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A GUIDE TO THE UNWARY:
Construction Manager Liability Under New York Labor Law §240(1)

What's in a name? Everything, if a construction manager is found to be an "agent" of the owner of a New York construction project.

New York Labor Law §240(1) (the "Scaffold Law") imposes "absolute liability" on owners, contractors, and their *agents* for personal injuries suffered by persons engaged in demolition and construction related activities resulting from the forces of gravity. "Absolute liability" means liability without consideration of the comparative fault of the injured plaintiff. Because of the significant liabilities and exposures created by the statute, the term "agent" has been the subject of a great deal of litigation, particularly in the context of construction managers.

Liability imposed upon "agents" of an owner is premised upon a showing that the agent has the ability to direct or control the work giving rise to the accident. A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done at the location at which a plaintiff is injured, and has the authority to control the activity bringing about the injuries so as to enable it to avoid or correct the unsafe condition.[1]

Frequently, the question of whether or not a construction manager is the agent of the owner for Labor Law purposes is found by the courts to be a question of fact. This is most often true in public works projects where there are no general contractors. In those cases, construction managers are sometimes compelled to assume a public or governmental entity's authority and responsibility with respect to safety requirements and compliance.[2]

In *Walls v. Turner Construction Company*,[3] the seminal case on the issue, Turner entered into a construction management agreement with the Massapequa Union Free School District. As a public project, there was no general contactor — each contractor entered into its own agreement with the district. Because there was no general contractor, under the terms of Turner's contract, the duty to oversee the contractors and overall site safety, including the ability to stop the work in the event of a dangerous condition, fell upon the construction manager. As a result, the court found that because Turner served as the "eyes, ears, and voice of the owner," Turner was liable as the statutory agent of the owner under Labor Law §240(1).

According to the United States Department of Labor, construction managers "plan, coordinate, budget, and supervise construction projects from early development to completion." The labeling of an entity as "construction manager" versus "general contractor" is not determinative of the issue of liability under the Labor Law. Instead, the courts analyze the role of the construction manager and whether that entity was delegated supervisory control and/or authority over the work being performed at the time to the accident.[4] Where the designated "construction manager" hired the subcontractors and oversaw construction, the court found that there was a question of fact as to whether the defendant was the "agent" of the owner for the purposes of Labor Law §240(1).[5]

Central to the question of whether or not a construction manager is the statutory agent of the owner for the purposes of Labor Law §240(1) is the contract between the owner and construction manager. Where a contract with the owner affirmatively provided that the construction manager was not responsible for construction methods or safety precautions at the worksite, the court held that the construction manager was not subject to the absolute liability provisions of Labor Law §240(1).[6]

It is critical, therefore, to protecting construction managers from the potential exposure of Labor Law §240(1) to focus on the language of the contract documents. The limitations of the construction manager's responsibilities should be detailed, in particular, with respect to issues

relating to the enforcement of safety rules and regulations. In those cases where the construction manager can point to the limiting contract language, those construction managers have fared far better than others whose language is less specific.[7]

The conduct of the construction manager's employees is also a focus of the courts' analysis. Although general, supervisory power is insufficient to give rise to liability,[8] where there is testimony that the construction manager had the authority to supervise the work and stop "unsafe work practices," the court found a question of fact as to whether the defendant was liable as the agent of the owner.[9]

In contrast, where the testimony was that the defendant construction manager did not have safety responsibilities and could not unilaterally stop the work, the complaint was dismissed.[10] Also, where upon observing an unsafe practice the appropriate action for the construction manager was to contact the prime contractor responsible for the work, the court held that the construction manager did not exercise direct supervision over the work and was not liable under Labor Law §240(1).[11]

This is not to suggest that construction managers should ignore safety practices on a job site. Certainly, everyone on a project must be aware of his or her surroundings. An accident avoided is a lawsuit avoided, and no one wants to see a worker injured. Still, it is important that the employees of the construction manager recognize their roles on the project in order to avoid the exposures presented under New York's Labor Law.

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1 *Linkowski v. City of New York, 33 A.D.3d 971, 824 N.Y.S.2d 109 (2nd Dept. 2006).*
2 *Pino v. Irvington Union Free School District, 43 A.D.3d 1130, 843 N.Y.S.2d 133 (2nd Dept 2007).*
3 *4 N.Y. 3d, 861, 798 N.Y.2d 351 (2005).*
4 *Barios v. City of New York, 75 A.D.3d 517, 905 N.Y. S.2d 255 (2nd Dept. 2010).*
5 *Salsinha v. Malcolm Pirnie, 76 A.D,3d 411, 906 N.Y.S.2d 532 (1st Dept.2010).*
6 *Baker v. Town of Niskayuna, 69 A.D.3d 1016, 891 N.Y.S.2d 749 (3rd Dept. 2010); McLaren v. Turner Construction Company, 105 A.D.3d 1016; 963 N.Y.S.2d 386 (2nd Dept. 2013); Uzar v. Ciminelli Constr. Co., 53 AD3d 1078, 862 N.Y.S.2d 234 (4th Dept.2008).*
7 *Rodriguez v. JMB Architecture, LLC, 82 A.D.3d 949, 951-952 (2nd Dept. 2011); Delahaye v. St. Anne's School, 40 A.D.3d 679, 836 N.Y.S.2d 233 (2nd Dept. 2007); Kindlon v. Schoharie Central School District, 66 A.D.3d 1200, 887 N.Y.S.2d 310 (3rd Dept. 2009).*
8 *Armentano v. Broadway Mall Props., Inc., 30 A.D.3d 450, 817 N.Y.S.2d 132 (2nd Dept.2006).*
9 *Sheridan v. Albion Central School District, 41 A.D.3d 1277, 838 N.Y.S.2d 296 (4th Dept.2007).*
10 *Borbeck v. Hercules Constr. Corp., 48 A.D.3d 498, 852 N.Y.S.2d 264 (2nd Dept. 2008).*
11 *Kindlon v. Schoharie Central School District, 66 A.D.3d 1200, 887 N.Y.S.2d 310 (3rd Dept. 2009).*