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TRIAL PRACTICE

Establishing Liability Under Labor Law §241(6)

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Causes of action under Labor Law §240(1) and Labor Law §241(6) are commonly pleaded in construction accident cases. Both statutes impose nondelegable duties on contractors, owners, and their agents, to provide specified protections to workers. This duty exists regardless of whether or not they exercised supervision or control over the worksite. Both statutes exclude from liability owners of one- and two-family homes who contract for, but do not direct or control, the work. However, the two statutes have material differences in their theories of liability and in the proof they require.

Scope and Meaning

Labor Law §240(1) is familiar to many practitioners. It imposes absolute liability for the failure to provide adequate protection against risks arising from physically significant elevation differentials during the performance of enumerated activities specified in the statute. Comparative negligence is not a defense to liability under §240(1), and liability under the statute is not dependent upon the breach of any outside rules, regulation or standards of conduct. *Zimmer v. Chemung County Performing Arts*, 65 N.Y.2d 513 (1985).

Labor Law §241(6) provides, in relevant part, as follows:

> 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:
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> * * *
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> 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

The Industrial Code contains a vast array of regulations which may be significant in establishing liability under §241(6).

It differs from Labor Law §240(1) in two particularly significant ways. First, comparative negligence may be asserted as a defense. Second, §241(6) is not a self-contained standard. In order to trigger the defendant's liability, the plaintiff must prove that a violation of a provision of the New York Industrial Code was a proximate cause of his injuries. The violation of a regulation will serve as evidence of negligence, which the defendant may be able to refute. See, e.g., *Long v. Forest-Fehlhaber*, 55 N.Y.2d 154, 159 (1982) (noting, in a §241(6) case, that "a violation of an administrative regulation, though promulgated by leave of a statute, is simply some evidence of negligence").

Because the duty imposed by the statute is nondelegable, a worker need not show that defendants exercised supervision or control over his worksite in order to establish his right of recovery. *Ross v. Curtis-Palmer Hydro Electric Co.*, 81 N.Y.2d 494 (1993). Even if, for example, an owner had no involvement in administering the worksite, just as in a §240(1) case, it can be held liable.

It is also important to note that Labor Law §241(6) is not limited specifically to construction sites. See *Joblon v. Solow*, 91 N.Y.2d 457 (1998). Rather, it covers accidents that occur in the context of construction, demolition and excavation work. The Industrial Code defines covered work as follows: "All work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures, whether or not such work is performed in proximate relation to a specific building or other structure..." See 12 NYCRR 23-1.4[b][13].

The Industrial Code contains a vast array of regulations which may be significant in establishing liability under §241(6). Although there are certain regulations that are very commonly asserted as a basis for liability under §241(6), it may be necessary to scour the regulations where an obscure type of equipment or workplace condition is implicated to see if it is the subject of a regulation.

Some of the common predicates for liability are contained in 12 NYCRR 23-1.7. For example, 12 NYCRR23-1.7(d) addresses slipping hazards; 12 NYCRR 23-1.7(e) addresses tripping and other hazards. The latter distinguishes between passageways [1.7(e)(1)] and work areas [1.7(e)(2)], with subtle distinctions in the hazards identified in each.

Under this regulation, it is important to establish that the accident occurred in one of the statutorily identified areas and that the defect itself was a tripping hazard, within the scope of the regulation. For example, in *Lois v. Flintlock Constr. Services*, 2016 NY Slip Op 01555 (1st Dept. March 2016), plaintiff tripped on a plastic tarp and broken concrete. The court found that the area was a passageway, so » Page 7

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the regulation applied. The tarp upon which plaintiff tripped was an actionable hazard, and accordingly, he was permitted to assert the §241(6) claim. By contrast, in *Costa v. State*, 123 A.D.3d 648 (2d Dept. 2014), claimant's decedent stepped down from a steel beam onto a three-to-four-feet-high stack of wood, which gave way, and he fell. The court held that the decedent did not trip, and the pile of wood could not be considered a tripping hazard.

Not every provision of the Industrial Code will be actionable under Labor Law §241(6). Only a violation of a concrete specification will give rise to a nondelegable duty. *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494 (1993); *Gonzalez v. Perkan Concrete Corp.*, 110 A.D.3d 955 (2d Dept. 2013). A regulation that merely recites a general duty of care or reiteration of a common law safety principle will not do. Whether a particular regulation is sufficiently concrete to form a basis for liability under §241(6) is frequently the subject of motion practice.

The Court of Appeals' decision in *Misicki v. Caradonna*, 12 N.Y.3d 511 (2009), illustrates the type of analysis that may be necessary to determine whether a particular regulation expresses a general duty or a specific command. The Court of Appeals was asked to construe the first three sentences of 12 NYCRR 23-9.2(a), which addresses power operated equipment:

> (a) Maintenance. All power-operated equipment shall be maintained in good repair and in proper operating condition at all times. Sufficient inspections of adequate frequency shall be made of such equipment to insure such maintenance. Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement.

The First, Second and Third Departments had ruled that section 23-9.2(a) did not support a claim under Labor Law §241(6), and the Fourth Department had ruled to the contrary. The Court of Appeals found that only the third sentence imposed an affirmative duty to correct "any structural defect or unsafe condition in such equipment" sufficient to mandate a distinct standard of conduct, rather than a general reiteration of common-law principles. As such, it was the type of concrete specification required under *Ross*. This case illustrates that differences among the various appellate division departments may prove significant in certain cases.

More recently, 12 NYCRR 23-1.5(c)(3) which addresses the responsibility of employers for the condition of equipment and safeguards underwent similar analysis. The portion of the regulation that mandated a duty to repair was found sufficiently concrete to support a claim under §241(6). *Becerra v. Promenade Apartments*, 126 A.D.3d 557 (1st Dept. 2015); *Perez v. 286 Scholes St. Corp.*, 134 A.D.3d 1085, 1086 (2d Dept. 2015).

Pleading and Motions

Even in cases where the worker was injured due to an elevation-related risk that may be within the scope of §240(1), there may also be liability under Labor Law §241(6). It is important to plead both statutes. For example, 12 NYCRR 1.7 (b)(1) specifically states the manner in which a hazardous opening must be guarded. It applies to any hazardous opening into which a person may step or fall provided that it is of significant depth and size. A fall through an opening may also be actionable under §240(1). In *Wrobel v. Town of Pendleton*, 120 A.D.3d 963 (4th Dept. 2014), plaintiff stepped into a three-to-four-foot hole while working at a construction site. He alleged violations of both §240(1) and §241(6).

The court held that §240(1) was not applicable to plaintiff's fall into a mere hole in the ground, but that there was a cause of action under §241(6) for failing to guard the opening with a substantial cover in accordance with 12 NYCRR 23-1.7 (b)(1)(i). Similarly, 12 NYCRR 23-1.21 addresses "Ladders and Ladderways." Although an improperly secured ladder may also give rise to liability under §240(1), both statutes should be pleaded. It is clear that §241(6) becomes especially significant where it is the only statute implicated.

Although generally the specific provisions of the Industrial Code will be identified in the complaint or bill of particulars, the failure to do so initially may not be fatal to the claim. Leave to amend to add other regulations may be granted even after the Note of Issue is filed where there is a showing of merit and the amendment involves no new factual allegations, raises no new theories of liability and causes no prejudice to defendants.

In *Kelleir v. Supreme Industrial Park*, 293 A.D.2d 513 (2d Dept. 2002), the court allowed plaintiff to allege a code violation for the first time in opposition to defendants' summary judgment motion. In *Noetzell v. Park Avenue Hall Housing Development Fund Corporation*, 271 A.D.2d 231 (1st Dept. 2000), the court held that identification of code provisions merely amplified the facts and theories previously alleged. As such, it held that service of a supplemental bill of particulars identifying a further code section was proper under CPLR 3043(b).

In *Klimowicz v. Powell Cove Assoc.*, 111 A.D.3d 605 (2d Dept. 2013), the court held that defendants were put on sufficient notice through the plaintiff's bill of particulars and deposition testimony that the cause of action alleging violations of Labor Law §241(6) related to missing scaffold planks. Thus, they could not reasonably claim prejudice or surprise. Plaintiffs were belatedly permitted to allege violations of 12 NYCRR 23-5.1 (c), (e) (1) and 23-5.3 (f) which set forth specific, rather than general, safety standards with respect to scaffolds.

Whereas under Labor Law §240(1), liability may often be determined on a summary judgment motion, it is far less fre-

quent under §241(6) because of the defense of comparative negligence, and because a violation of a regulation is only evidence of negligence. See, e.g., *Fazekas v. Time Warner Cable*, 132 A.D.3d 1401 (4th Dept. 2015). But it is possible to obtain summary judgment under §241(6) in certain cases.

In *Capuano v. Tishman Const. Corp.*, 98 A.D.3d 848 (1st Dept. 2012), plaintiffs were granted summary judgment under Labor Law §241(6) based upon violations of 12 NYCRR 23-1.7(e)(2), which provides that working areas shall be kept free from the accumulation of dirt and debris and scattered tools and materials, and 12 NYCRR 23-1.30 which addresses lighting. The court rejected defendants' argument that §241(6) did not impose absolute liability arising from the breach, but rather required a determination as to whether the safety measures employed were reasonable and adequate under the circumstances and whether the alleged violations of the regulations existed for a sufficient period of time to be discovered and remedied. The court found that they failed to raise an issue of fact sufficient to defeat plaintiff's motion.

In *Melchor v. Singh*, 90 A.D.3d 866 (2d Dept. 2011), plaintiff established his prima facie entitlement to judgment as a matter of law under §241(6) for defects in his ladder which violated multiple sections of 12 NYCRR 23-1.21(b) and proximately caused his injuries.

In *Reynoso v. Bovis Lend Lease, LMB*, 39 Misc.3d 1224(A), 972 N.Y.S.2d 146 (Sup Ct. Kings Co. 2013) affd, 125 A.D.3d 740 (2d Dept. 2015), the court granted plaintiff's motion for summary judgment predicated on a violation of 12 NYCRR 23-1.7(d), observing that: "Certain Industrial Code provisions are so closely related to causation that a violation demonstrates prima facie that the worksite was not 'operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.'"

However, summary judgment has been denied where an Industrial Code violation may have been established but the court concluded that the violation did not conclusively establish a defendant's liability as a matter of law, but rather only constituted some evidence of negligence, reserving for the jury the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances. *Seaman v. Bellmore Fire District*, 59 A.D.3d 515 (2d Dept. 2009).

Conclusion

Labor Law §241(6) occupies an important niche in Labor Law litigation. The nondelegable duty it imposes upon owners and general contractors is far broader than the duty imposed under principles of common law negligence. Although it is constrained by the necessity of an Industrial Code violation, it is especially invaluable under circumstances to which §240(1) is not applicable.

On the other hand, its protection to workers is hampered by its reliance upon the Industrial Code. The code was enacted many years ago and has been only sparingly amended. (Although other rules and regulations may be incorporated by reference, the regulations upon which a claim under §241(6) may be established are largely contained within the Industrial Code). Accordingly, it does not comprehensively address all of the hazards of the modern workplace.

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a potential problem? Clearly, it is not enough to disclose that two different clients seek patents on the proverbial better mousetrap. What is enough simply to identify a potential problem?

(b) How does one analyze whether there is or is not a potential conflict? Once a conflict check discloses a potential problem, what is the analytic framework to determine the problem? What additional facts are needed to determine this?

Conclusion

As courts have recognized, epresenting two clients seeking patents for competing technologies is a position "fraught with possible conflict of interest" and his perilous situation can continue even after one representation is completed. We have highlighted some of the pitfalls practitioners should be alert for and questions hey should be asking when confronted with this situation.

1. As of 2013, the United States adopted a first-to-file system, and the interference procedure has been abolished with respect to applications filed after that date.

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