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NASSAU LAWYER

The Journal Of The Bar Association Of Nassau County, N.Y., Inc.

L 46 No. 7

<http://www.nassaubar.org>

September 1998

From Allen to Rizzuto: The Court of Appeals' Journey in Defining Liability under Labor Law § 241(6)

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Beginning with its opinion in the seminal case of *Allen v. Cloutier Constr. Corp.*,¹ continuing with its landmark decision in *Ross v. Curtis-Palmer Hydro-Electric Corp.*,² and culminating in its recent decision in *Rizzuto v. L.A. Wenger Contr. Co., Inc.*,³ the Court of Appeals has defined, restricted, and now clarified the application and scope of liability under Labor Law § 241(6). In light of the recent decision in *Rizzuto*, it now seems appropriate to review the evolution of the statute as interpreted by the Court of Appeals.

Prior to 1962, Labor Law § 241 contained seven subdivisions, the first five of which were identical to the current Labor Law § 241(1)-(5), and the last two of which authorized the Board of Standards and Appeals to enact regulations for the protection of workers. The first five subdivisions were held to establish a "nondelegable duty", violation of which resulted in "absolute, first instance liability upon an owner or general contractor unrelated to questions of negligence."⁴ Violation of the last two subdivisions of the pre-1962 statute, however, was held to constitute only "some evidence of negligence," based on the distinction between a violation of an administrative regulation as opposed to the violation of a statute.

In 1962, the seven subdivisions of section 241 were replaced with a single paragraph requiring "owners, general contractors and, for the first time, subcontractors to provide 'reasonable and adequate protection and safety to the

persons employed in" construction, excavation and demolition operations.⁵ As the amended statute was "devoid of any specific directions normally contained in statutes imposing absolute liability," it was found to simply codify "the common-law duty ... of an owner or general contractor to provide a safe place to work."⁶ The effect of this modification was discussed by the Court of Appeals with disapproval in *Allen*:

It soon became all too evident that the intent of the Legislature - to give the workman in the hazardous employment of construction, demolition and excavation added protection other than workmen's compensation, in the form of non-delegable duties cast upon the owner and general contractor with ensuing liability for breach of those duties - was being easily circumvented under the 1962 version of section 241 by its requirement of control. Owners and contractors were able to insulate themselves from liability for injuries caused by dangerous and unlawful conditions on the job site, and indeed were encouraged to disregard such conditions, lest they be found to be in control. More importantly, the inclination of an owner or contractor to engage a subcontractor predicated on price alone was greatly enhanced, with a concomitant disregard of the safety record and practices of the subcontractor.⁷

Thus, the statute was amended again in 1969 in order to replace "ultimate responsibility for safety practices

at building construction jobs where such responsibility actually belongs, on the owner and general contractor."⁸ The 1969 amendment reinstated the first five subdivisions of the pre-1962 statute, renumbered former subdivisions 6 and 7 as 7 and 8, and added subdivision 6. Reviewing the effect of this amendment, the Court of Appeals held that "the conclusion is inescapable that the change effected by the 1969 legislation was a substantial one, for it fashions absolute liability upon an owner or contractor for a breach of the duties imposed by subdivisions 1 through 6 of section 241 irrespective of their control or supervision of the construction site."⁹

The Court's use of the phrase "absolute liability" in *Allen* with regard to Labor Law § 241(6) quickly became the subject of additional judicial scrutiny. In *Monroe v. City of New York*, the Appellate Division, Second Department was called upon to decide whether subdivision 6 of section 241 imposed the same type of "absolute liability" as did subdivisions 1 through 5 of the statute.¹⁰ Preliminarily, the Second Department concluded that "the Court of Appeals comment that subdivision 6 imposed 'absolute liability' was unnecessary to the determination of the precise issue then before the court" and that it therefore constituted "obiter dictum."¹¹ The Appellate Division then noted that, unlike subdivisions 1 through 5, subdivision 6 of Labor Law § 241 contains no explicit and definite commands analogous to those found, for example, in Labor Law

§ 240(1). Finally, the Appellate Division found that subdivision 6 should not be read as imposing "absolute" liability in the same sense as subdivisions 1 through 5, concluding that the duty of owners and general contractors under Labor Law § 241(6) was neither "absolute" nor one of reasonable care, but rather in the nature of a "nondelegable duty" resulting in vicarious liability for accidents resulting from "the negligence of general contractors or subcontractors in failing to conduct their construction, demolition, or excavation operations so as to provide for the reasonable and adequate protection of the persons employed therein."¹² This definition of the duty imposed by Labor Law § 241(6) was cited and implicitly adopted by the Court of Appeals in *Long v. Forest-Fehlhaber*, wherein the issue was whether comparative negligence could be a defense to liability under the statute.¹³

The Court of Appeals returned to Labor Law § 241(6) in *Ross v. Curtis-Palmer Hydro-Electric Corp.*, in which it clearly delineated the tri-partite scheme of the Labor Law:

We have traditionally treated the provision that merely incorporates the general common-law standard (Labor Law § 200(1)) differently from the provisions containing specific commands and standards (see Labor Law § 240(1); § 241). The latter have been held to create duties that are nondelegable, while the former do not. We have also attached analytical significance to the distinction between the Labor Law provisions that

Continued on page 20

FROM ALLEN TO RIZZUTO

Continued from page 18

are "self-executing" in the sense that they may be implemented "without regard to external considerations such as rules and regulations, contracts, or custom and usage" (Labor Law § 240(1); § 241(1)-(5)) and those whose terms "require reference to outside sources to determine the standard by which a defendant's conduct must be measured" (Labor Law § 200(1); § 241(6)). Again, important legal consequences have been made to depend on whether the statutory provision in question sets forth a specific requirement or standard of conduct or instead "does no more than broadly [require] that the work area "provide reasonable and adequate protection and safety.""¹⁴

In order to preserve the distinction between Labor Law § 200(1) and § 241(6), the Court found it necessary to draw a distinction between those provisions of the Industrial Code that mandate "compliance with concrete specifications and those that establish general safety standards by invoking ... '[g]eneral descriptive terms'."¹⁵ The Court ultimately held that violation of a "concrete specification" of the Industrial Code gives rise to a "nondelegable duty", while violation of a "general safety standard" does not.¹⁶ In its decision, the Court also referred to Labor Law § 241(6) as "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."¹⁷ Significantly, the Court stated

that a plaintiff under Labor Law § 241(6) reaps the "benefit [of] the reduced burden of proof" required under the statute.¹⁸ It did not, however, elaborate as to the nature of the reduction in the plaintiff's burden of proof.

The Court of Appeals decision in *Rizzuto* provided a comprehensive explanation of a plaintiff's burden of proof under Labor Law § 241(6). In *Rizzuto*, the plaintiff, an employee of a subcontractor, was injured when employees of the Transit Authority, which owned the construction site inadvertently sprayed the plaintiff and his work area with diesel fuel. The plaintiff immediately began to leave the area to clean himself off, slipped on the oil, and fell, suffering injuries. The plaintiff sued the general contractor, alleging negligence, breach of Labor Law § 200, and violation of Labor Law § 241(6) by virtue of a breach of Industrial Code regulation 23-1.7(d).

The trial court held that the general contractor could not be held liable to the plaintiff under Labor Law § 200 because it lacked notice of the dangerous condition. It further held that plaintiff's allegation that his accident was caused by a violation of Industrial Code § 23-1.7(d) was insufficient because the regulation only applied to slippery conditions on elevated work sites. The Appellate Division, Second Department unanimously affirmed the trial court, ruling that the general contractor could not be held liable under either Labor Law § 200 or Labor Law § 241(6) unless the general contractor had the notice of the dangerous condition, citing its prior decision in *McCague v. Walsh Constr. Co.*¹⁹ In essence, the Second Department held that a general contractor could not be

Continued on page 23

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