This CLE will be presented in the format of oral arguments on summary judgment motions
***Nick Gjelaj of Zaremba Brown, PLLC for plaintiff** and*
***Susan Scaria of Fullerton Beck, LLP for defendants** GC and Owner*
*before the **Hon. Lewis Lubell.***

Statement of Facts

Plaintiff alleges violations of Labor Law §§ 240, 241(6), 200 and New York State Industrial Code § 23-3.3. Plaintiff was a demolition worker working for XYZ Demo, Inc. ("XYZ Demo") and was working on a gut renovation project when he was suffered a fractured ankle and a concussion. The project involved gut renovation of a 6-story building. The architectural drawings for the project issued by the project/building owner ("Owner") to the general contractor ("GC") noted all interior walls were to be removed on each floor but that the flooring was to remain to extent it was in good repair.

During the demolition stage of the project, the GC had a Site Superintendent visit the job site daily for a few hours each day and walked the entire job site. The Owner sent a representative to the job site once per week to attend progress meetings with the GC.

Plaintiff's foreman from XYZ Demo directed plaintiff and his co-workers where to start the demolition work on the floor each day and what tools had to be used. XYZ Demo provided all tools necessary for the demolition work. To the extent ladders were needed, those were provided by the Owner.

XYZ Demo had been working on the same floor for 1 week as of the date of the accident. They had completed the interior demolition of the 6th floor and demolition of 50% of the interior walls and framing on the 5th floor. All floors were identical - wood with wood joist supports. XYZ Demo was not scheduled to demolish any portion of the 5th floor. The floor was approximately 100' wide by 200' long. Plaintiff testified he did not notice any defects on the 5th floor or any deterioration of any portions of the floor at any time prior to the accident.

On the date of the accident plaintiff, his co-workers and his foreman from XYZ Demo had been working on interior demolition on the 5th floor. At his deposition plaintiff testified that he and his co-workers would let large sections of sheetrock walls fall to the floor during the demolition process. Some sections of wall that fell weighed 100lbs and required 2 people to lift and move them to a debris container kept on the floor for the demolition debris.

At the GC's deposition, the GC's Superintendent testified that during the course of his daily walk-throughs he made observations of the floor at each story to assess for any deterioration. He did not recall observing any structural problems on the 5th floor prior to plaintiff's accident. In discovery, counsel for the GC turned over daily progress logs that were filled out by the GC's Assistant Site Superintendent. The GC Superintendent testified the logs provided a general description of work performed by the subcontractors working on site daily and information about any safety issues and/or accidents. The Superintendent reviewed the logs for the prior day in the mornings before he started his walk throughs. The daily log for 2 days prior to the date of the accident included a note that "XYZ foreman reported 5th floor northeast corner wood floor slats rotted in certain sections and some rusted nails."

At the time of the accident, plaintiff was working in the northeast section of the floor demolishing a wall with a co-worker. The wall was 10' wide and the ceiling was 9' tall. Plaintiff had demolished 50% of the wall. At the moment of the accident plaintiff swung his sledgehammer and knocked out a large section of sheetrock wall to the floor. When the sheetrock dropped, plaintiff heard a cracking sound then felt himself fall straight down through the flooring and land on the 4th floor, striking his head against the floor and breaking his left ankle.

None of the parties retained liability experts for this case.

I. **Who is a Labor Law plaintiff**? A "covered person" for Labor Law purposes is one working on a construction project that involves alteration of a building or structure (Saint v. Syracuse Supply Co., 25 N.Y.3d 117 (2015). The statute applies to project owners and "contractors" who have overall site safety control and imposes absolutely liability regardless of negligence. Bland v. Manocherian, 66 N.Y.2d 452 (1985).

- If injured person is a pedestrian walking past a construction project and is injured, the injured person is not a "covered person" and does not have a viable Labor Law claim
- If a homeowner is renovating her house and her friend is helping with the renovation of the home and the friend falls off the ladder the friend is not a covered person under the Labor Law.

II. What is Labor Law § 240?

A. Accidents involving workers who fall from temporary work platforms, such as scaffolds, *or* permanent floors where collapse was reasonably foreseeable:

1. Jones v. 414 Equities, 866 N.Y.S.2d 165 (1st Dept 2008) – plaintiff was performing demolition work on a permanent floor; while carrying a 50 lb to 60 lb demolished section of wall across a floor, the floor collapsed; First Department found the collapse was foreseeable; Richardson v. Matarese, 206 A.D.2d 353, 614 N.Y.S.2d 424 (2d Dept 1994)

2. Restrepo v. Yonkers Racing Corp., Inc., 954 N.Y.S.2d 17 (1st Dept 2013) – plaintiff was removing asbestos from a soffit area when he fell through an access door 12' to the floor below; there was deposition testimony that the access door was intended to be accessed from below to reach mechanical work in the soffit area; First Department held it was not foreseeable that the access door would be traversed and could collapse so the accident did not trigger § 240 liability; Martins v. Board of Education of City of NY, 919 N.Y.S.2d 196 (2nd Dept) (question of fact on foreseeability)

B. What constitutes a "falling object" to trigger § 240 liability:

1. Wilinski v. 334 E. 92nd Street Hous. Dev. Fund Corp., 18 N.Y.3d 1 (2011) - plaintiff was demolishing brick walls in an areas where prior demolition left 2 vertical plumbing pipes about 10' tall standing unsecured (slated for removal later); at the time of the accident a wall being demolished near where plaintiff was working fell, struck the vertical pipes and the pipes fell 4' and struck plaintiff; Court of Appeals held that the height differential between the pipes and plaintiff was not "de minimus given the 'amount of force [the pipes] w[ere] [] able [to] genera[e] over their descent" and as such the harm to plaintiff "'flow[ed] directly from the application of the force of gravity to the [pipes].'"; also Runner v. NY Stock Exchange, Inc., 13 N.Y.3d 599 (2009)

2. Fabrizi v. 1095 Avenue of the Americas, 22 N.Y.3d 658 (2014) – an electrician was relocating a "pencil box" (box inside an electrical conduit) that was attached between two 4" wide and 8' to 10' long conduits running vertically from the ceiling to the top of the box. The vertical conduit was attached to the ceiling by 4" compression couplings. Plaintiff had removed the pencil box then 15 minutes later while still in the area, the top portion of the conduit fell on plaintiff's hand. In a 5-4 split decision, the Court of Appeals held that the compression coupling was not a safety device within the meaning of § 240 such that its failure triggered liability under the statute. NB: The dissent noted that the applicability of § 240 should not be dependent on whether the couplings were a safety device but rather part of the buildings infrastructure; see also Simmons v. City of New York , 85 N.Y.S.3d 462 (2nd Dept 2018) – plaintiff was moving a 600-lb air compressor on a pallet jack that was secured to the jack with 2 pieces of scrap wood around the sides of the compressor then the blades of the jack were raised 6" above the floor; while moving the jack across the floor, the jack struck a piece of concrete on the floor, causing it to stop short and the compressor to roll off onto plaintiff's ankle. Second Department held that the injuries were not related to an elevation or gravity related risk; in the decision the Court focused on the condition precedent under § 240 for falling object cases that the accident occurred as a result of a the absence of a safety device that was required for the purposes of hoisting or securing the item (Simmons, at 467.)

III. **Labor Law § 241(6)** imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. Due to the vagueness of the statute, the Courts have held that establishing a violation of this Labor Law section requires proving a violation of a relevant and sufficiently specific section of the New York State Industrial Code that provides directives for maintaining a safe work site. (Rizzuto v. Wenger Construction Corp., 91 N.Y.2d 343 (1998) and Cruz v. 1142 Bedford Avenue, LLC, 145 N.Y.S.3d 77 (2nd Dept 2021))

A. Salinas v. Barney Skanska Construction Co., 769 N.Y.S.2d 559 (2nd Dept 2003) – plaintiff was employed by a demolition company and was removing a large heavy air conditioning duct attached at a ceiling by burning through metal rods supporting it. There were no mechanical means provided for lowering the duct once the rods were removed. Plaintiff alleged a violation of § 241(6) based on a violation of Industrial Code §3.3(c). The Second Department found the allegation of Industrial Code §23- 3.3(c) was applicable because plaintiff was performing demolition by hand rather than with a machine; and defendants failed to make a prima facie showing that the required inspections were performed on site.

B. Cody v. State of New York, 919 N.Y.S.2d 55 (2nd Dept 2011) – plaintiff was climbing down a ladder then stepped off onto the floor, stepping on a piece of lumbar, causing him to twist his ankle. Plaintiff alleged violation of § 1.7(e)(1) but the Second Department held that the area where the accident occurred was an open work area and not a passageway and as such the mechanism of the accident did not trigger liability under this Industrial Code.

C. Torkel v. NYU Hospitals Center, 883 N.Y.S.2d 8 (1st Dept 2009) – plaintiff was rolling a filled container from the work site to his truck using a ¾ inch thick sheet of plywood as a makeshift ramp to move the container over a gap between the edge of the work site and the street; while moving the container over the ramp, the container fell and spilled concrete debris on his leg causing him injury; plaintiff alleged a violation of § 241(6) based on a violation of § 23-1.7(f), which requires "[s]tairways, ramps or runways shall be provided as the means of access to working levels above or below ground…"; First Department held that § 1.7(f) was not relevant to the mechanism of the accident sufficient to support a violation of § 241(6) because the height differential between the sidewalk and the adjacent road did not qualify as "working levels above or below ground."

IV. **Labor Law § 200** is a codification of general negligence with a twist. There 2 types of § 200 claims – accidents caused as a result of the means and methods of the how the work was being performed; and accidents related to a created condition on the job site. (Cappabianca v. Skanska USA Bldg. Inc., 950 N.Y.S.2d 35 (1st Dept. 2012).

A. Means and Methods:

1. Prerequisite to triggering § 200 liability against an owner or contractor is to establish the defendant had sufficient level of control and supervision over the "injury producing" work.

i. Paz v. City of New York, 925 N.Y.S.2d 453 (1st Dept 2011) – plaintiff was working for the general contractor; he climbed up a sidewalk bridge to perform work on the edge of the building; at the top of the bridge he stood with one foot on the ledge of the building and one foot on the suspended scaffold while putting on his safety harness and then fell when the scaffold shifted; First Department found the Owner did nothing but provide general instructions on what work was needed and not "how to do it, [or] monitoring and oversight of the timing and quality of the work." Providing general instructions failed to qualify the Owner's actions as sufficient control and supervision over plaintiff's work at the time of the accident to subject the owner to liability under § 200.

ii. Vohra v. Mount Sinai Hospital, 115 N.Y.S.3d 876 (1st Dept 2020) – plaintiff was working for a subcontractor of the scaffolding contractor. The scaffolding contractor was hired by the general contractor. Plaintiff fell from the scaffold while dismantling it. The First Department found that the scaffolding contractor asserted sufficient control and supervision over plaintiff's dismantling work such that their actions

subjected them to liability under § 200 (the trial court's decision denying the scaffolding company summary judgment on the § 200 claim noted that plaintiff received instructions daily from the scaffolding company owner rather than anyone from his own company).

B. Created Condition – If the entity created a hazardous condition, they are liable. In Powers v. Plaza Tower, LLC, 103 N.Y.S.3d 383 (1st Dept 2019) the plaintiff fell from a decommissioned catwalk on the building he was walking along during renovation work. The catwalk had been partial demolished as a part of a prior project and had no ready access. Plaintiff climbed over a parapet wall on the roof to get onto the catwalk and fell through the grating on the catwalk. The First Department upheld the lower court's denial of the building Owner's summary judgment on Labor Law § 200 by finding the Owner created the condition by having the catwalk partially demolished and not completely removed; liability under § 200 was found against the Owner based on their knowledge of the unsafe condition and failure to warn plaintiff of same.

V. **Sole Proximate Cause Defense -** The only defense a statutory defendant has to a Labor Law § 240 or 241(6) claim is to establish the accident was not proximately caused by the lack of an adequate safety device but rather solely as a result of plaintiff's own negligence. Blake v. Neighborhood Housing Services of New York City, Inc., 1 N.Y.3d 280 (2003).

A. In Cahill v. Triborough Bridge and Tunnel Authority, 43 N.Y.3d 35 (2004), the Court of Appeals reversed the trial court's decision granting plaintiff summary judgment on his § 240 claim, holding that questions of fact existed as to whether plaintiff was provided an adequate safety device and/or knew they were available for him on site; that "he chose for no good reason not to use the safety device"; and that but for his choice in not using the safety device the accident would not have happened.

B. BUT if plaintiff can show that there was a custom and practice on the work site of engaging in the type of unsafe activity that was a proximate cause of the accident, the sole proximate cause defense is defeated. In Biaca-Neto v. Boston Rd. II Housing Development Fund Corp., 34 N.Y.3d 1166 (2020), the Court of Appeals held a question of fact existed as to whether plaintiff's actions were the sole proximate cause of his accident. Plaintiff was wearing a harness and tied off while standing on a scaffold below a window cut out in the building. He then unhooked his harness, grabbed a scaffold beam approximately 7' above the platform he was standing on and hoisted himself up to exit the scaffold through the window cutout. While do doing he slipped and fell backward to the scaffold platform and suffered injuries. He testified to having observed his co-worker doing the same thing right before him. There was a standing order issued by the general contractor not to enter the building this way, but plaintiff was not advised of the order. There was evidence in the record that the general contractor may have been aware that, even after the standing order was issued, the workers continue to engage in this unsafe practice.