[*1]

SCANNED ON 1/13/2008

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Carol Edmead Justice PART 35

William McLaughlin and Catherine McLaughlin

-v-

Plaza Construction Corp. and Marine Estates, LLC

INDEX NO. 118362/06

MOTION DATE 9/9/08

MOTION SEQ. NO. 003

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED
NOV 13 2008
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Based on the foregoing, it is hereby

ORDERED that defendants' cross motion for summary judgment, dismissing plaintiffs' complaint regarding Labor Law §240(1), is denied; and it is further

ORDERED that plaintiffs' motion for summary judgment, finding defendants liable under Labor Law §240(1), is granted; and it is further

ORDERED that defendants' cross motion for summary judgment, dismissing plaintiff's complaint regarding Labor Law §241(6), is denied; and it is further

ORDERED that plaintiffs motion for summary judgment, finding defendants liable under Labor Law §241(6), is granted; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

Dated: 11/12/08

HON. CAROL EDMEAD J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------x

WILLIAM McLAUGHLIN AND CATHERINE McLAUGHLIN,

Index No. 118362/06

Plaintiffs,

-against-

DECISION/ORDER

PLAZA CONSTRUCTION CORP. and
MARINE ESTATES, LLC,

Defendants.

----------x

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiffs William McLaughlin ("plaintiff") and Catherine McLaughlin (collectively "plaintiffs") seek recovery against defendants Plaza Construction Corp. and Marine Estates, LLC (collectively "defendants") for injuries William McLaughlin sustained while working at 55 West 25th Street, New York, N.Y. ("subject premises").

Plaintiffs move, pursuant to CPLR 3212, for summary judgment against defendants on the grounds that defendants' arguments in defense have no merit and that, since Labor Law §§240(1) and 241(6) applied, there were no triable issues of fact on the subject of liability.

In response, defendants cross move, pursuant to CPLR 3212, for summary judgment to dismiss plaintiffs' claims under Labor Law §§ 240(1) and 241(6) on the grounds that neither code section applies to plaintiff's alleged accident.

Factual Background[1]

Plaintiff was an elevator installation mechanic working for Thyssenkrupp Elevator Company (the "elevator company"), a subcontractor to Marine Estates. Defendant Marine

[1] These facts are taken from plaintiffs' affirmation in support of their motion for summary judgment.

Estates was the owner of the construction project. Defendant Plaza Construction Corp. was Marine Estate's construction manager. The elevator company's employees had "installed a temporary electrical mechanical hoist machine, which consisted of an electric motor and a drum with a lifting cable. The mechanical hoist was bolted into the second floor of the tower under construction" (plaintiffs' complaint, paragraph 9). Plaintiffs describe the hoisting mechanism in relevant detail:

> In order to lift the elevator cars and equipment to various heights within the elevator shafts, a cable was run from the hoisting drum on the mechanical hoist into an elevator shaft. The hoisting cable was then directed by pulleys, which were bolted into the shaft wall up to the top of the shaft. The lifting cable was first directed through a lower block and pulley on the second floor and then up the shaft to the top of the shaft. At the top of the shaft, the lifting cable was directed by additional pulleys to and down [*sic*] an adjoining shaft, where it was attached to the top of the elevator car which was to be lifted (*id.* at paragraph 9 (citations omitted)).

Several blocks and pulleys were located inside the elevator shaft:

> The first block and pulley was located inside the second floor elevator shaft, two to three feet above the level of the hoisting machine. The pulley was secured to the shaft wall by a "block," a piece of metal rail, which had two holes drilled into it. The block or metal rail, in turn, was bolted into the cement shaft wall using a type of concrete fastener known as a "Hilti" bolt. . . . The pulley is then attached to the rail (the block) by a shackle and the hoisting cable is then run through the pulley (*id.* at paragraph 11 (citations omitted)).

The elevator company's employees had installed the pulleys and blocks, securing each with at least two Hilti bolts, plaintiffs allege. However, plaintiff "did not install any of the pulleys or blocks or supervise their installation" (*id.* at paragraph 12).

On September 13, 2006, the elevator company's mechanics were hoisting an elevator cab to the top of one of the elevator shafts at the subject premises. The cab was carrying several spools of wire cable. In the process, "the lifting cable had become tangled on the lifting drum of the mechanical lifting machine" (*id.* at paragraph 13). Plaintiff was summoned to help a co-

worker untangle the cable. The "governor brake" of the elevator was engaged to prevent the elevator from descending. "At this point, the elevator car was at the 6th or 7th floor and plaintiff and [co-worker] were on the 2nd floor. With the elevator braked, [the co-worker] then put the hoisting drum in reverse, unwinding lengths of cable so that the cable could be rewound in a uniform fashion on the drum" (*id.*). When plaintiff and the co-worker had disentangled the cable, the co-worker restarted the hoist. Plaintiff was next to the hoisting machine (*id.* at paragraph 16). The accident occurred as follows:

> After restarting the hoist, the lowermost block and pulley, the one attached on the same floor as the hoisting machine, suddenly tore free from its attachments to the cement shaft wall as the two Hilti bolts securing it failed. The hoisting cable violently sprang upwards under the weight of the elevator car and the pulley and block mechanism came flying off the wall and tracked along the cable toward the mechanical hoist and into plaintiff. The rail and pulley struck plaintiff and catapulted plaintiff 6 feet over the hoisting machine to the floor on the other side of the hoist (*id.* at paragraph 15; *see also* plaintiff's affidavit, paragraph 14).

Plaintiff suffered several injuries as a result of the impact.

Plaintiffs' Contentions

Plaintiffs contend that the facts make a *prima facie* case for partial summary judgment against defendants, pursuant to Labor Law §240. Plaintiffs maintain that plaintiff "was injured during a hoisting operation as a consequence of the failure of a safety device, the block and pulley, used in the hoist. His injury was gravity related and secondary to an elevation differential between his location on the 2nd floor and the load being hoisted (the elevator cab), which was on the 6th or 7th floor" (plaintiffs' complaint at paragraph 22).

Plaintiffs contend that Labor Law §240(1) "imposes absolute liability upon an owner or general contractor for failing to provide or erect safety devices necessary to give proper

protection to a worker who sustains injuries proximately caused by the failure of a safety device" (plaintiff's memorandum of law, p. 3). Citing case law, plaintiffs contend that Labor Law §240(1) was designed "to encompass protection for workers against injury from construction risks posed by elevation differentials at work sites"(*id.* at 3-4). Plaintiffs argue that the accident "happened during, and as a consequence of, a Section 240(1) 'hoisting' operation" (*id.* at 5). "Not only was a partially assembled elevator car being hoisted, but the car was packed with wire spools being lifted to an elevated level," plaintiffs contend (*id.*). Further, there was a difference in elevation between the elevator car and plaintiff, and "[t]he weight of the load, that is gravity, effected the attachment points of the block and pulley (the safety device) and caused the safety device (the block and pulley) to dramatically and spectacularly fail"(*id.*). It also was foreseeable for a poorly attached block and pulley to fail during a hoisting operation. "The language of Section 240(1), when it speaks to furnishing "hoists," "pulleys" and "braces" which provide 'proper protection,' clearly envisions imposing absolute liability when those devices fail," plaintiffs contend (*id.*).

Plaintiffs also contend that the facts make a *prima facie* case for partial summary judgment against defendants, pursuant to Labor Law §241(6). Plaintiffs contend that Labor Law 241(6) "imposes a non-delegable duty upon an owner or [general contractor] to ensure that construction at the work place is conducted so as to provide for the reasonable and adequate protection of workers" (*id.* at 6). Plaintiffs argue that defendants violated a specific Industrial Code Regulation, i.e., 12 NYCRR §23-6(c), which states in pertinent part that all "suspended pulley blocks, sheaves, well wheels or similar devices shall be moused or securely fastened or

safety hooks shall be used." Because the pulley and block device was not secure in this case, defendants violated the regulation.

Plaintiffs argue that "the cable and the block attached to the elevator shaft wall ripped out of the wall, causing the accident" (plaintiffs' motion, paragraph 18). They base their conclusion on the observations of workers at the time of the accident and an investigation by the elevator company. The day after the accident, a safety consultant under contract with defendant Plaza Construction visited the subject premises. "While [the safety consultant] never arrived at any 'final' conclusions as to why the pulley and block separated from the wall, it was his preliminary opinion that there weren't enough [Hilti] bolts in the anchorage point . . . . [Defendants] failed to provide 'proper protection' to plaintiff in violation of a concrete regulation of the Industrial Code which requires blocks and pulleys to be properly secured when used in a hoisting operation" (*id.* at paragraphs 21-22).

Plaintiffs further argue that comparative negligence is not a consideration in this case, because plaintiff did not install the block and pulley device, nor was plaintiff operating the hoisting mechanism at the time of the accident. "Therefore, partial summary judgment on the issue of liability pursuant to Section 241(6) is warranted," plaintiffs conclude (plaintiff's memorandum of law, p. 9).

Defendants' Cross Motion

In support of their cross motion for summary judgment, defendants first contend that Labor Law §240(1) does not apply because plaintiff's accident was not an "elevation-related" accident. Defendants argue that the hoisting device was not elevated above plaintiff. Labor Law §240 "applies only where a worker is exposed to the risk of falling from an elevated work site or

being hit by a falling object," defendants argue (defendants' cross motion, paragraph 30). Defendants maintain that "the shackle, pulley, and rail device that came into contact with the plaintiff's elbow and abdomen, was located on the same level as the plaintiff. . . . Specifically, both the apparatus and the plaintiff were located on the second floor at the time of the accident," (*id.* at paragraph 29). Further, citing *Ross v Curtis-Palmer Hydro-Elec. Co.* (81 NY2d 494, 501, 601 N.Y.S.2d 49 [1993]), defendants point out that "the Court of Appeals has specifically precluded application of Labor Law §240(1) to non-gravity-related accidents" (*id.* at paragraph 32).

Defendants argue that the First Department case of *Buckley v Columbia Grammar and Preparatory* (44 AD3d 263, 841 NYS2d 249 [2007]) is dispositive. Defendants contend that the *Buckley* court used the standard of foreseeability set in *Narducci v Manhasset Bay Associates* (96 N.Y.2d 259, 727 N.Y.S.2d 37 [2001]), and the case at bar does not meet that standard (*id.* at paragraph 45). The *Buckley* court concluded that Labor Law §240(1) was not implicated even though the plaintiff in *Buckley* was struck by an object at a different height (*id.* at paragraph 46). In the case at bar, plaintiff was on the same level as the object that struck him, defendants argue (*id.* at paragraphs 46-63, citing deposition testimony).

Defendants go on to distinguish the cases plaintiffs cite (*id.* at paragraphs 64-76) . Those cases involved elevation-related incidents. Since the case at bar does not involve an elevation-related risk, plaintiffs "cannot state a Labor Law §240 claim," and their claim should be dismissed, defendants conclude.

Second, defendants argue that plaintiffs' claim under Labor Law §241(6) also should be dismissed, because plaintiffs failed to cite any relevant Industrial Code rules. Plaintiffs allege that

defendants violated 12 NYCRR §23-6.2(c). However, defendants point out that Industrial Code Regulation §23-6.2, on which plaintiffs rely, comes under the heading of "Rigging, Rope and Chains for Material Hoists." Here, plaintiff's "accident did *not* involve a material hoist" (*id.* at paragraph 79). "In fact, the parties confirm that the eventual purpose of the elevators under construction was to transport 'passengers' and not 'materials,' " defendants argue (*id.*). Citing the affidavit testimony of expert George Murray ("Murray"), an elevator inspector, defendants argue that the lift involved in plaintiff's accident did not meet any industry standard for a material hoist (*id.* at paragraph 88). Citing the affidavit testimony of engineer Richard Hoffman ("Hoffman"), defendants further contend that the Hilti bolt that broke, allegedly causing the accident, does not qualify as one of the fasteners described in 12 NYCRR §23-6.2(c) (*id.* at paragraph 93).

Defendants go on to distinguish two cases that plaintiffs cite, on the grounds that those cases involved hooks or pulleys specifically mentioned in Industrial Code 12 NYCRR §23-6.2(c), in contrast to the case at bar. Defendants argue that because the elevators involved in the plaintiff's accident were passenger elevators, not material hoists, and because a "Hilti bolt" is not among the items listed in the Industrial Code section that plaintiffs cite, the Industrial Code rule is inapplicable (*id.* at paragraphs 96-97). Therefore, as plaintiffs cannot state a claim under Labor Law §241(6), the court should dismiss their claim.

Plaintiffs' Opposition

In opposition, plaintiffs contend that defendants should be precluded from offering the expert opinion evidence of Murray and Hoffman on three grounds. First, the expert evidence defendants offer is not timely in that defendants failed to identify these experts in pretrial disclosure prior to the filing of the note of issue. Second, defendants gave plaintiffs "only a single

day's advance notice" of "destructive discovery and inspection and testing which formed the foundation of the experts' testimony," in violation of CPLR 3120(2). Third, defendants conducted an inspection over the strong objection of plaintiffs' counsel, without court approval and six weeks after the motion for summary judgment was made. Plaintiffs' counsel was deprived of the opportunity to have plaintiffs' own experts present. Therefore, the experts' testimony should be stricken.

Next, plaintiffs contend that plaintiff's accident meets all of the requirements for the application of Labor Law §240(1). First, plaintiff's accident was elevation-related. Plaintiffs claim that Labor Law §240(1) covers "workers working at a height or workers struck by objects during a protected operation" (plaintiffs' opposition, paragraph 11). Plaintiffs also maintain that this is a falling object case, given that the object fell "by tracking down and along the hoist wire, was the failed block and pulley, both Section 240 enumerated devices" (*id.*). Plaintiffs further argue that plaintiff's accident was caused by an elevation-related risk, "the kind that the safety devices listed in Section 240(1) protect against." At the time the accident occurred, the material being hoisted was "approximately four stories above the plaintiff when the block and pulley on the hoist failed," plaintiffs contend. Defendants wrongly focus on the difference in height between the work site and the point in the wall where the block and pulley were secured. Plaintiffs maintain that "[t]he event was caused by the force and effect of gravity, the elevator car. By necessity, the block and pulley came from above plaintiff down the hoist wire and into plaintiff as the weight of the elevator caused the hoist wire to spring taut" (*id.* at paragraph 16). A hoisting operation was in progress; a safety device used in the hoisting operation failed; and it "failed as a result of an

elevation related differential between the work site and the load being lifted (the gravity component)," plaintiffs contend (*id.*).

Plaintiffs further argue that even where courts have found only a modest difference of height between a worker and a load being hoisted, they have upheld liability under Labor Law §240(1) (*id.* at paragraph 18). A plaintiff does not have to be struck by the "object that is actually being 'hoisted' " (*id.* at paragraph 19). In addition, the First Department has found §240(1) liability even where no difference in height between the worker and a load being hoisted was established (*id.* at paragraph 20).

Finally, plaintiffs contend that defendants' argument that Labor Law §241(6) does not apply lacks merit. The blocks and pulleys used for the temporary material hoist involved in the accident were not "securely fastened," as required by Industrial Code 12 NYCRR 23-6.2. The hoist involved in the case at bar was not a passenger elevator, but a temporary hoisting machine designed "to lift the elevator frame and elevator materials and equipment used in conjunction with constructing the elevators," plaintiffs argue. (The passenger elevator was to be built later on the elevator frame.) While the Industrial Code does not define a "material hoist," Industrial Code 12 NYCRR §23-1.4(33) defines a "material platform hoist" as a "power or manually-operated suspended platform operating in guide rails attached to a tower or similar structure used for raising or lowering material exclusively and operated and controlled from a point outside the conveyance" (*id.* at paragraph 27). Plaintiffs also reference Industrial Code 12 NYCRR §23-6.3 regarding the design of a material platform hoist. The hoist involved in the case at bar was "exclusively" for lifting materials and equipment, the car itself, and spools of wire and metal shackles, because the temporary hoist was to be dismantled upon completion of the installation of

the passenger elevator. If defendants' "argument were accepted, owners and contractors could dodge the safety requirements of Section 23-6.2 by the simple expedient of using passenger elevator shafts to raise and lower materials . . . . Such a result would clearly be inconsistent with the safety goals of the statute and regulations," plaintiffs argue (*id.* at paragraph 29).

Plaintiffs go on to contest defendants' contention that the First Department case of *Buckley* is dispositive in showing that the case at bar does not involve an elevation-related risk. Plaintiffs argue that the "counterweights [in *Buckley*] were not being lifted as part of any hoisting operation, but were moving as part of the normal operation of the elevator. Not surprisingly, the Court found no Section 240(1) case existed because a hoisting operation was not in [progress]" (*id.* at paragraph 31). Plaintiffs also distinguished *Narducci*, from the case at bar, as *Narducci* involved a falling pane of glass; it did not involve material being hoisted, plaintiffs argue (*id.*).

Defendants' Reply

In reply, defendants contend plaintiffs have presented no evidence that the accident is elevation-related. The plaintiffs contend in their opposition that the block and pulley that broke from the wall fell "by tracking down and along the hoist wire." However, plaintiffs offer no testimony in support of this contention, defendants argue. Further, while *Ross v Curtis-Palmer Hydro-Elec. Co.*, mentioned in plaintiff's reply, involved an elevation-related risk, the injury to the plaintiff in *Ross* "was caused by a non-height related factor – his awkward crouching on the platform. The Court of Appeals held that there was no §240 liability . . . and awarded summary judgment to the defendant," defendants argue (paragraph 4). In addition, plaintiffs failed to cite the failure of any safety device listed in Labor Law §240(1). Plaintiffs do not allege that plaintiff fell from a height or an object fell on plaintiff, defendants argue; the object that struck plaintiff

was on the same level as plaintiff. Plaintiffs' "contention that there was a height differential between the plaintiff and the elevator platform, located on the sixth or seventh floor in another shaft-way is an illusory issue."

Defendants go on to distinguish the case law plaintiffs cite in support of their case and reassert their contention that *Buckley* is analogous to the case at bar. "In that case, as here, it was not foreseeable that the object that struck plaintiff (the counter weight in *Buckley* and the shackle, pulley, and rail device in this case) posed an elevation-related hazard inherent in the activity." Citing *Narducci* (96 N.Y.2d at 268), defendants argue that a hoisting or securing device listed in Labor Law §240(1) was not "necessary" or "even expected" in plaintiff's case at bar (*id.* at paragraph 7). Defendants also contend that while plaintiffs in their motion discuss the inadequacy of the block and pulley, "it is unclear . . . how a block and pulley would have prevented the accident since one was already in use."

Furthermore, plaintiffs failed to cite any relevant Industrial Code rules, in that Industrial Code 12 NYCRR 23-1.4 deals with material hoists. Plaintiffs have not shown that a material hoist was involved in the accident. Defendants also contend that the court should reject plaintiffs' arguments based on Industrial Code 12 NYCRR §§23-1.4(33) and 23-6.3. Plaintiffs raised this point for the first time in their opposition to defendants cross motion; therefore, defendants argue, the court should disregard it.

Finally, defendants contend that they properly disclosed their expert witnesses. Citing CPLR §3101(d) and case law, defendants argue that the courts have set no deadline for the disclosure of expert witnesses. Further, defendants argue that absent a showing of intentional or prejudicial delay, the First Department has held that expert testimony should not be precluded.

Analysis

A. Failure to Identify Experts in Pretrial Disclosure

The failure of a party to comply with CPLR § 3101(d) is not automatic grounds to strike expert opinion testimony. CPLR § 3101(d) provides in relevant part:

> Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party *shall not* thereupon be precluded from introducing the expert's testimony at the trial *solely on grounds of noncompliance with this paragraph*. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just (*emphasis added*).

In weighing the admissibility of expert testimony, the court may consider whether the late disclosure was intentional, whether the opposing party was informed of the expert early enough before a trial, and whether the late disclosure prejudices the opposing party (*St. Hilaire v White*, 305 AD2d 209, 210, 759 NYS2d 74, 75 [1st Dept 2003]). In the case at bar, plaintiffs' objection to the testimony of experts Murray and Hoffman on the grounds that the disclosure of these experts comes too late in the process, in violation of CPLR § 3101(d), is unpersuasive. Plaintiffs cite several cases from the Second Department in support of their argument. In accordance with First Department case law, however, plaintiffs fail to show that defendants' late disclosure was intentional, or how plaintiffs were prejudiced by defendants' actions. That plaintiffs were deprived of the opportunity to have their own expert present at the inspection, in and of itself, does not establish prejudice. Further, the disclosure of defendants' expert testimony comes early

in this action to support defendants' timely filed cross motion. Therefore, plaintiffs' request that the testimony of Murray and Hoffman be rejected, pursuant to CPLR 3101(d), is denied at this juncture.

B. Notice for Discovery and Inspection

CPLR §3120 provides that a party to an action must give the opposing party notice of any discovery or inspection related to a case. CPLR §3120(2) requires that the notice "shall specify the time, which shall be not less than twenty days after service of the notice or subpoena, and the place and manner of making the inspection . . . and . . . shall set forth the items to be inspected . . . by individual item or by category, and shall describe each item and category with reasonable particularity." CPLR §3103(c) allows a court to remedy abuses of disclosure. "If any disclosure under this article has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed." However, the adversely affected party must show that it has been harmed or prejudiced by the misconduct (*see Lipin v Bender*, 84 N.Y.2d 562, 572 [1994]). Here, plaintiffs argue that defendants gave them only one day's notice that defendants' experts would inspect the subject premises. They also contend that the defendants' inspection of the subject premises was "destructive." While plaintiffs argue that they were inconvenienced by the defendants' failure to give adequate notice, they have not shown how they have been harmed or prejudiced by defendants' conduct. Therefore, plaintiffs request that the court disregard the evidence gathered from defendants' inspection is denied at this juncture.

D. Summary Judgment

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212 [b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove a prima facie entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980], *supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the

existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman*, 49 NY2d at 562). Defendant "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

1. Labor Law §240(1)

To establish a cause of action under Labor Law §240 (1), a plaintiff must show that the statute was violated and the violation was the proximate cause of his injury *(Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280, 771 N.Y.S.2d 484, 803 N.E.2d 757 [2003]). Labor Law §240(1), also known as the Scaffold Law, provides, in relevant part:

> All contractors and owners and their agents . . . in the *erection*, demolition, repairing, altering, painting, cleaning or pointing *of a building or structure* shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, *hoists*, stays, ladders, slings, hangers, *blocks, pulleys,* braces, irons, ropes, *and other devices* which shall be so constructed, placed and operated as to give proper protection to a person so employed (*emphasis added*).

"The statute is violated when the plaintiff is exposed to an elevation-related risk while engaged in an activity covered by the statute and the defendant fails to provide a safety device adequate to protect the plaintiff against the elevation-related risk entailed in the activity or provides an inadequate one" (*Jones v 414 Equities LLC*,__ NYS2d __, __, 2008 N.Y. Slip Op. 08197WL 4707496 [1st Dept 2008] (citations omitted)). Labor Law §240(1) imposes absolute liability on an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (*Ernish v City of New York*, 2 AD3d 256, 768 NYS2d 325 [1st Dept 2003], citing *Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880 [1985]).

> In *Rocovich v Consolidated Edison Co.* (78 NY2d 509), the Court of Appeals defined the scope of Labor Law § 240 (1) as encompassing only special hazards inherent in elevation-related tasks (supra, at 514). The Court again addressed the scope of Labor Law § 240 (1) in *Ross v Curtis-Palmer Hydro-Elec. Co.* (81 NY2d 494), wherein it stated that "Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*"(*Gill v Samuel Kosoff & Sons, Inc.*, 229 A.D.2d 824, 825 [1996]).

Thus, pursuant to Labor Law §240 (1), owners and contractors have the duty to provide safety equipment to protect workers from hazards related to elevating themselves or their materials at the work site (*Drew v Correct Manufacturing Corp.*, 149 AD2d 893 [3d Dept 1989]). In enacting Labor Law 240(1), the legislative intent was to protect workers "by placing 'ultimate responsibility for safety practices at building construction jobs where such responsibility actually

belongs, on the owner and general contractor' (1969 N.Y. Legis. Ann., at 407), instead of on workers, who 'are scarcely in a position to protect themselves from accident' [citation omitted]" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520, 493 N.Y.S.2d 102, [1985]). As the *Zimmer* court noted, "this statute is one for the protection of workmen from injury and undoubtedly is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (*id.* at 520-521, *quoting Quigley v Thatcher*, 207 NY 66, 68, 100 NE 596 [1912]). The statute imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury *(Gordon v Eastern Ry. Supply*, 82 N.Y.2d 555, 559, 606 N.Y.S.2d 127, 626 N.E.2d 912 [1993]; *Ross* at 500; *Rocovich* at 513).

Specifically, "Labor Law § 240(1) applies to both falling worker and falling object cases" (*Simione v City of New York*, 16 Misc.3d 1111(A), 847 N.Y.S.2d 899 [table; text at 2007 WL 2049715, *2, 2007 N.Y. Slip Op. 51386(U)]). *Ross* elaborates on such elevation-related hazards. Citing *Rocovich*, the court in *Ross* explained:

> The "special hazards" to which we referred in *Rocovich*, however, do not encompass any and all perils that may be connected in some tangential way with the effects of gravity. Rather, the "special hazards" referred to are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (see, *DeHaen v Rockwood Sprinkler Co.*, 258 NY 350). In other words, Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*Ross* at 500-501 [holding that a worker who strained his back by being awkwardly positioned on a scaffold did not fall under the protection of Labor Law 240(1)]).

The case law makes clear that Labor Law 240(1) does not cover the "tangential risks" related to construction work (*see Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 267, 841 NYS2d 249 [2007], *citing Misseritti v Mark IV Const. Co., Inc.*, 86 NY2d 487, 490 [1995] [no

Labor Law §240(1) liability in the case of an elevator worker testing an elevator car who was injured by a counterweight that fell out of the compartment housing it.]). The case law also makes clear that not every construction accident, even if related to elevation or gravity, falls within the scope of Labor Law §240(1) (*see Soles v Eastman Kodak Co.*, 162 Misc.2d 406, 408, 616 NYS.2d 871, 873 [1994] [worker carrying a door frame up several flights of stairs injured his back when he reached out to keep the frame from falling]).

The issue here is whether, as a matter of law, plaintiff was exposed to an elevation-related risk when he was struck by the block and pulley mechanism. Contrary to defendants' contentions, plaintiffs have demonstrated that at the time of the accident, plaintiff was involved in the type of elevation-related risk contemplated by Labor Law §240(1). Plaintiffs characterize plaintiff's accident as a falling object case, and the court agrees.

A hoist is a safety device listed in Labor Law §240(1). At the time of the accident, a hoist was carrying a load several floors above plaintiff. Labor Law §240(1) requires that hoists be secured properly. In the case at bar, the weight of the hoist caused the block and pulley securing the hoisting cable to break loose and strike plaintiff (plaintiff's motion, paragraph 15; *see also* plaintiff's affidavit, paragraph 14). The court in *Augello v 20166 Tenants Corp.* (251 AD2d 44, 45 [1998]), the court held that Labor Law 240(1) encompassed the risks entailed by a poorly secured pulley assembly: "Plaintiff was severely injured while working at a construction site when his hand was hit by a falling pulley assembly. The accident was clearly within the remedial scope of Labor Law § 240(1) since the falling pulley assembly had not been properly secured"(*id.*, *citing Ross*). The court in *Gabriel v The Boldt Group, Inc.*(8 A.D.3d 1058, 1059, 778 N.Y.S.2d 829

[2004])[2] was even clearer: "[A] defective hoist is itself a falling object when the hoist collapses while being used to lift an object."

The court in *Carmody v ADM Mill. Co.* (665 FSupp 147 [1987]), is particularly instructive on what it means to secure objects to protect workers. In *Carmody*, the plaintiff was injured while operating a material hoist. The plaintiff demonstrated that the hoist cable was not properly secured with clamps. "On the morning of November 5, 1982, the hoist failed, sending debris to the ground. Some of that debris struck the plaintiff working below, causing him injury. The plaintiff directs the court to evidence that the hoist was not constructed so as to give the 'proper protection' required by § 240(1)" (*Carmody* at 149).

Here, plaintiffs have established that the hoist in the case at bar was not properly secured as required by Labor Law 240(1). Plaintiffs provide testimony from professionals investigating the accident that the block and pulley did not contain enough Hilti bolts to keep them secured to the wall of the elevator shaft (*see* plaintiffs' motion, paragraph 2). As a result, the block and pulley broke under the weight of the load of materials the hoist was carrying. Plaintiff suffered injuries after he was struck by the inadequately secured block and pulley.

Defendants argue that 240(1) does not apply because plaintiff was on the same level as the block and pulley that hit him. While plaintiff was standing next to the hoist when the accident happened (plaintiffs' motion, paragraph 16), plaintiffs established that the block and pulley were above plaintiff when they broke. Plaintiffs stated as much in their affirmation: "The first block and pulley was located inside the second floor elevator shaft, *two to three feet above the level of*

[2] Liability under Labor Law §240(1) found when plaintiff was struck by hoisting apparatus after it collapsed while lifting a metal insert to the top of a silo.

the hoisting machine" (plaintiff's affirmation, paragraph 11 (*emphasis added*)). At the time of the accident, the block and pulley "came from above plaintiff down the hoist wire and into plaintiff," they contend (plaintiffs' reply, paragraph 16). Defendants argue that plaintiffs offered no testimony supporting this contention (defendants' reply, paragraph 11). However, plaintiff provided testimony in the affidavit accompanying plaintiffs' motion that supports plaintiffs' contention that the block and pulley were above him.

> After restarting the hoist, the block and pulley attached in the shaft directly behind me – the first pulley in line – broke free from the wall of the elevator shaft. My back was to the shaft so I did not actually see it separate from the wall. I did hear the noise, however. I was immediately and violently struck by what I now believe to be the hoisting cable snapping upward under the weight of the elevator car into my flank, and the block and pulley which exploded off the shaft wall and *tracked down* the hoisting cable toward the mechanical hoist drum (plaintiff's affidavit, paragraph 14 (emphasis added)).

Later in the same affidavit, plaintiff states that "the heavy block and pulley careened *down* into my body" (*id.* at paragraph 17, (emphasis added)).

In further support of plaintiffs' claim, the case law indicates that the height of a falling object in relation to the injured victim is not dispositive in Labor Law 240(1) cases. For example, in *Sharp v Scandic Wall Ltd. Partnership* (306 A.D.2d 39 [2003]) a worker was injured after he stood on an elevator car that dropped 30 feet. Section 240 liability was imposed despite the fact that plaintiff and load were at the same level:

> Plaintiff, however, is protected by section 240 (1). He was injured because the elevator he was hoisting to the ground fell, and the elevator fell because the hoist he was using, once removed, was not, as the statute requires, "so constructed, placed and operated as to give proper protection.". . . . While the case is unusual in that the load being hoisted was at the same level as the injured worker, it remains that plaintiff's injuries were the immediate result of "the effects of gravity" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]) and the ultimate result of the lack of a hoist properly placed and operated so as to afford the protection required by the statute" (*id.* at 40).

Here, plaintiff was struck by a falling block and pulley. And even though plaintiff was not struck by the falling hoist or any of the material on the hoist, the failure of the block and pulley certainly put him at risk of being struck by other objects falling from above. The key issue here is whether the safety device in place at the time of the accident – the block and pulley supporting the hoist – was adequate to protect plaintiff. Plaintiffs have established that this safety device failed during a hoisting operation, and plaintiff was injured as a result of that failure.

In a falling object case, a plaintiff has to show "more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell, while being hoisted *or secured*, because of the absence or inadequacy of a safety device of the kind enumerated in the statute"((*emphasis added*) *Narducci v Manhasset Bay Associates* (96 NY2d 259, 268, 727 NYS2d 37, 41 [2001], *supra* [worker on a ladder injured after shifting to avoid being hit by glass pane falling from an adjacent window denied summary judgement under Labor law §240(1)]). In other words, a plaintiff claiming liability under Labor Law §240(1) must show that the failure of the block and pulley, for example, was a foreseeable elevation-related risk.

Here, citing *Narducci*, defendants argue that the failure of the block and pulley was not a foreseeable risk. Case law defines a falling object contemplated by Labor Law 240(1) as one that is "an integral part of the renovation/construction work undertaken by plaintiff that involved the hoisting or securing of objects" (*Boyle v 42nd Street Development Project, Inc.*, 38 A.D.3d 404, 407, 2007 N.Y. Slip Op. 02595, 3 [2007]). As the court held in *Boyle*, where an unsecured rod fell, injuring the plaintiff, it "could not be stated more plainly that, if the nuts were not finally tightened, then the rods which the nuts were securing were not completely "secured" within the meaning of section 240 (1)" (*Boyle* at 408). The Boyle court distinguished *Narducci* on the

grounds that the pane that fell in *Narducci* was not an integral part of the work undertaken by plaintiff (*id.*).

In the case at bar, the hoist and pulley definitely were an integral part of the material hoist and plaintiff's work; thus, the block and pulley qualify as safety devices within the scope of Labor Law 240(1). Plaintiffs have established that the hoist and pulley supported the material hoist. Plaintiffs also have established through the testimony of investigators that the block and pulley failed because it didn't have enough Hilti bolts securing it. The investigators concluded that the addition of extra Hilti bolts would have prevented the block and pulley from breaking (plaintiff's motion, paragraph 21). Because the block and pulley meets the definition of a falling object contemplated by Labor Law 240(1), plaintiffs have established that the failure of the block and pulley was a foreseeable risk.

Defendants' argument that *Buckley* is dispositive in establishing that the failure of the block and pulley here was not a foreseeable risk is unpersuasive. In *Buckley*, a counterweight fell on the plaintiff, an elevator mechanic, while he was testing an elevator car. The Appellate Division, First Department, stated:

> Here, plaintiffs failed to establish that the work involved a significant inherent risk attributable to an elevation differential, that the injury was the foreseeable consequence of failure [*sic*] to provide proper protective devices of the type enumerated in the statute, or that the counterweights that fell on the worker constituted a load being hoisted or that required securing within the contemplation of the statute (*Buckley* at 269).

Buckley is distinguishable from the case at bar because the counterweight in *Buckley* was not being lifted as part of any hoisting operation, but was moving as part of the normal operation of the elevator. Further, the counterweight that fell in *Buckley* was not one of the protective devices enumerated in the statute. By contrast, here, as established by plaintiffs, the block and pulley and

the Hilti bolts securing them are safety devices contemplated by the statute. Further, *Buckley* distinguishes *Boyle*, which supports plaintiffs' case here. *Buckley* held that liability under Labor Law §240(1) was established in *Boyle* "since the hazard of a rod, part of an assembly being worked on at a site adjacent to the elevator shaft, falling down the shaft was a foreseeable and inherent elevation-related risk of the work involved" (*Buckley* at 270).

Plaintiffs have met their burden in establishing that Labor Law §240(1) applies to their case, and that there are no triable issues of fact on the subject of defendants' liability on Labor Law §240(1). Plaintiffs have shown that plaintiff was involved in the type of elevation-related risk contemplated by the statute, that defendants failed to provide adequate safety devices (a secure block and pulley) in violation of Labor Law §240(1), and that defendants' violation was a proximate cause of plaintiff's accident. At the same time, defendants have failed to demonstrate that plaintiffs' claim under Labor Law §240(1) should be dismissed on the ground that plaintiffs have failed to meet their burden. Therefore, plaintiffs' motion for summary judgment on the issue of liability based on Labor Law §240(1) is granted, and defendants' cross motion to dismiss such claim is denied.

2. Labor Law §241(6)

Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation or demolition (*see Ross* at 501-502). However, the worker must allege and prove that the owner or contractor violated a rule or regulation of the Commissioner of the Department of Labor that sets forth a specific standard of conduct, as opposed to a general reiteration of the common law (*see Ross* at 502-504). The violation of a specific standard of

conduct, once proven, does not establish negligence as a matter of law, but rather is some evidence of negligence to be considered with other relevant proof (*see Long v Forest-Fehlhaber*, 55 N.Y.2d 154, 160 [1982]).

In terms of the obligations statutorily imposed by Labor Law §241(6), it has been recognized that the statute is "a hybrid, since it reiterates the general common-law standard of care and then contemplates the establishment of specific detailed rules through the Labor Commissioner's rule-making authority" (*Ross* at 503). In *Ross*, the Court of Appeals, in adherence with prior determinations, held that a plaintiff may not rely solely upon the "broad, nonspecific regulatory standard"contained in section 241(6) (*id.* at 504), but instead, must rely upon the violation of a specific administrative rule, *i.e.*, a corresponding Industrial Code violation that mandates compliance with "concrete specifications," and not one which merely establishes "general safety standards" (*id.* at 505).

In the case at bar, plaintiffs argue defendants violated 12 NYCRR 23-6(c) of the Industrial Code, which regulates "material hoists." The section states:

> (c) Fittings. All hooks, shackles and other fittings subject to tension or shear shall be drop-forged. The use of deformed or damaged hooks, shackles, chains or other fittings is prohibited. All suspended pulley blocks, sheaves, well wheels or similar devices shall be moused or securely fastened or safety hooks shall be used.

Here, defendants have failed to demonstrate that the mechanical device employed at the time of the accident was not a material hoist covered by 12 NYCRR 23-6(c).

A material hoist is "essentially an elevator for materials" (*Soles v Eastman Kodak Co.*, 162 Misc2d 406, 409 n 1, 616 NYS2d 871, 873 [1994]). Defendants argue that the elevators involved in the case at bar were "simply automatic passenger elevators under construction" (see

defendants' affidavit of Murray, paragraph 9). However, a passenger elevator under construction is not the same as an up-and-running passenger elevator (*see Lindstedt v 813 Assoc.*, 167 Misc 2d 273, 276 [1996] [Claim by an elevator repairman injured while repairing an "existing" passenger elevator in a building denied because the passenger elevator was not a material hoist.]). At the time of the accident, plaintiff was a member of a team of workers assembling and installing *new* elevators for passenger use at the subject premises (*see* plaintiff's affidavit, paragraph 5). In order to assemble the elevator cars in the shaft, the workers built a *temporary mechanical hoist* to "hoist material, equipment, and ultimately, the elevator cars, up the elevator shaft as part of the construction process" (*id.* at paragraph 7). Given the fact that this temporary mechanical hoist was built solely to host construction material, it clearly falls within the scope of Industrial Code §12 NYCRR 23-6(c).

Defendants' objection to plaintiffs' raising for the first time Industrial Code 12 NYCRR §§23-1.4(33) and 23-6.3 in plaintiffs' opposition lacks merit. As the court explained in *Dannasch v Bifulco*, the "function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" (184 AD2d 415, 417, 585 NYS2d 360, 362 [1st Dept 1992]). However, in the case at bar, plaintiffs did not raise a new argument or grounds for summary judgment. Instead, plaintiffs cited Industrial Code 12 NYCRR §§23-1.4(33) and 23-6.3 merely to clarify the basis for summary judgment plaintiffs' already had articulated under Industrial Code 12 NYCRR §23-6.2(c). Plaintiffs cited the Industrial Code's definition of a "material platform hoist" to support their argument that defendants are liable pursuant to Labor Law 241(6) for violating

Industrial Code 12 NYCRR §23-6.2(c). Therefore, defendants' argument that plaintiffs improperly introduced a new argument is not persuasive.

Defendants contest the application of Industrial Code 12 NYCRR §23-6(c) on the grounds that the Hilti bolts used to secure the block and pulley of the mechanical hoist are not among the items specifically listed in the Industrial Code. However, the defendants' argument lacks merit. It is clear from the language of 12 NYCRR § 23-6(c) that the list of securing devices is not intended to be exhaustive. The first sentence makes reference to "[a]ll hooks, shackles and *other fittings* subject to tension or shear" [emphasis added]. The second sentence prohibits the use of "other" non-specified damaged fittings. Furthermore, it has been held that the phrase "other device" denotes "a functionally similar or related device" (*Koumianos v State*, 141 AD2d 189, 191 [3d Dept 1988])[3]. In the case at bar, plaintiffs demonstrated that defendants violated a specific standard of conduct set forth in Industrial Code 12 NYCRR §23-6(c) regarding the safety of material hoist involved in the accident, so as to support their claim that defendants are liable under Labor Law § 241(6).

[3] The court interpreted the phrase "other device" in Labor Law §240(1). "As a threshold argument, the State asserts that the Court of Claims erred in considering the come along to be an 'other device' covered by Labor Law §240 (1). We disagree. Even were we to consider the expert affidavits presented by the State on its motion to renew and/or reargue, which explain that the come along is neither a pulley nor a hoist, we find that the come along does qualify as an 'other device.' The record confirms that the come along was utilized to tighten cables intended to support the scaffolding needed to paint the bridge. As such, the come along may properly be deemed a 'functionally similar or related device' within the statutory coverage [citation omitted] (*Koumianos v State*, 141 AD2d 189, 191 [3d Dept 1988]).

Based on the foregoing, it is hereby

ORDERED that defendants' cross motion for summary judgment, dismissing plaintiffs' complaint regarding Labor Law §240(1), is denied; and it is further

ORDERED that plaintiffs' motion for summary judgment, finding defendants liable under Labor Law §240(1), is granted; and it is further

ORDERED that defendants' cross motion for summary judgment, dismissing plaintiff's complaint regarding Labor Law §241(6), is denied; and it is further

ORDERED that plaintiffs motion for summary judgment, finding defendants liable under Labor Law §241(6), is granted; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

Dated: November 12, 2008

Hon. Carol R. Edmead, J.S.C.