

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA 14- X
COLEMAN, JAMES

C

Plaintiff(s),

Index No. ~~2493~~2005

DECISION/ORDER

- against -

Present:

BARRY SAIMAN

Hon.

Justice

CITY N.Y.

Defendant(s).

X

The following papers numbered 1 to 5 Read on this motion, **SUMMARY JUDGMENT**
Noticed on September 8, 2006 and duly submitted as No. on the Motion Calendar of

	<u>PAPERS NUMBERED</u>
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	<u>1-2, 3-4</u>
Answering Affidavit and Exhibits-----	<u>5</u>
Replying Affidavit and Exhibits-----	<u> </u>
Affidavit-----	<u> </u>
Pleadings - Exhibit-----	<u> </u>
Stipulation - Referee's Report --Minutes-----	<u> </u>
Filed papers-----	<u> </u>

This motion has been referred to this Court for decision by the Supreme Court Justice at IA Part 3 (City Part). Upon the foregoing papers, Oral Arguments held on June 12, 2007 and due deliberation thereof, the Decision/ Order on this motion is decided as follows:

Motion seeking an order granting summary judgment pursuant to CPLR § 3212 is granted. Plaintiff submitted the instant motion seeking summary judgment on the issue of liability with respect to Labor Law §240(1). Defendant's cross-motion seeking to strike plaintiff's note of issue and set a discovery schedule is denied.

The plaintiff commenced this action to recover money damages arising from injuries that he allegedly sustained on July 28, 2005, while working on a platform of a hydraulic lift. Plaintiff alleges that he was repairing a portion of the elevated tracks of the #4 Jerome Avenue Line at the Mosholu Parkway station when the platform of the hydraulic lift collapsed causing plaintiff to fall a distance of 25 feet.

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. **Rotuba Extruders, Inc. v. Ceppos**, 46 N.Y. 2d 223, 231, 413 N.Y.S.2d 141, 145 (1978). This Court's

function when deciding summary judgment motions is issue finding rather than issue determination. This Court must scrutinize the papers on the motion carefully in the light most favorable to the party opposing summary judgment and should draw all reasonable inferences in favor of the non-moving party. Sosnoff v. Jason D. Carter, et al., 165 A.D.2d 486, 492, 568 N.Y.S.2d 43, 47 (1st Dept. 1991); Assaf, et al. v. Ropog Cab Corp., et al., 153 A.D.2d 520, 521, 544 N.Y.S.2d 834, 835 (1st Dept. 1989).

Moreover, Labor Law § 240(1) in pertinent part provides that owners and contractors furnish such scaffolds, hoists, stays and ladders necessary to perform the required work and such devices shall be so constructed, placed and operated as to afford proper protection to workers employed in construction work. The language of Labor Law §240(1) is intended to address "exceptionally dangerous conditions posed by elevation differentials when the work site itself is elevated." Melo v. Consolidated Edison Company of New York, Inc., 668 N.Y.S.2d 190 (1st Dept 1998).

On a motion seeking summary judgment with respect to liability pursuant to Labor Law §240(1), the plaintiff is required to show that there are no questions of fact regarding whether the violation of the statute was the proximate cause of his injuries. Labor Law §240(1) imposes absolute liability upon owners and general contractors when a worker is injured because the owner and/or contractor breached his or her duty to protect the worker and the breach of that duty was the proximate cause of the worker's injuries. Zahn v. Pauker, 107 A.D.2d 118, 119 (3rd Dept 1985).

In this case plaintiff argues that he is entitled to summary judgment as a matter of law because defendant failed to provide adequate safety devices. Plaintiff further argues that defendant's failure to provide adequate safety devices was the proximate cause of the accident. Plaintiff established entitlement to summary judgment as a matter of law. Plaintiff submitted an affidavit establishing how the accident occurred and a photograph of the accident scene. It is undisputed that plaintiff was standing on a hydraulic lift platform when that platform collapsed causing plaintiff to fall 25 feet. Plaintiff also submitted the accident report prepared by the New York City Transit Authority which confirmed plaintiff's account of how the accident occurred. The evidence submitted establishes that plaintiff, while engaged in repair work of a New York City owned subway track, fell from an elevated position because plaintiff was not provided with adequate safety devices.

Defendant contends that plaintiff's motion should be dismissed because discovery is not complete. Defendant also cross-moved to strike plaintiff's note of issue. Pursuant to the

Uniform Rules of the Trial Courts Section 202.21(e) a motion to strike a note of issue must be made within twenty days after service thereof. Here, plaintiffs contend the note of issue in this case was served on November 2, 2006. Defendants offered no evidence contradicting that date of service. Defendant's cross-motion was not made until February 22, 2007 and well after the statutory time allotted. As such, defendant's cross-motion is denied as untimely.

Defendant also opposes plaintiff's motion based on its contention that the motion is premature. CPLR §3212(f) provides that the court may deny a motion for summary judgment if it appears that the facts essential to justify opposition may exist, but cannot be stated because disclosure of those facts have not yet occurred. However, it is well established that a self-serving claim that discovery would lead to relevant evidence, by itself, is insufficient to defeat a motion for summary judgment. Jefferies v. N.Y.C.H.A., 8 A.D.3d 178, 780 N.Y.S.2d 1 (1st Dept 2004). Defendants failed to establish that plaintiff is in possession of any discoverable material that could serve to defeat the instant motion. Defendant has only put forward speculative arguments in support of its cross-motion and opposition. It is well settled that mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a motion for summary judgment. Gilbert Frank Corp. v. Federal Insurance Co., 70 N.Y.2d 966 (1988). As such defendant's cross-motion is denied. It is hereby,

ORDERED that the Clerk of the Court enter judgment in favor of the plaintiff on the issue of liability with respect to plaintiff's Labor Law §240(1). It is further,

ORDERED, that the DCM Clerk in the Motion Support Office in room 217, upon service upon him/her of a conformed copy of this decision and order with notice of entry, shall assign a date for the purpose of taking an inquest and assessment of the damages incurred by the plaintiff.

Upon scheduling of the inquest the plaintiff is further directed to serve the defendant with notice of the date of the inquest and bring proof of such service to the inquest.

The foregoing constitutes the decision and Order of the Court.

Dated: 10/5/07

Hon. _____


BARRY SALZMAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
JAMES COLEMAN,

Index No: 24930/05

Plaintiff,

AFFIRMATION IN SUPPORT

-against-

Hon. Paul Victor

CITY OF NEW YORK,

Defendant.
-----X

LAWRENCE P. BIONDI, an attorney duly admitted to practice law before the Courts of the State of New York hereby affirms the following under the penalties of perjury as follows:

1. That I am the attorney for plaintiff in the above-captioned action. As such, I am fully familiar with the facts and circumstances surrounding this action, the source of my knowledge being a review of the file maintained by my office throughout the course of this action.
2. This Affirmation is respectfully submitted in support of plaintiff's motion for summary judgment as to liability against the defendant CITY OF NEW YORK pursuant to Section 240(1) of the New York State Labor Law. A copy of plaintiff's Complaint and defendant's Answer are annexed hereto collectively as "Exhibit 1".
3. Plaintiff was injured on July 28, 2005 in the course of his employment

with the New York City Transit Authority (NYCTA) during the removal and replacement of subway tracks at the elevated station on Jerome Avenue, south of Mosholu Parkway. On July 28, 2005 plaintiff was employed by the New York City Transit Authority (NYCTA) as a track-worker. Plaintiff and his track gang, as well as another gang, were replacing rails on the elevated tracks for the #4 Jerome Line, south of Mosholu Parkway. At the time of the accident, plaintiff was standing on the platform of a hydraulic lift truck. The platform was raised to the level of the elevated tracks so that plaintiff could receive the tools that were used in connection with replacing the rails. The tools would then be stored in the truck. The boom was extended approximately 25' above the top of the truck. The hand rails of the platform were up and secured. During this process, the anchors that hold the platform to the boom failed causing the platform to collapse and topple. As a result thereof, plaintiff fell with the platform approximately 25' onto the truck below sustaining severe and permanent personal injuries. Plaintiff's affidavit is annexed hereto as "Exhibit 2".

4. An investigation was immediately conducted by the NYCTA as to the cause of the accident. Witness statements were obtained from all NYCTA employees working at the accident scene. All of these statements confirmed that the platform collapsed and toppled over causing plaintiff to fall approximately 25' therefrom. Witness statements are annexed as "Exhibit 3".

5. Photographs of the hydraulic lift truck, platform, elevated tracks and

accident scene were taken immediately after the accident. These photographs actually depict the fallen plaintiff and the defective platform. Six photographs depicting the accident scene are annexed as "Exhibit 4" .

6. Defendant CITY OF NEW YORK is the owner of the real property, elevated subway tracks and all apparent structures thereto at the accident scene. It has been conclusively determined that the City of New York is the owner of the said premises for purposes of section 240 of the Labor Law. The Court Appeals in Coleman v. City of New York, 91 N.Y. 2d 821, 689 N.E. 2d 523, 666 N.Y.S. 2d 553, 1997 N.Y. LEXIS 3683 specifically held that the City of New York was the owner of the subway system within the meaning of Labor Law § 240 (1) despite the fact that the subway system was leased to the NYCTA and the City lacked any ability to control same. In Coleman, a structure maintainer employed by the NYCTA was injured while performing repair work when he fell through a canopy attached to an elevated train station in Brooklyn that was owned by the City. Summary Judgment pursuant to Labor Law § 240 (1) was consequently sustained by the Court of Appeals.

7. It has also been conclusively determined that the type of work plaintiff was engaged in at the time of the accident, i.e. track replacement work, constitutes "repair" or "alteration" work within the meaning of Labor Law § 240 (1) . See Wallin v. City of New York, 232, A.D. 2d 548, 649 N.Y.S. 2d 159 (2nd Dept. 1996).

8. The plaintiff is entitled to summary judgment as a matter of law by reason of defendant's violation of Labor Law section 240(1). Section 240(1) of the New York State Labor Law provides, in pertinent part, as follows:

Section 240. Scaffolding and other devices for use of employees

1. 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, hangars, 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.

9. The courts in New York have uniformly construed Section 240(1) to place absolute liability on an owner and a general contractor or their agents, where violations of the statute proximately cause injuries. Zimmer v. Chemung County Performing Arts, Inc., 65 N.Y.2d 513, 493 N.Y.S.2d 102 (1985).

10. Issues of fact relating to fault, notice and contributory negligence are irrelevant, and contributory negligence is not a defense. Haines v. New York Telephone Co., 46 N.Y.2d 132, 412 N.Y.S.2d 863 (1978). The ability of a worker to control the work, or safety precautions on the jobsite, are irrelevant. Bland v. Manocherian, 66 N.Y.2d 452, 497 N.Y.S.2d 880 (1985).

11. A breach of the statute which proximately causes injury mandates liability. The plaintiff need only prove that the statute was violated, and that the violation was the proximate cause of the injuries sustained. It is not necessary that the owner or general contractor either be present or control the work site. Rocovich v. Consolidated Edison Co. 78 N.Y.2d 509, 577 N.Y.S.2d 219 (1991). It is firmly established that Section 240(1) is applicable where the proximate cause of injury or death is a fall from an elevated work place lacking the requisite safety devices. Rocovich, id.

12. The Court of Appeals has made it well settled that the liability of an owner or a general contractor is absolute upon proof that a worker's injuries were proximately caused by a violation of the obligations of an owner or general contractor under Labor Law Section 240(1). Zimmer, supra; Haimes, supra. Section 240(1) imposes a non delegable duty and absolute liability upon owners and contractors for failing to furnish or erect safety devices that are necessary to protect workers from injuries proximately related to the lack of those implements. Bland, supra.

13. In the case at bar, it is not disputed that the elevated platform upon which plaintiff was working collapsed and toppled over due to the failure of the anchors securing the platform to the boom. The only inference that can be drawn from all of this is that the elevated platform was unsafe and that the defendant violated its duty under Labor Law Section 240(1).

14. Faced with these facts, the Court of Appeals has consistently held that the plaintiff is entitled to summary judgment on the issue of liability pursuant to Labor Law Section 240(1). *Bland, supra; Zimmer, supra; Gordon v. Eastern Railway Supply, Inc.*, 82 N.Y.2d 555, 606 N.Y.S.2d 127 (1993).

15. There is no question that the Labor Law Section 240(1) requirement that the scaffold or elevated platform be properly "constructed, placed and operated as to give proper protection to a person so employed" was designed to protect against precisely the type of "elevation related" hazard presented by the plaintiff at the time of his accident. *Rocovich, supra*. Nor is there any question that it was a violation of that statutory requirement which was the occasion of the plaintiff's injury. The elevated platform herein failed to serve the core objective of the requirement of Section 240(1) by failing to provide a means for the plaintiff to negotiate his work safely, for which the defendant is absolutely liable.

16. It is clear that the determining factor in every case addressing the applicability of Section 240(1) is the risk related to elevation differentials where gravity becomes a factor in producing the injuries. As the Court held in *Rocovich, supra*:

The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured. It is because of the special hazards in having to work in these circumstances, we believe, that the

Legislature has seen fit to give the worker the exceptional protection that Section 240(1) provides. Consistent with this statutory purpose we have applied Section 240(1) in circumstances where there are risks related to elevation differentials.

Id. 577 N.Y.S.2d at 222.

17. Under the circumstances at hand, and based upon the compelling case law as set forth above, it is submitted that summary judgment must be granted in the plaintiff's favor on his Labor Law Section 240(1) cause of action against the defendant.

WHEREFORE, for the reasons highlighted hereinabove, it is respectfully submitted that this Court issue an Order granting plaintiff's motion in it's entirety, together with such other and further and different relief as to this Court deems just, proper and equitable under the circumstances.

Dated: White Plains, New York
December 4, 2006

Yours,



LAWRENCE P. BIONDI

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

----- X
JAMES COLEMAN, :

Plaintiff, :

-against- :

CITY OF NEW YORK, :

Defendants. :

: Index No.: 24930/05

: **AFFIRMATION IN**
: **OPPOSITION TO**
: **PLAINTIFF'S MOTION FOR**
: **SUMMARY JUDGMENT AND**
: **IN SUPPORT OF**
: **DEFENDANT'S CROSS-**
: **MOTION TO STRIKE NOTE**
: **OF ISSUE**

:
----- X

CORNELIUS J. REDMOND, an attorney duly admitted to practice law before the Courts of the State of New York, aware of the penalties of perjury, affirms as follows:

1. I am associated with the law firm of WALLACE D. GOSSETT, attorneys for the defendants CITY OF NEW YORK, and as such am fully familiar with all of the prior pleadings and proceedings heretofore had herein as pertain to the instant motion.

2. I respectfully submit this Affirmation in Opposition to Plaintiff James Coleman's Motion for Summary Judgment and in support of The City of New York's, (hereinafter "CITY") cross-motion to strike the Note of Issue.

PRELIMINARY STATEMENT

3. Plaintiff seeks an order granting Summary Judgment premised upon Labor Law §240(1) alleging that defendant CITY is liable for the happening of plaintiff's accident based upon the fact that plaintiff fell approximately twenty five feet from a the platform of a hydraulic

lift truck, while working as an employee for the New York City Transit Authority on a Transit Authority elevated station.

4. The CITY opposes plaintiffs summary judgment motion due to it's prematurity – virtually no discovery has yet to be completed and insufficient information exists to determine the key issues of fact – (1) cause of plaintiff's fall, (2) specific work plaintiff was engaged in and (3) safety devices in place.

5. The CITY also moves to strike plaintiff's Note of Issue due to the fact that no discovery has been completed.

ALLEGED FACTUAL BACKGROUND

6. Plaintiff alleges that on July 28, 2005, he sustained personal injuries while engaged in the routine removal and replacement of subway tracks at the elevated station on Jerome Avenue, south of Mosholu Parkway. Plaintiff alleges he fell approximately 25 feet, off a raised platform of a hydraulic lift truck. The platform was raised to the level of the elevated tracks so that plaintiff could receive the tools in connection with the routine replacement of the rails. The alleged cause of the accident was that "the anchors that hold the platform to the boom failed causing the platform to collapse and topple." (Plaintiff's Motion, Para. 3.).

7. At the time of plaintiff's accident he was a track worker with the New York City Transit Authority (NYCTA), performing the duties of a track gang member, replacing rails on the elevated tracks at the Number 4 Train Line, south of Mosholu Parkway. Plaintiff was standing on the raised platform receiving tools that were used to connect the rails. The hand-rails of the platform were up and secured and while engaged in the aforementioned work, the

anchors that hold the platform to the boom failed- causing the platform to collapse and topple. The plaintiff fell approximately 25 feet onto the truck below. (Plaintiff's Affidavit, Attached to Plaintiff's Motion Papers as Exhibit "2").

8. Contrary to plaintiff's assertion that the cause of plaintiff's fall was the failure of the anchors to adequately hold the platform, such is not an undisputed fact, and has not been fairly and fully investigated. (Plaintiff's Motion, para. 13.). Plaintiff may have fallen from the elevated platform and his fall might have caused the anchors to become loose and topple the platform. There exist numerous possible scenarios that have not been fully and fairly investigated.

PROCEDURAL HISTORY

9. This action was commenced by service of a Notice of Claim upon the CITY OF NEW YORK, (hereinafter CITY) on or about September 27, 2005, a copy of which is annexed hereto as Exhibit "A".

10. The plaintiff's served a Summons and Verified Complaint on or about December 12, 2005, a copy of which is annexed hereto as Exhibit "B". Issue was joined by the City by service of an Answer on or about January 30, 2006, a copy of which is attached hereto as Exhibit "C".

11. On or about December 4, 2006, the instant motion was filed.

12. On December 18, 2006, it was determined that the Law Office of Wallace D. Gossett would be assuming the defense of this case and a Notice of Substitution was filed with the Court, attached hereto as Exhibit "D".

13. Plaintiff has apparently filed a Note of Issue in the instant case. (Although Affiant is not in possession of same.)

14. As of this date, there has been no statutory hearing pursuant to Public Authorities Law 50-h.

15. As of this date, Plaintiff has not served a Bill of Particulars.

16. As of this date there have been no depositions.

17. As of this date, there has been virtually no discovery exchanged.

**PLAINTIFF'S NOTE OF ISSUE MUST BE STRICKEN AS
PRE-MATURE- VIRTUALLY NO DISCOVERY HAS BEEN
COMPLETED**

18. On December 18, 2006, two months ago, it was determined that the Law Office of Wallace D. Gossett would be assuming the defense of the instant case on behalf of the CITY.

19. There has been absolutely no discovery in the instant case. There has been no investigation as to the cause and other specific circumstances surrounding this incident.

20. In fact, to date, the CITY has never been provided with basic documents and materials involving this matter, including, but not limited to, any responses to any of its various discovery related demands.

21. The CITY would be severely prejudiced as a result of not having any discovery and not being able to properly investigate the underlying claims herein and prepare and present its defenses.

**SUMMARY JUDGMENT PREMISED UPON
LABOR LAW § 240(1) MUST BE DENIED AS
PREMATURE AT THE CURRENT
JUNCTURE CONSIDERING THAT NO
DISCOVERY HAS BEEN PROVIDED TO
ENABLE THE CITY TO PROPERLY
INVESTIGATE AND DEFEND THIS ACTION**

22. Contrary to plaintiff's assertion that this is an "open and shut" case, defendant is entitled to investigate the instant matter and to determine whether any defenses are applicable.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

V. Cole

-----X
JAMES COLEMAN,

Index No.: 24930-05

Plaintiff,

-against-

PLAINTIFF'S
AFFIRMATION IN
OPPOSITION TO
CROSS-MOTION.

CITY OF NEW YORK,

Defendant.
-----X

1A-3

LAWRENCE P. BIONDI, an attorney duly admitted to practice law before the Courts of the State of New York hereby affirms the following under the penalties of perjury, as follows:

2/23
IA-3

1. That I am the attorney for plaintiff, JAMES COLEMAN, in the above-captioned action.

2. This affirmation is respectfully submitted in opposition to defendant's cross-motion to strike the note of issue and in further support of plaintiff's motion for summary judgment pursuant to section 240 of the Labor Law.

3. Defense counsel incorrectly and inexcusably argues that plaintiff did not serve a Bill of Particulars and that virtually no discovery was exchanged. This is absolutely untrue. Plaintiff served his Verified Bill of Particulars and its Response to Demand for Discovery and Inspection on April 13, 2006. (Copy of same with affidavit of service pertaining thereto is annexed as plaintiff's Exhibit "1").

4. A Preliminary Conference was held on June 22, 2006 and an Order was entered in connection therewith. (A copy of the preliminary conference Order is annexed as plaintiff's Exhibit "2"). All of the directives contained in said Order have been complied with by the plaintiff.

5. Defense counsel also inexplicably fails to advise the court that defendant specifically

6

waived the deposition of the plaintiff. (See letter dated October 18, 2006 confirming same annexed hereto as plaintiff's Exhibit "3".) Defendant also specifically waived plaintiff's IME by failing to schedule same despite our inquiries in connection therewith.

6. Defense counsel also inexplicably fails to advise the Court that the Note of Issue was served on November 2, 2006. Defendant failed to move to strike the Note of Issue in a timely fashion pursuant to 22NYCRR Section 202.21(e). Defendant has also failed to offer any excuse whatsoever as to why it failed to move to strike the Note of Issue in a timely fashion and accordingly this Court does not have any discretion to strike the Note of Issue.

7. Defendant's failure to comply with the Preliminary Conference Order and its specific waiver of plaintiff's deposition and IME cannot serve as the basis to strike the Note of Issue. Defendant has failed to offer any excuse or "unusual and unanticipated circumstances" that developed after the filing of the Note of Issue that would require the striking thereof. There has been no change in the status of the case or plaintiff's physical condition subsequent to the filing of the Note of Issue which necessitates that additional discovery be conducted herein.

8. It is well settled that the "unusual or unanticipated circumstances" that is required by 22 NYCRR 202.21(e) refers to material changes in the nature of the case subsequent to the filing of the Note of Issue and not merely defendant's failure to conduct discovery in the first instance. For example, in Gordon v. County of Nassau, 241 A.D.2d 478, 659 NYS 2d 514, the defendant in a personal injury action was not entitled to compel plaintiff to appear for physical examination where defendant had failed to comply with several Orders directing it to conduct physical examination of the plaintiff within a specific time frame. The Court further held that budget crisis and resulting layoffs in defendant's attorneys office did not constitute "unusual or anticipated circumstances" that developed after the filing of the Note of Issue that would require pretrial proceedings to prevent substantial prejudice (22 NYCRR 202.21(d)). In Tedesco v. Murawski, 212 AD2d 1053, 724 NYS

2d 1007 (1995, 4th Dept.) the Court specifically held that in the absence of special, unusual or extraordinary circumstances spelled out in factual detail, the Court should not have allowed physical examination of the plaintiff after the Note of Issue and Statement of Readiness had been filed.

9 The Law Offices of Wallace D. Gossett, Esq. were substituted as attorney for defendant herein on or about December 18, 2006. This is not an adequate basis to strike the Note of Issue. The First Department has definitively held that substitution of counsel after the Note of Issue is filed is not an unusual circumstance that justifies additional disclosure. See Schroeder v. IESI NY Corp., 805 NYS2d 79 (2005, 1st Department).

10. It seems that defendant's former counsel did not provide present counsel with its complete file herein. The fact that present defense counsel was unaware that plaintiff previously provided all discovery responses; that prior defense counsel specifically waived plaintiff's deposition and IME; and that plaintiff's Note of Issue was served on November 2, 2006, simply does not provide this court with any basis to strike the Note of Issue in accordance with the cases outlined above.

11 Defendant's arguments with respect to the merits of plaintiff's Labor Law Section 240 claim must similarly fail. Plaintiff has submitted an affidavit wherein he specifically states how and why the accident occurred. Plaintiff's version of the accident was confirmed by numerous witness statements of plaintiff's co-workers employed by the New York City Transit Authority. The photographs submitted herein further clearly, accurately and unequivocally confirm plaintiff's version of the accident. Defendant, on the other hand, has absolutely failed to submit any evidence in admissible form to even remotely suggest that the hydraulic lift platform did not fail. Although defendant has failed to submit any evidence to rebut the fact that the anchors that hold the platform failed causing the platform to collapse and topple, the precise reason why the lift platform collapsed and toppled is irrelevant. The fact remains that plaintiff was caused to fall from an elevated height due to the collapse and failure of the hydraulic lift platform. This fact is plainly and painfully

evidenced by the photographs submitted herein. It is totally improper for defendant to speculate that plaintiff may have fallen from the elevated platform and that his fall might have caused the anchors to become loose and topple the platform. If this is what defendant actually believes happened, it was incumbent upon defendant to submit proof in admissible form to support same. Transit Authority witnesses were available to defendant to depose prior to the filing of the Note of Issue. Even though defendant specifically waived the deposition of the plaintiff (see Exhibit "3" annexed hereto), the deposition of the plaintiff would not help the defendant since plaintiff will testify in accordance with his affidavit submitted herein.

12. Defendant also argues that there is an issue as to whether plaintiff was actually engaged in the replacement of tracks which defendant concedes is a covered activity pursuant to Section 240 of the Labor Law. Again, defendant has failed to submit any evidence in admissible form to even suggest that plaintiff was not engaged in the replacement of tracks. Defendant also argues that the specific activity that plaintiff was engaged in at the actual time of the accident, i.e., handling and receiving tools on the elevated platform might not be considered a covered act under the Labor Law. However, defendant has failed to submit any case law to support this view. The issue of what work is covered under Labor Law § 241(6) was addressed by the Court of Appeals in Joblon v. Solow, 91 N.Y.2d 457, 672 N.Y.S.2d 286, 695 N.E.2d 237 (1998). In that case, the plaintiff was an electrician who was employed to chop a hole through the wall of an office building, route conduit pipe and wire through the hole, and install a wall clock. The Court of Appeals held that the plaintiff, who fell from a ladder while engaged in this task, was "altering" within the meaning of § 240(1). After concluding that the plaintiff was engaged in "altering" within the meaning of § 240(1), the Court went on to uphold his claim under §241(6), stating:

Liability under Labor Law §§ 241(6) is not limited to accidents on a building construction site (*see, Mosher v. State of New York*, 80 N.Y.2d 286, 590 N.Y.S.2d 53, 604 N.E.2d 115). As in *Jock v. Fien* (80 N.Y.2d 965, 967,

590 N.Y.S.2d 878, 605 N.E.2d 365), we look to the regulations contained in the Industrial Code (12 NYCRR 23-1.4[b][13]) to define what constitutes construction work within the meaning of the statute (*see also, DaBolt v. Bethlehem Steel Corp.*, 92 A.D.2d 70, 73-74, 459 N.Y.S.2d 503, *lv. dismissed* 60 N.Y.2d 554, 467 N.Y.S.2d 1029, 454 N.E.2d 1318). Because the Industrial Code includes "work of the types performed in the construction, erection, *alteration*, repair, maintenance, painting or moving of buildings or other structures" in the definition of construction work (12 NYCRR 23-1.4[b][13] [emphasis added]), we conclude that plaintiff could state a claim under Labor Law §§ 241(6).

Id., 91 N.Y.2d at 466, 695 N.E.2d at 242, 672 N.Y.S.2d at 291.

13. The Court of Appeals recently addressed the scope of covered activities in Prats v. Port Authority of New York and New Jersey, 100 N.Y.2d 878, 800 N.E.2d 351, 768 N.Y.S.2d 178 (2003), stating:

In certifying this case to our Court, the Second Circuit questioned whether *Joblon v. Solow*, 91 N.Y.2d 457, 465, 672 N.Y.S.2d 286, 695 N.E.2d 237 [1998] bars plaintiffs recovery. There, we looked to the "time of injury" to determine whether plaintiffs work fell within section 240(1). Defendant would have us read that phrase in an overly literal manner. In our view, however, the words must be applied in context. At one extreme, a construction worker who, between hammer strokes, pauses to see where to hit the next nail is at that moment "inspecting." But this is very different from an inspection conducted by someone carrying a clipboard while surveying a possible construction site long before a contractor puts a spade in the ground. Here, AWL employed the plaintiff mechanic substantially to perform work that involved alteration of a building, and, under the facts of this case, he enjoyed the protection of section 240(1) even though he was inspecting, or more precisely, climbing a ladder, at the moment of the accident. While we have held that job titles are not dispositive (*see Joblon*, 91 N.Y.2d at 465-466, 672 N.Y.S.2d 286, 695 N.E.2d 237), the facts support the conclusion that plaintiff—while working as a mechanic—undertook the kind of work the Legislature intended to protect under section 240(1). Although at the instant of the injury he was inspecting and putting the finishing touches on what he had altered, he had done heavier alteration work on other days at the same job site on the same project. He was a member of a team that undertook an enumerated activity under a construction contract, and it is neither pragmatic nor consistent with

the spirit of the statute to isolate the moment of injury and ignore the general context of the work. The intent of the statute was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts.

As for defendant's second argument, we agree that section 240(1) does not cover routine maintenance done outside the context of construction work. Plaintiff, however, argues that the accident occurred while he engaged in "alteration," an enumerated activity. Essentially, routine maintenance for purposes of the statute is work that does not rise to the level of an enumerated term such as repairing or altering. We agree with plaintiff. He was engaged in a process involving the building's alteration, and his work went beyond mere maintenance.

Joblon, 91 N.Y.2d at 465, 672 N.Y.S.2d 286, 695 N.E.2d 237 is instructive. There, we held that "altering" for purposes of section 240(1) "requires making a significant physical change to the configuration or composition of the building or structure." We determined that extending wiring and chiseling a hole through a concrete wall was enough to constitute "altering." Moreover, in *Panek v. County of Albany*, 99 N.Y.2d 452, 758 N.Y.S.2d 267 [2003], we applied the *Joblon* "altering" analysis to the removal of air handlers from a building before its demolition. The Court concluded that the plaintiff "was clearly engaged in a significant physical change to the building when he was injured, thus satisfying the *Joblon* standard for an alteration" (*id.* at 458, 672 N.Y.S.2d 286, 695 N.E.2d 237). Here, constructing walls and leveling floors are at least as significant as drilling through concrete, the threshold for altering we identified in *Joblon*. AWL's project also has much in common with the work carried out in *Panek*. Applying *Joblon* and *Panek*, we are satisfied that AWL's work involved building alteration, and therefore was not routine maintenance.

Id., 100 N.Y.2d at 881, 800 N.E.2d at 353-354, 768 N.Y.S.2d at 180 - 181. See also *Brogan v. International Business Machines Corp.*, 157 A.D.2d 76, 79, 555 N.Y.S.2d 895 (3d Dep't 1990).

14. The analysis given by the Court of Appeals in *Prats* applies equally to the case at bar. Similar to *Prats*, the plaintiff herein was a member of a team that undertook a protected activity under the Labor Law as the Court of Appeals stated in *Prats* "it is neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the work. The intent of the

statute was to protect workers employed in the enumerated acts, even while performing duties ancillaries to those acts”.

15. Similarly, in Fernandes v. Equitable Life Assurance Society of U.S., 4 A.D.3d 214, 774 N.Y.S.2d 4 (1st Dep't 2004), the Court held that a plaintiff who was performing HVAC testing of newly installed equipment, in the midst of construction work being performed by other laborers, was part of the "erection" phase of the offices being constructed on the premises. Likewise, in Greenfield v. Macherich Queens Ltd. Partnership, 3 A.D.3d 429, 771 N.Y.S.2d 498 (1st Dep't 2004), the plaintiff was walking through a newly built store in order to compile a punch list of unfinished items and last minute changes when he fell from a ladder while attempting to comply with store owner's request that he cover windows with brown paper. The Court held that he was entitled to recover for his injuries under the Labor Law even though he was not actually engaged in creating the punch list at the time of the accident. In Aubrecht v. Acme Elec. Corp., 262 A.D.2d 994, 692 N.Y.S.2d 544 (4th Dep't 1999), plaintiff architect was injured at a construction site while inspecting an interior wall soffit. The Appellate Division held that the plaintiff was within the class of persons for whom Labor Law §§ 240(1) and §§ 241(6) liability is imposed because his work was essential to the construction of a building or structure and he was employed for such purpose. Similarly, in Crowther v. City of New York, 262 A.D.2d 519, 692 N.Y.S.2d 439 (2d Dep't 1999), the plaintiff was employed by a company retained solely to inspect the steel work and fireproofing at a construction project. The day to day construction itself was carried out by other companies. The Second Department held that plaintiff is a person entitled to the protections of Labor Law §241(6).

16. Thus, persons who are injured during both preliminary and completion phases of

construction projects are entitled to the protections of The Labor Law where their work is a necessary part of such project, as was the case here. See also Campisi v. Epos Contracting Corp., 299 A.D.2d 4, 747 N.Y.S.2d 218 (1st Dep't 2002) (plaintiff superintendent of construction, who was injured in fall through temporary flooring while at work coordinating and monitoring performance and progress of contractors working pursuant to a contract with city, was performing work necessary and incidental to erection or repair of a building or structure, under 240(1)); Brogan v. International Business Machines Corp., supra (contractor's employee who was injured while readying tanks for installation, a task that was integral part of contract for project, established *prima facie* case for finding owner liable under statute imposing nondelegable duty upon owners to provide reasonable and adequate protection to those involved in construction, excavation or demolition work).

17. This conclusion also is definitively illustrated by comparison to the Court of Appeals' decision in Nagel v. D & R Realty Corp., 99 N.Y.2d 98, 782 N.E.2d 558, 752 N.Y.S.2d 581 (2002). In that case, the Court of Appeals held that a plaintiff who was injured while performing a two-year elevator test could not recover under Labor Law § 241(6) because he was merely engaged in routine maintenance. However, in reaching this conclusion, the Court specifically stated that its holding was due to the fact that the elevator test "was not connected to construction, demolition or excavation of a building or structure", and was therefore not within the statute's coverage. JcL, 99 N.Y.2d at 102, 782 N.E.2d at 561, 752 N.Y.S.2d at 584. Here, since plaintiff's work was connected to construction, demolition or excavation of a building or structure, it was within the statute's coverage. Defendant has absolutely failed to submit any evidence in admissible form to even suggest that plaintiff was not doing exactly what he stated in his affidavit. In fact, defendant has conceded that replacing rails is a covered activity under

Section 240 of the Labor Law pursuant to Wallin v. City of New York 232 AD2d 548, 649 NYS2d 159 (2d Dept. 1996).

18. In accordance with the above, plaintiff is entitled to summary judgment on his Labor Law Section 240 claim. No issue of fact exists in connection therewith and plaintiff's entitlement to Summary Judgment is self evident based upon how this accident actually occurred and the photographs evidencing same.

19. Moreover, contrary to the allegations of defense counsel, discovery is complete and defendant cannot simply ignore that it specifically waived plaintiff's deposition and IME. Defendant also did not move within 20 days to vacate the Note of Issue and the within Cross-Motion is untimely pursuant to 22NYCRR Section 202.21(e). Defendant has also failed to submit a Good Faith Affirmation alleging any unusual or unanticipated circumstances which occurred post Note of Issue sufficient to entitle defendant to additional discovery. Plaintiff's medical status has remained unchanged and this Honorable Court does not have discretion to strike the Note of Issue since defendants application is untimely and no unusual or unforeseen circumstances exist.

WHEREFORE, it is respectfully requested that plaintiff's motion for summary judgment pursuant to Section 240 of the Labor Law be granted and that defendant's cross-motion be denied in its entirety, together with such other and further relief as this Court deems just and proper.

Dated: White Plains, New York
February 16, 2007



Lawrence P. Biondi