

**CONSTRUCTION ACCIDENT LITIGATION
JULY-OCTOBER 2011 SUPPLEMENT**

Presented by Brian J. Shoot

I. APPLICABILITY OF LABOR LAW SECTIONS 240 OR 241(6) TO THE WORK AND/OR THE WORKER IN ISSUE

A. The Issue Of Whether The Work In Issue Was The *Kind Of Work* That Is Covered By Labor Law § 240(1) And/Or Labor Law § 241(6)

1. “Altering”

Schick v. 200 Blydenburgh, LLC, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2011 WL 4599855 (2nd Dep’t 2011) (where defendant Pal Supply Corp. was the incoming tenant at a warehouse, where plaintiff, a field technician for Verizon, was assigned to provide telephone service for Pal Supply, where plaintiff said that a Pal Supply employee told him to run a wire from the serving terminal along the ceiling to an area above the office doorway, and where plaintiff fell when “the ladder slipped or shifted due to sand, dirt, or dust on the floor,” “plaintiff’s work constituted a significant physical change and, therefore, falls under the enumerated activity of ‘altering’ within the meaning of Labor Law § 240(1)” and “also constituted construction work under Labor Law § 241(6)”).

4. The Importance Of Context

Medina v. City of New York, ___ A.D.3d ___, 929 N.Y.S.2d 582 (1st Dep’t 2011) (where plaintiff testified that he was injured while laying new subway track, and where the defendant Transit Authority’s supervisor “characterized plaintiff’s work as ‘routine maintenance’” but “later conceded that the upgrade to the D subway line was **part of a five-year signal improvement contract, which entailed replacement of 400 to 500 obsolete signal rails** that were incompatible with updated braking and signaling systems,” Supreme Court erred in concluding that the work constituted “routine maintenance” as a matter of law; “the removal and dismantling of the rail constituted demolition of a structure” and the hazard in issue -- that a “stressed” rail could split and cause an accident -- constituted “the kind of hazard contemplated by section 23-3.3(c)”).

Flores v. ERC Holding LLC, 87 A.D.3d 419, 928 N.Y.S.2d 7 (1st Dep’t 2011) (where plaintiff was injured while attempting to “affix [a] 700-pound steel beam to the bucket of a backhoe so that the beam could be **lifted onto a truck for transport to the Queens construction site,**” and where **the accident occurred in plaintiff’s employer’s off-site facility**, “[p]erforming construction work for purposes of Labor Law § 240(1) ... and working at a construction site for purposes of Labor Law § 241(6) ... are distinguished from fabricating and transporting materials to be used in connection with ongoing work at a construction site”; it was “[d]ispositive that at the time of his injury, plaintiff was engaged in the fabrication and loading of steel at his employer’s Bronx facility, not in performing construction work at the Queens site”; “[a]pplying the Labor Law to fabrication performed and loading of steel beams onto a truck for

transport some 12 miles away at a facility that is independently owned and operated would be an untoward extension of the protection afforded by the Legislature”).

Vasquez v. Minadis, 86 A.D.3d 604, 604-605, 927 N.Y.S.2d 670, 672 (2nd Dep’t 2011) (where “roofer came to the premises to investigate a reported problem with leaks from the roof of the premises,” where plaintiff’s supervisor “directed him to take the roofer to his apartment to climb through his kitchen window to the roof of the premises,” and where plaintiff “slipped and fell three stories onto the concrete ground,” defendants should have been granted summary judgment as to the plaintiff’s § 240 claim since defendants “established that **the work in which the plaintiff was assisting was merely investigatory, and that the plaintiff was not a person employed to perform an activity enumerated under Labor Law § 240(1)**”).

II APPLICABILITY OF LABOR LAW §§ 240 OR 241(6) TO THE PARTICULAR DEFENDANT

A. Owners

Guryev v. Tomchinsky, 87 A.D.3d 612, 614, 928 N.Y.S.2d 574, 576 (2nd Dep’t 2011) (where the owners of the individual condominium unit hired a contractor “to renovate their condominium unit,” they and not the Board of Managers of the building were the “owners” for purposes of Labor Law §§200 and 241(6) inasmuch as the owner “is the party who, as a practical matter, has the right to hire or fire subcontractors and to insist that proper safety practices are followed [citation omitted]”).

B. Contractors

Gonzalez v. TJM Construction Corp., 87 A.D.3d 610, 611, 928 N.Y.S.2d 344, 346 (2nd Dep’t 2011) (defendant, the construction manager, was correctly denied summary judgment inasmuch as it “failed to establish the absence of triable issues of fact regarding whether it had sufficient authority to supervise and control the plaintiff’s work such that it could be liable pursuant to Labor Law §§ 240(1) and 241(6) as a statutory agent of the owner or general contractor”).

Morris v. C&F Builders, Inc., 87 A.D.3d 792, 792, 928 N.Y.S.2d 154, 155-156 (3rd Dep’t 2011) (where defendant was a “prime contractor and did not coordinate or supervise the electrical work on the premises,” and where plaintiff himself indicated that defendant played no role with respect to his electrical work and that the owner-hired electrical subcontractor “could come and go as he pleased,” defendant was not subject to liability under Labor Law §§ 240(1) or 241(6) with respect to the site condition that gave rise to plaintiff’s accident).

III. LABOR LAW SECTION 240 AND THE ELEVATION-RELATEDNESS PREREQUISITE

A. Falling Workers

Cordeiro v. TS Midtown Holdings, LLC, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2011 WL 4089443 (1st Dep’t 2011) (where plaintiff was sliding open the latch to the elevator hoistway doors when the doors “unexpectedly opened, causing him to fall to the floor below,” plaintiffs “met their prima facie burden of establishing entitlement to partial summary judgment on their Labor Law § 240(1) claim” even though “the doors through which plaintiff fell were a permanent fixture of the building” inasmuch as the doors “were not a ‘normal appurtenance,’ but rather, an access opening specifically built for the purpose of allowing workers to perform their work on the building elevators by hoisting materials to the building’s motor rooms”; the “hatch in this case was a ‘device’ within the meaning of § 240(1)” and plaintiff was exposed to “a gravity-related risk of falling into the hallway from the motor room”).

Morris v. City of New York, ___ A.D.3d ___, 929 N.Y.S.2d 585, 586 (1st Dep’t 2011) (where plaintiff “was injured when a temporary wooden step on which he was standing shifted as he and another employee were moving an air tank up a concrete stairway from the basement of the work site to the first floor,” there was “an issue of fact as to whether the temporary step had been placed at the bottom of the concrete stairway to aid employees in ascending the stairway to different levels of the site, and thus constituted a device to protect employees against elevation-related risks within the meaning of Labor Law § 240(1)”).

Henry v. Eleventh Avenue, L.P., 89 A.D.3d 523, 524, 928 N.Y.S.2d 72, 73 (2nd Dep’t 2011) (where plaintiff “was installing waterproofing on the roof of the shanty” when he “struck his head against something and fell eight feet to the ground,” and where plaintiff “had not been provided with any safety devices to prevent or protect against a fall,” Supreme Court correctly granted plaintiffs summary judgment; “[c]ontrary to the defendants’ contention, the injured plaintiff’s eight-foot fall from the roof of the shanty is the type of elevation-related hazard that is contemplated by Labor Law § 240(1)”).

B. Falling Objects

The Collapse Of The “Same Level” Rule -- The Decision in *Wilinski v. 334 East 92nd Street Housing Development Fund Corp.*, ___ N.Y.3d ___, ___ N.Y.S.2d ___, 2011 WL 5040902 (October 25, 2011), mod’g 71 A.D.3d 538, 898 N.Y.S.2d 15 (1st Dep’t 2010).

Back in *Misseritti v. Mark IV Constr. Co.*, 86 N.Y.2d 487, 634 N.Y.S.2d 35 (1995), the plaintiff was injured when a completed firewall that allegedly should have been braced collapsed on him. The Court unanimously ruled in a relatively brief opinion, which, by the way, was written by Judge Ciparick, that it could not be said “that the collapse of a completed firewall” was “the type of elevation-related accident” that Labor Law § 240(1) was “intended to guard against” (86 N.Y.2d at 491, 634 N.Y.S.2d at 38).

Three years later, in a case in which the hook holding a steel plate became undone and the plate fell on plaintiff's foot, the Court of Appeals ruled in a short memorandum opinion that Labor Law § 240(1) did not apply because “**the steel plate was resting on the ground or hovering slightly above the ground**” and “**was not elevated above the work site.**” *Melo v. Consolidated Edison Company*, 92 N.Y.2d 909, 911, 680 N.Y.S.2d 47, 48-49 (1998).

In the wake of *Misseritti* and *Melo*, the conventional wisdom was that Labor Law § 240(1) did not apply to a so-called “falling object” case if the base of the object that fell and struck plaintiff was at the same level as the plaintiff. See, e.g. *Whitehead v. City of New York*, 79 A.D.3d 858, 913 N.Y.S.2d 697, 699-700 (2nd Dep’t 2010); *Kaminski v. 53rd Street and Madison Tower Development, LLC*, 70 A.D.3d 530, 895 N.Y.S.2d 76, 77 (1st Dep’t 2010); *Garcia v. Edgewater Development Company*, 61 A.D.3d 924, 878 N.Y.S.2d 134 (2nd Dep’t 2009); *Spiegler v. Gerken Building Corporation*, 57 A.D.3d 514, 516, 868 N.Y.S.2d 712, 714 (2nd Dep’t 2008); *Cruz v. Neil Hospitality, LLC*, 50 A.D.3d 619, 855 N.Y.S.2d 219, 220 (2nd Dep’t 2008); *Mikcova v. Alps Mechanical, Inc.*, 34 A.D.3d 769, 825 N.Y.S.2d 130, 131 (2nd Dep’t 2006); *Peay v. New York City School Construction Authority*, 35 A.D.3d 566, 827 N.Y.S.2d 189, 192 (2nd Dep’t 2006).

Here, the Court of Appeals, in another opinion penned by Judge Ciparick, said that the rule was more “nuanced” than that ... and that so-called “same level” cases can fall within the scope of the statute.

Facts: Plaintiff and other workers were demolishing brick walls at a vacant warehouse. By virtue of the demolition thus far, there were two pipes – each four inches in diameter, each rising to a height of ten feet – that were unsecured.

“Earlier that morning, plaintiff voiced concerns to his supervisor that leaving the pipes standing during demolition of the surrounding walls could be dangerous. Nevertheless, no safety measures were taken to secure the pipes. Shortly thereafter, debris from a nearby wall that was being demolished hit the pipes, causing them to topple over” (Op., p. 3).

Plaintiff asserted claims under Labor Law §§ 240 and 241(6). With respect to the former, defendants argued that the pipes were at the “same level” as plaintiff and that Labor Law § 240(1) was therefore not implicated.

Held: Regarding the Labor Law § 240 claim, the Court reasoned that the scope of Labor Law § 240 had “evolved” in the almost two decades since *Misseritti*, that the statute’s “core purpose” was now “to provide workers with adequate protection from reasonably preventable, gravity-related accidents.”

The Court ruled that *Misseritti* did not call for the “categorical exclusion of injuries caused by falling object that ... were on the same level as the plaintiff” and that the elevation differential in the case was “physically significant.” However, the remaining question, which could not be answered on the existent record, was whether protective devices could have in fact been used to secure the pipes. This, the Court said, was an issue of fact.

The gist was as follows:

Our jurisprudence defining the category of injuries that warrant the special protection of Labor Law § 240(1) has evolved over the last two decades, centering around a core premise: that a defendant’s failure to provide workers with adequate protection from

reasonably preventable, gravity-related accidents will result in liability.

* * *

We do not agree that Misseritti calls for the categorical exclusion of injuries caused by falling objects that, at the time of the accident, were on the same level as the plaintiff. Misseritti did not turn on the fact that plaintiff and the base of the wall that collapsed on him were at the same level.

* * *

Applying Runner to the instant case, we hold that **plaintiff is not precluded from recovery under section 240(1) simply because he and the pipes that struck him were on the same level.** The pipes, which were metal and four inches in diameter, stood at approximately 10 feet and **toppled over to fall at least four feet before striking plaintiff**, who is 5'6" tall. **That height differential cannot be described as de minimis given the “amount of force [the pipes] were able to generate” (id. at 605) over their descent.** Thus, plaintiff suffered harm that “flow[ed] directly from the application of the force of gravity to the [pipes]” (id. at 604; see also Rocovich, 78 NY2d at 514). However, though the risk here “ar[ose] from a physically significant elevation differential,” (Runner, 13 NY3d at 604) it remains to be seen whether plaintiffs’ injury was “the direct consequence of [defendants’] failure to provide adequate protection against [that] risk” (id.).

In this regard, this case is distinguishable from Misseritti in a significant way: while, in Misseritti, the kinds of protective devices section 240(1) prescribes were shown to be inapplicable to the circumstances of the decedent’s injury, here, neither party has met its burden with respect to that issue. Plaintiff asserts, but does not demonstrate, that protective devices such as blocks or ropes could have been used to secure the pipes and prevent the accident. Defendants assert, but fail to demonstrate, that no protective devices were called for.

Moreover, there is an important distinction between the facts of this case and other cases where summary judgment has been granted in defendants’ favor. Here, the pipes that caused plaintiff’s injuries were not slated for demolition at the time of the accident. This stands in contrast to cases where the objects that injured the plaintiffs were themselves the target of demolition when they fell (see e.g. Brink, 259 AD2d at 265). In those instances, imposing liability for failure to provide protective devices to prevent the walls or objects from falling, when their fall was the goal of the work, would be illogical.

* * *

We conclude, therefore, that while there is a potential “causal connection between the object[s’] inadequately regulated descent and plaintiff’s injury,” (Runner, 13 NY3d at 605), **neither party is entitled to summary judgment on plaintiff’s Labor Law § 240(1) claim.**

The *Wilinski* Court’s § 240 ruling was rendered by 4 to 3 vote. The dissenters, per opinion by Judge Pigott, decried the departure from *Misseritti* and *Melo* and from the Appellate Divisions’ “reasonable interpretation” of those rulings. The dissenters felt that the majority’s ruling would inject “confusion and uncertainty” into an area of law that was formerly well settled.

Gonzalez v. TJM Construction Corp., 87 A.D.3d 610, 610-611, 611, 928 N.Y.S.2d 344, 345-346, 346 (2nd Dep’t 2011) (where plaintiff, a mason, “was inside the building on the ground floor next to a window that had been removed, talking to his foreman, when, according to the plaintiff, a brick fell from ‘out of nowhere’ and struck him,” “plaintiff failed to eliminate all questions of fact as to whether the brick that struck him was an object that required securing for the purposes of the undertaking being performed”; but defendant was also correctly denied summary judgment inasmuch as it “failed to eliminate all triable issues of fact regarding its contention that the brick that struck the plaintiff was not an object that required securing for the purposes of the undertaking pursuant to Labor Law § 240(1)”).

Davis v. Wyeth Pharmaceuticals, Inc., 86 A.D.3d 907, 928 N.Y.S.2d 377 (3rd Dep’t 2011) (where plaintiff, a construction laborer, was “injured while moving a filtration unit weighing in excess of 1,000 pounds,” when he “and a coworker had used two pallet jacks to hoist the unit 8 to 10 inches off the floor,” when, “[i]n the process of moving the unit horizontally across the floor, plaintiff slipped and grabbed the unit, causing it to tip over and land on his leg as he fell to the ground,” “Supreme Court’s determination that plaintiff’s injury was not the result of a risk related to an elevation differential was supported by the record,” inasmuch as “the object that resulted in plaintiff’s injury was not being hoisted or secured [citations omitted] or otherwise being moved vertically from one elevation to another”).

Medina v. City of New York, supra, ___ A.D.3d ___, 929 N.Y.S.2d 582 (1st Dep’t 2011) (where plaintiff “was standing on the [train] track bed when a 12-foot section of the rail, unsecured and weakened by saw cuts, suddenly sprang upward and then fell, striking his leg,” plaintiff’s Labor Law § 240(1) cause of action was “properly dismissed” since “the rail was propelled by the kinetic energy of the sudden release of tensile stress in the steel rail” and “plaintiff’s injuries were not the result of the effects of gravity”).

IV. SUMMARY JUDGMENT ISSUES

Mazurett v. Rochester City School District, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2011 WL 4637552 (4th Dep’t 2011) (where plaintiff “fell from a collapsing scaffold at a construction site on property owned by defendant,” “[t]he fact that the scaffold collapsed ‘is sufficient to establish as a matter of law that the [scaffold] was not so ‘placed ... as to give proper protection’ to plaintiff’ pursuant to the statute [internal citations omitted]”).

Henry v. Eleventh Avenue, L.P., supra, 89 A.D.3d 523, 524, 928 N.Y.S.2d 72, 73 (2nd Dep’t 2011) (where plaintiff “was installing waterproofing on the roof of the shanty” when he “struck his head against something and fell eight feet to the ground,” and where plaintiff “had not been provided with any safety devices to prevent or protect against a fall,” Supreme Court correctly granted plaintiffs summary judgment; “the risk of the injured plaintiff hitting his head against the concrete slab or an object protruding therefrom, located only four to five feet above his head, ‘was neither so extraordinary nor so attenuated as to constitute a superseding cause sufficient to relieve [the defendants] of liability [internal citation omitted]”).

Wysk v. New York City School Construction Authority, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2011 WL 4506173 (2nd Dep’t 2011) (where plaintiff “was working on the ground level, putting materials on and taking materials off a material hoist, when he was struck in the ankle by a bucket containing a mop head,” and where “plaintiff testified that he was several feet away from the hoistway opening when he was struck by the bucket and that he first saw the bucket when it was about a foot away at eye level, a split second before it struck him,” “Supreme Court properly denied the plaintiff’s motion because he failed to meet his prima facie burden of establishing his entitlement to judgment as a matter of law by showing that his injuries were proximately caused by the alleged violations of the Labor Law, namely, the absence or inadequacy of a safety device or other violation of the statute”).

Berman v. Franchised Distributors, Inc., ___ A.D.3d ___, ___ N.Y.S.2d ___, 2011 WL 4839156 (2nd Dep’t 2011) (where plaintiff placed an A-frame ladder so that two of its footings were resting on grass and two were resting on an asphalt sidewalk alongside a wall of the building, and where plaintiff testified that “the top of the ladder moved away from the building and he fell” as he was attempting to descend the building, plaintiff made a *prima facie* showing for summary judgment under Labor Law § 240(1) but “defendant raised triable issues of fact as to whether they provided a proper safety device and whether the conduct of the plaintiff, including his alleged consumption of alcohol prior to and during the time that he was working [citation omitted], was the sole proximate cause of his injuries”).

Pietrowski v. Are-East River Science Park, LLC, 86 A.D.3d 467, 468, 928 N.Y.S.2d 266, 268 (1st Dep’t 2011) (it was “error to grant summary judgment in plaintiffs’ favor with respect to their Labor Law § 240(2) claim” where “the record presents a triable issue of fact with respect to whether plaintiff fell from the scaffold, or while he was descending to it”).

VI. LABOR LAW § 240 DEFENSES

A. The “Sole Proximate Cause” Defense

The Case Of The Purportedly “Redundant” Safety Device And Its Impact Upon The “Sole Proximate Cause” Defense -- The Decision in *Grove v. Cornell University*, ___ N.Y.3d ___, ___ N.Y.S.2d ___, 2011 WL 4916199 (October 18, 2011), mod’g 75 A.D.3d 718, 904 N.Y.S.2d 559 (3rd Dep’t 2010).

Suppose that plaintiff has two safety devices, either of which would be sufficient to avoid the subject accident if the device were working properly and plaintiff availed himself or herself of the device’s protection. Now further suppose that plaintiff deliberately chooses not to use one of those devices because he or she figures that the other device will suffice, but that the other device is, unbeknownst to plaintiff, broken.

Is the plaintiff’s deliberate failure to use the working, available device the “sole proximate cause” of the accident for the purposes of Labor Law § 240?

That, in essence, was the question that here spilt the Appellate Division.

Facts: Plaintiff was working 30 feet up in a basket affixed to a boom lift. Entry to the basket was effected through a gate with a spring-loaded hinge that was supposed to automatically lock. Plaintiff had been provided with a harness and lanyard and had purportedly been reminded, just moments before the accident, to tie on to the basket.

Plaintiff failed to tie on to the basket. This would not have of itself caused the accident. However, the hinge was broken with the consequence that the gate did not self-close. Plaintiff could still have closed the gate manually had he noticed this, but he apparently did not notice it. Plaintiff fell the 30 feet through the open gate.

Was the plaintiff’s apparently deliberate failure to tie on to the basket the “sole proximate cause” of his accident as a matter of law?

Appellate Division: The Appellate Division ruled in the defendants’ favor by 3 to 2 vote. The majority wrote:

... the evidence established that the gate and lanyard were available, adequate and operable safety devices, and that **if plaintiff had either attached his lanyard as required or closed and latched the gate manually, the provided safety devices would have prevented him from falling out of the basket.** Contrary to the position adopted by the dissent, the fact that the spring-loaded *hinge* was not operating properly did not render the *gate* defective. Moreover, as there was no evidence that the lanyard was anything other than an adequate, available and operable safety device that would have prevented any fall by plaintiff, **it ultimately is irrelevant whether the gate was functioning automatically, as defendant was not required to furnish an additional, redundant safety device.**

* * *

Moreover, as plaintiff's own negligent conduct was, as a matter of law, the sole proximate cause of his injuries, defendants were entitled to summary judgment dismissing plaintiff's Labor Law § 240(1) claim [citations omitted]

75 A.D.3d at 720, 904 N.Y.S.2d at 561, emphasis added.

The two dissenters felt that plaintiff's conduct was *a* cause of the accident, but not necessarily "the sole proximate cause" of the accident:

Here, there is sufficient evidence in the record from which a jury could find that the failure to provide an adequate safety device, to wit, a basket with a properly operating, self-closing gate, in violation of Labor Law § 240(1), was a contributing cause to plaintiff's fall. Moreover, **defendants have not shown conclusively that the defective gate on the basket was not a proximate cause of this accident, nor have defendants established that plaintiff's conduct was the sole proximate cause of the accident** (*cf. Torres v. Monroe Coll.*, 12 A.D.3d 261, 262, 785 N.Y.S.2d 57 [2004]). A jury should make those determinations (*see Cammon v. City of New York*, 21 A.D.3d 196, 200, 799 N.Y.S.2d 455 [2005]). While plaintiff was properly denied summary judgment on this record (*see Tronolone v. Praxair, Inc.*, 22 A.D.3d 1031, 1033, 804 N.Y.S.2d 520 [2005]), we are not persuaded that defendants established that they were entitled to summary dismissal.

75 A.D.3d at 72-1722, 904 N.Y.S.2d at 562, emphasis added.

Court of Appeals: The Court of Appeals unanimously modified on abbreviated 500.11 review (letter briefing and no oral argument), stating that triable issues were presented. The memorandum decision was, in its entirety, as follows:

The judgment appealed from and the order of the Appellate Division brought up for review should be modified, without costs, by denying defendants' motion for summary judgment seeking dismissal of plaintiff's Labor Law § 240(1) claim and, as so modified, affirmed.

Triable issues of fact exist as to whether defendants failed to provide an adequate safety device to plaintiff in violation of Labor Law § 240(1) or whether plaintiff's conduct was the sole proximate cause of his injuries.

Emphasis added.

Query: Obviously, in determining whether defendants were entitled to summary judgment, both appellate courts were obligated to construe the evidence in plaintiff's favor.

So my question is this. Was the Court of Appeals saying, (a) that it was for the jury to say whether the defective hinge was a concurrent cause of the accident, (b) that it was for the jury to say whether plaintiff's conduct barred recovery *even if* the defective hinge was a concurrent cause of the accident, or, (c) both of the above?

Cordeiro v. TS Midtown Holdings, LLC, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2011 WL 4089443 (1st Dep’t 2011) (where plaintiff was sliding open the latch to the elevator hoistway doors when the doors “unexpectedly opened, causing him to fall to the floor below,” “defendants failed to raise a triable issue of fact as to whether plaintiff was the sole proximate cause of the accident” inasmuch as defendants “did not submit any admissible evidence that plaintiff knew he should have used his safety harness under these circumstances, or that he knew his partner had a suitable 50-foot lifeline to which the harness could have been attached”).

Mazurett v. Rochester City School District, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2011 WL 4637552 (4th Dep’t 2011) (where plaintiff “fell from a collapsing scaffold at a construction site on property owned by defendant,” the Court rejected “defendant’s contention that plaintiff was a recalcitrant worker whose own actions were the sole proximate cause of the accident”; “[a]lthough defendant submitted evidence that plaintiff was instructed to use a more stable scaffold and to use a ladder to ascend the scaffold, defendant failed to submit any evidence that plaintiff refused to use a particular scaffold or ladder that was provided to him”; “[e]ven assuming, arguendo, that plaintiff was negligent, we conclude that his own conduct cannot be deemed the sole proximate cause of the accident inasmuch as plaintiffs established that a statutory violation was a proximate cause of plaintiff’s injuries”).

Pietrowski v. Are-East River Science Park, LLC, 86 A.D.3d 467, 467-468, 928 N.Y.S.2d 266, 268 (1st Dep’t 2011) (although plaintiff’s foreman “averred that ‘there were no independent safety cable systems erected’ at the location of [plaintiff’s] fall, the record evidence proffered by defendants suggest[ed] the opposite,” thus creating a triable issue of fact, along with defendant’s further proof that plaintiff “was provided with a safety booklet outlining the elevation related safety rules including tie off requirements for iron workers” and that “all employees were aware that choker cables were readily available in gang boxes on each floor,” there was an issue as to whether “defendants failed to provide [plaintiff] with choker cables, or whether they were made available and [plaintiff] was recalcitrant in failing to use them”).

VII. LABOR LAW § 241(6)

The Last Antecedent - The Decision in *Wilinski v. 334 East 92nd Street Housing Development Fund Corp.*, supra, ___ N.Y.3d ___, ___ N.Y.S.2d ___, 2011 WL 5040902 (October 25, 2011), mod’g 71 A.D.3d 538, 898 N.Y.S.2d 15 (1st Dep’t 2010).

The Labor Law § 241(6) issue concerned the meaning of 12 NYCRR § 23-3.3(b)(3). That provision stated:

Walls, chimneys and other parts of any building or other structure shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration.

Defendants urged that the words “wind pressure or vibration” modified the entire subsection and that it was alright if parts of the building fell or collapsed so long as they did not fall or collapse as a result of being weakened by wind pressure or vibration. Plaintiff argued, and the Appellate Division panel in this case found, that the phrase “by wind pressure or vibration” applied only to the last antecedent, the words “be weakened.”

The Court acknowledged that “lower courts ruling on this issue have largely adopted defendants’ proposed reading of the regulation.” However, it ruled:

... we believe that the Appellate Division’s interpretation [in this case] is the better one. Thus, we affirm the court’s finding that plaintiff is not required to show that the pipes fell or collapsed due to wind pressure or vibration to state a claim under 13 NYCRR 23-3.3(b)(3).

The Court of Appeals further ruled that defendants failure to prove that their non-compliance with 12 NYCRR § 23-3.3(c), requiring “continuing inspections ... by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material,” “did not cause plaintiff’s accident.” Defendants were therefore correctly denied summary judgment on the § 241(6) claim.

A. Pleadings

Cordeiro v. TS Midtown Holdings, LLC, supra, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2011 WL 4089443 (1st Dep’t 2011) (where plaintiff was sliding open the latch to the elevator hoistway doors when the doors “unexpectedly opened, causing him to fall to the floor below,” and where plaintiffs first alleged violation of § 23-1.7[b] in “a third supplemental bill of particulars served, without leave of court, after plaintiffs moved for summary judgment,” plaintiffs should have been permitted to rely thereon since “plaintiffs’ original bill of particulars claims that defendants failed to adequately maintain the hatchway, causing plaintiff to fall when it suddenly opened” and “plaintiffs’ belated identification of 12 NYCRR 23-1.7(b)(1) ‘entails no new factual allegations, raises no new theories of liability, and has caused no prejudice to defendant[s]’ [internal citation omitted]”, but “Supreme Court properly dismissed plaintiff’s Labor Law § 241(6) claim to the extent it is based on 12 NYCRR 23-1.16, since plaintiffs never alleged in their original bill of particulars that plaintiff was given defective safety equipment”).

B. Viable Claims

Gonzalez v. TJM Construction Corp., supra, 87 A.D.3d 610, 611, 928 N.Y.S.2d 344, 346 (2nd Dep’t 2011) (where plaintiff, a mason, “was inside the building on the ground floor next to a window that had been removed, talking to his foreman, when, according to the plaintiff, a brick fell from ‘out of nowhere’ and struck him,” Supreme Court should have denied defendant’s motion for dismissal of “so much of the Labor Law § 241(6) cause of action as was predicated on an alleged violation of 12 NYCRR 23-1.7(a)(1)” inasmuch as defendant “failed to establish the absence of issues of fact regarding its contention that the area in which the plaintiff was standing when he was struck was not ‘normally exposed to falling material or objects’”).

Guryev v. Tomchinsky, supra, 87 A.D.3d 612, 614, 928 N.Y.S.2d 574, 576 (2nd Dep’t 2011) (where plaintiff was using a nail gun to install base moldings when a nail ricocheted and struck his eye, and where plaintiff “based [his] cause of action on Industrial Code (12 NYCRR) § 23-1.8(a), which requires the furnishing of eye protection equipment to employees who, inter alia, are ‘engaged in any ... operation which may endanger the eyes,’” plaintiff’s submissions “failed to eliminate a triable issue of fact as to whether, at the time of his accident, he was engaged in work that ‘may endanger the eyes’ so as to require the use of eye protection pursuant to Industrial Code”).

Pietrowski v. Are-East River Science Park, LLC, supra, 86 A.D.3d 467, 469, 928 N.Y.S.2d 266, 269 (1st Dep’t 2011) (where it was undisputed that a scaffold cracked when plaintiff struck it and “defendants presented no evidence as to whether they provided any nails, cleats or other securing devices for this floating scaffold at the time of the accident in accordance with the Code’s requirement,” the “court properly denied defendants’ motion for summary judgment dismissing the Labor Law § 241(6) claim inasmuch as plaintiffs alleged that defendants violated Industrial Code (12 NYCRR) § 23-5.8(h)”).

Cordeiro v. TS Midtown Holdings, LLC, supra, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2011 WL 4089443 (1st Dep’t 2011) (where plaintiff was sliding open the latch to the elevator hoistway doors when the doors “unexpectedly opened, causing him to fall to the floor below,” “Supreme Court improperly dismissed plaintiff’s Labor Law § 241(6) claim to the extent it is based on an alleged violation of Industrial Code (12 NYCRR) § 23-1.7(b)(1)” inasmuch as “the provision is sufficiently specific to support a Labor Law § 241(6) claim” and “issues of fact exist as to whether it was violated”).

C. Rejected Claims

Vasquez v. Minadis, supra, 86 A.D.3d 604, 605, 927 N.Y.S.2d 670, 672 (2nd Dep’t 2011) (where “roofer came to the premises to investigate a reported problem with leaks from the roof of the premises,” where plaintiff’s supervisor “directed him to take the roofer to his apartment to climb through his kitchen window to the roof of the premises,” and where plaintiff “slipped and fell three stories onto the concrete ground,” defendants should have been granted dismissal of plaintiff’s § 241(6) claim since “the appellants established that the accident did not result from construction, excavation, or demolition work”).

Morris v. City of New York, supra, ___ A.D.3d ___, 929 N.Y.S.2d 585, 586 (1st Dep’t 2011) (where plaintiff “was injured when a temporary wooden step on which he was standing shifted as he and another employee were moving an air tank up a concrete stairway from the basement of the work site to the first floor,” “[i]n view of the evidence that the temporary step was unstable and that snow and debris accumulated in the working areas and in the hallways and other passageways that plaintiff and the other employee had to traverse to reach the air tanks, defendant failed to demonstrate that Industrial Code ... §§ 23-1.7(d)(e)(1) and (2) and (f), which address slipping, tripping and other hazards, and vertical passages, and § 23-2.7(b), which addresses temporary stairway construction, are inapplicable to the facts of this case and thus do not support the Labor Law § 241(6) cause of action”).

Gray v. City of New York, 87 A.D.3d 679, 680, 928 N.Y.S.2d 759, 761-762 (2nd Dep’t 2011) (where plaintiff stepped on a wooden ramp while alighting from his truck and the ramp purportedly separated underneath his feet, causing him to fall to the ground, the regulation relied on by plaintiff, 12 NYCRR 23-1.22(b)(2), was “sufficiently specific,” but “defendants made a prima facie showing that this provision was not applicable to the facts of the case”).

Pietrowski v. Are-East River Science Park, LLC, supra, 86 A.D.3d 467, 469, 928 N.Y.S.2d 266, 269 (1st Dep’t 2011) (where it was undisputed that a scaffold cracked when plaintiff struck it and “defendants presented no evidence as to whether they provided any nails, cleats or other securing devices for this floating scaffold at the time of the accident in accordance with the Code’s requirement,” “the motion court erred when it denied defendants’ motion to dismiss plaintiff’s Labor Law § 241(6) claim, to the extent premised on a violation of Industrial Code (12 NYCRR) § 23-1.7(b)(1)” inasmuch as “[i]t is clear that this provision of the Industrial Code is wholly inapplicable to the facts of this accident since plaintiff did not fall through an ‘opening’ as defined by this section of the Industrial Code”).

VIII. LABOR LAW § 200

A. General Principles

Gray v. City of New York, supra, 87 A.D.3d 679, 679, 928 N.Y.S.2d 759, 761 (2nd Dep’t 2011) (“Labor Law § 200 codifies the common-law duty to maintain a safe work site”).

B. Viable Claims

Schick v. 200 Blydenburgh, LLC, supra, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2011 WL 4599855 (2nd Dep’t 2011) (where defendant Pal Supply Corp. was the incoming tenant at a warehouse, where plaintiff, a field technician for Verizon, was assigned to provide telephone service for Pal Supply, where plaintiff said that a Pal Supply employee told him to run a wire from the serving terminal along the ceiling to an area above the office doorway, and where plaintiff fell when “the ladder slipped or shifted due to sand, dirt, or dust on the floor,” “Pal Supply failed to make a prima facie showing, as a matter of law, that it did not create the allegedly dangerous condition, and that it lacked actual or constructive notice of the condition”).

Cordeiro v. TS Midtown Holdings, LLC, supra, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2011 WL 4089443 (1st Dep’t 2011) (where plaintiff was sliding open the latch to the elevator hoistway doors when the doors “unexpectedly opened, causing him to fall to the floor below,” “Supreme Court properly denied defendants’ cross motion for summary judgment dismissing plaintiffs’ common-law negligence and Labor Law § 200 claims” since “[p]roof of defendants’ supervision and control over plaintiff’s work is not required to impose liability under the statute and the common law where, as here, the accident results from a dangerous work site condition”).

Vasquez v. Minadis, supra, 86 A.D.3d 604, 605, 927 N.Y.S.2d 670, 672-673 (2nd Dep’t 2011) (where “roofer came to the premises to investigate a reported problem with leaks from the roof of the premises,” where plaintiff’s supervisor “directed him to take the roofer to his apartment to climb through his kitchen window to the roof of the premises,” and where plaintiff “slipped and fell three stories onto the concrete ground,” “Supreme Court properly denied those branches of the appellants’ cross motion which were for summary judgment dismissing the Labor Law § 200 and common-law negligence causes” inasmuch as defendants “did not make a prima facie showing of their entitlement to judgment as a matter of law with respect to the plaintiff’s allegation that their act of permanently sealing off access to the roof from inside the premises created a dangerous condition”).

C. Rejected Claims

Morris v. City of New York, supra, ___ A.D.3d ___, 929 N.Y.S.2d 585, 586 (1st Dep’t 2011) (“[t]he record demonstrates only that defendant had general supervisory authority at the work site, which is insufficient to trigger liability under Labor Law § 200 and common-law negligence principles”).

Gray v. City of New York, supra, 87 A.D.3d 679, 679, 928 N.Y.S.2d 759, 761 (2nd Dep’t 2011) (where plaintiff stepped on a wooden ramp while alighting from his truck and the ramp purportedly separated underneath his feet, causing him to fall to the ground, the defendants, who were essentially the site owners and who admittedly did not supervise or control the plaintiff’s work, “established their prima facie entitlement to judgment as a matter of law based upon evidence that they did not create the alleged dangerous condition and that they had no actual or constructive notice of the condition”; indeed, “plaintiff’s own deposition testimony, submitted in support of the motion, demonstrated that the defect was not visible and apparent”).

Morris v. C&F Builders, Inc., 87 A.D.3d 792, 793, 928 N.Y.S.2d 154, 156 (3rd Dep’t 2011) (where defendant was a prime contractor that had no control over plaintiff’s work and had no duty, contractual or otherwise, to enforce safety standards at the work site, Supreme Court correctly dismissed the plaintiff’s Labor Law § 200 claim).