 111 A.D.3d 1208 (3d Dept. 2013), the court found section 23.1.7(d) applicable where a device used to dispense roofing material (membrane roll) shifted because of an allegedly icy and slippery roof.

In *Velasquez v. 795 Columbus LLC*, 103 A.D.3d 541 (1st Dept. 2013) plaintiff allegedly slipped on mud, rocks and water at construction site while working on concrete floor; the court reasoned that section 23.1-7(d) applied because mud is not part of floor or integral to plaintiff's work.

In *Trombley v. DLC Elec., LLC*, 2015 N.Y. App. Div. LEXIS 9346 (3d Dept. 2015) the court held that summary judgment dismissing plaintiff's claim under 12 NYCRR 23-1.7(d) was properly granted because the provision does not apply where plaintiff's injuries were caused when he tripped over exposed conduits.

In *Trinajstic v. St. Owner, LP*, 149 A.D.3d 631 (1st Dept. 2017), plaintiff slipped on dust or broken tiles while placing protection over newly refinished floors. Defendant's summary judgment motion was denied because even though plaintiff's job duties included some cleaning/debris removal, it did not bar his claim because the record indicated that he was not engaged in cleaning/debris removal at the time of the accident.

In *Lopez v. Edge 11211, LLC*, 150 A.D.3d 1214 (2d Dept. 2017), plaintiff slipped on unsecured rosin paper; because the rosin paper was an integral part of the work, it did not constitute a "foreign substance" within the meaning of 23-1.7(d). In *Pereira v. New Sch.*, 148 A.D.3d 410 (1st Dept. 2017), plaintiff slipped on wet concrete deposited on a piece of plywood, which caused his foot to become entangled with bundles of rebar protruding from under the plywood. 23-1.7(d) was applicable

because the wet concrete and rebar were not integral to the work being performed, as the plaintiff did not work with concrete or rebar on the day of the accident.

In *Reynoso v. Bovis Lend Lease LMB, Inc.*, 125 A.D.3d 740 (2d Dept. 2015), 12 NYCRR 23-1.7(d) applied where plaintiff slipped and fell on a surface covered with ice and snow after being instructed to carry plywood to an adjacent construction site. See also *Harasim v. Eljin Const. of New York, Inc.*, 106 A.D.3d 642 (1st Dept. 2013) in which the court found this Industrial Code section applicable where plaintiff allegedly slipped on stairway that was sole means of access to work site although questions of fact existed as to whether the slippery condition on the stairway caused plaintiff's accident.

#### 5. 23-1.7(e) Tripping and Other Hazards

In *O'Sullivan v. IDI Constr. Co., Inc.*, 7 N.Y.3d 805 (2006), the court 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. In *Trombley*, the court held that summary judgment dismissing plaintiff's claim under 12 NYCRR 23-1.7(e) was properly granted because the exposed conduits over which plaintiff tripped, thereby causing his injuries, were "an integral part of the construction." *Trombley*, 2015 N.Y. App. Div. LEXIS 9346. In *Stier v. One Bryant Park LLC*, 113 A.D.3d 551 (1st Dept. 2014), an unsecured masonite was not considered to be a tripping hazard. In *Lester v. JD Carlisle Corp., MD.*, 156 A.D.3d 577 (1st Dept. 2017), loose granules on a temporary roof surface, consisting of a membrane covered in small granules described as a fine-grit stone similar to sand, cinder materials, or ball bearings, was not integral to the structure or the work; instead, it was an accumulation of debris from which § 23-1.7(e)(2) requires work areas to be kept free. In *Mooney v. BP/CG Center II, LLC*, 179 A.D.3d 490 (1st Dept. 2020), a single screw did not constitute accumulation of dirt and debris, or a sharp projection.

In *Licata v. AB Green Gansevoort, LLC*, 2018 WL 826168 (1st Dept. Feb. 13, 2018), plaintiff was injured when his foot got caught in a hole. Although plaintiff could not state, with certainty, whether or not the garbage and debris on the floor actually covered the hole, an inference could be drawn that strewn garbage and debris obscured his view and hid the hole from him, thereby creating a hazardous condition.

This section is inapplicable where the facts establish that plaintiff slipped as opposed to tripped. *Purcell v. Metlife Inc.*, 2012 N.Y. Misc. LEXIS 2036, \*23 (N.Y. County, Sup. Ct. 2012), *aff'd* by 108 A.D.3d 431 (1st Dep't 2013).

In *Carrera v. Westchester Triangle Hous. Dev. Fund Corp.*, 116 A.D.3d 585 (1st Dept. 2014), plaintiff slipped and tripped in an outdoor area on ground composed of dirt and rocks. The court found section 23-1.7(d) inapplicable partly because the rock on which plaintiff may have tripped was part of ground surface and cannot be considered accumulated debris as required in § 23-1.7(e)(1).

In *Burns v. Lecesse Constr. Servs. LLC*, 130 A.D.3d 1429 (4th Dept. 2015), the court held that defendant's motion for summary judgment was properly denied as to plaintiff's claim under 12 NYCRR 23-1.7(e) where plaintiff fell down a stairway in an apartment complex under construction

after tripping on a drywall screw protruding from the top of the stairway. *See also Steiger v. LPCiminelli, Inc.*, 104 A.D.3d 1246 (4th Dept. 2013) where the term “passageway” is interpreted by the courts to mean a “defined walkway or pathway used to traverse between discrete areas as opposed to an open area.” In *Steiger*, the court found that a parking lot was not a passageway because it was not defined and sidewalk at issue was not a passageway because plaintiff did not use it to travel between work areas or between work area and parking lot where his vehicle was parked. In *Morra v. White*, 276 A.D.2d 536 (2d Dept. 2000), 12 NYCRR 1.7(d) and (e) were inapplicable 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. In *Aragona v. State*, 147 A.D.3d 808 (2d Dept. 2017), a corridor, two to three-foot wide, created by piles of lumber and materials on each side, used by the plaintiff to get from one point of the barge to another was a “passageway” within the meaning of 23-1.7(e)(1). In *Prevost v. One City Block LLC*, 155 A.D.3d 531 (1st Dept. 2017), summary judgement was not appropriate, where plaintiff fell in an eight-foot-wide “corridor,” because determining if the “corridor” constituted a “passageway” was a question to be addressed by the trier of fact. A ramp constitutes a “passageway” within the meaning of 23-1.7(e)(1). *Fitzgerald v. Marriott Int’l, Inc.*, 156 A.D.3d 458 (1st Dept. 2017).

In *Moses v. Pinazo*, 265 A.D.2d 391 (2d Dept. 1999), both 12 NYCRR(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 (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 place 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 (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. In *Wunderlich v. Turner Const. Co.*, 147 A.D.3d 598 (1st Dept. 2017), plaintiff tripped on a protruding bolt. Defendant’s motion for summary judgment was denied because it was not known whether the bolt was old or newly installed. In *Mitchell v. T. McElligott, Inc.*, 152 A.D.3d 928 (3d Dept. 2017), two extension cords laying across the floor, which caused the plaintiff to trip, constituted “scattered tools and materials” within the meaning of 23-1.7(e)(2).



The Fourth Department in *Rothschild v. Faber Homes*, 247 A.D.2d 889 (4th Dept. 1998) held that an ongoing storm was no exception to a claim based on 23-1.7(d) thus 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.

#### 6. 23-1.7(f) – Vertical Passage

In *Trombley v. DLC Elec., LLC.*, 134 A.D.3d 1343 (3d Dept. 2015), this industrial code section was found not to be applicable where the accident did not involve a plaintiff ascending or descending to a different level. In *Molloy v. Long Island R.R.*, 150 A.D.3d 421 (1st Dept. 2017), 23-1.7(f) did not apply where plaintiff fell from the cab of a locomotive on which he was a brakeman. "As a matter of law, [descending] from a construction vehicle does not pose an elevation-related risk." In *Sotarriba v. 346 West 17th Street LLC*, 179 A.D.3d 599 (1st Dept. 2020), 23-1.7(f) did not apply to unguarded stairwell opening not being used as a means of access to the work areas.

In *Pita v. Roosevelt Union Free Sch. Dist.*, 156 A.D.3d 833 (2d Dept. 2017), 23-1.7(f) was not applicable where the plaintiff was not performing work on the upper level of the roof; rather, he was walking across it. In *Sawczynsyn v. New York Univ.*, 158 A.D.3d 510 (1st Dept. 2018), a ramp from a truck bed to a 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 23-1.7(f)."

#### B. Other Regulations

##### 1. 23-1.5 - General responsibility of Employers

In *Basile v. ICF Kaiser Eng'rs. Corp.*, 227 A.D.2d 959 (4th Dept. 1996), plaintiff slipped and fell on a stack of pipes. The general standard of care set forth under 23-1.5 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. *Trombley v. DLC Elec., LLC.*, 2015 N.Y. App. Div. LEXIS 9346 (3d Dept. 2015); *Maday v. Gabe's Contr., LLC*, 20 A.D.3d 513 (2d Dept. 2005).

In *Timmons v. Barrett Paving Materials, Inc.*, 83 A.D.3d 1473 (4th Dept. 2011), the Fourth Department found that the provision that requires "reasonable and adequate" protection and that machinery be in good "repair" and "safe" sets forth only general safety standard. However, the First Department recently held that Rule 23-1.5(c)(3), which requires 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" constitutes an affirmative duty and therefore, provides a basis for recovery under Labor Law 241(6). *Becerra v Promenade Apts. Inc.*, 126 A.D.3d 557, 559 (1st Dept. 2015); *Salerno v. Diocese of Buffalo*, 161 A.D.3d 1522 (4th Dept. 2018).

The Second Department in *Balladares v. Southgate Owners Corp.*, 40 A.D.3d 667 (2d Dept. 2007) held that 23-1.5 was inapplicable where a worker was injured as result of basement floor collapse during demolition of brick wall with jackhammer.

2. 23-1.8(a) - Personal protective equipment; Eye protection

In *McByrne v. Ambassador Constr. Co.*, 290 A.D.2d 243 (1st Dept. 2002), the First Department allowed plaintiff's § 241(6) claim to stand where plaintiff electrician was struck in the eye by a wire as 23-1.8(a) requires "approved eye protection equipment."

In *Pilato v. Nigel Enterprises, Inc.*, 48 A.D.3d 1133 (4th Dept. 2008), the court explained that this provision requires that protective equipment be furnished when activity involves foreseeable risk of eye injury; it was inapplicable where a worker's eye injury allegedly occurred when he fell between ceiling joists and hit his face.

In *Quiros v. Five Star Improvements, Inc.*, 134 A.D.3d 1493 (4th Dept. 2015), the court held that defendant's motion for summary judgment was properly denied as to plaintiff's 12 NYCRR 23-1.8(a) claim where plaintiff was injured when a nail from a nail gun he was using ricocheted and penetrated his right eye. The court distinguished this case from *Herman v. Lancaster Homes*, 145 A.D.2d 926 (4th Dept. 1988) in which the court held that plaintiff had no cause of action where he was struck in the eye with a ricocheting nail while manually hammering. The *Quiros* court opined that "the dangers a nail gun present[s] to the eyes are more apparent tha[n] the dangers of manual hammering," and that using a nail gun falls within the regulatory definition of engaging "in any other operation which may endanger the eyes."

*Fresco v. 157 East 72nd Street Condominium*, 2 A.D.3d 326 (1st Dept. 2003) held that whether there was a violation of the provision is ordinarily a question of fact.

3. 23-1.8(c)(4) - Personal protective equipment; Protective apparel; Protection from corrosive substances

In *Creamer v. Amsterdam High School*, 241 A.D.2d 589 (3d Dept. 1997), the Court found that the provision requiring appropriate protective equipment where an employee is required to use or handle corrosive substances was 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.

In *Flores v. Infrastructure Repair Service, LLC*, 115 A.D.3d 543 (1st Dept. 2014), the court explained that this provision requires that every employee working with corrosive substances or chemicals be provided with appropriate protective clothing and eyewear; it is inapplicable where unrefuted expert evidence showed that hot rubberized asphalt is not corrosive substance. *See also Welsh v. Cranesville Block Co.*, 258 A.D.2d 759 (3d Dept. 1999) (where provision applied to plaintiff allegedly

injured from the corrosive effects of wet concrete that he was required to kneel in while performing his work).

#### 4. 23-1.10 - Hand Tools

In *Starr v. New York City Transit Auth.*, 2015 N.Y. Misc. LEXIS 4612 (N.Y. Sup. Ct. Dec. 18, 2015), both parties failed to meet their burden for summary judgment where there was no evidence in the record to establish whether or not a grinder plaintiff was using had a cut-off switch within easy reach.

#### 5. 23-1.11 Lumber and Nail Fastenings

In *Cardenas v. Ben Krupinski Gen. Contr., Inc.*, 2015 N.Y. Misc. LEXIS 4324 (N.Y. Sup. Ct. Nov. 9, 2015), this provision was inapplicable where the plaintiff's own testimony indicated no defects were observed in lumber or nail fastenings used to construct subject scaffold.

#### 6. 23-1.12 – Guarding of Power-Driven Machinery

In *Owens v. Coxall*, 2015 NY Slip Op 31738(U), ¶ 5 (N.Y. Sup. Ct. Aug. 10, 2015), the provision was applicable in an accident where plaintiff was injured using a saw not equipped with a blade guard or spreader.

#### 7. 23-1.13 – Electrical hazards

In *Fanizzi v. Cauldwell-Wingate Co., LLC*, 2016 N.Y. Misc. LEXIS 25, 2016 NY Slip Op 30007(U) (N.Y. Sup. Ct. Jan. 5, 2016), the court held that the statute is sufficiently specific to support a § 241(6) claim where injured worker was electrocuted from loose hanging wire and thrown from ladder. In *O'Leary v. S & A Elec. Contracting Corp.*, 149 A.D.3d 500 (1st Dept. 2017), 23-1.13 was applicable where plaintiff was electrically shocked by temporary electrical wiring laid on the floor. In *Rubino v. 330 Madison Co., LLC*, 150 A.D.3d 603 (1st Dept. 2017), 23-1.13 was applicable where a metal part of plaintiff's safety harness came into contact with a live electrical wire that was hanging down from a drop ceiling.

In *Wolodin v. Lehr Construction Corp.*, 177 A.D.3d 496 (1st Dept. 2019), 23-1.13 was violated as a matter of law where insulation used to guard circuit did not protect worker who was required to cut through energized wires. In *Higgins v. TST 375 Hudson, L.L.C.*, 179 A.D.3d 508 (1st Dept. 2020), 23-1.13 was applicable where plaintiff was shocked when he came into contact with live junction box while installing duct work.

#### 8. 23-1.15 - Safety railing

In *Mazzu v. Benderson Development Co.*, 224 A.D.2d 1009 (4th Dept. 1996), 23-1.15 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. See *Scribner v. State of New York*, 130 A.D.3d 1207 (3d Dept. 2015) (where this section was held inapplicable under § 241(6) cause of action where drop from the roof plaintiff was working onto the scaffolding on which he fell, did not qualify as a hazardous opening).

In *Ramirez v. Metropolitan Transp. Auth.*, 106 A.D.3d 799 (2d Dept. 2013) this provision prescribed standards for safety railings when such railing is required under Industrial Code; it was found to be inapplicable to accident occurring when plank in elevated catwalk broke and no allegation that railing failed. See also *Forschner v. Jucca Co.*, 63 A.D.3d 996 (2d Dept. 2009), explaining that this provision prescribed standards for safety railings when such railing is required under the Industrial Code; it is inapplicable where plaintiff was not provided with safety railing.

#### 9. 23-1.16, 23-1.17 and 23-1.24 - Safety belts, harnesses, tail lines and lifelines; Life nets;

In *Bennion v. Goodyear Tire & Rubber Co.*, 229 A.D.2d 1003 (4th Dept. 1996), none of the aforementioned provisions applied as at the time of plaintiff's fall, he was not required to wear a safety belt or utilize a life net and the accident did not involve a fall from the roof.

In *Giordano v. Tishman Const. Corp.*, 152 A.D.3d 470 (1st Dept. 2017), plaintiff fell from scaffolding when he stepped on a pipe brace that gave way. Although he was wearing a harness and double lanyard, there were issues of fact as to whether the scaffolding itself provided adequate anchoring points, and whether plaintiff could have used his double lanyard to remain tied off at all times.

In *Yaucan v. Hawthorne Vill., LLC*, 155 A.D.3d 924 (2d Dept. 2017), defendants failed to provide adequate protection; plaintiff was wearing a harness and a lifeline when a piece of falling iron struck the scaffold, causing the plaintiff to jump from the scaffold and fall to the ground. Plaintiff's lifeline did not stop his fall because it was too long.

In *Thompson v. Sithe/Independence, LLC*, 107 A.D.3d 1385 (4th Dept. 2013), section 23-1.16, which prescribes standards for safety belts, harnesses and lifelines, is inapplicable where drop line for attachment of safety harness had been removed in area where plaintiff was working. This code provision does not specify when enumerated safety devices are required.

In this regard, see also *Ramirez v. Metropolitan Transp. Auth.*, 106 A.D.3d 799 (2d Dept. 2013), where the court found that the section prescribing standards for safety belts, harnesses and lifelines is inapplicable where such devices were offered but plaintiff was not wearing one when he fell. Section 23-1.17, which prescribes standards for life nets was inapplicable where plaintiff was working on elevated catwalk and fell only a few feet. The court explained that the absence or failure of life net could not be proximate cause of his injuries.

In *Forschner v. Jucca Co.*, 63 A.D.3d 996 (2d Dept. 2009), the court held 23-1.17 to be inapplicable where plaintiff was not provided with life nets.

Regarding work on roofs, see also *Mergenhausen v. Dish Network Service L.L.C.*, 64 A.D.3d 1170 (4th Dept. 2009), where the court found 23-1.24, which requires, inter alia, roofing brackets where roof slope is steeper than one in four inches, was sufficiently specific and applicable where plaintiff allegedly slipped and fell from roof while installing satellite dish.

10. 23-1.21(b)(1), 23-1.21(c) - Ladders and ladderways; General requirements for ladders; Strength; Single ladders

In *Santamaria v. 1125 Park Ave. Corp.*, 249 A.D.2d 16 (1st Dept. 1998), the court held that 23-1.21(b)(1) does provide basis for liability under Labor Law § 241(6) where the ladder plaintiff fell from did not comply with minimum strength standard specified in regulation.

In *Campos v. 68 East 86th Street Owners Corp.*, 117 A.D.3d 593 (1st Dept. 2014), the court explained that 23-1.21(b)(1) did not support plaintiff's Labor Law § 241(6) cause of action where plaintiff testified that he had used ladder without incident before and there was no evidence that ladder was unable to sustain plaintiff's weight. This provision requires that ladders be capable of sustaining at least four times the maximum load to be placed thereon without breakage, dislodgment or loosening of component parts.

The Court in *Croussett v. Chen*, 102 A.D.3d 448 (1st Dept. 2013) held this provision to be inapplicable where there was no evidence that ladder incapable of supporting four times maximum load intended to be supported thereon. See also *Amantia v. Barden & Robeson Corp.*, 38 A.D.3d 1167 (4th Dept. 2007) where provision was considered to be inapplicable where worker used form for pouring concrete to assist him to climb down from truck's cargo floor; form not a "ladder" within meaning of rule and, in any event, there was no evidence that accident related to the form's strength.

In *Cross v. Noble Ellenburg Windpark, LLC*, 157 A.D.3d 457 (1st Dept. 2018), metal bars welded to a trailer's body for use as a ladder or stairway to the trailer's top, were not a single ladder within the meaning of 23-1.21(c).

11. 23-1.21(b)(4)(ii), 1.21(b)(9), and 1.21(e)(3) – Ladders and ladderways; General requirements for ladders; Installation and use; Placement of ladders in doorways; Stepladders; Stepladder footing

In *Fladd v. Installed Bldg. Prods., LLC*, 134 A.D.3d 1480 (4th Dept. 2015), these provisions were held applicable and defendants were not entitled to summary judgment where injured plaintiff fell off ladder placed in garage doorway and was hit when coworker opened door.

In *Enderlin v. Herbert Indus. Insulation*, 224 A.D.2d 1020 (4th Dept. 1996), the section 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 that 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.

In *Nalvarte v. Long Island Univ.*, 153 A.D.3d 712 (2d Dept. 2017), 23-1.21(b)(4)(ii) did not apply where plaintiff stacked two Baker scaffolds on top of each other and then placed an A-frame ladder, in the closed position, atop the two scaffolds. The A-frame ladder could not be opened because the scaffold platform was not wide enough, later the scaffold fell backwards, causing the plaintiff to fall.

In *Messina v. City of N. Y.*, 148 A.D.3d 493 (1st Dept. 2017), plaintiff's motion for summary judgement was granted after defendants failed to prove whether plaintiff was the sole proximate cause of the accident, where plaintiff was injured when the A-frame ladder, on which plaintiff was standing, moved underneath him as he applied pressure to it.

In *Fladd v. Installed Bldg. Prods., LLC*, 134 A.D.3d 1480 (4th Dept. 2015), defendants failed to establish as a matter of law that 12 NYCRR 23-1.21(e) did not apply where plaintiff was injured while standing on a ladder that was set up on "crush and run" gravel or pea stone.

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 (1st Dept. 2003).

In *Vega v. Renaissance 632 Broadway, LLC*, 103 A.D.3d 883 (2d Dept. 2013), this provision, which requires that standing stepladders be used only on firm, level footings and that work performed from a step of a stepladder 10 feet or more above the footing either be steadied by a person standing at foot or secured against sway by mechanical means, was found to be inapplicable to accident involving a ladder that was 6- to 8-feet high where plaintiff was standing less than 10 feet above footing.

The First Department in *Croussett v. Chen*, 102 A.D.3d 448 (1st Dept. 2013) held the provision to be sufficiently specific to support Labor Law § 241(6) cause of action but inapplicable where plaintiff testified that he opened and set up ladder without incident, that the aluminum side supports were in working order, and that the ladder had four rubber footings.

## 12. 23-1.25(f) – Welding and flame cutting operations

In *Dupre v. Arant*, 151 A.D.3d 1675 (4th Dept. 2017), plaintiff was cutting a hole, using a six-foot ladder and a demolition saw, in a large tank; something inside the tank either caught fire or exploded, causing plaintiff to be blown from, or to jump from, the ladder and suffer injuries. The court held that the plaintiff failed to allege that he was engaged in any activity covered by 23-1.25(f).

### 13. 23-1.28 – Hand-propelled vehicles

In *Ahern v. NYU Langone Med. Ctr.*, 147 A.D.3d 537 (1st Dept. 2017), summary judgment was not appropriate where plaintiff testified that he struggled to move a mini-container, and was injured when it rolled onto his foot, after he forcefully pulled on the mini-container. The testimony presented a question of fact on whether the wheels on the mini-container were “free-running” as required by 23-1.28(b).

### 14. 23-1.29 – Public vehicular traffic

In *Federico v. State of New York*, 2015 N.Y. Misc. LEXIS 3084 (N.Y. Ct. Cl. 2015), the court found statutory provisions were able to stand on § 241(6) claim where plaintiff was injured from oncoming traffic while attempting to move precautionary barrels to side of highway.

### 15. 23-1.30 – Illumination

In *Herman v. St. John's Episcopal Hosp.*, 242 A.D.2d 316 (2d Dept. 1997), the court explained that requiring "illumination sufficient for safe working conditions" is sufficiently specific to support a claim but ultimately found to be inapplicable to plaintiff's case when he failed to establish that the lighting where his accident occurred was poor.

In *Boggs v. City of New York*, 135 A.D.3d 583 (1st Dept. 2016) the court found there was an issue of fact whether this section had been violated where lighting was 50 feet away from the accident location and ambient lighting at the accident site was insufficient to read a standard newspaper.

In *Hernandez v. Columbus Ctr., LLC*, 50 A.D.3d 597 (1st Dept. 2008), the court held that the provision, which requires illumination “sufficient for safe working conditions” that is “no less than 10 foot candles,” may have been violated where plaintiff testified that illumination was “poor” and consisted only of street light located 150 to 200 feet away. *See also Verel v. Ferguson Elec. Const. Co., Inc.*, 41 A.D.3d 1154 (4th Dept. 2007) where despite an affidavit that temporary light stringers provided at least 10 foot candles of illumination throughout project’s work area, plaintiff’s deposition testimony that the location in which he worked was so dark that a person would not be able to read a newspaper and that there was no artificial lighting in the area where he worked was sufficient to raise a question of fact as to whether § 23-1.30 was violated.

In *Hall v. Queensbury Union Free Sch. Dist.*, 147 A.D.3d 1249 (3d Dept. 2017), summary judgment was appropriate where testimony from all who responded to the scene said that they did not have any difficulty seeing in the stairwell, and recalled that the lights were on and functioning when they arrived. Further, they testified that they had not received any prior complaints about the adequacy of lighting, that there were no prior reported injuries, and there were no known issues with the existing light fixtures.

#### 16. 23-2.1(a)(1) – Maintenance and housekeeping

In *Barrios v. Boston Pops. LLC*, 55 A.D.3d 339 (1st Dept. 2008), the court dismissed plaintiff's § 241(6) claim as the Industrial Code provisions relied upon by plaintiff were inapplicable. Specifically, the court reasoned that a loading dock is not a "passageway, walkway, stairway, or other thoroughfare" and therefore, 23-2.1(a)(1) was inapplicable.

The Court in *Desena v. North Shore Hebrew Academy*, 119 A.D.3d 631 (2d Dept. 2014) held that this provision, which requires that building materials be stored in safe and orderly manner and that material piles be stable and located so as not to obstruct passageways, walkways, stairways or other thoroughfares, was inapplicable where the accident occurred in open area of worksite.

In *Marrero v. 2075 Holding Co. LLC*, 106 A.D.3d 408 (1st Dept. 2013), this provision was considered to be inapplicable where there was no allegation that accident occurred in one of the enumerated areas.

In *Hebbard v. United Health Servs. Hosps., Inc.*, 135 A.D.3d 1150 (3d Dept. 2016), the court held that 12 NYCRR 23-2.1(a)(1) applies where a stack of scaffolds tipped onto plaintiff when he attempted to move one of them.

*See also Cody v. State of N.Y.*, 82 A.D.3d 925 (2d Dept. 2011) where this provision was held inapplicable where accident occurred in open work area and material that caused plaintiff to fall was not being stored but rather was in use.

#### 17. 23-4.2 – Trench and area type excavations

In *Gjeka v. Iron Horse Transport, Inc.*, 151 A.D.3d 463 (1st Dept. 2017), 23-4.2 was applicable where the plaintiff was directing traffic, around an unguarded trench in a road that was being excavated, and was struck by defendant's truck, causing him to fall into the trench.

#### 18. 23-5.1 – General provisions for all scaffolds

In *Videan v. NRG Energy, Inc.*, 149 A.D.3d 1533 (4th Dept. 2017), the court dismissed the plaintiff's claim insofar as it was based on violations of 23-5.1(3)(1) and (5), because the plaintiff admitted that the accident did not occur because of any problems with the planks on the scaffold; rather, it occurred because the scaffold was not high enough to enable him to reach his work area.

In *Varona v. Brooks Shopping Ctr. LLC*, 151 A.D.3d 459 (1st Dept. 2017), while plaintiff was working on a scaffold he suffered a seizure and collapsed. The court held 23-5.1 was not applicable as it was not a proximate cause of plaintiff's injuries.



19. 23-5.18(b) – Manually-propelled mobile scaffolds

In *Solorzano v. Skanska USA Bldg., Inc.*, 155 A.D.3d 661 (2d Dept. 2017), plaintiff admitted that there were guardrails on all four sides of the scaffold from which he fell; accordingly, plaintiff failed to establish his entitlement to judgment under § 241(6).

20. 23-6.1(d) – Material Hoisting; General requirements:

A freight elevator is not a “material hoist” as contemplated by the code. *Barrios v. Boston Pops. LLC*, 55 A.D.3d 339 (1st Dept. 2008).

In *Kretowski v. Braender Condominium*, 57 A.D.3d 950 (2d Dept. 2008), the court found that this provision, which provides that material hoisting equipment shall not be loaded in excess of the live load for which it was designed and requires that loads be properly trimmed, securely slung, and balanced, was sufficiently specific to support a Labor Law § 241(6) cause of action and potentially applicable where worker was injured by a brick that fell from a pallet that was being hoisted to a building roof.

In *Flowers v. Harborcenter Dev., LLC*, 155 A.D.3d 1633 (4th Dept. 2017), 23-6.1(d) “cannot serve as the basis for § 241(6) liability because the [tower] crane used by plaintiff is specifically exempt from the mandate.”

21. 23-7.1 – Personnel Hoists; General requirements

Where plaintiff was injured from falling guide rail while on lift device, §241(6) cause of action was dismissed because provision is not sufficiently specific to support the claim. *Wade v. Bovis Lend Lease LMB, Inc.*, 102 A.D.3d 476 (1st Dept. 2013). 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.

22. 23-9.5(g) Excavating machines

In *Zaino v. Rogers*, 153 A.D.3d 763 (2d Dept. 2017), plaintiff argued that the general requirements in 23-1.5(c)(3) and 23-9.2(a), were applicable where plaintiff was struck by a crawler-mounted excavator. The court held 23-1.5(c)(3) and 23-9.2(a) were insufficient in light of the language in 23-9.5(g), which expressly exempts crawler-mounted excavators from the back-up alarm requirement.

### 23. 23-9.6(b)(1) – Aerial baskets

In *Vrlaku v. Plaza Const. Corp.*, 57 Misc.3d 1215(A) (Sup. Ct. Richmond County. 2017), defendants argued that 23-9.6(b)(1) did not apply because the term “scissor-lift” was not defined within the section; however, the court held that just because there was not a regulation specific to “scissor-lifts,” did not mean it is not a covered piece of equipment.

### 24. 23-9.7(e) – Motor trucks

In *Pruszko v. Pine Hollow Country Club, Inc.*, 149 A.D.3d 986 (2d Dept. 2017), the platform of a pickup truck, where the plaintiff was injured, was considered a “platform” within the meaning of 23-9.7(e).

#### C. Demolition

Demolition work is defined under § 23-1.4(b)(16) as “[t]he 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 (Sup. Ct. Queens County. 1996), *aff'd* 245 A.D.2d 561 (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 (2d Dept. 2004), a plaintiff was removing a steel garage door track, which fell on his head injuring him. The court held that § 23-3.3 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 (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.

In *Cardnas v. One State Street, LLC*, 68 A.D.3d 436 (1st Dept. 2009) § 23-3.3 requires that the work involve changes to structural integrity of building, as opposed to mere renovation of its interior.

In *Shea v. Bloomberg, L.P.*, 124 A.D.3d 621 (2d Dept. 2015), there was a triable issue of fact as to whether plaintiff was engaged in demolition work as defined by 12 NYCRR 23-1.4(b)(16) when he was ejected from the rear cargo box of a John Deere Gator utility vehicle while working as a stagehand for a company that sets up and tears down temporary stages and canopies.

In *Pol v. City of New York*, 126 A.D.3d 526 (1st Dept. 2015), plaintiff's replacing of a component of a subway track system did not constitute demolition as defined by 12 NYCRR 23-1.4(b)(16).

The Court in *Kaminski v. 53rd Street & Madison Tower Development, LLC*, 70 A.D.3d 530 (1st Dept. 2010) held that 23-3.3(b)(2) provides that masonry shall not be permitted to fall in such masses as to endanger the structural stability of any floor or structural support that such masonry may strike in falling; potentially applicable where there was evidence from which it could be inferred that masonry from collapsed eight-floor wall damaged floor and staircase, endangering their stability.

Regarding demolition of walls and partitions *see also Card v. Cornell University*, 117 A.D.3d 1225 (3d Dept. 2014) where the court found the provision potentially applicable where a concrete half wall fell and landed on plaintiff's foot during its demolition allegedly due to structural instability resulting from removal of horizontal rebar, part of wall's concrete base and shallowness of vertical rebar.

In *Torres v. Love Lane Mews, LLC*, 156 A.D.3d 410 (1st Dept. 2017), 23-3.3(g) did not apply to a worker who was struck by falling bricks because the accident occurred outside rather than within a building.

## **LABOR LAW SECTION 200**

### **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." *See Comes v. New York State Elect. and Gas Corp.*, 82 N.Y.2d 876 (1993); *Cappabianca v. Skanska USA Bldg. Inc.*, 99 A.D.3d 139 (1st Dept. 2012) (Labor Law §200 codifies the owner's and general contractor's common-law duty to provide a safe construction site). For an individual to recover under the safe workplace doctrine, the actual injury must be connected with the workplace.

Claims asserted under Labor Law § 200 fall typically fall into one of two categories (1) workers injured as a result of a premises defect; or (2) those involving the means and methods in which the contractor is performing their work. *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494 (1993); *Mendoza v. Highpoint Assoc.*, 83 A.D.3d 1, 919 N.Y.S.2d 129 (1st Dep't 2011); *Ortega v. Puccia*, 57 A.D.3d 54 (2d Dep't 2008). Where the worker's injury arises from the means and methods used to complete the work, plaintiff must prove that the owner, general contractor and/or agent of the owner or general contractor, had authority to supervise and control the injured person's means and methods for completing their work. *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 601 N.Y.S.2d 49 (1993); *Cuertas v. Kourkoumelis*, 265 A.D.2d 293, 696 N.Y.S.2d 475 (2d Dept. 1999). *Comes*, 82 N.Y.2d at 876; *Ortega*, 57 A.D.3d at 62. Where a dangerous or defective premises condition is the alleged cause of the worker's injury, an owner is only

liable under Labor Law §200 where it either created or had notice of the condition that allegedly caused the injury. *Mendoza*, 83 A.D.3d at 13; *Chowdhury v. Rodriguez*, 57 A.D.3d 701, 867 N.Y.S.2d 123 (2d Dep't 2008).

#### A. Means and Methods

As a general rule, an owner is not vicariously liable for a general contractor's negligence and an owner and a contractor are not liable for a subcontractor's negligence. See *Elezaj v. P.J. Carlin Constr. Co.*, 225 A.D.2d 441 (1st Dept. 1996); *Dawson v. Diesel Constr. Co.*, 51 A.D.2d 397 (1st Dept. 1976). However, an owner or contractor may be found liable if it exercises "control" or "supervision" over the negligent party. See *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876 (1993); *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 505 (1993); *Jones v. County of Erie*, 121 A.D.3d 1562 (4th Dept. 2014); *Karanikolas v. Elias Taverna, LLC*, 120 A.D.3d 552, 555 (2d Dept. 2014).

"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 (1992); see also, *Affri v. Basch*, 13 N.Y.3d 592 (2009); *Wnetrzak v. V.C. Vitanza Sons, Inc.*, 79 A.D.3d 939, 940 (2d Dept. 2010)(defendant satisfied its *prima facie* burden of establishing that plaintiff was injured, not by a dangerous condition, but by the manner in which he performed his work, and that it did not have the authority to supervise or control the performance of his work); *Lopez v. Dagan*, 98 A.D.3d 436 (1st Dept. 2012); *Alvarez v. Hudson Valley Val. Realty Corp.*, 107 A.D.3d 748 (2d Dept. 2013); *Lopez v* LEXIS 1353, \*6 (3d Dept. 2018).

In *Lombardi, supra*, plaintiff fell from a ladder while cutting a tree limb, but could not recover from a property owner for claims of common law negligence or Labor Law § 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. See *Lombardi*, 80 N.Y.2d at 290. 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. See *id.*; see also *DeSimone v. Structure Tone*, 306 A.D.2d 90 (1st Dept. 2003).

Even providing general instructions on what needs to be done, but not how to do it, as well as general monitoring and oversight of the timing and quality of work, is not sufficient to impose liability under Labor Law § 200. See *Fiorentino v. Atlas Park LLC*, 95 A.D.3d 424 (1st Dept. 2012); *Bajor v. 75 E. End Owners Inc.*, 89 A.D.3d 458 (1st Dept. 2011); see also *Dalanna v. City of New York*, 308 A.D.2d 400, (1st Dept. 2003)("[M]onitoring and oversight of the timing and quality of the work is not enough to impose liability under §200, [n]or is a general duty to ensure compliance with safety regulations or the authority to stop work for safety reasons."); *Hughes v. Tishman Constr. Corp.*, 40 A.D.3d 305 (1st Dept. 2007). To be charged with liability under Labor

Law § 200, an owner or general contractor must perform more than its general duty to supervise the work and to ensure compliance with safety regulations. *See Bisram v. Long Is. Jewish Hosp.*, 116 A.D.3d 475 (1st Dept. 2014); *Cahill v. Triborough Bridge & Tunnel Auth.*, 31 A.D.3d 347, 350-51 (1st Dept. 2006); *Delaney v. City of New York*, 78 A.D.3d 540 (1st Dept. 2010). “[G]eneral supervisory authority is insufficient to constitute supervisory control [as it] must be demonstrated that the contractor controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed.” *Hughes v. Tishman Constr. Corp.*, 40 A.D.3d 305 (1st Dept. 2007); *see also, Burkoski v. Structure Tone, Inc.*, 40 A.D.3d 378, 381 (1st Dept. 2007); *McNabb v. Oot Bros., Inc.*, 64 A.D.3d 1237 (4th Dept. 2009); However, the existence of such an undertaking may create an issue of fact as to control, even where the owner or general contractor disclaims actual supervision of the subcontractors. More specifically, the right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence. *See Banscher v. Actus Lend Lease, LLC*, 132 A.D.3d 707 (2d Dept. 2015).

To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, an owner must have the authority to supervise and control the work. 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[led] the activity bringing about the injury to enable it to avoid or correct an unsafe condition.” *O’Sullivan v. IDI Constr. Co., Inc.*, 7 N.Y.3d 805 (2006) (citing *Russin v. Picciano*, 54 N.Y.2d 311 (1981)); *see also Alonzo v. Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 A.D.3d 446 (1st Dept. 2013) (defendants’ lack of direction and control over plaintiff’s work at the time of the alleged injury resulted in dismissal of plaintiff’s Labor Law § 200 claims); *see also Larkin v. Sano-Rubin Constr. Co., Inc.*, 124 A.D.3d 1162 (3d Dept. 2015).

## B. Premise Defect

An owner or contractor must have created or had either actual or constructive notice of the dangerous condition which caused the alleged incident. *See Bennett v. Hucke*, 131 A.D.3d 993 (2d Dept. 2015); *Velez v. City of New York*, 134 A.D.3d 447 (1st Dept. 2015)(defendant denied summary judgment because it failed to demonstrate lack of constructive notice of a drain cover that caused plaintiff to trip). An owner cannot escape liability by blinding themselves from the obvious. Owners have a duty to make reasonable inspections to detect defects and the failure to do so can constitute negligence if such an inspection would have disclosed the defect. *See McGough v. Cryan, Inc.*, 111 A.D.3d 900 (2d Dept. 2013); *Lee v. Bethel First Pentecostal Church*, 304 A.D.2d 798 (2d Dept. 2003); *Licata v AB Green Gansevoort, LLC*, 2018 N.Y. App. LEXIS 1022, \*5, (1st Dept. 2018). It is also well established that a subcontractor may be held liable under Labor Law § 200 where the work it performed created the condition that caused the plaintiff's injury even if it did not possess any authority to supervise and control plaintiff's work or work area. *See Piche v. Synergy Tooling Sys., Inc.* 134 A.D.3d 1439 (4th Dept. 2015)(subcontractor not entitled to summary judgment as it created the dangerous condition).

Plaintiff's failure to prove that the owner/general contractor owned the allegedly defective device is fatal to plaintiff's Labor Law §200 claim based on premise defect. *Giambalvo v. Chemical Bank*, 260 A.D.2d 432, 687 N.Y.S.2d 728 (2d Dep't 1999); *see also Maniscalco v. Liro Eng'g constr. Mgmt., P.C.*, 305 A.D.2d 378, 759 N.Y.S.2d 163 (2d Dep't 2003); *Cruz v. City of New York*, 2074 A.D.2d 858, 616 N.Y.S.2d 986 (2d Dep't 1994).

In *Giambalvo v. Chemical Bank*, *supra*, plaintiff was injured when he fell from an allegedly defective ladder while changing a light bulb. Building owner, Chemical Bank, denied it owned the ladder from which plaintiff fell. Despite plaintiff's testimony that he assumed Chemical Bank owned the ladder because it was stored in a room in Chemical Bank's building accessible to cleaning contractors, plaintiff failed to provide any evidence that Chemical Bank actually owned the ladder. *Giambalvo*, 260 A.D.2d at 434, 687 N.Y.S.2d at 730.

### C. Readily Observed Hazards / Hazards Inherent in the Work

New York courts have held that the duty of an owner or general contractor to provide workers with a safe place to work does not extend to hazards, which are part of or inherent in the very work being performed or to those hazards that may be readily observed by reasonable use of the senses in light of the worker's age, intelligence, and experience. *See Burgos v. Premiere Properties, Inc.*, 145 A.D.3d 506 (1st Dept. 2016); *Bodtman v. Living Manor Love, Inc.*, 105 A.D.3d 434 (1st Dept. 2013); *see also, Bombero v. NAB Constr. Corp.*, 10 A.D.3d 170 (1st Dept. 2004)("[w]hen a worker confronts the ordinary and obvious hazards of his employment, and has at his disposal the time and other resources ... to enable him to proceed safely, he may not hold others responsible if he elects to perform his job so incautiously as to injure himself"); *Spence v. Island Estates at Mt. Sinai II, LLC*, 79 A.D.3d 936 (2d Dept. 2010)(In case where plaintiff tripped on ruts in ground at construction site, Court dismissed plaintiff's Labor Law § 200 claim when plaintiff admitted during his deposition that he had observed and walked over the ruts prior to the incident and the existence of such ruts was not unusual); *Lopes v. Ross*, 126 A.D.3d 766 (2d Dept. 2015)(location of a bunk bed in relation to a ceiling beam was not an inherently dangerous condition and was readily observable by the reasonable use of one's senses, thus precluding a part-time housekeeper's action to recover damages for personal injuries against her employers, after the housekeeper allegedly hit her head on the ceiling beam while attempted to descend the bunk bed ladder).

## II. PROTECTED PERSONS

The duty to provide a safe workplace pursuant to Labor Law § 200 is limited to employees. *Mordkofsky v V.C.V. Dev. Corp.*, 76 N.Y.2d 573 (1990)(Labor Law § 200, does not extend to individuals who are not employees). *See also Widera v. Ettco Wire & Cable Corp.*, 204 A.D.2d 306 (2d Dept. 1994) (no Labor Law § 200 cause of action for injuries sustained by an employee's family member, allegedly as a result of exposure to toxins brought home from workplace on the employee's work clothes). New York courts, however, have held that Labor Law § 200 is not limited to construction workers, but provides protection to those employees engaged in other work where construction activities are being performed. *See Jock v. Fien*, 80 N.Y.2d 965 (1992); *Foots v Consolidated Bldg. Contrs., Inc.*, 119 A.D.3d 1324 (4th Dept. 2012). However, a plaintiff is

not a person "employed" within the meaning of the statute imposing a general duty to protect the health and safety of employees where he or she was not hired to perform the task that caused his or her injury. *See Sowa v. S.J.N.H. Realty Corp.*, 21 A.D.3d 893 (2d Dept. 2005).

## **EMPLOYER PROTECTION FROM LABOR 200, 240(1) AND 241(6) CLAIMS**

### I. Workers' Compensation Bar

Pursuant to Workers' Compensation Law §11, an employee that is injured during the course of employment cannot sue his or her employer for bodily injuries sustained on the job and is limited to workers' compensation benefits as his or her sole remedy. The Compensation Law also bars third parties from seeking indemnification or contribution from an injured plaintiff's employer when the plaintiff was acting within the scope of his or her employment at the time of the injury. WCL §11. *Cunningham v. State of New York*, 60 N.Y.2d 248 (1983)(Dismissal of plaintiff's complaint warranted where plaintiff applied for and received workers' compensation benefits). The administrative judge's decision in the workers' compensation proceeding that plaintiff's injuries arise out of and in the course of his employment is final and conclusive. *Warner v. State of New York*, 53 N.Y.2d 346 (1981).

### A. Special Employee

A special employee is one who is transferred for a limited duration to the service of another. *Fung v Japan Airlines Co., Ltd.*, 9 NY.3d 351 (2007); *Thompson v Grumman Aerospace Corp.*, 78 N.Y.2d 553 (1991); *Salinas v 64 Jefferson Apartments, LLC*, 170 A.D.3d 1216 (2d Dep't 2019); *Ribeiro v Dynamic Painting Corp.*, 23 A.D.3d 795 (3d Dep't 2005); *Goss v State University Const. Fund*, 261 A.D.2d 860 (4th Dep't 1999).

The determination of special employment status is dependent upon a number of factors including, among others, the method of payment, ownership of equipment and the relative nature of the work, *Ribeiro v Dynamic Painting Corp.*, 23 A.D.3d 795 (3d Dep't 2005). The key to the determination is who controls and directs the manner, details and ultimate result of the employee's work, *Bayona v Hertz Corp.*, 148 A.D.3d 608, (1st Dep't 2017); *Ribeiro supra*; *Ramnarine v. Memorial Ctr. For Cancer & Allied Diseases*, 281 A.D.2d 218, (2001)(control and direction of the manner, details and ultimate result of employee's work is "significant and weighty" in determining existence of a special employment relationship). The consent of the employee, express or implied, to becoming the servant of the special employer will also be considered. *Ramsey v New York Cent. R. Co.*, 269 N.Y. 219 (1935); *McNamara v Leipzig*, 227 N.Y. 291 (1919); *Gallo v Higgins Erections & Haulers, Inc.*, 45 A.D.2d 790 (3d Dep't 1974); *Guerra v Simpson Iron Works, Inc.*, 35 A.D.2d 566 (2d Dep't 1970); *Bird v New York State Thruway Authority*, 8 A.D.2d 495 (4th Dep't 1959). Meanwhile, general supervisory control is insufficient to establish special employment status. *McLaughlan v BR Guest, Inc.*, 149 A.D.3d 519 (1st Dep't 2017). The special employment relationship is not defeated merely by the fact that plaintiff's general employer was responsible for paying plaintiff's wages and maintaining workers' compensation and insurance for the plaintiff, *Adams v North-Star Const. Co., Inc.*, 249 A.D.2d

1001 (4th Dep't 1998) (fact that temporary employment agency placed plaintiff with defendant, paid plaintiff's wages and plaintiff received workers' compensation benefits from agency's insurance carrier is not dispositive); *Burdette v Niagara County Indus. Development Agency*, 227 A.D.2d 979 (4th Dep't 1996); *Olsen v We'll Manage, Inc.*, 214 AD2d 715, 625 NYS2d 301 (2d Dep't 1995).

Generally, whether a person can be categorized as a special employee is a question of fact, *Hintze v Brookhaven Nat. Laboratory*, 278 A.D.2d 456 (2d Dep't 2000); see *VeRost v Mitsubishi Caterpillar Forklift America, Inc.*, 124 AD3d 1219 (4th Dep.t 2015); *Pato v Sweeney Steel Service Corp.*, 117 A.D.2d 984 (4th Dep.t 1986). However, the issue may be decided by the court as a matter of law where the particular undisputed critical facts compel that conclusion and present no triable issue of fact. *Thompson v Grumman Aerospace Corp.*, *supra*; *Graziano v 110 Sand Co.*, 50 A.D.3d 635 (2d Dep't 2008); *Hintze v Brookhaven Nat. Laboratory*, *supra*; see *Salinas v 64 Jefferson Apartments, LLC*, *supra*; *Short v Durez Division-Hooker Chemicals & Plastic Corp.*, 280 A.D.2d 972 (4th Dep't 2001); *Rothenberg v Erie Metal Stamping Co., Inc.*, 204 A.D.2d 249 (1st Dep't 1994); *Levine v Lee's Pontiac*, 203 A.D.2d 259 (2d Dep't 1994); *Degruchy v Xerox Corp.*, 188 A.D.2d 1003 (4th Dep't 1992).

When an employee elects to receive workers' compensation benefits from his general employer, a special employer is shielded from any action at law commenced by the employee, *Salinas v 64 Jefferson Apartments, LLC*, 170 A.D.3d 1216, (2d Dep't 2019); *Hintze v Brookhaven Nat. Laboratory*, 278 A.D.2d 456 (2d Dep't 2000). The special employment relationship is not defeated merely by the fact that plaintiff's general employer was responsible for paying plaintiff's wages and maintaining workers' compensation and insurance for the plaintiff. *Adams v North-Star Const. Co., Inc.*, 249 A.D.2d 1001 (4th Dep't 1998) (fact that temporary employment agency placed plaintiff with defendant, paid plaintiff's wages and plaintiff received workers' compensation benefits from agency's insurance carrier is not dispositive); *Burdette v Niagara County Indus. Development Agency*, 227 A.D.2d 979 (4th Dep't 1996); *Olsen v We'll Manage, Inc.*, 214 A.D.2d 715 (2d Dep't 1995).

## II. Exceptions

Exception the Worker's Compensation Bar are where plaintiff sustained a "grave injury" or there is a written contract by which the employer expressly agrees to indemnify the third-party. See *Flores v. Lower E. Side Serv. Ctr.* 4 N.Y.3d 31 363 (2005).

### A. Grave Injury

Once a grave injury is shown, a third party defendant may seek full contribution from the plaintiff's employer Workers' Compensation Law §11 defines grave injury to include one or more of the following: " death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and



severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.” WCL §11.

The court of Appeals has given the statutory list of grave injuries a strict construction and designed to be exhaustive rather than illustrative. *Castro v. United Container Machinery Group, Inc.*, 96 N.Y.2d 398 (2001)(loss of five fingertips is not a grave injury where the statute expressly requires loss of multiple fingers and standard English usage of the word “finger” means the whole finger, not just the tip); *Meis v. ELO Org.*, 97 N.Y.2d 714 (2002) (loss of a thumb is not a ‘permanent and total loss of use’ of a hand). Where the specific language of the statute requires interpretation (e.g., “an acquired injury to the brain caused by an external physical force resulting in permanent total disability”), the court will look to the legislative intent in enacting the statute. *Rubeis v. Aqua Club Inc.*, 3 N.Y.3d 408 (2004); *Fleming v. Graham*, 10 N.Y.3d 296 (2001).

## B. Contractual Indemnity

A party is entitled to full contractual indemnification, even from an employer, provided the “intention to indemnify can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances (*Drzewinski v. Atlantic Scaffold & Ladder Co.*, 70 N.Y.2d 774, 521 N.Y.S.2d 216 (1987)) and the agreement was entered into prior to the alleged incident. *Majewski v. Broadalbin-Pert Cent. School Dist.*, 91 N.Y.2d 577 (1998) ; *Shea v. Bloomberg, L.P.* 125 A.D.3d, 621, 2 N.Y.S.3d 512 (2d Dep’t 2015); *Lesisz v. Salvation Army*, 40 A.D.3d 1050, 1051 (2d Dept. 2007).

The right to contractual indemnification and the extent to which it applies will depend upon the specific language of the contract. *Gillmore v. Duke/Fluor Daniel*, 221 A.D.2d 938, 939, 634 N.Y.S.2d 588 (4th Dep’t 1995); see *Kader v. City of New York*, 16 A.D.3d 461, 463, 791 N.Y.S.2d 634 (2d Dep’t 2005). Indemnification provisions may be broadened by contract, allowing a general contractor to require a subcontractor to indemnify it not only for the acts of the subcontractor which give rise to an injury but also for injuries which arise in connection with the work the subcontractor assumes under the contract. See *Correia v. Prof. Data Mgmt., Inc.*, 259 A.D.2d 60 (1st Dep’t 1999) (if the indemnification provision is broadly worded to require indemnification for acts “arising out of” the indemnitor’s performance, it is irrelevant whether the proposed indemnitor was negligent).

Contractual indemnification arising in the context of the Labor Law is limited Section 5-322.1 of the General Obligations Law. An indemnification provision satisfies General Obligations Law 5-322.1 where the provision does not require the promisor to indemnify the promisee for the promisee’s own negligence. *Brooks v. Judlau Contr., Inc.*, 11 N.Y.3d 204, 209 (2008).

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