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Expert Analysis

Trends on Duty and Liability Under State Labor Law

New York State's Labor Law poses challenges to both plaintiffs and defendants. This article will explore trends of Labor Law §§240(1) and 241(6) and certain differences in interpretation of the Labor Law statutes by the Appellate Division departments.

Labor Law §240(1) imposes a non-delegable duty on owners and contractors to "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 [construction workers employed on the premises]."

In order to establish a violation of Labor Law §240(1) the claimant must "show that the statute was violated and that the violation proximately caused his injury."[1]

The legislative purpose behind this statute was to recognize, and thereby protect workers from, the exceptionally dangerous conditions presented by elevation differentials for workers under unique gravity-related hazards presented by the stated safety devices.[2] "Manifestly, a violation of the statute cannot 'establish liability if the statute is intended to protect against a particular hazard, and a hazard of a different kind is the occasion of the injury.'"[3] "Not every worker who falls at a construction site…gives rise to the extraordinary protections of Labor Law §240(1)."[4] Moreover, since a defendant is liable only for the "normal and foreseeable consequences" of its acts, a worker who is caused to fall or is injured by the application of an external force is entitled to the protection of the statute only if the application of that force was foreseeable.[5]

By **Nelson E. Canter**

In *Blake v. Neighborhood Hous. Servs. of New York City Inc.*,[6] the Court of Appeals held that liability under Labor Law §240(1) is contingent on a statutory violation and proximate cause. Thus, the plaintiff has an obligation to prove that the defendant violated the statute and said violation was a contributing cause to his fall.[7] Further, the Court of Appeals held that summary judgment may be granted where the record conclusively establishes that no Labor Law §240(1) violation was shown by plaintiff to have been a proximate cause of his accident.[8]

A worker who is caused to fall or is injured by the application of an external force is entitled to the protection of the statute only if the application of that force was foreseeable.

In *Scharff v. Sachem Central School District at Holbrook*,[9] a worker was allegedly injured when he slipped on the surface of the roof on which he was working. The plaintiff's deposition testimony indicated that he fell onto the roof but did not fall from the roof. Defendants moved for summary judgment on plaintiff's Labor Law §240(1) claim. The Court found:

> [T]his section of the Labor Law does not "encompass any and all perils that may be connected in some tangential way with the effects of gravity." Merely because "a worker is injured while working above ground does not ipso facto mean that the injury resulted from an elevation-related risk contemplated by Section 240(1) of the Labor Law."[10]

The Court held that the defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the worker's injury was not a result of elevation-related risk.

In *Moutray v. Baron*,[11] the plaintiff, an employee of masonry subcontractor, was injured when he lowered the platform of a scaffold, which could be electronically moved by means of a remote control device, onto his right foot. The court held that the facts did not establish plaintiff's causes of action under Labor Law §§240(1), 241(6) and 200. The court found that "plaintiff was not injured in a gravity-related incident…[and] the harm caused by these circumstances is outside the protective shield of Labor Law §240(1)."[12]

Labor Law §240(1) cannot serve as a predicate for plaintiff's negligence claim because his injuries did not result from an "elevation-related risk" as discussed in *Scharff*. While there is no dispute that plaintiff was working at an elevated level when he sustained an injury, that fact alone is insufficient to establish liability under Labor Law §240(1)

Codification of Duty

Labor Law §200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work.[13] It applies to owners, contractors, or their agents who had constructive or actual knowledge of the dangerous condition.[14] However, if the claim arises from a subcontractor's methods, "recovery against the owner or general contractor cannot be had unless it is shown that the party…exercised some supervisory control" over the work at the site.[15] Additionally, an owner does not have a duty to protect a worker from risks that are "readily observable by the reasonable use of the senses, taking into account of the age, intelligence and experience of the worker."[16]

In *Zavesky v. Decato*,[17] the appellant homeowners hired plaintiff to assemble a modular home. Plaintiff was injured when he climbed onto the delivery truck to unload the building materials and

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fell, sustaining personal injuries. Plaintiff claimed his fall was a result of unevenly bundled lumber. The Court held the following:

> Labor Law §200, the common-law duty owed by a landowner to laborers will not give rise to liability unless the property owner had constructive or actual knowledge of the dangerous condition. Moreover, an owner's duty to provide a safe workplace will not extend to injuries arising from a defect in the contractor's own methods unless the owner exercised some supervisory control over the operation.[18]

Similar to the case at bar, in *Zavesky*, the defendants submitted evidence establishing that they had no actual or constructive notice of the dangerous manner in which the delivery truck was allegedly loaded and that they exercised no supervisory control over the unloading of the truck. Therefore, the Second Department held that the defendants were entitled to summary judgment on plaintiff's Labor Law §200 claim. Clearly, the alleged condition must have been visible and apparent and it must have existed for, or recurred over a sufficient length of time prior to the accident to have permitted defendant to discover and remedy it.[19]

The duty imposed by §200 is predicated upon a contractual or actual authority to control the activity bringing about the injury. Implicit in the statutory imposition of the duty to provide a safe place to work is the prerequisite that the party charged with such responsibility have the concomitant authority and degree of control over the activity which produces the injury to enable it to take the action necessary to correct or avoid an unsafe condition.[20] The plaintiff must show that defendants "controlled the method and means of the work or exercised the requisite supervisory control over the operation."[21]

New York courts have held that a defendant is able to establish prima facie entitlement to judgment as a matter of law in regard to Labor Law §200 claims by tendering affidavits asserting that they did not supply any materials or equipment to the plaintiff or to the plaintiff's employer, or that they did not have the authority to supervise or control the performance of the work.[22] However, New York courts have made specific rulings regarding what constitutes a right "to control" the work under the statute. Mere retention of inspection privileges is not control.[23] Liability is not found based on a defendant's ability to stop work alone.[24]

Similarly, "the general duty to supervise the work and ensure compliance with safety regulations does not amount to supervision and control of the work site such that the supervisory entity would be liable for the negligence of the contractor who performs the day-to-day operations."[25] Furthermore, language obligating a defendant to "supervise" the work and comply with legal standards is not sufficient to hold a general contractor liable for injuries to a subcontrator's employees.[26]

Safety Provisions

In order to state a cause of action under Labor Law §241(6), a plaintiff must set forth the relevant safety provisions of the New York State Industrial Code which were allegedly violated, and demonstrate that his or her injuries were proximately caused thereby.[27] "In addition, the provision must be applicable to the facts of the case."[28] An owner or contractor can only be held liable under the Labor Law if the particular Industrial Code provision sets forth a specific standard of conduct rather than general safety standard. *Trbaci v. AJS Const. Project Management Inc.*, Slip Copy, 2009 WL 224698 (Kings Co. Sup. Ct. January 16, 2009); R*oss v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 505 (1993).

An owner or general contractor may, of course, raise any valid defense to the imposition of vicarious liability under section 241(6), including contributory and comparative negligence.[29] Even so, OSHA standards have been deemed insufficient as a matter of law to sustain a claim under §241(6).[30]

1. *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 39, 790 N.Y.S.2d 74 (2004). See also *Cody v. State of New York*, 52 A.D.3d 930 (2008); *Pearl v. Sam Greco Constr. Inc.,* 31 A.D.3d 996, 997, 819 N.Y.S.2d 193 (3d Dept. 2006).

2. See *Rocovich v. Consolidated Edison*, 78 N.Y.2d 509, 513, 577 N.Y.S.2d 219 (1991); *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 500-501, 601 N.Y.S.2d 49 (1991); *Narducci v. Manhasset Bay Associates*, 96 N.Y.2d 259, 727 N.Y.S.2d 37 (2001).

3. *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513 (1991) (internal citation omitted). See also *Nieves v. Five Boro A.C. & Refrig. Corp.*, 93 N.Y.2d 914, 916, 690 N.Y.S.2d 852 (1999) ("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").

4. *Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259, 267, 727 N.Y.S.2d 37 (2001).

5. See *Gordon v. Eastern Ry. Supply*, 82 N.Y.2d 555, 562, 606 N.Y.S.2d 127, (1993); See *Buckley v. Columbia Grammar & Preparatory*, 44 A.D.3d 263, 841 N.Y.S.2d 249. (1st Dept. 2007).

6. 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003).

7. Blake, 1 N.Y.3d at 287.

8. Blake, 1 N.Y.3d at 289.

9. 53 A.D.3d 538, 861 N.Y.S.2d 406 (2d Dept. 2008),

10. *Scharff* 53 A.D.3d 538 (internal citations omitted).

11. 244 A.D.2d 618, 663 N.Y.S.2d 926 (3d Dept. 1997).

12. *Moutray*, 244 A.D.2d at 619.

13. *Ortega v. Puccia*, 57 A.D.3d 54, 866 N.Y.S.2d 323 (2d Dept. 2008); *Reinoso v. Ornstein Layton Mgt.*, 19 A.D.3d 678, 679, 798 N.Y.S.2d 95 (2d Dept. 2005).

14. See *McGuiness v. Contemporary Interiors*, 205 A.D.2d 739, 613 N.Y.S.2d 697 (2d Dept. 1994); *Beckford v. Canessa*, 205 A.D.2d 655, 613 N.Y.S.2d 659 (2d Dept. 1994); *Leon v. Peppe Realty Corp.*, 190 A.D.2d 400, 596 N.Y.S.2d 380 (1st Dept. 1993).

15. *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 505 (1993) (citing *Lombardi v. Stout*, 80 N.Y.2d 290, 590 N.Y.S.2d 55).

16. *Rosenblatt v. Wagman*, 50 A.D.3d 1536, 867 N.Y.S.2d 780 (3d Dept. 2008).

17. 223 A.D.2d 642, 636 N.Y.S.2d 419 (2nd Dept. 1996).

18. *Zavesky*, 223 A.D.2d at 643 (internal citations omitted).

19. See *Pirillo v. Longwood Associates Inc.*, 179 A.D.2d 744, 745, 579 N.Y.S.2d 120 (2d Dept. 1991); *Bronx County Publ Adm'r. v. New York Hous. Auth.*, 182 A.D.2d 517, 582 N.Y.S.2d 415 (1st Dept. 1992).

20. *Reynolds v. John T. Brady & Co.*, 38 A.D.2d 746, 329 N.Y.S.2d 624 (2d Dept. 1972).

21. *Duarte v. State*, 57 A.D.3d 715, 869 N.Y.S.2d 602, 603 (2d Dept. 2008).

22. See *Chowdhury v. Rodriguez*, 867 N.Y.S.2d 123, 867 N.Y.S.2d 123 (2d Dept. 2008); *Venezia v. State of New York*, 57 A.D.3d 522, 868 N.Y.S.2d 710 (2d Dept. 2008).

23. *Ramos v. State*, 34 A.D.2d 1056, 312 N.Y.S.2d 185 (3d Dept. 1970).

24. See, e.g., *Warnitz v. Liro Group, Ltd.*, 254 A.D.2d 411, 678 N.Y.S.2d 910 (2d Dept. 1998).

25. *Warnitz*, 254 A.D.2d 411 (internal citations omitted).

26. See *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 505 (1993).

27. *Kaleta v. New York State Elec. & Gas Corp.*, 41 A.D.3d 1257, 837 N.Y.S.2d 824 (4th Dept. 2007); *Rivera v. Santos*, 35 A.D.3d 700, 702, 827 N.Y.S.2d 222 (2d Dept 2006); *Plass v. Solotoff*, 5 A.D.3d 365, 357, 773 N.Y.S.2d 84 (2d Dept. 2004); *Ferrero v. Best Modular Homes Inc.*, 33 A.D.3d 847, 851, 823 N.Y.S.2d 477 (2d Dept. 2006).

28. See, *Singleton v. Citnalta Constr. Corp.*, 291 A.D.2d 393, 394, 737 N.Y.S.2d 630 (2d Dept. 2002).

29. See *Long v. Forest-Fehlhaber*, 55 N.Y.2d 154, at 161 (1982); *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 502, n. 4, 601 N.Y.S.2d 49 (1993).

30. See *Pelleschi v. City of Rochester*, 198 A.D.2d 762 ("A violation of OSHA regulations by an employer does not impose a nondelegable duty on an owner or general contractor under Labor Law §241(6)"); *Schiulaz v. Arnell Const Corp.*, 261 A.D.2d 247 (1st Dept. 1999); *Khan v. Bangla Motor and Body Shop Inc.*, 27 A.D.3d 526, 529, 813 N.Y.S.2d 126, 129 (2d Dept. 2006).