LABOR LAW UPDATES

A review and update on recent Supreme Court, Appellate Division and Court of Appeals decisions relating to §240, §241(6) and §200 with an eye on developing issues

Labor Law Claims, Coverage and Litigation
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HON. ELIZABETH A. GARRY
New York State Supreme Court
Appellate Division, Third Department

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New York Labor Law –
The "safe place to work" statutes

- Section 240(1) → The Scaffolding / "Gravity" law
- Section 241(6) → The Code provisions
- Section 200 → The common law codified

Labor Law Section 240(1) → *Scaffold / Gravity law*

WHO: All **contractors and owners and their agents**, except owners of one and two-family dwellings who contract for but do not direct or control the work, . . .

- recent case re owner liability (see Peck v Szwarcberg, 122 AD3d 1216 [3rd Dept 2015]);
- construction managers may be exempt, see Larkin v Sano-Rubin Construction Co., Inc, 124 AD3d 1162 (3rd Dept 2015);
- If construction is for purely commercial purpose, homeowner may lose the exemption (see Truppia v Busciglia, 74 AD3d 1624 [3rd Dept 2010], and VanHoesen v Dolen, 94 AD3d 1264 [3rd Dept 2012]).

WHEN: in the **erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure**

- Any building or structure
    - Defined as: "any production or piece of work artificially built up composed of parts joined together in some definite manner" (Lewis-Moors v Contel of NY, 78 NY2d 942 [1991]; also Lombardi v Stout, 80 NY2d 290 [1992]).

WHAT:

- **shall furnish or erect, or cause to be furnished or erected** for the performance of such labor,
- **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**."

PURPOSE: 240(1)

To **protect workers by placing the "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor"** (1969 NY Legis Ann, at 407), **instead of on workers, who 'are scarcely in a position to protect themselves from accident'"** (Zimmer v Chemung County Performing Arts, Inc., 65 NY2d 513, 520 [1985] (citations omitted)).

"[T]his statute is one for the protection of workmen from injury, and undoubtedly **is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed"** (Quigley v Thatcher, 207 NY 66, 69 [1912]).

APPLICATION: Labor Law Section 240(1)

240(1) is often referred to as imposing "strict lability"

Plaintiff Must Show: a statutory violation, causation, & injuries

- plaintiff does *not* have to prove fault or negligence

"Liability under Labor Law § 240(1) arises when ***a worker's injuries are 'the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential***'" (Scribner v State, 130 AD3d 1207, 1208 [3rd Dept 2015], quoting Runner v New York Stock Exch., Inc., 13 NY3d 599, 603 [2009]).

"To establish entitlement to recovery under the statute, a plaintiff must demonstrate that "a failure to provide the required protection at a construction site [ ] proximately caused the injury and that 'the injury sustained is the type of elevation-related hazard to which the statute applies'" (William Wright v Ellsworth Partners, LLC., --- N.Y.S.3d ----, 2016 WL 6106466 [3rd Dept 2016]; quoting Oakes v Wal–Mart Real Estate Bus. Trust, 99 AD3d 31, 34 [2012], quoting Wilinski v 334 E. 92nd Hous. Dev. Fund Corp., 18 NY3d 1, 7 [2011]; see Runner v New York Stock Exch., Inc., 13 NY3d 599, 603–604 [2009]; Ross v Curtis–Palmer Hydro–Elec. Co., 81 NY2d 494, 500–501 [1993]).

1. **Plaintiff must demonstrate he or she was engaged in the [1] "erection, demolition, repairing, altering, painting, cleaning or pointing of a [2] building or structure"**

NOTE: Routine maintenance and cleaning:

- 240(1) does not apply to routine maintenance and cleaning. In determining whether a task was a repair rather than routine maintenance, courts will consider such factors as "whether the work in question was occasioned by an isolated event as opposed to a recurring condition. . . whether the object being replaced was "a worn-out component" in something that was otherwise "operable"; and whether the device or component that was being fixed or replaced was intended to have a limited life span or to require periodic adjustment or replacement" (Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc., 118 AD3d 524, 527 [1st Dept 2014]) (internal citations omitted).
- "[D]elin[e]ating between routine maintenance and repairs is frequently a close, fact-driven issue . . . and [t]hat distinction depends upon whether the item being worked on was inoperable or malfunctioning prior to the commencement of the work . . . , and whether the work involved the replacement of components

damaged by normal wear and tear" (Cullen v AT&T, Inc., 140 A.D.3d 1588, 1593 [4th Dept 2016]) (internal quotations and citations omitted).

- Performing work ancillary to a project may be covered; a project may be considered as a whole (see Randall v Time Warner Cable, Inc., 81 AD3d 1149 [3rd Dept 2011]).

NOTE: Preparatory work:

- Suggestion that preparatory work necessary in order to begin qualifying "construction" that is covered by the statute is also protected (Makaj v Metro. Trans. Auth., 18 AD3d 625 [2nd Dept 2005]).
- Where "a person is investigating a malfunction, . . . efforts in furtherance of that investigation are protected activities under Labor Law § 240(1)" (Cullen v AT&T, Inc., 140 A.D.3d 1588, 1593 [4th Dept 2016] (Worker fell on his way back down an over 140 foot pole after he had climbed the pole to investigate a possible repair to the telephone pole)).
- It is necessary for the worker to already have been engaged to complete a protected task under 240(1) in order for an injury resulting from necessary preparatory work to receive protection. Thus, where a worker was injured by a falling tree branch in the course of cutting the tree as required prior to performing work upon a fence (a qualifying "structure" under 240(1)), the worker was not protected, because he had not yet been contracted to perform the work on the fence (Cicchetti v Tower Windsor Terrace, LLC, 128 A.D.3d 1262 [3rd Dept 2015]; (NB: this case is cited as negative authority following Randall, above).

2. Causation by the absence or inadequacy of a 240(1) safety device

A PHYSICAL device has been deemed required (see Miranda v Northstar Building Corp., 79 AD3d 42 [3rd Dept. 2010]).

3. Qualifying Injury or damages

"The kind of accident triggering section 240(1) coverage is one that will sustain the allegation that an ***adequate 'scaffold, hoist, stay, ladder or other protective device' would have 'shield[ed] the injured worker from harm directly flowing from the application of the force of gravity to an object or person***' (Salazar v Novalex Contracting Corp., 18 NY3d 134, 139 [2011], quoting Runner v New York Stock Exch., Inc., 13 NY3d 599, 604 [2009] (internal citations removed)).

What danger is a worker protected against? *Elevation-related hazards (gravity)*

- Rocovich v Consolidated Edison Co., 78 NY2d 509 [1991]

The two types of qualifying accidents under 240(1):

- Falling Workers
- Falling Objects

A. Falling Workers:

- Simple cases of trip and fall accidents do not qualify
- Sliding, without hitting the ground, may be enough. Where a worker slid down a roof, but did not fall off the roof, and was injured, the Court of Appeals held 240(1) applicable. The issue is not "whether the worker actually hit the ground," rather the issue is whether the worker was injured as a result of an "elevation-related" risk that arose from the absence or inadequacy of a safety device enumerated in the statute (Striegel v Hillcrest Heights Dev. Corp., 100 NY2d 974 [2003]).
- Where plaintiff falls and is injured, but never touches the ground, the fact that the plaintiff's equipment "'arrests his fall before he str[ikes] the ground' does not establish that it afforded proper protection inasmuch as it nonetheless 'proved inadequate to shield him from gravity-related injuries'" (Cullen v AT&T, Inc., 140 AD3d 1588, 1593 [4th Dept 2016]).
- Regarding tripping while alighting from a ladder cases, the Court of Appeals has noted that "[t]he extraordinary protections of Labor Law § 240(1) extend only to a narrow class of special hazards, and do not encompass any and all perils that may be connected in some tangential way with the effects of gravity." Moreover, "where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no section 240(1) liability exists" (Nieves v Five Boro Air Conditioning & Refrigeration Corp., 93 NY2d 914 [1999]) (citations and quotation marks omitted); see also Coleman v Crumb Rubber Manufacturers 92 AD3d 1129 [3rd Dept 2012]).
- The Court of Appeals has similarly found section 240(1) to be inapplicable to injuries related to alighting from a construction vehicle as "[a]s a matter of law, the risk of alighting from the construction vehicle [is] not an elevation-related risk which calls for any protective devices of the types listed" (Bond v York Hunter Construction, 95 NY2d 883 [2000]).

B. Falling Objects:

- 1st: A worker, engaged in work qualifying under 240(1), is injured by a falling object
- 2nd: accident must be elevation-related

Where plaintiffs, in separate cases, were injured by falling objects located above them, the Court of Appeals held that 240(1), as applied to falling objects, "applies where the falling of an object is related to a 'significant risk inherent in the relative elevation at which materials or loads must be positioned or secured[,]" thus, in order to qualify, the object must fall [1] while being hoisted or secured, and [2] the fall must be due to the absence or inadequacy of a safety device as enumerated under 240(1) (Narducci v Manhasset Bay Associates, 96 NY2d 259 [2001]).

- 3rd: cause of the object's fall was absence or inadequacy of an enumerated safety device

C. Runner – when the injury is not due to the fall of a worker or object

The Second Circuit certified the following questions to the Court of Appeals:

"I. Where a worker who is serving as a counter-weight on a makeshift pulley is dragged into the pulley mechanism after a heavy object on the other side of a pulley rapidly descends a small set of stairs, causing an injury to plaintiff's hand, is the injury (a) an 'elevation related injury,' and (b) directly caused by the effects of gravity, such that section 240(1) of New York's Labor Law applies?"

"II. If an injury stems from neither a falling worker nor a falling object that strikes a plaintiff, does liability exist under section 240(1) of New York's Labor Law?" (568 F.3d 383, 389 [2009]).

Response:

"[T]he single decisive question is ***whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential***."

"[T]he ***applicability of the statute*** in a falling object case such as [Runner] ***does not . . . depend upon whether the object has hit the worker***. . . . rather ***whether the harm flows directly from the application of the force of gravity to the object***."

- Runner v New York Stock Exchange, Inc., 13 NY3d 599 [2009]

D. What does a "physically sufficient elevation differential" mean?

In Oakes v Wal-Mart Real Estate Business Trust, the Third Department held that plaintiff was not entitled to recovery under 240(1) after his legs were crushed in a construction accident when an unsecured bar joist being carried by a forklift fell two feet, struck a vertically positioned truss, which fell onto the plaintiff and crushed him into another truss. Although the truss weight resulted in a significant force being generated as it fell due to the force of gravity, there was no elevation differential given that the truss and plaintiff were located at the same level and they were roughly the same height.

- "it is not enough that a plaintiff's injury flowed directly from the application of the force of gravity to an object or person, even where a device specified by the statute might have prevented the accident. Absent an elevation differential, "[t]he protections of Labor Law § 240(1) are not implicated simply because the injury is caused by the effects of gravity upon an object[.] . . . the fact that severe injury was caused by the force of gravity working on an object or person was insufficient to prove the elevation-related risk or elevation differential necessary to invoke "the exceptional protection" of the statute (Oakes v Wal-Mart Real Estate Business Trust, 99 A.D.3d 31, 36 [3rd Dept 2012] (internal citations and quotations omitted); Rocovich v Consolidated Edison Co., 78 NY2d 509, 514 [1991]).

The falling scaffold trio:

In Christiansen v Bonacio Constr., Inc., where the cross-bar component of a scaffold was the cause of plaintiff's injury, and that cross-bar was only two feet above

plaintiff's height, there was not a significant elevation differential to apply the protections of 240(1).

- "In order to determine whether a height differential is physically significant, we must consider "the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent" (129 AD3d 1156, 1158 [2015]).
- Thereafter in Hebbard v United Health Services, 135 AD3d 1150 (3rd Dept 2016), the 240(1) cause was similarly dismissed when an employee engaged in moving the stacked scaffolds was injured when "they toppled onto him". (Notably, in both of these cases, the 241 cause was upheld)

- In the most recent case involving stacked pallets falling onto a plaintiff, however, the Court held that there were insufficient facts to make a finding based upon the record – no indication of the height or weight of the scaffolds, or of plaintiff's height, or the manner in which he was struck. "[L]iability under Labor Law § 240(1) is not precluded simply because the falling object and the injured worker are located on the same level. Rather, 'the single decisive question is whether plaintiff's injuries were the direct consequence of [defendants'] failure to provide adequate protection against a risk arising from a ***physically significant elevation differential***'" (Wright v Ellsworth Partners, LLC., --- N.Y.S.3d ----, 2016 WL 6106466 [3rd Dept 2016], quoting Wilinski v 334 E. 92nd Hous. Dev. Fund Corp., 18 NY3d at 10, quoting Runner at 603).

"[W]here the injured worker and the falling object are located on the same level, liability under Labor Law § 240(1) is precluded as a matter of law where there is no height differential between the falling object and the worker" (Wright v Ellsworth Partners, LLC., supra).

There is no "bright-line test or automatic minimum/maximum[,]" de minimis falls involving falls "at or very near ground level are insufficient" whereas "otherwise qualifying falls of several feet have been determined to be sufficiently elevated so as to fit the within the intended protective scope[.]" Where a worker fell off of a wet boulder, at a height of 15 to 16 inches, while operating a jackhammer in order to break the boulder into pieces, that "middle ground" elevation was sufficient as his injury was gravity-related and "represented the type of 'special hazard' that arises when a work site is itself elevated" (Amo v Little Rapids Corp., 301 AD2d 698 [3rd Dept 2003]; review of cases set forth in Kropp v Town of Shandaken, 91 AD3d 1087 (3rd Dept 2012).

240(1) Defenses

A. The Recalcitrant Worker Defense

- A defendant may assert this defense where a worker violates, refuses or fails to adhere to safety instructions he or she was given.

- Cahill v Triborough Bridge and Tunnel Authority, 4 NY3d 35 [2004]
    - Plaintiff was a worker on the repair job of the Triborough Bridge. He had been instructed weeks prior to his accident resulting in his injury to use a man lift or an affixed safety line and harness when climbing. Plaintiff was injured when he fell, and had not used either the man lift or the safety harness as he had been instructed.
    - The issue? Was the instruction to use the safety devices too temporally removed to classify plaintiff as a recalcitrant worker, rather than a simply careless/forgetful worker?
    - The Court of Appeals held that the recalcitrant worker defense could, though not necessarily does, apply to a worker who fails to adhere to safety instructions, even where those instructions are given weeks before the subject accident occurs.
        - "We decide in this case that, where an employer had made available adequate safety devices and an employee has been instructed to use them, the employee may not recover under Labor law § 240(1) for injuries cause solely by his violation of those instructions, even though the instructions were given several weeks before the accident occurred."

B. The Sole Proximate Cause Defense

- § 240(1) requires owners and contractors to provide "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices" as is necessary to complete the work, AND, such safety devices "shall be so constructed, placed and operated as to give proper protection to a person so employed."
- Blake v Neighborhood Housing Services of New York City, Inc., 1 NY3d 280 [2003].
    - In Blake, the plaintiff was injured while working alone renovating a home. He was injured when he fell from a ladder, apparently because plaintiff did not properly secure the extension ladder such that it began to close once he climbed it.
    - Holding: COA unanimously affirmed lower courts judgment in favor of the defendant. "The terms [of 240(1)] may have given rise to the mistaken belief that a fall from a scaffold or ladder, in and of itself, results in an award of damages to the injured party. That is not the law, and we have never held or suggested otherwise."
    - "Even where a worker is not 'recalcitrant,' we have held that there can be no liability under section 240(1) when there is no violation and the worker's actions (here, his negligence) are the 'sole proximate cause' of the accident. Extending the statute to impose liability in such a case would be inconsistent with statutory goals since the accident was not caused by the absence of (or defect in) any safety device, or in the way the safety device was placed."

C. Recalcitrant Worker as the Sole Proximate Cause?

In drawing a connection between Cahill and Blake, the Court of Appeals has explained that a *recalcitrant worker* who is injured after disregarding safety instructions, must also be the *sole proximate cause* of her injury, i.e., but for the worker's failure to adhere to safety instructions, he or she would not have been injured.

Cahill v Triborough Bridge and Tunnel Authority, 4 NY3d 35 [2004]:

"The controlling question, however, is not whether plaintiff was "recalcitrant," but **whether a jury could have found that his own conduct**, rather than any violation of Labor Law § 240(1), **was the sole proximate cause of his accident**. We noted in Blake that "[e]ven when a worker is not 'recalcitrant' ... there can be no liability under section 240(1) when there is no violation and the worker's actions (here, his negligence) are the 'sole proximate cause' of the accident" . . . Here, **a jury could have found that plaintiff had adequate safety devices available**; that he knew both that they were available and that **he was expected to use them**; that **he chose for no good reason not to do so**; and that **had he not made that choice he would not have been injured**. Those factual findings would lead to the conclusion that defendant has no liability under Labor Law § 240(1)[.]"

By way of contrast, the Court of Appeals, in Barreto v. Metropolitan Transp. Authority, 25 NY3d 426 (2015), explained a further distinction in the connection between the "recalcitrant worker" and the "sole proximate cause" defenses.

- Plaintiff, a worker on a construction site, was instructed as to proper safety steps to cover and uncover a manhole. He failed to do so and was injured after falling into the manhole. Interestingly, there was insufficient lighting for the worker to be able to see that the manhole was uncovered.
- Worker was a recalcitrant worker because he failed to adhere to safety procedures. However, the Court of Appeals reasoned that a jury could conclude he was not the sole proximate cause of his injuries because the lack of lighting.
- The plaintiff was allowed to recover under § 240(1).

D. Some final thoughts on this subset:

There are certainly limits – a failure to provide devices should not be construed as a worker's choice not to use them (see Johnson v Small Mall LLC, 79 AD3d 1240 [3rd Dept 2010]). Nor does the provision of one device, i.e, a lanyard, necessarily excuse another faulty device, i.e, a non-functional gate on a bucket lift, see Grove v Cornell University, 75 AD3d 718 [3rd Dept 2010], aff'd as modified 17 NY3d 875 [2011]).

As with all Labor Law claims, these inquiries are highly fact specific (see DeSheilds v Carey, 69 AD3d 1191 [3rd Dept 2010]).

Also: Must be an employee, i.e, a worker hired to perform the task – an owner is NOT protected by this statute (see Hill v Country Club Acres, Inc., 134 AD3d 1267 [3rd Dept. 2015]).

240(1) Recent Updates: Qualifying Tasks

240(1) applies to the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure."

Saint v Syracuse Supply Co., 25 NY3d 117 [April 2015]

- Highlights the nuanced difference between merely aesthetic, "cosmetic" changes (see Munoz v DJZ Realty, LLC, 5 NY3d 747 [2005]) and physical alterations which constitute construction.
- The most relevant facts are as follows. While engaged in work with a three-man crew on a billboard, plaintiff fell after a gust of wind caused him to be hit in the chest by the vinyl advertisement they were trying to fix to the structure.
- The key distinction in this case is that the task was not merely aesthetic, and instead required to addition of physical structures, albeit non-permanent structures. The billboard was not simply covered with a new vinyl advertisement (mere aesthetic), rather the billboard structure required physical changes, namely the addition of plywood and vinyl, in order to secure the new advertisement in place.
- Most important aspect of the ruling in Saint is that the Court of Appeals reasoned that 240(1) does not "impose or even mention a requirement that an alteration be of a permanent nature" (Saint v Syracuse Supply Co., 25 NY3d at 128).

The Appellate Divisions' application of Saint:

- ***Distinguished by:** Royce v DIG EH Hotels, LLC, 139 AD3d 567 [1st Dept 2016]
    - Whereas Saint involved the physical, albeit temporary, alteration of the billboard structure, in Royce the injured plaintiff was merely engaged in the "set-up" and "positioning" of staging and lighting equipment in a hotel ballroom such that the actual structure of the ballroom was not altered in any way.
- Cullen v AT&T, Inc., 140 AD3d 1588 [4th Dept 2016]

240(1) Recent Updates: The Safety Device

Fabrizi v 1095 Ave. of the Ams., L.L.C., 22 NY3d 658 [Feb 2014]

- Plaintiff is a subcontractor-electrician. His task was to relocate a “pencil box” (this is a panel provides access to electrical wiring) that was located in between two pieces of conduit pipe; the two conduit pipes were located on either side of the pencil box (before it was removed) and were attached to the building's main structure by a "compression coupling." After having removed the pencil box, the

metal conduit pipe that had been located above the pencil box fell on plaintiff and injured him. Thereafter, plaintiff sued the general contractor and building owner for violation of the Scaffold Act, § 240 (1) requiring that owners and contractors "furnish or erect … 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." Both parties moved for summary judgment. Plaintiff argued that a better coupling, not the "compression" coupling used, would have prevented the box from falling.

- The trial court agreed and granted plaintiff summary judgment on liability. On appeal, the Appellate Division ruled that plaintiff failed to demonstrate, as a matter of law, that the coupling was the proximate cause of the accident.
- The Court of Appeals ruled that defendants (not plaintiffs) were entitled to summary judgment because the coupling was not a safety device within the meaning of § 240.
- The Court of Appeals held that in order for plaintiff to prevail in this 240(1) action, must establish [1] a hazard contemplated by the statute and [2] "the failure to use or the inadequacy of, a safety device of the kind enumerated therein." (Narducci v Manhasset Bay Associates, 96 NY2d 259, 267 [2001]).
    - In its analysis, the court determined that "**[t]the only function of the coupling was to keep the conduit together as part of the conduit/pencil box assembly**. The coupling had been **installed a week before the incident** and had been serving its intended purpose until a change order was issued and plaintiff dismantled the conduit/pencil box assembly…. **It cannot be said that the coupling was meant to function as a safety device** in the same manner **as those devices enumerated in section 240(1)**." Fabrizi v 1095 Ave. of Americas, L.L.C., 22 NY3d 658 [2014]).
    - FIRST: Does the device constitute a safety device covered under 240(1)?
    - SECOND: Was the device meant to act as a safety device, or was it intended for some purpose other than to "function as a safety device in the same manner as those devices enumerated in section 240(1)[?]"
- Note: The *dissent* highlights the Court of Appeals' change in approach to 240(1) application regarding safety devices: "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential"
    - Fabrizi changes this -- Now it must be shown not only that the safety device used qualifies as such under 240(1), but also that the *purpose* of the device was to function as a safety device.

The Appellate Divisions' application of Fabrizi:

- Pazmino v 41-50 78th Street Corp., 139 AD3d 1029 [2nd Dept 2016]
- Sarata v Metropolitan Transp. Authority, 134 AD3d 1089 [2nd Dept 2015]
- Guallpa v Leon D. DeMatteis Const. Corp., 121 AD3d 416 [1st Dept 2014]
- Seales v Trident Structural Corp., 142 AD3d 1153 [2nd Dept 2016]
- Christiansen v Bonacio Const., Inc., 129 AD3d 1156 [3rd Dept 2015]
- Floyd v New York State Thruway Authority, 125 AD3d 1456 [4th Dept 2015]

- Miles v Buffalo State Alumni Ass'n, Inc., 121 AD3d 1573 [4th Dept 2014]
- Treile v Brooklyn Tillary, LLC, 120 AD3d 1335 [2nd Dept 2014]
- Vatavuk v Genting New York, LLC, 142 AD3d 989 [2nd Dept 2016]
- Zamora v 42 Carmine St. Associates, LLC, 131 AD3d 531 [2nd Dept 2015]

240(1) Recent Updates: Causation – Nicometi clarifies Nieves and Melber

Nicometi v Vineyards of Fredonia, LLC, 25 NY3d 90 (April 2015)

- Plaintiff wore stilts while installing insulation in the ceiling of a building, and was injured when he slipped on ice. It was undisputed that neither Plaintiff nor the supervisor addressed the ice present on the floor. It was undisputed that the stilts had *not* failed in any way (did not break, bend or were otherwise faulty).
- Defendants argued that § 240(1) did not protect plaintiff because his injuries were caused by ice, not an elevation-related hazard.

In Nieves the Court of Appeals held that "***where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no section 240(1) liability exists***" (Nieves v Five Boro Air Conditioning & Refrigeration Corp., 93 NY2d 914 [1999]) (citations and quotation marks omitted).

In Melber, where a worker using stilts fell when he tripped on electrical conduit on the floor of his work space, the Court of Appeals held that although the electrical wiring was a "hazard in the workplace against which employees should be protected," such wiring is not a "special" elevation-related hazard contemplated by § 240(1) (Melber v 6333 Main St., 91 NY2d 759 [1998]).

In Nicometi, the Court of Appeals clarifies the holdings in Nieves and Melber:

- Causation requires showing that the resulting injury was the kind ***foreseeable***, and **the safety device would have and was meant to** prevent that kind of injury.
- "[T]he relevant and proper inquiry is whether the hazard plaintiff encountered on the stilts was a separate hazard wholly unrelated to the hazard which brought about [the] need [for a safety device] in the first instance"
- Liability arises "only where the plaintiff's injuries are the "direct consequence" of an elevation-related risk[,] not a separate and ordinary tripping or slipping hazard."
- The Court reasoned it would be improper to conclude otherwise, as requiring a safety device to protect workers from everyday workplace hazards, not elevation-hazards, would be inconsistent with the purpose of the statute.

In applying these points to the facts in Nicometi, plaintiff slipped on ice, an "ordinary danger" unrelated to his task. Thus, although falling was a safety concern, and the stilts were a proper 240(1) safety device and were meant to prevent falls related

to completion of plaintiff's task, the stilts were not meant to prevent an injury caused by slipping on ice and the protections of 240(1) are inapplicable.

The Appellate Divisions' application of Nicometi:

- Wormer v Watkins Glen Properties, LLC, 140 AD3d 1378 [3rd Dept 2016]
- Christiansen v Bonacio Const., Inc., 129 AD3d 1156 [3rd Dept 2015]
- Doto v Astoria Energy II, LLC, 129 AD3d 660 [2nd Dept 2015]
- Cullen v AT&T, Inc., 140 AD3d 1588 [4th Dept 2016]
- Almodovar v Port Authority of New York and New Jersey, 138 AD3d 571 [1st Dept 2016]
- Zamora v 42 Carmine St. Associates, LLC, 131 AD3d 531 [2nd Dept 2015]
- Torres v City of New York, 127 AD3d 1163 [2nd Dept 2015]

Section 241(6) – Construction, Excavation, & Demolition Work

Section 241(6) – Construction, Excavation, & Demolition Work

All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, **when constructing or demolishing buildings or doing any excavating** in connection therewith, **shall comply** with the following requirements:

(6) ***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.

To prevail under 241(6), a plaintiff must demonstrate (see Scribner v State, 130 AD3d 1207 [3rd Dept 2015]):

- "**the existence of an injury sustained in an area where "construction, excavation or demolition work is being performed**",
    - In determining what constitutes **"construction, excavation or demolition work"**, the code which is argued to have been violated, thus triggering 241(6) protections, must be consulted (see e.g. Saint v Syracuse Supply Co., 25 NY3d 117 [April 2015], (the Industrial Code was consulted to determine whether plaintiff's task constituted "construction" such that the protections of 241(6) could be applied)).

- "**the violation of a regulation setting forth a specific standard of conduct applicable to the working conditions which existed at the time of the injury**" and
- **that the violation was the proximate cause of the injury**."

"In order to establish a section 214(6) claim, plaintiff 'must show the applicability of a specific provision of the Industrial Code to the relevant work, a violation of the regulation, and that such violation constituted causally related negligence'" (Christiansen v Bonacio Const., Inc., 129 AD3d 1156, 1159 [3rd Dept 2015]).

The interpretation of regulations made pursuant to application of Section 241 should not run counter to or undermine the legislative intent to ensure worker safety provided for under Section 241(6) (See Morris v Pavarini Const., 22 NY3d 668 [2014]).

"[T]he absolute liability imposed upon owners and general contractors pursuant to Labor Law ... § 241(6) does not apply to prime contractors having no authority to supervise or control the work being performed at the time of the injury" (Trombley v DLC Elec., LLC, 134 AD3d 1343, 1343 [3rd Dept 2015]; see Russin v Louis N. Picciano & Son, 54 NY2d 311 [1981]).

A successful 241(6) cause of action "require[s] the worker to ***identify the specific rule or regulation*** promulgated by the Commissioner of Labor that the contractor or owner allegedly ***violated*** (see Ross v Curtis–Palmer Hydro–Elec. Co., 81 NY2d 494, 501–502 [1993]; *see also* Labor Law § 241[6]). The ***rule or regulation alleged to have been violated must be a "specific" and "positive command" rather than a mere reiteration of a common-law standard of care*** that would do little more than incorporate 'the ordinary tort duty of care into the Commissioner's regulations'" (Gammons v City of New York, 24 NY3d 562, 576 [2014] (internal citation omitted).

Where the underlying regulations alleged to have been violated are deemed inapplicable, the 241(6) claim must be dismissed (Card v Cornell University, 117 AD3d 1225, 1228 [3rd Dept 2014]).

"Elements of a viable Labor Law § 241(6) cause of action include "the violation of a regulation setting forth a specific standard of conduct applicable to the working conditions which existed at the time of the injury and that the violation was the proximate cause of the injury" (Scribner v State of New York, 130 AD3d 1207 [2015] [internal quotation marks and citation omitted]; see Copp v City of Elmira, 31 AD3d 899, 899 [2006]).

Therefore, "***[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace***" (Hebbard v United Health Services Hospitals, Inc., 135 AD3d 1150, 1151 [3rd Dept 2016]; St. Louis v Town of N. Elba, 16 NY3d 411, 416 [2011] [internal citation omitted]).

Section 200
General duty to protect the health and safety of employees; enforcement

(1) **All places** to which this chapter applies **shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places**.
All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section.

Codification of the common law duty: requires showing of supervisory control and actual or constructive knowledge of the unsafe manner of the performance of the work (see Card v Cornell University, 117 AD3d 1225 (3rd Dept 2015); Larosae v American Pumping Inc., 73 AD3d 1270 [3rd Dept 2010]).