

# Construction & Surety Law Newsletter

A publication of the Torts, Insurance and Compensation Law Section  
of the New York State Bar Association

## Summary of Decisions and Statutes

### ARCHITECTS, ENGINEERS AND SURVEYORS

**36-1.** A cognizable claim for tortious interference with contract is pleaded where the general contractor alleges that the architect maliciously and for its own benefit made arbitrary and erroneous determinations with respect to the requirements of the contract and recommended termination of the contract without just cause or reasonable grounds. *Schmidt & Schmidt, Inc. v. Town of Charlton*, 68 A.D.3d 1314, 890 N.Y.S.2d 693 (3d Dep't 2009).

**36-2.** A divided panel of the First Department concluded that the purchasers of a penthouse apartment failed to state a claim for negligent misrepresentation against the engineering firm which designed the faulty HVAC system. The purchasers failed to allege a special relationship close enough to approach privity. As strangers to the engineering agreement between the developer and the engineering firm, the purchasers were obliged to establish that the engineer was aware that its statement would be used for a particular purpose, that the engineer knew the purchasers would rely on the statement in furtherance of that purpose, and that the engineer had engaged in conduct linking it to the purchasers, as evidence that the engineer understood the purchasers would be relying on its statement. *Sykes v. RFD Third Avenue 1 Associates, LLC*, 67 A.D.3d 162, 884 N.Y.S.2d 745 (1st Dep't 2009).

### LABOR LAW §§ 200, 240, 241

**36-3.** A claim is stated under Labor Law § 240(1) when the injuries are a direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential, whether

or not the injured party actually fell or was struck by a falling object. The relevant inquiry is whether the harm flows directly from the application of the force of gravity to the object. In this case, a rope wrapped around a metal bar could not effectively control an 800-pound reel of wire being moved down a flight of four stairs. The worker holding the rope was pulled against the bar, injuring his hands. *Runner v. New York Stock Exchange, Inc.*, 13 N.Y.3d 599, 895 N.Y.S.2d 279 (2009).

**36-4.** The homeowners' exemption under Labor Law §§ 240 and 241 applied to the owners of a two-family dwelling whose participation in the renovation of an apartment within their home was limited to discussion of the results that they wished to see and not the method or manner in which the work was to be performed. The homeowners' direction to their contractor to place a vent through the roof was simply an aesthetic decision that did nothing more than express how they wanted the home to look at the completion of the project. They did not provide equipment or work materials, and they were not present when the work was performed. Both the method and the manner of the injured contractor's work were left to his judgment and experience. Nor did the homeowners exercise supervisory control over the work so as to incur liability for the injury under Labor Law § 200 or in common law negligence. Three Court of Appeals judges in a dissenting opinion would have found a question of fact whether the homeowners' exemption applied in this case. *Affri v. Basch*, 13 N.Y.3d 592, 894 N.Y.S. 370 (2009).

**36-5.** The Fourth Department extended the homeowners' exemption from liability under Labor Law §§ 240(1) and 241(6) to a property on which a single-family



residence was intended to be constructed, but where a storage barn was the site of the injury to a self-employed carpenter and was the only existing structure at the time of injury. The owners subsequently constructed the residence and established that the barn was intended to be used and actually used for the storage of personal belongings and not for commercial purposes. *Dineen v. Rechichi*, 70 A.D.3d 81, 888 N.Y.S.2d 834 (4th Dep't 2009).

**36-6.** Trench collapses do not fall within the class of hazards that Labor Law § 240(1) was intended to guard against. However, 12 NYCRR 23-4.2 and 12 NYCRR 23-4.4 set forth detailed requirements regarding the bracing and shoring of trenches and are sufficiently specific regulations to support a claim under Labor Law § 241(6). *Ferreira v. Village of Kings Point*, 68 A.D.3d 1048, 891 N.Y.S.2d 475 (2d Dep't 2009).

**36-7.** Tree removal alone does not fall within any of the enumerated categories of construction work under 12 NYCRR 23-1.4(b)(14), which provide the basis for liability under Labor Law § 241(6). *Enos v. Werlatone, Inc.*, 68 A.D.3d 713, 890 N.Y.S.2d 109 (2d Dep't 2009).

**36-8.** After initially acknowledging that liability of a property owner or contractor under Labor Law § 240(1) depends on whether adequate safety devices were provided, furnished, or placed for the worker's use on the work site, the First Department then analyzed whether a worker has a duty to search the work site for such safety devices when they are not provided directly to him or her. After examining prior holdings of the Court of Appeals, the First Department held in a 4-1 decision that the obligation to search the work site is limited to those situations when the worker knows the exact location of the safety device or devices and where there is a practice of obtaining such devices because it is a simple matter for the worker to do so. *Cherry v. Time Warner, Inc.*, 66 A.D.3d 233, 885 N.Y.S.2d 28 (1st Dep't 2009).

## MECHANICS' LIENS AND TRUST CLAIMS

**36-9.** When the real property owner is also the president of the corporate tenant, who negotiated the improvements contract with the general contractor, consent to the improvements may be inferred by the owner's conduct. The owner failed to distinguish his individual

and corporate capacities. *J.K. Tobin Construction Co., Inc. v. David J. Hardy Construction Co., Inc.*, 64 A.D.3d 1206, 883 N.Y.S.2d 681 (4th Dep't 2009).

## PUBLIC CONTRACTS

**36-10.** An "alterations and omissions" clause in a public works contract, which reserves the public owner's right to alter plans or omit work as deemed reasonably necessary to protect the public interest and which precludes any claim for damages or loss of anticipated profits, places the claimant on notice and is enforceable. However, the alteration or omission may not negate the essential identity of the main purpose of the contract and may not be exercised arbitrarily or capriciously. *Peter Scalandre & Sons, Inc. v. State of New York*, 65 A.D.3d 774, 883 N.Y.S.2d 821 (3d Dep't 2009).

## STATUTES

**36-11. Chapter 380 of the Laws of 2009**—"State Green Building Construction Act" amends the Public Buildings Law to add Article 14C, requiring that the construction and substantial renovation of state buildings comply with "green" building standards established by the Office of General Services. Repeals Article 13 of the Energy Law. Effective August 26, 2010.

**36-12. Chapter 417 of the Laws of 2009**—amends Article 35-E of the General Business Law to require a calendar month billing cycle and payment within 30 days after approval of the invoice with respect to private construction contracts where the total aggregate cost of the project equals or exceeds \$150,000, and impose mandatory, expedited arbitration through the American Arbitration Association at the election of any aggrieved party for those payment disputes which cannot be successfully resolved by the efforts of the parties to the construction contract, subcontract, or material supply contract. Effective September 8, 2009.

**36-13. Chapter 494, Part D of the Laws of 2009**—amends Section 103(1) of the General Municipal Law to increase from \$20,000 to \$35,000 the threshold for public works contracts required to be awarded to the lowest responsible bidder following public advertisement for sealed bids. Effective November 12, 2009.

From the NYSBA Book Store

# Construction Site Personal Injury Litigation

New York Labor Law §§ 200, 240(1), 241(6)

Section Members  
get 20% discount\*  
with coupon code  
PUB????N



## EDITORS-IN-CHIEF

**Thomas F. Segalla, Esq.**  
Goldberg Segalla LLP  
Buffalo, NY

**Brian T. Stapleton, Esq.**  
Goldberg Segalla LLP  
Buffalo, NY

## Key Benefits

- Understand the statutory causes of action under N.Y. Labor Law §§ 200, 240(1) and 241(6)
- Be able to handle a construction site litigation case with confidence
- Understand the insurance implications between the parties involved

Perhaps no single scheme of statutory causes of action has initiated more debate between plaintiff's bar and its supporters and the defense bar than that promulgated under New York Labor Law §§ 200, 240(1) and 241(6).

The liability of various parties involved in a construction project—including owners, architects, engineers, other design professionals, general or prime contractors and employees—generates frequent disputes concerning the responsibilities of these parties. The authors discuss ways to minimize exposure to liability through careful attention to contract and insurance provisions.

The 2008 revision updates case and statutory law, with emphasis on recent developments in this area of practice.

\*Discount good until September 30, 2010.

## PRODUCT INFO AND PRICES

Book Prices

2006 (with 2008 revision) • 480 pp.,  
loose-leaf • PN: 4047

<b>NYSBA Members</b>	\$80
<b>Non-Members</b>	\$110

2008 revision (available to past  
purchasers only)  
PN: 54047

<b>NYSBA Members</b>	\$60
<b>Non-Members</b>	\$90

\$5.95 shipping and handling within the continental U.S. The cost for shipping and handling outside the continental U.S. will be based on destination and added to your order. Prices do not include applicable sales tax.

## Get the Information Edge

NEW YORK STATE BAR ASSOCIATION

1.800.582.2452 [www.nysba.org/pubs](http://www.nysba.org/pubs)

Mention Code: PUB????





NEW YORK STATE BAR ASSOCIATION  
TORTS, INSURANCE AND COMPENSATION LAW SECTION  
One Elk Street, Albany, New York 12207-1002

## TORTS, INSURANCE AND COMPENSATION LAW SECTION

Visit us  
on the Web  
at

[www.nysba.org/TICL](http://www.nysba.org/TICL)

## Construction & Surety Law Newsletter

### Editor

Henry H. Melchor  
Bond, Schoeneck & King, PLLC  
One Lincoln Center  
Syracuse, New York 13202

### Assistant Editors

Emily D. Brown  
Stephanie M. Campbell  
Kristy B. Frame  
Hilary L. McHugh  
James J. Pergolizzi

### Division Officer

#### Chair

Kenneth T. Boyd  
Polin, Prisco & Villafane  
One School Street - Suite 206  
Glen Cove, New York 11542

This newsletter is published for members of the New York State Bar Association's Torts, Insurance and Compensation Law Section by the Construction and Surety Law Division. Attorneys should report decisions of interest to the Editor. Since many of the decisions are not in the law reports, lawyers reporting will be credited on their contribution.

Copyright 2010 by the New York State Bar Association.  
ISSN 1530-3977 (print) ISSN 1933-8449 (online)