New York Labor Law 200, 240, and 241

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I. Executive Summary

There are currently three Labor Law statutes in New York, Sections 200, 240, and 241. It is unlikely that any of the sections will be modified in the future despite the current "Crisis in New York Insurance" which is driving up the cost of insurance between 8% - 11% of hard costs – a 250% increase in just one year.

Crystal & Company has created a summary of the key sections of the New York Labor Law that will impact project owners, construction companies, contractors and property owners with regard to premiums and liability. Section 200 requires construction employers to provide a safe work environment; Section 240 relates to accidents from heights; and Section 241 outlines the requirements for how areas of construction should be controlled.

Currently, a new law has been introduced in the New York Assembly which would modify the labor laws to allow for the defense of contributory negligence. The legislation only has seven co-sponsors and unless the Governor backs this legislation, the bill will never make it to a floor vote. If the bill does make it to a floor vote, political observers are predicting that it will be in late 2014.

Background

There have been three (3) construction deaths in New York in the first quarter of 2013.

According to the Department of Buildings, there were 157 construction-related accidents in 2010 compared to 218 construction accidents in 2009. Fatal construction accidents were down 78% in 2010 with only four of the 157 accidents resulting in fatalities. Injuries were down 31% with 165 reported injuries in 2010 compared to 241 injuries in 2009.

The Department of Buildings attributes the decline in construction injuries and fatalities to increased regulation, a heightened awareness of safety, and a 7% decline in application for new construction permits.

Because of the dangers within the construction industry, the State Legislature created a specific set of labor laws to protect workers that construct, demolish, renovate, excavate, or repair buildings or other structures. The various laws are to reduce the number and severity of construction site accidents in New York. The other purposes of the laws are to ensure that construction workers, who have been injured while on the job, receive fair compensation for their injuries and losses.

Summary of Law Labor Laws

Section 200 is very broad in scope. This section states that all construction employers must provide a reasonably safe environment for all of their employees as well as anyone else legally on their work site. Employers are required to properly maintain, guard, light, and operate all machinery and other equipment on the construction site.

Section 240 is known as the Scaffolding Law. This is the law that involves accidents from heights, such as falls from ladders or objects falling onto workers. Height has been defined by the courts as the last rung in a ladder, or about ten inches. Labor Law 240 states that the responsibility of keeping workers safe when working from significant heights should be placed on construction companies, property owners, and contractors and not the workers. Owners and contractors should provide appropriate safety measures and guards to all workers (examples include: safety harnesses, lanyards, barricades, fencing, netting, and safety railings). The law also states that scaffolding must be able to hold four times the amount of weight it is expected to bear.

Court rulings of fall related accidents are broadly defined and effect applicability of the law. The result is litigation against those hiring, supervising or subcontracting the injured workers for work performed on such things as ladders, scaffolds, roofs, stairs, open platforms and even stools. Individuals that are injured from falling objects such as tools, materials, debris being raised, lowered, or secured, are subject to the law. The courts have now expanded the interpretation to include injuries resulting from falling objects whose base is on the same level as the injured worker (for example, injuries resulting from a box, crate, equipment tipping over and striking a worker).

The interpretation of Labor Law 240 has been extremely liberal to the benefit of the worker. This has put all Labor Law 240 claims in the category of strict liability. Insurance companies can only mitigate the claim payment, not deny the claim, because of contributory negligence of the worker.

Section 241 specifically outlines requirements that relate to how areas of construction or demolition should be "constructed, shored, equipped, guarded, arranged, operated, and conducted". This "safe place to work" law has requirements designed to keep workers safe from tripping accidents, drowning, water accidents, slipping hazards, chemical hazards, and air contamination hazards on the job site.

Measures to Limit/Reduce Liability

As project owners, property owners, tenants and contractors are all impacted by New York's Labor Laws, there are a few best practices which may limit and/or reduce their exposure. These are:

Assure Work Site Safety:

- That ladders, scaffolding or other means of access to the work site/area are properly constructed, in good condition, maintained and operated properly
- Verify workers are adequately and properly trained to use the tools and equipment in a safe manner

Hire Contractor with Good Safety Performance Measurements:

- Review their qualifications
- Obtain and check references
- Verify licenses (Call 311 – NYC Only)
- Avoid contractors with less than two (2) years of business history

- Obtain the contractor's workers' compensation experience modification rate (an EMR greater than 1.0 may indicate an unsafe contractor as well as a frequency of claims)
- Verify OSHA citation history (OSHA.gov search page)

There is additional help to the contractor that is not familiar with the labor laws. There are the OSHA standards that deal with work at heights, falling objects, ladders, scaffolding, walking surfaces, material storage etc. However, that is just not enough. Therefore, there needs to be a:

- Written contract with indemnification language
- Criteria for hiring contractors
- Site specific safety plans and protocol with contractor responsibilities and accountability
- Aggressive claims management per claim
- Contractors with an experience modification rate factor greater than one (1) are potentially a contractor at risk

Use Own Written Contracts Developed by Legal Counsel:

The contract should contain language for:

- An indemnification clause/hold harmless provision to require subcontractors to indemnify the insured for losses arising out of their work. Also, require the subcontractor to obtain insurance naming the contractor, property owner, etc. as an additional insured on the subcontractor's policy including a broad form endorsement.
- Contractor to maintain in force insurance coverage of $2,000,000 per occurrence, $2,000,000 general aggregate, and $2,000,000 completed operations in general liability coverage during the project. Additionally, it is recommended that there be at least $5,000,000 in excess liability in place.
- All insurances maintained in a like and kind manner for a period of up to three (3) years after the project is completed.
- Contractor will follow all applicable federal, state, local and NYC safety requirements.

A site specific safety plan that includes:

- A Site Safety Manager
- Competent workers for erecting and dismantling scaffolding
- Documented education and training to workers working on scaffolding
- Documented education and training to workers erecting and dismantling scaffolding
- Documented education and training to workers using ladders
- Fall Prevention Plan specific to the work performed (Job Hazard Analysis/Means and Method Statement)
- Falling Object plan/policy and procedure to control the related hazard (example, netting, overhead protection, signage, storage of materials and supplies from the edge of the building, roof, floor and wall)

- Daily documented site inspection of all areas where workers are working at heights and walking surface (housekeeping)
- Document safety meetings with individual sign in sheet.

Root cause accident investigations with documented corrective actions:

- Preserve equipment/devices in a safe place and establish chain of custody
- Take photos with point of reference/dimensions
- Obtain statements, agreements, contracts, insurance policies and certifications, record any post accident test
- Safety Violation policy and procedure that documents safety violations to workers with corrective actions taken, specifically for actions and conditions that would apply to Labor Law 200, 240 and 241.
- Aggressive claims management

Conclusion

The key practices to limiting the labor law liability are:

- Understanding the labor law
- Having good contract language between all parties
- Hiring a good contractor and having pre-qualification criteria to work on a BlackRock construction project
- Establishing site specific safety plans for work at heights, falling objects etc.
- Maintain documentation for safety meetings, training sessions, accident investigations safety violations, safety inspections with corrective actions
- Thorough documented root cause accident investigations
- A well educated and trained workforce

Resources:

- Crystal and Company, Inc. – Risk Control, Claims &, Brokerage
- Chartis Insurance, Inc. – Construction Risk Management
- NYC Department of Buildings

II. APPENDIX

This appendix will outline various defenses raised in response to claims and/or violations of Labor Law §§200, 240(1) and 241(6). Changes in the New York Workers' Compensation Law have made it more difficult to implead actively negligent employers. It is important to note that these defenses are subject to judicial interpretation thereby resulting in varying application of the law.

LABOR LAW SECTION 200

New York Labor Law §200(1) states that:

> ***All places … 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.***

Labor Law §200 is a codification of the common law duty of an owner or employer to provide a safe place to work and is essentially the same as a negligence claim (see, **Jock v. Fien**, 80 N.Y.2d 965, 590 N.Y.S.2d 878 [1992]).

The most common defenses to Section 200 claims are:

Comparative Negligence – Comparative negligence continues to be a defense to a cause of action under §200.

- **Sandler v. Patel,** 288 A.D.2d 459, 733 N.Y.S.2d 131 [2d Dept 2001] where the plaintiff fell down stairs on which he had seen the defect before

- **Cruz v. Toscano,** 269 A.D.2d 122, 702 N.Y.S.2d 289 [1st Dept 2000] where the plaintiff had seen people injured using a saw without a guard before he was injured doing so

- **Bombard v. Central Hudson Gas & Elec. Co.,** 229 A.D.2d 837, 645 N.Y.S.2d 909, appeal dismissed, 89 N.Y.2d 854, 652 N.Y.S.2d 732 [1996] where a power line touched by the plaintiff was readily observable by the use of one's senses

Actual Knowledge or Constructive Notice of a Dangerous Condition – Liability will not be imposed under §200 absent the defendant's actual or constructive notice of a dangerous condition at the premises.

- **Chowdhury v. Rodriguez,** 57 A.D.3d 121, 867 N.Y.S.2d 123 [1st Dept 2008]

- **Molyneaux v. City of New York,** 28 A.D.3d 438, 813 N.Y.S.2d 729 [2d Dept 2006]

No Liability without Supervision, Direction or Control of the Work – Where a defendant cannot be liable under §200 unless they actually directed or controlled the work leading to the injury.

- **Cruz v. Toscano,** 269 A.D.2d 122, 702 N.Y.S.2d 289 [1st Dept. 2000]

- **Nos v. Greenpoint Mfg. and Design Center Local Dev. Corp.,** 262 A.D.2d 539, 691 N.Y.S.2d 342 [2d Dept 1999] where the defendant had notice of a dangerous condition at the site

- **Comes v. New York State Elec. & Gas,** 82 N.Y.2d 876, 609 N.Y.S.2d 168 [1993] involving knowledge of unsafe methods of performance

- **Colon v. Lehrer-McGovern Bovis, Inc.,** 259 A.D.2d 417, 687 N.Y.S.2d 130 [1st Dept 1999] where authority to supervise will not render an owner liability under § 200

- **Artega v. 231/249 W. 39 St. Corp.,** 45 A.D.3d 320, 847 N.Y.S.2d [1st Dept 2007]

No Liability Because Owner or Contractor had the Authority to Stop the Work

- **Buccini v. 1568 Broadway Assocs.,** 250 A.D.2d 466,673 N.Y.S.2d 398 [1st Dept 1998]

- **Warnitz v. Liro Group, Ltd.,** 254 A.D.2d 411, 678 N.Y.S.2d 910 [2d Dept 1998]

No Liability Because Owner or Contractor had Monitored Progress of the Work

- **Comes v. New York State Elec. & Gas,** 82 N.Y.2d 876, 609 N.Y.S.2d 168 [1993]

Plaintiff Injured While Attempting to Correct Condition which Caused Injury – A plaintiff may not recover under §200 if he or she is injured by the very condition which was to be corrected.

- **Bojovic v. New York City Hous. Auth.,** 284 A.D.2d 356, 726 N.Y.S.2d 444 [2d Dept 2001] where the plaintiff fell down stairs he was surveying

- **Vanerstrom v. Strasser,** 240 A.D.2d 563, 659 N.Y.S.2d 77 [2d Dep't 1997] where the elevator repairman was killed while fixing an elevator

- **Contrera v. Gesher Realty Corp.,** 1 A.D.3d 111, 766 N.Y.S.2d 200 [1st Dept 2003] where the plaintiff fell down stairs he was fixing

Plaintiff Not Lawfully Frequenting the Premises and/or was a Volunteer – A plaintiff not injured while performing work at a site cannot recover under §200 unless he or she was "lawfully frequenting" the premises. Therefore, a plaintiff / volunteer is barred from a recovery under the Labor Law §200.

- **Mordkofsky v. V.C.V. Devel. Corp.,** 76 N.Y.2d 573 [1990]

- **Harrison v. City of New York,** 248 A.D.2d 592, 670 N.Y.S.2d 552 (2d Dep't 1998) where it was held that the plaintiff was not lawfully frequenting the premises when he fell from a ladder while evaluating the feasibility of using a hoist on a project

Open And Obvious Condition – There is generally no liability under §200 if the plaintiff was injured by an "open and obvious" condition.

Wendell v. Sylvan Lawrence Co., 279 A.D.2d 383, 720 N.Y.S.2d 24 [1st Dept 2001]

LABOR LAW SECTION 240(1)

New York Labor Law § 240(1) provides as follows:

> ***Scaffolding and other devices for use of employees:***
>
> ***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, in the erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure 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***

This statute was designed to protect workers from the "extraordinary risks" at construction sites, such as the dangers of falling from a height or having materials or loads fall on them from a height. In construing the statute, the courts scrutinize the work being performed as well as the nature of the protective device and the manner in which it is utilized.

Although §240(1) may appear to be straightforward, few legislative enactments have taxed the courts more because of the infinite factual variations arising under the statute. As a result, courts have failed to fashion broad rules which has led to calls for a legislative overhaul of the statute (see Riccardi, Scaffold Law Is Falling Out of Favor With Some, NYU, Mar. 15, 2001, at 1, col. 3.).

Since Labor Law §240(1) imposes absolute liability on owners, contractors and their agents, it is crucial to investigate any grounds upon which to preclude its application. While the statute has often been read broadly in order to protect workers, there is now a trend to narrow the reach of the statute (see Siracuse, Outside Counsel, Pendulum Swings Back on the "Falling Objects" Test, NYU, April 2, 2002, at p. 1). The case of **Narducci v. Manhasset Bay Assoc.,** 96 N.Y.2d 259, 727 N.Y.S.2d 37 (2001) has helped narrow the reach of the statute more than any other case to date.

The most common defenses to Section 240(1) claims are:

Plaintiff not Engaged in Protected Activity – The evolution of case law has extended the applicability of §240(1) to accidents occurring at locations far removed from the precise location of the building or structure where the construction, alteration or demolition is actually taking place.

- **Lombardi v. Stout,** 80 N.Y.2d 290, 590 N.Y.S.2d 55 [1992] where a worker falling from a defective ladder while cutting down a tree located on property intended for construction is entitled to absolute liability protection

However, routine maintenance and decorative modifications are not covered activities, see **Joblon v. Solow,** 91 N.Y.2d 457, 672 N.Y.S.2d 286 [1998].

- **Rogala v. Van Bourgondien,** 263 A.D.2d 535, 693 N.Y.S.2d 204 [2d Dept 1999] where a fall from a ladder installing window screens at a hotel is not covered

- **Haghighi v. Baier,** 240 A.D.2d 368, 657 N.Y.S.2d 774 [2d Dept 1997] where a plaintiff injured changing a light bulb is not covered

A worker engaged in alteration cannot be protected by the statute unless the alteration involves a significant physical change to the configuration or composition of the building or structure.

- **Joblon v. Solow**, 91 N.Y.2d 457, 672 N.Y.S.2d 286 [1998] where wallpapering has been found not to be an alteration

- **Tate v. Clancy-Cullen Storage Co.,** 178 A.D.2d 292, 577 N.Y.S.2d 377 [1st Dept 1991] where the replacement of a fire alarm system was found to be an alteration

- **Walsh v. Applied Digital Data,** 190 A.D.2d 731, 594 N.Y.S.2d 626 [2d Dept 1993] where the removal of computer cable was found to be an alteration

- **Brown v. Christopher Street Owners Corp.,** 87 N.Y.2d 938, 641 N.Y.S.2d 221 [1996] where domestic household cleaning is not covered

Plaintiff not "so employed" – In order to be protected by §240(1), a plaintiff must establish that he or she was "so employed" in one of the activities set forth in the statute.

- **Petermann v. Ampal Realty Corp.,** 288 A.D.2d 54, 733 N.Y.S.2d 9 (1st Dept 2001), where the plaintiff, an engineer for a building's managing agent, was injured when he fell from a ladder while turning off a valve so that plumbing work could begin at the premises. Plaintiff's §240(1) claim was dismissed since he was not engaged in work covered by the statute.

- **Martinez v. City of New York,** 93 N.Y.2d 322, 690 N.Y.S.2d 524 [1999] where a plaintiff who fell from a desk while checking for asbestos in a school was not covered by §240(1)

- **Stringer v. Musacchia,** 11 N.Y.3d 212, 898 N.Y.S.2d 545 [2008] where volunteers are not "so employed" within the meaning of the statute such that § 240(1) does not apply to volunteers who perform a service gratuitously

Plaintiff was not Working on a Building or Structure – A plaintiff is protected by §240(1) unless he or she is working on a building or structure. A structure has been defined as "any production or piece of work artificially built up or composed of parts joined together in some definite manner", see **Joblon v. Solow,** 91 N.Y.2d 457, 672 N.Y.S.2d 286 [1998].

The following have all been deemed structures within the meaning of Labor Law § 240(1):

- **Gordon v. Eastern Ry. Supply,** 82 N.Y.2d 555, 606 N.Y.S.2d 127 [1993], a railway car
- **Izrailev v. Ficarra Furniture of Long Island, Inc.,** 70 N.Y.2d 813, 523 N.Y.S.2d 432 [1987]), an electrical sign
- **Agnes v. Cornacchione,** 278 A.D.2d 800, 723 N.Y.S.2d 572 [4th Dept 2000], a crane
- **Tauriello v. N.Y. Tel. Co.,** 199 A.D.2d 377, 605 N.Y.S.2d 373 [2d Dept 1993] a utility pole and a telephone pole with attached hardware, cable and support system

The following have not been deemed structures within the meaning of Labor Law § 240(1):

- **Dilluvio v. City of New York,** 264 A.D.2d 115, 704 N.Y.S.2d 550 [1st Dept 2000]) a road being repaved
- **Manente v. Ropost, Inc.,** 136 A.D.2d 681, 521 N.Y.S.2d 96 [2d Dept 1988] a lamp post in a parking lot is not a structure where the plaintiff was repairing a malfunction fixture
- **Fitzpatrick v. State of New York,** 25 A.D.3d 775 [2d Dept 2005] a lighting pole has been deemed to be structure where the plaintiff was injured while replacing a light fixture pole

Violation was not the Proximate Cause of the Incident – A cause of action pursuant to §240(1) cannot be sustained unless the violation is the proximate cause of the alleged injuries, see **Anspach v. Miller Bluff's Constr. Corp.,** 280 A.D.2d 564, 720 N.Y.S.2d 536 [2d Dept 2001] and **Kyle v. City of New York,** 268 A.D.2d 192, 707 N.Y.S.2d 445 [1st Dept 2000].

- **Sheehan v. Fordham University,** 259 A.D.2d 328, 687 N.Y.S.2d 22 [1st Dept 1999] where a plaintiff is entitled to summary judgment under § 240(1) if he or she can demonstrate that the failure to provide a required safety device was a contributing cause of the accident

However, if the defendant is able to establish that adequate safety devices were provided and that plaintiff's own actions were the sole proximate cause of the incident, the defendant will be able to prevail on a motion for summary judgment, see **Blake v. Neighborhood Housing Services of New York, Inc.**, 91 N.Y.2d 958, 672 N.Y.S.2d 840 [1998], **Weininger v. Hagedorn & Co.,** 91 N.Y.2d 958, 672 N.Y.S.2d 840 [1998], re-argument denied 92 N.Y.2d 875, 677 N.Y.S.2d 777 [1998] and **Harrington v. State of New York,** 277 A.D.2d 807, 716 N.Y.S.2d 748 [3d Dept 2000].

One and Two Family Dwelling Exception – The owner of a one or two family dwelling is exempt from §240(1) liability, see **Bartoo V Buell,** 87 N.Y.2d 362, 639 N.Y.S.2d 778 [1996], unless the owner actually directed or controlled the work performed, see **Duarte v. East Hills Constr. Corp.,** 274

A.D.2d 493, 711 N.Y.S.2d 182 [2d Dept 2000]. The term "direct or control" is strictly construed and refers to a situation where the owner supervises the method and manner of the work.

- **Miller v. Trudeau,** 270 A.D.2d 683, 704 N.Y.S.2d 727 [3d Dept 2000] a homeowner who provides a ladder but does not direct the plaintiff's work cannot be liable under the statute

- **Lombardi v. Stout,** 80 N.Y.2d 290, 590 N.Y.S.2d 55 [1992] an owner who rents a one or two family home loses the exception

Falling Object was Deliberately Dropped – A plaintiff injured by an intentionally dropped object will not be protected by the statute, see **Roberts v. General Elec. Co.,** 97 N.Y.2d 737, 742 N.Y.S.2d 188 [2002] and **Corey v. Gorick Const. Co.,** 271 A.D.2d 911, 706 N.Y.S.2d 512 [3d Dept 2000].

Recalcitrant Worker – A plaintiff may not recover under §240(1) if he or she refuses to make use of available safety devices provided by an owner, contractor, or his employer, see **Cahill v. Triborough Bridge Tunnel Auth.**, 4 N.Y.3d 35 [2004] and **Blake v. Neighborhood Housing Serv. of NY City Ins**., 1 N.Y.3d 280 [2003].

- **Lozada v. State of New York,** 267 A.D.2d 215, 700 N.Y.S.2d 38 (2d Dept 1999) where a plaintiff's §240(1) claim was dismissed where he was repeatedly told to use a safety line and refused to despite the fact that it was available

- **Jastrzebski v. North Shore Sch. Dist.,** 223 A.D.2d 677, 637 N.Y.S.2d 439 (2d Dept 1996) where the Appellate Division, Second Department upheld the dismissal of the plaintiff's §240(1) claim where the plaintiff was instructed to use a scaffold but was injured when he used a ladder instead. The general availability of a safety device or a general instruction to use a device is not sufficient to invoke this exception.

- **Gallagher v. New York Post,** 14 N.Y.3d 83 [2010] where the defendant must establish that the device is readily available at the work site, and plaintiff knew he was expected to use it, but for no good reason choose not to

Danger Causing Injury was Part of the Usual Peril of the Job – Some cases have held that a plaintiff cannot recover under §240(1) if he or she was injured by a hazard normally encountered at a construction site.

- **Alvia v. Teman Electrical Contracting, Inc.,** 287 A.D.2d 421, 731 N.Y.S.2d 462 (2d Dept 2001) where the plaintiff was injured when he fell into a 12" x 16" hole in the floor. The plaintiff's §240(1) claim was dismissed on the grounds that the plaintiff was not injured by a gravity-related hazard but merely by a typical peril one encounters at a construction site

- **Misseritti v. Mark IV Constr. Co.,** 209 A.D.2d 931, 619 N.Y.S.2d 473 (4th Dept 1994), affirmed, 86 N.Y.2d 487, 634 N.Y.S.2d 35 (1995) where the plaintiff was injured while working at ground level when a wall collapsed on him

Insignificant Height Differential – An elevation differential alone is not sufficient to invoke §240(1) as there is no set height at which §240(1) is triggered. See the following decisions in which the causes of action pursuant to §240 were dismissed due to de minimus height differentials, **Rocovich v. Consolidated Edison Co.,** 78 N.Y.2d 509, 577 N.Y.S.2d 219 [1991], **Rissel v. Nornew Energy Supply, Inc.,** 281 A.D.2d 880, 722 N.Y.S.2d 643 [4th Dept 2001], **Boyle v. 5 East 9th St. Owners Corp.,** 250 A.D.2d 535, 673 N.Y.S.2d 128 [1st Dept 1998] and **De Mayo v. 1000 Northern of New York Co.,** 246 A.D.2d 498, 667 N.Y.S.2d 400 [2d Dept 1998].

Plaintiff Harmed by a Permanent Structure – Numerous cases have held that if the falling object or the place that the plaintiff fell from was a normal building appurtenance or permanent structure, the plaintiff will not be protected by §240(1).

- **Carrion v. Lewmara Realty Corp.,** 222 A.D.2d 205, 635 N.Y.S.2d 1 [1st Dept 1995] where a handyman repairing a permanent staircase was injured

- **Rodgers v. 72nd St. Assocs.,** 269 A.D.2d 258, 703 N.Y.S.2d 456 [1st Dept 2000] where an elevator repairman fell through the emergency exit door on the roof of the freight elevator

- **Jones v. 414 Equitable LLC,** 57 A.D.3d 65, 866 N.Y.S.2d 165 [1st Dept 2008] where liability will attach if the collapse of the permanent structure was foreseeable

Accident was Unwitnessed – Absent a showing that an issue exists as to the plaintiff's credibility, the absence of an independent eyewitness does not preclude summary judgment, see **Casabianca v. Port Authority of New York and New Jersey**, 237 A.D.2d 112, 655 N.Y.S.2d 2 [1st Dept 1997] and **Dawson v. Pavarini Co.,** 228 A.D.2d 466, 644 N.Y.S.2d 285 [2d Dept 1996].

However, several decisions have held that summary judgment is inappropriate where the plaintiff is the sole witness, see **Wender v. Reliance,** 236 A.D.2d 466, 654 N.Y.S.2d 586 [2d Dept 1997], **Khan v. Convention Overlook, Inc.,** 232 A.D.2d 529, 648 N.Y.S.2d 946 [2d Dept 1996] and **Manna v. New York City Housing Authority,** 215 A.D.2d 335, 627 N.Y.S.2d 43 [1st Dept 1995].

Superseding Cause - Numerous decisions have held that a plaintiff is not protected by §240(1) where there was superseding cause of his or her injuries.

- **Egan v. A.J. Constr. Corp.,** 94 N.Y.2d 839, 702 N.Y.S.2d 574 (1999), where the plaintiff was trapped in a stalled elevator. Rather than wait to be rescued, he decided to jump from the elevator to the lobby below. The Court of Appeals held that as a matter of law, the plaintiff's jump from the elevator six (6) feet above the lobby floor after the doors had been opened manually was the superseding cause of his injuries.

- **Antonik v. New York City Housing Auth.,** 235 A.D.2d 248, 652 N.Y.S.2d 33 [1st Dept 1997] where the §240 claim was dismissed where the plaintiff/decedent died trying to exit a stalled elevator rather than wait for help

- **George v. State of New York,** 251 A.D.2d 541, 674 N.Y.S.2d 742 (2d Dept 1998] where a §240(1) claim was dismissed where the claimant was injured on his second 8 foot jump to a protective debris shield to aid a co-worker

Misuse – A plaintiff's misuse of equipment can be deemed a superseding cause of an accident and therefore a defense to a §240(1) claim.

- **Vouzianas v. Bonasera,** 262 A.D.2d 553, 693 N.Y.S.2d 59 (2d Dept 1999) where the court denied the plaintiff's motion for summary judgment under §240(1), finding that "plaintiff's conduct in dissembling the extension ladder at issue, and in using only the top half which lacked non-skid pads, constituted an unforeseeable, independent, intervening act which was a superseding cause of the accident"

- **Martin v. A-1 Compaction, Inc.,** 262 A.D.2d 537, 692 N.Y.S.2d 450 (2d Dept 1999) where the §240(1) claim was dismissed where plaintiff was fatally injured jumping up and down on a conveyor belt of a wood chipper in order to collapse the belt so the chipper could be moved

Intoxication – Another superseding cause can be the intoxication of the plaintiff. However, a plaintiff's intoxication can be a defense to a §240(1) claim only if it can be established that the intoxication was the sole proximate cause of the alleged incident, see **Podbielski v. KMO-361 Realty Assocs.,** 742 N.Y.S.2d 664 [2d Dept, May 28, 2002].

- **Kijak v. 330 Madison Ave. Corp.,** 251 A.D.2d 152, 675 N.Y.S.2d 341 (1st Dept 1998), where the plaintiff fell from an inadequate ladder and was then observed at the hospital to have liquor on his breath. The court granted the plaintiff's summary judgment motion reasoning that the defendants had offered "no evidence of how much the plaintiff had to drink, when he drank it, whether or not he was intoxicated or whether or not his intoxication was even a contributing cause of his fall, let alone the sole cause"

- **Hodge v. Crouse Hinds Division of Cooper Industries,** 207 A.D.2d 1007, 616 N.Y.S.2d 822 (4th Dept 1994) where the court considered evidence of the plaintiff's intoxication "admissible only as proof that such intoxication was the sole proximate cause of the accident"

It should be noted, that the issue of the plaintiff's intoxication being the sole cause of an accident will not defeat a motion for summary judgment where adequate safety devices were not in place, see **Sergeant v. Murphy Family Trust,** 284, A.D.2d 991, 726 N.Y.S.2d 537 [4th Dept 2001].

With regard to falling objects not being hoisted or secured:

- **Narducci v. Manhasset Bay Assocs.,** 96 N.Y.2d 259, 727 N.Y.S.2d 37 (2001) is a decision where the plaintiff was injured while standing on an extension ladder six feet from the

ground. While removing the first of several damaged window frames, a pane of glass from an adjoining window fell towards him. He turned to avoid being hit by the glass but his arm was cut. He did not fall from the ladder and the ladder did not fail in any way.

- **Capparelli v. Zausmer Frisch Assoc.,** which was decided with Narducci, was where the plaintiff, also standing on a ladder, was installing light fixtures in a ceiling grid when one of the fixtures fell on him and he was injured

The Court of Appeals rejected the §240(1) claims by plaintiffs Narducci and Capparelli on the ground that the glass and ceiling grid could not be considered "material or load being hoisted or secured". For the statute to apply, the Court of Appeals held that a plaintiff must show more than simply that an object fell causing injury to a worker. Rather, a plaintiff must establish that "the object fell while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute." The mere fact that the plaintiffs had been working at a height was irrelevant since the ladders they used did not cause or contribute to the fall.

Absence of Foreseeability – The Court of Appeals has stated that Labor Law §240 does not apply to "routine work - place risks," "ordinary and usual dangers," "general hazards of the workplace," and the types of perils a construction worker usually encounters at a work site thereby suggesting foreseeability as a necessary element in imposing liability under §240.

- **Salazar v. Novalex Constr. Corp.,** 72 A.D.3d 418, 897 N.Y.S. 423 (1st Dept 2010) where the plaintiff walked backwards into a trench while pouring concrete. In holding that §240 applied, the Appellate Division held that it was "eminently foreseeable that a worker would fall into a portion of the trench while spreading concrete on the floor." The dissent asserted that the plaintiff was injured by a "routine workplace risk" that could not have been avoided by any safety device contemplated by the statute.

Sole Proximate Cause – The New York State Court of Appeals has held that the defense of sole proximate cause is applicable where the violation of Labor Law section 240(1) played no role in the alleged incident, see **Weininger v. Hagedorn & Co.,** 91 N.Y.2d 958, 672 N.Y.S.2d 840 [1998] and **Blake v. Neighborhood Housing Services of New York City, Inc**., 1 N.Y.3d 280, 771 N.Y.S.2d 484 [2003].

- **Zimmer v. Chemung County Performing Arts,** 65 N.Y.2d 513, 493 N.Y.S.2d 102 [1985] the accident must be totally attributable to the plaintiff's actions for the defense to apply. If a violation of section 240 is even a fraction of a percent of the cause of the incident, the plaintiff is entitled to summary judgment on liability under section 240(1) and the plaintiff's culpable conduct cannot be factored into the award.

The defense of sole proximate cause has been applied predominantly where the plaintiff has intentionally misused a safety device in an unforeseeable manner.

- **Plass v. Solotoff,** 5 A.D.3d 365, 773 N.Y.S.2d 84 [2d Dept 2004] where the plaintiff deliberately used only one plank instead of the three (3) available to cover an opening on a scaffold

- **Urias v. Orange County Agricultural Society, Inc.,** 7 A.D.3d 515, 776 N.Y.S.2d 92 [2d Dept 2004] where the plaintiff deliberately climbed up a beam instead of waiting for a ladder that was being used by a co-worker and the beam broke causing the plaintiff to fall

- **Weininger, supra** where the plaintiff stood on a crossbar instead of an available ladder

- **Meade v. Rock-McGraw, Inc.,** 307 A.D.2d 156, 760 N.Y.S.2d 39 [1st Dept 2003] where the plaintiff deliberately used an "A" frame ladder like a single-sided extension ladder by failing to open up the ladder and setting it on all four rails and feet

LABOR LAW SECTION 241(6)

New York Labor Law §241(6) provides as follows:

> ***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:***
>
> > ***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 legislative purpose of §241(6) is to "give [workers] in the hazardous employment of construction, demolition, and excavation added protection, other than [workers'] compensation, in the form of non-delegable duties upon the owner and general contractor" (see **Allen v. Cloutier Constr. Corp.**, 44 N.Y.2d 290, 405 N.Y.S.2d 630 [1978]).

Under §241(6), an owner or general contractor is allowed to raise any defense to the imposition of liability (see **Long v. Forest-Felhaber**, 55 N.Y.2d 154, 448 N.Y.S.2d 132 [1982]). These defenses are particularly significant where it is not possible to implead an actively negligent tortfeasor. One may be unable to pursue a claim against an active tortfeasor because that party is in default or is an employer protected by Workers' Compensation Law § 11.

The most common defenses to Section 241(6) claims are:

Plaintiff was not Engaged in Protected Activity – In order to be protected by §241(6), a plaintiff must be engaged in construction, demolition, or excavation, the activities covered by the statute, or must be "lawfully frequenting" the site. However, even if the individual is lawfully frequenting the site, he or she must have construction related duties. The cases establish that the following factors are critical to this analysis: 1) plaintiff's job responsibilities; 2) the type of activity that caused the injuries; 3) the time of the accident; and 4) the place of the accident.

If a plaintiff's accident occurs just before or after an activity enumerated in the statute, no §241(6) action will lie.

- **Gibson v. Worthington Div. of McGraw-Edison Co.,** 78 N.Y.2d 1108, 578 N.Y.S.2d 127 [1991] where the plaintiff was injured inspecting a roof to submit a repair bid

- **Harrison v. City of New York,** 248 A.D.2d 592, 670 N.Y.S.2d 527 [2d Dept 1998] where the plaintiff was injured while inspecting a construction area to determine whether it was feasible for a mason subcontractor to use a hoist

Comparative Negligence – a plaintiff's contributory and comparative negligence are valid defenses to a §241(6) claim, see **Misicki v. Caradonna,** 12 N.Y.3d 511, 882 N.Y.S.2d 375 [2009]. A breach of duty imposed by a rule in the Code is merely evidence of negligence that the fact finder is to consider on the question of the defendants negligence, see **Long v. Forest-Fehlhaber,** 55 N.Y.S.2d 154 [1982] and Misicki, supra.

Plaintiff Failed to Set Forth a Specific Section of the Industrial Code – In order to establish a claim under §241(6), a plaintiff must establish a violation of a specific section of the New York State Industrial Code, see **Ross v. Curtis-Palmer Hydro-Elec. Co.,** 81 N.Y.2d 494, 504-505, 601 N.Y.S.2d 49, 55 [1993]. Sections of the Industrial Code which set forth general requirements for workplace safety are insufficient to invoke liability, see **Rizzuto v. L.A. Wenger Contr. Co.,** 91 N.Y.2d 343, 670 N.Y.S.2d 816 [1998]. A regulation is sufficiently specific if its direction is unequivocal and if it mandates a distinct standard of conduct, rather than reiterating common-law principles. However, it is not enough for a plaintiff to establish that a regulation is sufficiently specific, the plaintiff must also establish that the regulation was violated.

- **Flihan v. Cornell Univ.,** 280 A.D.2d 994, 720 N.Y.S.2d 695 [4th Dept 2001] where the plaintiff's allegations of OSHA violations was not sufficient to establish a 240(6) violation

Proximate Cause – Even if the plaintiff was engaged in one of the activities enumerated by the statute, and has cited a specific section of the Industrial Code, he or she must still establish that the alleged violation applies to the facts of the case, see **Francis v. Aluminum Co. of America,** 240 A.D.2d 985, 659 N.Y.S.2d 903 [3d Dept 1997], **Ares v. State,** 80 N.Y.2d 959, 590 N.Y.S.2d 874 [1992] and **Haghighi v. Bailer,** 240 A.D.2d 368, 657 N.Y.S.2d 774 [2d Dept 1997].

Automobile Accidents – Automobile accidents at construction sites are not covered by §241(6), see **McGurran v. DiLanio Planned Devel., Corp.,** 251 A.D.2d 467, 674 N.Y.S.2d 706 [2d Dept 1998].

One and Two Family Homeowners – As with §240(1), there is no liability under this section for the owners of one or two family homes. Mixed use premises do not automatically qualify for the exception, see **Cannon v. Putnam,** 75 N.Y.2d 708, 555 N.Y.S.2d 691 [1990].

- **Van Amerogen v. Donnini,** 78 N.Y.2d 880, 573 N.Y.S.2d 443 [1991]) where the court ruled that the essential character of the structure governs the exception