

THE “RECALCITRANT WORKER” DEFENSE IN LABOR LAW §240(1) LAWSUITS

- By -

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Labor Law §240(1) “does not extend to a ‘recalcitrant worker’, meaning one whose refusal to use available safety devices results in injury”.¹ The “recalcitrant worker” defense may allow a defendant to escape liability under that section of the Labor Law.²

An injured worker's comparative negligence is not a defense to a Labor Law §240 claim.³ While a worker’s comparative negligence is not a defense under the Scaffold Law, “the recalcitrant worker defense is available”.⁴

The recalcitrant worker defense is a practical application of the rule that, where plaintiff’s own actions are the sole proximate cause of his or her accident, there can be no liability.⁵ Even absent recalcitrance, liability will not be imposed under the Scaffold Law when an adequate safety device is provided and the injured worker either neglected to use the device or misused it so that the worker’s own conduct was the sole cause of his or her injury.⁶

A "recalcitrant worker" defense requires a showing that the injured worker refused to use the safety devices provided by the owner. The defense is premised upon the principle that the statutory protection does not extend to workers who have adequate and safe equipment available to them and refuse to use such equipment.⁷

The applicability of the "recalcitrant worker" defense is ordinarily a factual issue to be submitted to the jury.⁸ Still, plaintiff may be granted summary judgment on liability under the scaffold law if no issue of fact exists to support a recalcitrant worker defense.⁹

The defense is limited to cases in which a worker has been injured as a result of a refusal to use available safety devices provided by the employer or owner.¹⁰

That defense... requires a showing that the injured worker refused to use the safety devices that were provided by the owner or employer... It has no application where... no adequate safety devices were provided.¹¹

The defense requires a showing that the injured worker refused to use the safety devices that were provided by the owner or employer.¹²

Elements Of The Recalcitrant Worker Defense

To establish a recalcitrant worker defense, defendant must show that plaintiff deliberately refused to employ a safety device that was available, visible, and in place at the work site.¹³

Defendant must show that the worker "purposely did not" use a device properly despite possessing the device and knowing how to safely use the device.¹⁴ The following elements should be demonstrated to prove that plaintiff was a recalcitrant worker:¹⁵

- ¶ Plaintiff had an adequate safety device available;
- ¶ Plaintiff knew that the safety device was available;
- ¶ Plaintiff knew he or she was expected to use the available safety device;
- ¶ Plaintiff chose for no good reason not to use the available safety device; and
- ¶ Had plaintiff used the available safety device, plaintiff would not have been injured.

A recalcitrant worker defense requires evidence that "the worker deliberately refused to use safety devices available and visibly in place at the worker's immediate worksite".¹⁶

The recalcitrant worker defense applies to the type of safety devices enumerated in Section 240(1) of the Labor Law to be constructed, placed, and operated so as to give proper protection from elevation-related risks. A worker is not a recalcitrant worker for failing to use a safety device not enumerated in the Scaffold Law.¹⁷

Defendant must prove that plaintiff's recalcitrance was a cause of his or her accident. There may be more than one proximate cause of a workplace accident. A defendant can be found liable for causing the accident based upon a failure to provide proper protection even if plaintiff is deemed recalcitrant for not having used a particular available safety device.¹⁸

Alternative Means Of Gaining Access To A Construction Site

The existence of an alternative means to getting around a construction site, and the failure of plaintiff to use those means, do not alone raise a valid "recalcitrant worker" defense. Proof must be submitted that plaintiff refused to use an available safety device.¹⁹

A plaintiff's use of unapproved means of getting around a worksite, rather than use of available safety devices, does not make plaintiff a recalcitrant worker, but at most constitutes comparative negligence which is irrelevant under section 240 of the Labor Law.²⁰ An instruction not to walk across part of a work site does not create a fact issue under the recalcitrant worker doctrine, "since that defense is limited to cases in which a worker has been injured as a result of a refusal to use available safety devices provided by the employer or owner".²¹

Plaintiff's own negligence in choosing a particular method of ascending or descending from an elevated worksite may be immaterial to a recalcitrant worker defense. In any event, plaintiff's negligence is not a defense to imposition of Scaffold Law liability.²²

However, a worker who knowingly, intentionally, and voluntarily refuses to use available safety devices and voluntarily chooses to use an unauthorized means of access or departure merely because the worker does not like other, safe, and available alternatives can be a recalcitrant worker.²³ Issues of fact for the jury may be present when plaintiff fails to avail himself or herself of the safe means of gaining access to an area of the work site.²⁴

An instruction not to use a particular piece of equipment as a means of egress, and use of that equipment despite the instruction and availability of another means of egress, raises a fact issue as to proximate causation.²⁵

Mere Non-Use Of An Available Safety Device

The mere nonuse of safety devices made available to the worker does not warrant use of a recalcitrant worker defense.²⁶ The safety device must be ready and available for immediate use by the worker.²⁷

It is well established that an owner or contractor cannot avoid liability under the scaffold law merely by asserting that safety devices were available at the jobsite.²⁸

An owner or general contractor's duty is not satisfied by providing safety instructions or making safety devices available to workers.²⁹

The "mere presence of safety devices at the worksite does not diminish [a] defendant's liability."³⁰ A safety device available for use somewhere in the area of the construction site is insufficient to allow a defendant to escape liability.³¹

An owner or contractor does not fulfill its obligation merely by making available somewhere at the job site the necessary safety equipment.³²

... the mere presence of safety devices 'somewhere' at a worksite neither discharges a defendant's duty nor diminishes a defendant's liability under the statute.³³

The presence of safety devices other than at the site of the accident does not discharge a defendant's duty, if there were no safety devices in the area where plaintiff was injured.³⁴

Safety devices stored in a nearby tool box,³⁵ or a gangbox³⁶ do not provide a defense to a Scaffold Law claim. A safety device that was not provided to plaintiff and available at the work site on the day of the accident is no basis for submission of a recalcitrant worker defense to the jury.³⁷

Availability of a safety device at the job site and an instruction to plaintiff to use the device is not sufficient to raise a fact question on the recalcitrant worker defense absent the device actually being in place or plaintiff either actually being provided with the safety device or being told where the device was located.³⁸

The presence of safety devices elsewhere at a worksite does not trigger the recalcitrant worker defense without proof that plaintiff was told to use a specific safety device and refused to do so.³⁹ The recalcitrant worker defense does not apply where the safety device at issue was elsewhere on the job site and not fully assembled and ready to use by plaintiff.⁴⁰ Absent an instruction to use an available safety device and the worker's refusal to do so, a recalcitrant

worker defense will be dismissed.⁴¹

A passive instruction by the employer not to use a scaffold or ladder without an adequate securing device does not create a fact issue as to whether the disobedient worker was recalcitrant.⁴² "An owner's statutory duty is not met merely by providing safety instructions or by making other safety devices available, but by furnishing, placing and operating such devices so as to give proper protection."⁴³

The recalcitrant worker defense does not apply to a worker's failure to have someone secure a ladder off of which plaintiff later falls. Such a failure is not the equivalent of a refusal to use an available safety device.⁴⁴ A determination by a worker that a ladder does not need to be secured does not make the worker a "recalcitrant worker", despite instructions by the employer to secure the ladder.⁴⁵

Plaintiff is not required to guarantee his own safety by placing appropriate safety devices in a proper manner.⁴⁶ The mere failure to wear a hard hat does not make the injured worker a "recalcitrant" employee.⁴⁷ The availability of safety devices at the jobsite is insufficient to defeat a motion by plaintiff for summary judgment, if plaintiff has otherwise proven such entitlement.⁴⁸

The mere availability of plaintiff's own personal safety device at the time of the accident is of no avail to a defendant in a scaffold law case.⁴⁹ The presence of adequate safety devices at the worksite is no defense, if plaintiff did not refuse to use the devices or if plaintiff was instructed to use an unsafe device instead.⁵⁰

The Safety Device Is Not Suitable For Proper Protection

A recalcitrant worker defense based upon failure to use a safety device may be to no avail upon undisputed evidence that the device provided to, and actually used by plaintiff was itself defective.⁵¹

A factual issue may be raised as to whether a safety device that was provided was suitable and appropriate for plaintiff's proper protection without the use of additional devices or measures.⁵² The jury may need to determine if plaintiff refused to use a furnished safety device or was compelled to forego its protection by reason of the device's inadequacy under the circumstances.⁵³

Providing a worker with a safety belt will not later preclude recovery under Labor Law §240 for injuries if there were no safety lines to which the belt could have been attached in the work area where the worker fell.⁵⁴ Failure of a worker to use a safety harness does not make the worker a recalcitrant worker absent a safety line and proper tie-off point in the vicinity of plaintiff's accident.⁵⁵

A worker who uses the only safety device provided is not "recalcitrant".⁵⁶ The recalcitrant worker defense will not preclude liability under the scaffold law if the only safety line provided to which to hook a safety belt is located on an area of the worksite that cannot be reached by the worker standing where he or she is working.⁵⁷

The Worker Affirmatively Refuses To Use An Available Safety Device

The recalcitrant worker defense requires a showing that the injured worker refused to use a safety device that was provided by the owner or employer.⁵⁸ Defendant must show that plaintiff refused to use a particular and available safety device despite an instruction to do so,⁵⁹ refused to properly use an available and properly functioning safety device,⁶⁰ or refused to obey an instruction to use an available, proper, and functioning safety device.⁶¹

Mere negligence as a protected worker does not create a factual issue as to the recalcitrant worker defense since comparative negligence is of no consequence to a Labor Law §240(1) claim. Defendant must prove an intentional refusal to use a safety device.⁶²

The protection of section 240 will not be afforded to an injured worker who refuses to utilize adequate safety equipment that has been provided to him or her.⁶³ A deliberate refusal to use available safety devices that were in place for use at plaintiff's work station supports the recalcitrant worker defense.⁶⁴

The "recalcitrant worker" defense applies to a worker who refuses a specific and timely order to use a device available to the workers at the time of the accident.⁶⁵ An instruction specifically directed to plaintiff to use an available safety device can raise a triable fact issue as to whether plaintiff was a recalcitrant worker.⁶⁶

The Scaffold Law does not impose upon the owner or contractor a continuing duty of supervision to ensure that a recalcitrant worker uses an available safety device.⁶⁷ The burden rests upon defendant to prove that plaintiff was told to use the safety devices,⁶⁸ and "that plaintiff *refused* to use safety devices provided by the owner or contractor."⁶⁹

Use of an unsafe device can rise to the level of recalcitrance upon proof that the worker was instructed to avoid the use of the unsafe equipment and plaintiff disobeyed that directive.⁷⁰ An admission by plaintiff that he or she misused the device that caused the accident, despite specific, repeated and recent instructions regarding the device's proper and improper use supports dismissal of a Scaffold Law cause of action based upon the recalcitrant worker defense.⁷¹

Fact Issues As To Whether Worker Refused To Use Safety Devices

A fact question may exist as to whether plaintiff refused to properly use available safety equipment and was a recalcitrant worker.⁷² Proof sufficient to raise a fact question as to whether proper safety devices were provided but the injured plaintiff deliberately failed to use them warrants denial of a plaintiff's motion for summary judgment on Labor Law §240(1) liability.⁷³

The specific safety device which the worker refused to use, the cause of the accident, and the relationship between the accident and the unused safety device must be stated by defendant with factual specificity.⁷⁴ Conflicting evidence as to whether plaintiff was instructed to use a particular safety device, plaintiff had previously used the device, the device was available to plaintiff on the date of the accident, and plaintiff refused to make use of the available safety device can raise a triable fact issue of whether plaintiff was a recalcitrant worker.⁷⁵ A factual issue may be presented as to whether an available safety device was an adequate safety device such that the failure of plaintiff to use the device relieves defendant from liability.⁷⁶

A factual issue may exist regarding whether plaintiff refused to make use of an available safety device provided by the owner, contractor, or employer, a circumstance which might bar recovery under the statute.⁷⁷ An issue of fact as to why plaintiff was not using a safety device which plaintiff knew should be used may preclude summary judgment in favor of plaintiff.⁷⁸

Summary judgment in favor of plaintiff should be denied if the jury can find that failure to use an available safety device makes plaintiff a "recalcitrant worker".⁷⁹ Evidence that plaintiff purposely did not use a safety device properly raises an issue of fact as to the applicability of the "recalcitrant worker" defense.⁸⁰

A factual finding that would lead a jury to the conclusion that defendant has no liability under Labor Law §240(1) warrants denial of summary judgment in plaintiff's favor.⁸¹ A triable fact issue as to whether plaintiff was a "recalcitrant worker" supports denial of plaintiff's motion for partial summary judgment on the issue of Labor Law §240(1) liability.⁸²

The recalcitrant worker defense will not bar a grant of summary judgment in favor of plaintiff on Labor Law §240(1) liability absent evidence that plaintiff deliberately refused to use a safety device provided to him or her.⁸³ No issue of fact exists as to a recalcitrant worker defense absent evidence the injured worker refused to use an additional required safety device which was provided on the day of the accident.⁸⁴

Using An Available Safety Device Would Not Have Prevented The Accident

The circumstances of the worker's accident may preclude assertion of a recalcitrant worker's defense, even if safety belts and lines were available on the work site and workers were told to use them.⁸⁵

The defense does not apply if there was no way the safety device could have been used, even if plaintiff was deliberately refusing to use the device.⁸⁶ A worker may be unable to use an available safety device, despite an instruction to use the device, because the device cannot be placed into proper position.⁸⁷

Safety devices may be unable to prevent an accident where, for example, the accident involves the collapse of a scaffold. Even if use of the safety device may have mitigated the seriousness of the injury, if the accident itself would not have been avoided, then the recalcitrant worker defense does not apply.⁸⁸

The presence of a safety device at the jobsite does not raise a factual issue as to whether the worker was recalcitrant if the safety device would not have decreased the risk that plaintiff encountered when he was injured.⁸⁹ Even if a worker could be deemed recalcitrant for not using a safety device, plaintiff may be entitled to judgment on Labor Law §240 liability if a defective safety device was a "more proximate cause of the accident".⁹⁰

Failure to follow or obey safety instructions

Plaintiff's failure to comply with the instruction is not equivalent to refusing to use available, safe, and appropriate equipment.⁹¹

The mere failure by plaintiff to follow safety instructions does not render plaintiff a recalcitrant worker.⁹²

A worker who disobeys instructions as to safety practices and suffers injury is not thereby subject to a recalcitrant worker defense.⁹³

The recalcitrant worker defense is not proven by merely showing that the worker failed to comply with an instruction by an owner or employer to avoid using unsafe equipment or engaging in unsafe practices.⁹⁴ An instruction to avoid "unsafe practices" is not a "safety device" under the recalcitrant worker rule, as a worker's failure to comply with the instruction is not equivalent to

refusing to use an available, safe, and appropriate equipment.⁹⁵

The following instructions by an employer or contractor are not "safety devices" under the recalcitrant worker defense:⁹⁶

¶ An instruction to avoid using unsafe equipment;⁹⁷

¶ An instruction to refrain from engaging in an unsafe practice;⁹⁸

¶ An instruction to avoid a portion of a building where plaintiff was working;⁹⁹

¶ An instruction to use safe rather than rotten planking on a scaffold,¹⁰⁰ or on a temporary floor.¹⁰¹

¶ An instruction to wear available safety gear.¹⁰²

¶ An instruction to use a scaffold rather than a ladder.¹⁰³

¶ An instruction to use the equipment of one particular contractor, without instructing plaintiff not to use the particular defective device of another contractor that caused plaintiff's accident.¹⁰⁴

Evidence of such instructions does not, by itself, create an issue of fact sufficient to support a recalcitrant worker defense.¹⁰⁵

An ignored instruction to avoid using unsafe equipment is not the equivalent of refusing to use available safe equipment. Such evidence by itself does not create a fact issue to support a recalcitrant worker defense.¹⁰⁶ A worker does not become recalcitrant merely by disobeying a general instruction not to use certain equipment, if safer alternatives are not supplied.¹⁰⁷

A failure to comply with an instruction to wait until someone can assist plaintiff is not equivalent to a refusal to use an available safety device that is actually provided. At most, the failure to comply with the instruction shows only comparative negligence by plaintiff, which does not reduce an owner or contractor's liability under the Scaffold Law for failure to provide adequate safety devices.¹⁰⁸

Generalized safety instructions given at some point in the past is insufficient to raise a triable fact issue as to a recalcitrant worker defense.¹⁰⁹ Evidence that plaintiff failed to heed a general instruction given at some point in the past does not suffice to raise a triable fact issue regarding a recalcitrant worker defense.¹¹⁰ Merely failing to follow the advice of a co-worker does not render plaintiff "recalcitrant".¹¹¹

An issue of fact may exist as to whether an instruction was sufficiently specific or sufficiently directed plaintiff to an available safety device.¹¹² A worker who has no reasonable alternative but to acquiesce in the judgment exercised by the person with immediate control of his or her work is not recalcitrant for not obeying a contrary instruction by the employer.¹¹³

A worker who disregards a clear and specific order just prior to an accident to avoid a certain means of accomplishing the work and instead use another available method - as opposed to a worker who disregards a passive and distant instruction - may be a "recalcitrant worker". Defendant must show that plaintiff knowingly refused a direct order. Showing that an instruction to avoid

using unsafe equipment or to avoid engaging in an unsafe practice is insufficient; defendant must prove that plaintiff refused to use available, safe, and appropriate equipment.¹¹⁴

A worker who receives specific instructions to use a safety device and chooses to disregard those instructions is recalcitrant even where weeks elapse between the instructions and the worker's disobedience of the instructions.¹¹⁵ The requirement that the instruction be "immediate" is no longer current law.

The Injured Worker Is Not Furnished With Any Safety Device

The recalcitrant worker defense does not apply to a worker who is not furnished with any safety device.¹¹⁶ A plaintiff who is not offered appropriate safety devices is not a recalcitrant worker.¹¹⁷ A defendant cannot rely upon a particular safety device not provided to plaintiff as a basis for a recalcitrant worker defense.¹¹⁸

¹ Blake v. Neighborhood Housing Services of New York City, Inc., 1 N.Y.3d 280, 771 N.Y.S.2d 484, 803 N.E.2d 757 (2003).

² Gordon v. Eastern Ry. Supply, Inc., 82 N.Y.2d 555, 606 N.Y.S.2d 127, 626 N.E.2d 912 (1993)(Plaintiff was injured while cleaning the exterior of a railroad car with a hand-held sandblaster; defendant claimed plaintiff was repeatedly instructed to use a scaffold, not a ladder, when sandblasting railroad cars; an "instruction by an employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not a 'safety device' in the sense that plaintiff's failure to comply with the instruction is equivalent to refusing to use available, safe and appropriate equipment... [e]vidence of such instructions does not, by itself, create an issue of fact sufficient to support a recalcitrant worker defense"; plaintiff was not a recalcitrant worker).

³ Gordon v. Eastern Ry. Supply, Inc., 82 N.Y.2d 555, 606 N.Y.S.2d 127, 626

N.E.2d 912 (1993)(Plaintiff was injured while cleaning the exterior of a railroad car with a hand-held sandblaster; defendant claimed plaintiff was repeatedly instructed to use a scaffold, not a ladder, when sandblasting railroad cars; an “instruction by an employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not a ‘safety device’ in the sense that plaintiff’s failure to comply with the instruction is equivalent to refusing to use available, safe and appropriate equipment... [e]vidence of such instructions does not, by itself, create an issue of fact sufficient to support a recalcitrant worker defense”; plaintiff was not a recalcitrant worker).

⁴ McCann v. Central Synagogue, 280 A.D.2d 298, 720 N.Y.S.2d 459 (1st Dep’t 2001).

⁵ Cahill v. TBTA, 4 N.Y.3d 35, 790 N.Y.S.2d 74, 823 N.E.2d 439 (2004).

⁶ Traver v. Valente Homes, Inc., 20 A.D.3d 856, 799 N.Y.S.2d 318 (3rd Dep’t 2005)(A mason was building stone piers under an elevated exterior deck; to protect the work from rainfall, plaintiff spread a plastic tarpaulin over the open floor joists of the unfinished deck; the next day, as he was attempting to remove pooled rainwater from the plastic, he fell about 11 feet from the joists; defendant raised a material fact as to whether an admittedly available scaffold under the open joists was of sufficient height to make it unnecessary for plaintiff to climb onto the open joists of the deck to remove the water, as plaintiff testified he used the scaffolding the day before to place the plastic tarpaulin through the joists from below; plaintiff’s motion for partial summary judgment on Labor Law §§240[1], 241[6] claims was denied).

⁷ Barabash v. Farmingdale Union Free School District, NYLJ 4/18/97, p. 29, col. 2 (Sup. Nassau; Murphy, J.)(Plaintiff was standing on ladder while attempting to install beam directly over his head, when cable of lift that pressed the beam against the ceiling gave way, the beam dropped from above, and struck plaintiff, causing plaintiff to fall off of ladder; plaintiff’s motion for partial summary judgment on Labor Law §240[1] liability against owner granted; fact that plaintiff was not wearing a hard hat at time of accident did not make plaintiff a “recalcitrant worker”).

⁸ Eckhoff v. Consolidated Edison Company of New York, Inc., 214 A.D.2d 698, 625 N.Y.S.2d 604 (2d Dep’t 1995)(A jury issue existed as to whether plaintiff refused to use an available safety device provided by defendants).

⁹ Milewski v. Caiola, 236 A.D.2d 320, 654 N.Y.S.2d 738 (1st Dep’t 1997)(Neither plaintiff’s disregard of coworker’s advice that a plank plaintiff was laying across an elevator shaft was unsafe, nor conflicting deposition testimony as to whether plaintiff was wearing a safety harness at time of his accident created an issue of fact as to the recalcitrant worker defense; plaintiff’s motion for summary judgment on issue of liability granted).

¹⁰ Hagins v. State, 81 N.Y.2d 921, 597 N.Y.S.2d 651, 613 N.E.2d 557 (1993)(Plaintiff fell from the top of an unfinished abutment wall about 15 feet above a road construction site; plaintiff had been directed to retrieve a 16-foot board that was located near the abutment; plaintiff crossed over the road via an overpass, walked down the abutment, hoisted the lumber on his shoulder and attempted to return using the same route when he fell; the supervisor did not specifically direct plaintiff to use any particular route in his effort to retrieve the lumber; defendant's allegation that plaintiff was repeatedly told not to walk across the abutment did not create a triable fact issue under the "recalcitrant worker" doctrine, as "that defense is limited to cases in which a worker has been injured as a result of a refusal to use available safety devices provided by the employer or owner...").

¹¹ Stolt v. General Foods Corp., 81 N.Y.2d 918, 597 N.Y.S.2d 650, 613 N.E.2d 556 (1993)(Plaintiff was injured when he fell from a ladder; the ladder had been broken about a week earlier, and plaintiff had been instructed not to climb it unless someone else was there to secure it for him; plaintiff attempted to climb the ladder without assistance when his supervisor left the work area; the "recalcitrant worker" defense did not apply).

¹² Gordon v. Eastern Ry. Supply, Inc., 82 N.Y.2d 555, 606 N.Y.S.2d 127, 626 N.E.2d 912 (1993); Lynch v. City of New York, 209 A.D.2d 590, 619 N.Y.S.2d 657 (2d Dep't 1994).

¹³ Kouros v. State, 288 A.D.2d 566, 732 N.Y.S.2d 277 (3rd Dep't 2001)(Scaffold collapsed; defendants failed to establish that plaintiff deliberately refused to use equipment, as plaintiff was wearing a body harness and was attached to a safety line while performing his work; plaintiff could not be deemed a recalcitrant worker merely because he was not attached when another safety device [the scaffold] collapsed; plaintiff's failure to have at least one lanyard attached to the static line at all times showed only negligence in detaching both lanyards and in failing to reattach to the safety line prior to collapse of the scaffold).

¹⁴ Vasquez v. G.A.P.L.W. Realty, Inc., 236 A.D.2d 311, 654 N.Y.S.2d 16 (1st Dep't 1997)(Evidence suggested that plaintiff wore a safety belt, but did not attach it to a lanyard after having attached the device properly earlier in the day; plaintiff's motion for summary judgment on section 240 claim denied, as plaintiff may purposely not have used device properly).

¹⁵ Cahill v. TBTA, 4 N.Y.3d 35, 790 N.Y.S.2d 74, 823 N.E.2d 439 (2004)(In the course of greasing coil rod ties inside a form wall, plaintiff fell to the ground as he attempted to ascend the form while wearing a safety harness; while the harness was designed to be directly attached to a safety line, no such safety line was available to plaintiff; plaintiff had to use the harness' own positioning hook to inch his way up the form by releasing the hook, climbing up, and reconnecting the

hook to the form; three weeks earlier, after a foreman observed plaintiff improperly climbing a form, plaintiff was told not to use his positioning hook to climb and was instructed how to use the lanyards on his safety harness by attaching them to an available safety line on the form; plaintiff could be found by a jury to have been recalcitrant, even though there was no safety line at the time of the accident where plaintiff wanted to ascend, as plaintiff nevertheless used the positioning hook that was connected to a harness to ascend the form; plaintiff's motion for summary judgment was denied).

¹⁶ Morin v. Machnick Builders, Ltd., 4 A.D.3d 668, 772 N.Y.S.2d 388 (3rd Dep't 2004)(Plaintiff, a painter, claimed an extension ladder on which he was working slid away from the building as the ladder rested on a sidewalk, causing him to fall; a coworker claimed he warned plaintiff not to use the ladder on the icy sidewalk and advised that if plaintiff decided to climb the ladder he should tie it down or brace it against a truck to secure it, and that plaintiff told him he would place a sheet of plywood under the ladder; no scaffolding, lift platform, rope, harness, or similar safety device was available at the site; the recalcitrant worker defense did not apply).

¹⁷ Singh v. 49 East 96 Realty Corp., 291 A.D.2d 216, 737 N.Y.S.2d 345 (1st Dep't 2002)(Plaintiff was not a recalcitrant worker for failing to wear a hard hat at the time a piece of metal fell from above and struck him in the head, since a hard hat is not the type of safety device enumerated in Labor Law §240[1]).

¹⁸ Pardo v. Bialystoker Center & Bikur Cholim, 308 A.D.2d 384, 764 N.Y.S.2d 409 (1st Dep't 2003)(Plaintiff claimed defendants failed to secure a scaffold to the workplace wall by using "tie-ins"; even if plaintiff was recalcitrant for not having used a harness, a jury question still remained as to whether defendant's failure to provide a properly secured scaffold was a proximate cause of the accident).

¹⁹ Lajeunesse v. Feinman, 218 A.D.2d 827, 630 N.Y.S.2d 409 (3rd Dep't 1995)(Laborer, while walking up a ramp leading from the ground level to the main floor of a building on a construction site, was injured when the ramp collapsed and plaintiff fell to the bottom of a trench or pit below).

²⁰ Sherman v. Eugene I. Piotrowski Builders, Inc., 229 A.D.2d 959, 645 N.Y.S.2d 244 (4th Dep't 1996)(Roofer who was injured when he "hopped down" from upper roof to lower roof, a distance of about five feet, and his leg went through a seam of the plywood of the lower roof, could sue under section 240 of the Labor Law; worker's failure to use ladders that were elsewhere on site did not make plaintiff a recalcitrant worker).

²¹ Hagins v. State, 81 N.Y.2d 921, 597 N.Y.S.2d 651, 613 N.E.2d 557 (1993)(Plaintiff fell from the top of an unfinished abutment wall about 15 feet above a road construction site; plaintiff had been directed to retrieve a 16-foot board that was located near the abutment; plaintiff crossed over the road via an

overpass, walked down the abutment, hoisted the lumber on his shoulder and attempted to return using the same route when he fell; the supervisor did not specifically direct plaintiff to use any particular route in his effort to retrieve the lumber; defendant's allegation that plaintiff was repeatedly told not to walk across the abutment did not create a triable fact issue under the "recalcitrant worker" doctrine).

²² Klien v. General Foods Corp., 148 A.D.2d 968, 539 N.Y.S.2d 604 (4th Dep't 1989)(Worker fell while descending from an elevated work platform while remodeling a building; the accident happened when a stepladder, located in proximity to the elevated platform, slipped as plaintiff attempted to get down, causing him to fall; plaintiff's own negligence in choosing this particular method of descending was immaterial and no defense to Labor Law §240 liability).

²³ Harrington v. State, 277 A.D.2d 856, 715 N.Y.S.2d 807 (3rd Dep't 2000)(Rigger on a bridge was injured when he chose to descend from a pier by sliding down a containment tarp that ripped; plaintiff was a recalcitrant worker, as plaintiff was not "tied off" even though he had been provided with a lanyard and harness and was wearing both at the time of his accident, and he knew he was to be tied off at all times when working on an elevation more than six feet; plaintiff acknowledged he could have hooked his lanyard to braces as we walked across the bridge pier but chose not to do so, and no-one instructed him to slide down the tarp but instead plaintiff made a voluntary decision to use the tarp because he did not like his other options such as using a pick scaffold, calling for a ladder or rope, or returning using the same route he had just taken to enter the pier).

²⁴ Marrone v. 740 Corporation, 215 A.D.2d 173, 627 N.Y.S.2d 1 (1st Dep't 1995)(Jury issue existed as to whether a worker who did not use built-in stairway for safely gaining access from one floor to another, and who fell off of scaffold, was a "recalcitrant worker").

²⁵ Sopha v. Combustion Engineering, Inc., 261 A.D.2d 911, 690 N.Y.S.2d 813 (4th Dep't 1999)(Plaintiff fell while climbing through a second story window to access exterior scaffolding that would enable plaintiff to descend to ground level; plaintiff lost his balance when his asbestos-removal work suit caught on a windowsill and he fell to the scaffolding; fact questions existed as to whether plaintiff was instructed not to use the scaffolding as a means of egress, whether plaintiff commonly used the scaffolding in that manner despite the instructions, and whether stairs were available for use to access the second story where plaintiff was working).

²⁶ Haystrand v. County of Ontario, 207 A.D.2d 978, 617 N.Y.S.2d 249 (4th Dep't 1994)(Worker failed to use locking devices on scaffold; recalcitrant worker defense denied); Murray v. Niagara Frontier Transportation Authority, 199 A.D.2d 984, 607 N.Y.S.2d 506 (4th Dep't 1993)(Worker stumbled backward off of roof; safety line had been installed eight feet from roof's perimeter and safety belts

were made available to workers, but plaintiff was not wearing belt; recalcitrant worker defense denied).

²⁷ De Palma v. Metropolitan Transp. Auth., 304 A.D.2d 461, 759 N.Y.S.2d 37 (1st Dep't 2003)(Worker fell from a 12-inch-wide flange beam; there was no evidence that the worker refused to use a safety harness; safety harnesses were available in a tool box on the same floor as the floor on which plaintiff was working, but not ready for immediate use).

²⁸ Barabash v. Farmingdale Union Free School District, NYLJ 4/18/97, p. 29, col. 2 (Sup. Nassau; Murphy, J.)(Plaintiff was standing on ladder while attempting to install beam directly over his head, when cable of lift that pressed the beam against the ceiling gave way, the beam dropped from above, and struck plaintiff, causing plaintiff to fall off of ladder; plaintiff's motion for partial summary judgment on Labor Law §240[1] liability against owner granted; fact that plaintiff was not wearing a hard hat at time of accident did not make plaintiff a "recalcitrant worker").

²⁹ Murray v. Niagara Frontier Transportation Authority, 199 A.D.2d 984, 607 N.Y.S.2d 506 (4th Dep't 1993).

³⁰ Neville v. Deters, 175 A.D.2d 597, 572 N.Y.S.2d 256 (4th Dep't 1991); Adams v. Cimato Bros, Inc., 207 A.D.2d 997, 617 N.Y.S.2d 251 (4th Dep't 1994).

³¹ De Palma v. Metropolitan Transp. Auth., 304 A.D.2d 461, 759 N.Y.S.2d 37 (1st Dep't 2003)(Worker fell from a 12-inch-wide flange beam; there was no evidence that the worker refused to use a safety harness; safety harnesses were available in a tool box on the same floor as the floor on which plaintiff was working, but not ready for immediate use); Davis v. Board of Trustees, 240 A.D.2d 461, 658 N.Y.S.2d 648 (2d Dep't 1997)(The "mere presence of alleged safety devices somewhere on the job site" is not sufficient to raise a triable issue of fact as to a recalcitrant worker defense).

³² Singh v. Barrett, 192 A.D.2d 378, 596 N.Y.S.2d 45 (1st Dep't 1993); Smith v. Hooker Chemicals Corp., 89 A.D.2d 361, 455 N.Y.S.2d 446 (4th Dep't 1982); Krieger v. Pat Construction, Inc., 112 A.D.2d 10, 490 N.Y.S.2d 393 (4th Dep't 1985).

³³ Vona v. St. Peter's Hosp. of the City of Albany, 223 A.D.2d 903, 636 N.Y.S.2d 218 (3rd Dep't 1996)(Worker was covering armature of a door as part of asbestos abatement work, and although a foreman specifically directed the worker to obtain a ladder to perform the work, the worker instead stacked two five-gallon pails on top of one another to reach top of door; pails tipped, causing the worker to fall; an issue of fact as to Labor Law §240 liability, as the foreman did not direct the worker to a specific ladder as he was not sure precisely where one could be located and plaintiff claimed not to have seen an operable step

ladder within ten feet from and plainly visible from spot where plaintiff fell; plaintiff's motion for partial summary judgment on section 240 liability denied).

³⁴ Young v. Syroco, Inc., 217 A.D.2d 1011, 629 N.Y.S.2d 931 (4th Dep't 1995)(No safety nets or other safety devices were provided in area where plaintiff fell from roof); Szuba v. Marc Equity Properties, Inc., 19 A.D.3d 1176, 798 N.Y.S.2d 813 (4th Dep't 2005)(The recalcitrant worker defense "has no application where safety devices were merely present somewhere at the work site").

³⁵ Lantry v. Parkway Plaza L.L.C., 284 A.D.2d 697, 726 N.Y.S.2d 755 (3rd Dep't 2001)(While hoisting bundles of steel decking, a joist under plaintiff rolled, slipped off the beam on which it was resting, and the joist, the steel decking, and plaintiff fell to the ground; plaintiff's motion for partial summary judgment on Labor Law §240[1] liability was granted, as defendant failed to show plaintiff refused to use a safety harness and lanyard or that he was instructed to do so, and the evidence showed plaintiff never refused to wear such safety equipment and that at the time of the accident use of such equipment was not required; "the fact that safety harnesses and belts and lanyards were stored in a tool box on the back of the crane does not provide a defense").

³⁶ Kaffke v. New York State Elec. & Gas Corp., 257 A.D.2d 840, 685 N.Y.S.2d 305 (3rd Dep't 1999)(The presence of a safety belt in a gangbox in the basement rather than at plaintiff's work station did not satisfy the recalcitrant worker rule; plaintiff's motion for summary judgment on the issue of Labor Law §240[1] liability was granted).

³⁷ De Jara v. 44-14 Newtown Road Apartment Corp., 307 A.D.2d 948, 763 N.Y.S.2d 654 (2d Dep't 2003)(Fall from a fire escape as plaintiff leaned over a railing to paint the outside of the fire escape and the railing broke; the recalcitrant worker defense was properly not submitted to the jury absent evidence that the worker refused to use an additional safety device provided to him and available at the work site on the day of the accident).

³⁸ Powers v. Lino Del Zotto and Son Builders Inc., 266 A.D.2d 668, 698 N.Y.S.2d 74 (3rd Dep't 1999)(Plaintiff showed that, while normal procedure for installation of a beam required using a stepladder, all jobsite stepladders were in use, so plaintiff decided to install the beam by using a sawhorse; testimony from plaintiff's supervisor that stepladders were available at the job site that day and he instructed plaintiff not to install the beam by himself, not to stand on a sawhorse, and to use a stepladder did not raise a factual issue as to recalcitrant worker, as the supervisor did not claim he actually provided plaintiff with a safety device or indicate where it was located or that it was in place; supervisor's instruction to plaintiff "to wait a few minutes until [he] could assist him" and plaintiff's failure to comply with that instruction did not make plaintiff a recalcitrant worker; plaintiffs' motion for summary judgment on the issue of liability under Labor Law §240[1] was granted).

³⁹ Howe v. Syracuse University, 306 A.D.2d 891, 760 N.Y.S.2d 922 (4th Dep't 2003)(Plaintiff was standing on a scaffold while demolishing a 15-foot cinder block wall when the wall collapsed, crushing the scaffolding and causing plaintiff to fall or jump to the ground; the scaffold did not have safety railings and plaintiff was not using safety or tie lines; plaintiff's motion for partial summary judgment on Labor Law §240[1] liability was granted).

⁴⁰ Prenty v. Cava Const. Co., Inc., 289 A.D.2d 120, 735 N.Y.S.2d 43 (1st Dep't 2001)(Scissor life plaintiff was using toppled over, causing plaintiff to fall to the ground; recalcitrant worker defense did not apply where the general contractor told plaintiff to dismantle a scaffold on another side of the building and reassemble it, as such a task was not plaintiff's obligation and no fully assembled and ready-to-use scaffold was available to plaintiff).

⁴¹ Correia v. Professional Data Management, 259 A.D.2d 60, 693 N.Y.S.2d 596 (1st Dep't 1999)(Plaintiff was painting a 16-foot-high ceiling while atop a steel fixed scaffold covered with wooden planks when one plank gave way, plunging plaintiff to the ground; recalcitrant worker defense was dismissed absent proof that plaintiff was instructed to use a rolling scaffold and extension ladder and refused to do so).

⁴² Tennant v. Curcio, 237 A.D.2d 733, 655 N.Y.S.2d 118 (3rd Dep't 1997)(Plaintiff assisted a fellow employee for roofing work on a windy day; the other employee decided not to secure a ladder used to gain access to roof, even though the employer instructed plaintiff and the fellow employee to secure the ladder to the building, a rope was available for that purpose, and another worker on site offered to fabricate a securing bracket to fasten to the building to secure the ladder; as plaintiff descended the ladder from the roof, the ladder tipped and propelled plaintiff to ground; employer's general instruction to secure the ladder, the presence of rope somewhere on worksite, and an offer to fashion a securing bracket [which was not equivalent to providing a safety device] did not make plaintiff a recalcitrant worker, especially as plaintiff was assisting the other worker who decided there was no need to secure the ladder to the building).

⁴³ Barabash v. Farmingdale Union Free School District, NYLJ 4/18/97, p. 29, col. 2 (Sup. Nassau; Murphy, J.)(Plaintiff was standing on ladder while attempting to install beam directly over his head, when cable of lift that pressed the beam against the ceiling gave way, the beam dropped from above, and struck plaintiff, causing plaintiff to fall off of ladder; plaintiff's motion for partial summary judgment on Labor Law §240[1] liability against owner granted; fact that plaintiff was not wearing a hard hat at time of accident did not make plaintiff a "recalcitrant worker").

⁴⁴ Madden v. Trustees of the Duryea Presbyterian Church, 210 A.D.2d 382, 620 N.Y.S.2d 424 (2d Dep't 1994)(Summary judgment on section 240(1) claim was

granted in favor of a worker who fell when an unsecured ladder upon which he was descending slipped from underneath him).

⁴⁵ Tennant v. Curcio, 237 A.D.2d 733, 655 N.Y.S.2d 118 (3rd Dep't 1997)(Plaintiff assisted a fellow employee for roofing work on a windy day; the other employee decided not to secure a ladder used to gain access to roof, even though employer instructed plaintiff and the fellow employee to secure the ladder to building, a rope was available for that purpose, and another worker on site offered to fabricate a securing bracket to fasten to the building to secure the ladder; as plaintiff descended ladder from roof, the ladder tipped and propelled plaintiff to ground; employer's general instruction to secure the ladder, the presence of rope somewhere on worksite, and an offer to fashion a securing bracket [which was not equivalent to providing a safety device] did not make plaintiff a recalcitrant worker, especially as plaintiff was assisting the other worker who decided there was no need to secure the ladder to the building).

⁴⁶ Young v. Syroco, Inc., 217 A.D.2d 1011, 629 N.Y.S.2d 931 (4th Dep't 1995).

⁴⁷ Barabash v. Farmingdale Union Free School District, NYLJ 4/18/97, p. 29, col. 2 (Sup. Nassau; Murphy, J.)(Plaintiff was standing on ladder while attempting to install beam directly over his head, when cable of lift that pressed the beam against the ceiling gave way, the beam dropped from above, and struck plaintiff, causing plaintiff to fall off of ladder; plaintiff's motion for partial summary judgment on Labor Law §240[1] liability against owner granted; fact that plaintiff was not wearing a hard hat at time of accident did not make plaintiff a "recalcitrant worker").

⁴⁸ Smith v. Cassadaga Valley School Dist., 178 A.D.2d 955, 578 N.Y.S.2d 747 (4th Dep't 1991)(Plaintiff fell from scaffold that lacked safety rails on all but the rear of the platform; the failure of plaintiff to wear a safety belt did not warrant denial of plaintiff's motion for summary judgment).

⁴⁹ Murphy v. Islat Associates Graft Hat Manufacturing Co., 237 A.D.2d 166, 654 N.Y.S.2d 760 (1st Dep't 1997)(Worker fell from a crane after slipping on grease; plaintiff's motion for summary judgment on the issue of owner's liability under Labor Law §240[1] was granted, even though plaintiff may have had his own personal safety belt available at time of accident).

⁵⁰ Fernandez v. Broadway Plaza Associates, 215 A.D.2d 217, 626 N.Y.S.2d 166 (1st Dep't 1995)(Summary judgment granted to plaintiff under Labor Law §240 as plaintiff followed his supervisor's instructions to stand on an inverted pail placed on top of a radiator to remove window inlets).

⁵¹ Olszewski v. Park Terrace Gardens, Inc., 306 A.D.2d 128, 763 N.Y.S.2d 246 (1st Dep't 2003)(Collapsed scaffold; recalcitrant worker defense, based upon plaintiff's failure to secure to a safety line a harness he had been furnished was unavailing, as there was no dispute that the scaffold was defective; plaintiff's

motion for summary judgment on the issue of liability under the Scaffold Law was granted).

⁵² Garhartt v. Niagara Mohawk Power Corp., 192 A.D.2d 1027, 596 N.Y.S.2d 946 (3rd Dep't 1993)(Defendant claimed plaintiff admitted the safety belt at issue was in good working order, and was easy to use; defendant also claimed there was no reason for plaintiff to leave belt off while working, and that belt was only suitable safety device for plaintiff's type of work).

⁵³ Fajardo v. Trans World Equities, Co., 286 A.D.2d 271, 729 N.Y.S.2d 488 (1st Dep't 2001)(Plaintiff unhooked his safety harness just before moving to the area of the scaffold from which he fell; plaintiff claimed he had to unhook the harness because the safety line to which the harness was attached was not long enough to permit him to reach his workplace on the scaffold without detaching it; as there was conflicting evidence as to the length of the safety line, plaintiff's motion for partial summary judgment on his Labor Law §240[1] claim was denied).

⁵⁴ DiMuro v. Town of Babylon, 210 A.D.2d 373, 620 N.Y.S.2d 114 (2d Dep't 1994).

⁵⁵ Wojcik v. 42nd Street Development Project, Inc., NYLJ 9/16/05, p. 26, col. 3 (U.S.D.C., S.D.N.Y., Haight, J.)(Ironworker was removing a temporary flooring when he fell through a hole in the floor; plaintiff claimed that his request that scaffolding be erected under his work site was denied, he was not provided with a safety harness [a "personal fall arrest system" or "PFAS"], no PFAS was available in the gang box which contained the equipment, and no safety lines were erected in the area of the fall so that there was not place to tie-off a PFAS anyway; plaintiff also asserted that an elevator column or safety fence post was not a proper tie-off point; defendant conceded that no safety lines were erected in the vicinity of plaintiff's accident; defendant's motion for summary judgment on plaintiff's Labor Law §240[1] was denied).

⁵⁶ Morin v. Machnick Builders, Ltd., 4 A.D.3d 668, 772 N.Y.S.2d 388 (3rd Dep't 2004)(Plaintiff, a painter, claimed an extension ladder on which he was working slid away from the building as the ladder rested on a sidewalk, causing him to fall; a coworker claimed he warned plaintiff not to use the ladder on the icy sidewalk and advised that if plaintiff decided to climb the ladder he should tie it down or brace it against a truck to secure it, and that plaintiff told him he would place a sheet of plywood under the ladder; no scaffolding, lift platform, rope, harness, or similar safety device was available at the site; the recalcitrant worker defense did not apply).

⁵⁷ Rich v. State, 231 A.D.2d 942, 648 N.Y.S.2d 195 (4th Dep't 1996)(Worker was on top of truck, moving a scaffold that was on top of the truck and from which workers painted bridge, when he fell to the ground after the plank that he was pulling slipped; Labor Law §240 applied and worker was granted partial summary

judgment on Labor Law §240 claim; worker was not a recalcitrant worker, as he was provided with safety belt and lanyard, but the only safety line provided to which to hook a lanyard was located on the bridge and could not be reached by worker standing on top of truck).

⁵⁸ Tennant v. Curcio, 237 A.D.2d 733, 655 N.Y.S.2d 118 (3rd Dep't 1997)(Plaintiff assisted fellow employee for roofing work on a windy day; the other employee decided not to secure a ladder used to gain access to roof, even though the employer instructed plaintiff and the fellow employee to secure the ladder to the building, a rope was available for that purpose, and another worker on site offered to fabricate a securing bracket to fasten to the building to secure the ladder; as plaintiff descended ladder from the roof, the ladder tipped and propelled plaintiff to the ground; employer's general instruction to secure the ladder, a presence of rope somewhere on worksite, and an offer to fashion a securing bracket [which was not equivalent to providing a safety device] did not make plaintiff a recalcitrant worker, especially as plaintiff was assisting the other worker who decided there was no need to secure the ladder to the building).

⁵⁹ Lantry v. Parkway Plaza L.L.C., 284 A.D.2d 697, 726 N.Y.S.2d 755 (3rd Dep't 2001)(While hoisting bundles of steel decking, a joist under plaintiff rolled, slipped off the beam on which it was resting, and the joist, the steel decking, and plaintiff fell to the ground; plaintiff's motion for partial summary judgment on Labor Law §240[1] liability was granted, as defendant failed to show plaintiff refused to use a safety harness and lanyard or that he was instructed to do so, and the evidence showed plaintiff never refused to wear such safety equipment and that at the time of the accident use of such equipment was not required).

⁶⁰ Santangelo v. Fluor Constructors Intern., 266 A.D.2d 893, 697 N.Y.S.2d 881 (4th Dep't 1999)(Decedent fell when he was struck by the basket of a manlift; a fact issue existed as to whether decedent was properly using his safety harness at the time of the accident and was a recalcitrant worker because he allegedly refused to tie off).

⁶¹ Kulp v. Gannett Company, Inc., 259 A.D.2d 969, 687 N.Y.S.2d 840 (4th Dep't 1999)(Proof that plaintiff was able to tie off to a safety line or a beam and that plaintiff was instructed at weekly safety meetings to tie off at all times when working at a height tended to show that plaintiff purposely did not do so and raised a triable fact issue as to whether the safety device provided to plaintiff afforded proper protection and whether plaintiff was a recalcitrant worker).

⁶² De Palma v. Metropolitan Transp. Auth., 304 A.D.2d 461, 759 N.Y.S.2d 37 (1st Dep't 2003)(Worker fell from a 12-inch-wide flange beam; there was no evidence that the worker refused to use a safety harness).

⁶³ Smith v. Hooker Chemicals Corp., 89 A.D.2d 361, 455 N.Y.S.2d 446 (4th Dep't 1982).

⁶⁴ Harrington v. State, 277 A.D.2d 856, 715 N.Y.S.2d 807 (3rd Dep't 2000)(Rigger on a bridge was injured when he chose to descend from a pier by sliding down a containment tarp that ripped; plaintiff was a recalcitrant worker, as plaintiff was not "tied off" even though he had been provided with a lanyard and harness and was wearing both at the time of his accident, and he knew he was to be tied off at all times when working on an elevation more than six feet; plaintiff acknowledged he could have hooked his lanyard to braces as we walked across the bridge pier but chose not to do so, and no-one instructed him to slide down the tarp but instead plaintiff made a voluntary decision to use the tarp because he did not like his other options such as using a pick scaffold, calling for a ladder or rope, or returning using the same route he had just taken to enter the pier).

⁶⁵ Jastrzebski v. North Shore School Dist., 223 A.D.2d 677, 637 N.Y.S.2d 439 (2d Dep't 1996), *aff'd*, 88 N.Y.2d 946, 647 N.Y.S.2d 708, 670 N.E.2d 1339 (1996)(Supervisor told plaintiff to get down off of a ladder; after plaintiff descended, the supervisor told plaintiff that the ladder was "no good" and, pointing to a scaffold in place at the site, directed plaintiff to use the scaffold; plaintiff indicated assent to the directive, but then re climbed the ladder as soon as the supervisor turned his back and started to walk away, and then fell off of the ladder; plaintiff could have used assembled scaffold when ordered to do so by the supervisor, and the supervisor gave plaintiff very specific orders not to use ladder and to use an available scaffold; plaintiff's motion for partial summary judgment on Labor Law §240 liability denied).

⁶⁶ Stewart v. Playland Center, Inc., 8 A.D.3d 74, 778 N.Y.S.2d 159 (1st Dep't 2004)(Fall from a ladder with a defective rung; testimony of plaintiff's employer that shortly before the accident he instructed plaintiff to use an available scissors lift instead of a ladder raised a triable issue as to whether plaintiff was a recalcitrant worker; plaintiff's motion for summary judgment as to Labor Law §240[1] liability was denied).

⁶⁷ Jastrzebski v. North Shore School Dist., 223 A.D.2d 677, 637 N.Y.S.2d 439 (2d Dep't 1996), *aff'd*, 88 N.Y.2d 946, 647 N.Y.S.2d 708, 670 N.E.2d 1339 (1996)(Supervisor told plaintiff to get down off of a ladder; after plaintiff descended, the supervisor told plaintiff that the ladder was "no good" and, pointing to a scaffold in place at the site, directed plaintiff to use the scaffold; plaintiff indicated assent to the directive, but then re climbed the ladder as soon as the supervisor turned his back and started to walk away, and then fell off of the ladder; plaintiff could have used the assembled scaffold when ordered to do so by the supervisor, and the supervisor gave plaintiff very specific orders not to use the ladder and to use the available scaffold; supervisor "was not required to wait interminably at the foot of the ladder to make sure that the plaintiff did not climb the ladder."; plaintiff's motion for partial summary judgment on Labor Law §240 liability denied).

⁶⁸ Laurie v. Niagara Candy, 188 A.D.2d 1075, 592 N.Y.S.2d 181 (4th Dep't 1992)(Defendant failed to show that plaintiff was told to use a tie-off line with the safety belt plaintiff was wearing).

⁶⁹ Hall v. Cornell University, 205 A.D.2d 872, 612 N.Y.S.2d 694 (3rd Dep't 1994)(Emphasis original; plaintiff was injured when he chose to walk on top of wall even though a scaffold and ladder were provided; mere claims that defendant provided a scaffold and ladder, and defendant could not be compelled to ensure on a minute-by-minute basis that plaintiff continued to use those devices, were insufficient for invoking recalcitrant worker's defense); Desrosiers v. Barry, Bette & Led Duke, Inc., 189 A.D.2d 947, 592 N.Y.S.2d 826 (3rd Dep't 1993)(Defendants failed to show that worker deliberately refused to affix lanyard to prevent fall).

⁷⁰ Jamil v. Concourse Enterprises, Inc., 293 A.D.2d 271, 740 N.Y.S.2d 308 (1st Dep't 2002)(To retrieve a brush from atop an awning, plaintiff climbed a ladder; the ladder slid down and away from the building, causing plaintiff to sustain injuries; defendants' "attempt to portray plaintiff as a recalcitrant worker must fail as they point to no immediate instruction to avoid the use of unsafe equipment that plaintiff allegedly disobeyed").

⁷¹ Mayancela v. Almat Realty Development, LLC, 303 A.D.2d 198, 756 N.Y.S.2d 548 (1st Dep't 2003)(Plaintiff admitted that, for no particular reason, he misused the A-frame ladder from which he fell despite specific, repeated, and recent instructions from his employer regarding the ladder's proper and improper use; motion for summary judgment dismissing plaintiff's Labor Law §240[1] claim was granted).

⁷² Allen v. Village of Farmingdale, 282 A.D.2d 485, 723 N.Y.S.2d 219 (2d Dep't 2001).

⁷³ Mangione v. Smith, 301 A.D.2d 635, 754 N.Y.S.2d 330 (2d Dep't 2003)(Plaintiff was installing a fire escape leading from the third floor to the second floor of the exterior of a building when he stepped forward into the fire escape stairway and fell down the stairs); Devine v. Chase Manhattan Bank, N.A., 276 A.D.2d 664, 717 N.Y.S.2d 544 (2d Dep't 2000)(Plaintiff's motion for partial summary judgment on the issue of Labor Law §240[1] liability was denied, as a triable fact issue existed "as to whether the injured plaintiff refused to use safety devices that were made available to him thereby rendering him a 'recalcitrant worker'").

⁷⁴ Ferrara v. Bronx House, Inc., 163 Misc.2d 908, 622 N.Y.S.2d 864 (Civ.Ct. Bronx; 1994)(Worker who did not refuse to lock scaffold wheels, but thought the wheels were locked and shook the scaffold to make sure it was stationary, was not a "recalcitrant worker").

⁷⁵ Job v. 1133 Building Corp., 251 A.D.2d 459, 674 N.Y.S.2d 710 (2d Dep't

1998)(Plaintiff fell while dismantling a scaffold; proof that a safety belt had been provided to plaintiff, plaintiff was instructed at weekly safety meetings to use the belt, plaintiff had always previously worn the belt, and the belt was available to plaintiff on the date of the accident raised a triable fact issue as to whether plaintiff was a recalcitrant worker).

⁷⁶ Hickey v. C.D. Perry & Sons, Inc., 223 A.D.2d 799, 636 N.Y.S.2d 153 (3rd Dep't 1996)(Plaintiff fell down sluiceway when he attempted to cross the sluiceway on a plank which broke; issue of fact as to whether ladders on either side of sluiceway to permit passage from one end of dam to the other were adequate safety devices).

⁷⁷ Stewart v. Playland Center, Inc., 8 A.D.3d 74, 778 N.Y.S.2d 159 (1st Dep't 2004)(Fall from a ladder with a defective rung; testimony of plaintiff's employer that shortly before the accident he instructed plaintiff to use an available scissors lift instead of a ladder raised a triable issue as to whether plaintiff was a recalcitrant worker; plaintiff's motion for summary judgment as to Labor Law §240[1] liability was denied); Lynch v. City of New York, 209 A.D.2d 590, 619 N.Y.S.2d 657 (2d Dep't 1994).

⁷⁸ Ortega v. Catamount Construction Corp., 226 A.D.2d 154, 640 N.Y.S.2d 99 (1st Dep't 1996)(Worker was injured while standing on a ladder to remove asbestos; issue of fact existed as to why plaintiff was working on a ladder rather than scaffolding which plaintiff knew other workers were using and whether plaintiff was a "recalcitrant worker").

⁷⁹ Zaleski v. The O'Connor Group, NYLJ 1/21/97, p. 27, col. 4 (Sup. New York; Miller, J.)(Plaintiff fell over a building edge when a man-lift into which he was attempting to enter from the edge of roof suddenly moved away from the building's edge; plaintiff's motion for summary judgment was denied, as provision of a safety belt and line to plaintiff and plaintiff's failure to follow an instruction and to attach a safety belt and line to a man-lift before attempting to enter it raised issue of fact as to "recalcitrant worker" defense).

⁸⁰ Vasquez v. G.A.P.L.W. Realty, Inc., 236 A.D.2d 311, 654 N.Y.S.2d 16 (1st Dep't 1997)(Evidence suggested that plaintiff wore a safety belt, but did not attach it to a lanyard after having attached the device properly earlier in the day; plaintiff's motion for summary judgment on Labor Law §240 claim denied, as plaintiff purposely may not have used the device properly).

⁸¹ Cahill v. TBTA, 4 N.Y.3d 35, 790 N.Y.S.2d 74, 823 N.E.2d 439 (2004)(In the course of greasing coil rod ties inside a form wall, plaintiff fell to the ground as he attempted to ascend the form while wearing a safety harness; while the harness was designed to be directly attached to a safety line, no such safety line was available to plaintiff; plaintiff had to use the harness' own positioning hook to inch his way up the form by releasing the hook, climbing up, and reconnecting the

hook to the form; three weeks earlier, after a foreman observed plaintiff improperly climbing a form, plaintiff was told not to use his positioning hook to climb and was instructed how to use the lanyards on his safety harness by attaching them to an available safety line on the form; plaintiff could be found by a jury to have been recalcitrant, even though there was no safety line at the time of the accident where plaintiff wanted to ascend, as plaintiff nevertheless used the positioning hook that was connected to a harness to ascend the form; plaintiff's motion for summary judgment was denied).

⁸² Gniewek v. Consolidated Edison Co., 271 A.D.2d 643, 707 N.Y.S.2d 871 (2d Dep't 2000).

⁸³ Gaffney v. BFP 300 Madison II, LLC, 18 A.D.3d 403, 795 N.Y.S.2d 579 (1st Dep't 2005).

⁸⁴ Lightfoot v. State, 245 A.D.2d 488, 666 N.Y.S.2d 706 (2d Dep't 1997)(Bridge painter fell to the ground from atop a truck being used as a platform to paint the bridge, after a safety guardrail on the truck collapsed).

⁸⁵ Allan v. Rochester Inst. of Tech., 209 A.D.2d 929, 619 N.Y.S.2d 980 (4th Dep't 1994)(Recalcitrant worker defense did not apply to a worker who was injured when a beam upon which he was sitting became detached at one end and fell, throwing the worker to ground; safety belts and lines were available at work site and workers were told to use them).

⁸⁶ Desrosiers v. Barry, Bette & Led Duke, Inc., 189 A.D.2d 947, 592 N.Y.S.2d 826 (3rd Dep't 1993)(Worker showed that there was no line available to which lanyard [not used by plaintiff] could have been affixed to prevent fall).

⁸⁷ Harris v. Rodriguez, 281 A.D.2d 158, 721 N.Y.S.2d 344 (1st Dep't 2001)(Plaintiff fell when the roof of a shed upon which he was sitting, while attaching a cable to a box on an adjacent pole, collapsed; plaintiff's employer supplied plaintiff with a 24-foot ladder, which plaintiff wanted to use, but he and his partner left the ladder on their truck on the street because they could not safely transport it through the house or the alley way to the cable pole; plaintiff testified he had to climb onto the roof to perform his job; plaintiff testified he could not get the ladder into position because shrubbery blocked access and there was accumulated debris in the alleyway; defendants' motions for summary judgment were denied).

⁸⁸ Kaur v. W.S. Waite Inc., NYLJ 3/21/95, p. 29, col. 6 (Sup. Bronx, McKeon, J.)(Decedent fell from scaffold that collapsed while washing windows as part of window replacement program; recalcitrant worker defense did not apply even though use of a safety belt may have prevented the serious injuries that were suffered).

⁸⁹ Seguin v. Massena Aluminum Recovery Co., Inc., 229 A.D.2d 839, 645 N.Y.S.2d 630 (Plaintiff ascended a ladder and climbed onto roof, and then fell through the decaying roof and fell over 30 feet to concrete floor below; Labor Law §240 applied, and presence of ladder on work site was irrelevant, as it would not have decreased the elevation-related risk at issue).

⁹⁰ Milewski v. Caiola, 236 A.D.2d 320, 654 N.Y.S.2d 738 (1st Dep't 1997)(Neither plaintiff's disregard of coworker's advice that a plank plaintiff was laying across over an elevator shaft was unsafe, nor conflicting deposition testimony as to whether plaintiff was wearing a safety harness at time of accident created an issue of fact as to the recalcitrant worker defense; even if worker was recalcitrant for not wearing a harness, the failure to provide proper safety planking was a more proximate cause of accident; plaintiff's motion for summary judgment on issue of liability granted).

⁹¹ Gordon v. Eastern Ry. Supply, Inc., 82 N.Y.2d 555, 606 N.Y.S.2d 127, 626 N.E.2d 912 (1993)(Plaintiff was injured while cleaning the exterior of a railroad car with a hand-held sandblaster; defendant claimed plaintiff was repeatedly instructed to use a scaffold, not a ladder, when sandblasting railroad cars; an "instruction by an employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not a 'safety device' in the sense that plaintiff's failure to comply with the instruction is equivalent to refusing to use available, safe and appropriate equipment... [e]vidence of such instructions does not, by itself, create an issue of fact sufficient to support a recalcitrant worker defense"; plaintiff was not a recalcitrant worker).

⁹² Young v. Syroco, Inc., 217 A.D.2d 1011, 629 N.Y.S.2d 931 (4th Dep't 1995)(Defendant claimed plaintiff, who fell off of a roof, was instructed by a supervisor not to work in any areas where safety nets were not present and to place safety nets in an area before proceeding to work there; "recalcitrant worker" defense rejected by court).

⁹³ Adams v. Cimato Bros, Inc., 207 A.D.2d 997, 617 N.Y.S.2d 251 (4th Dep't 1994)(Worker slipped and fell off of a roof while carrying roofing materials; disobedience of instructions to return to peak of roof and wait for scaffolding to be put in place does not warrant invocation of recalcitrant worker defense).

⁹⁴ Tennant v. Curcio, 237 A.D.2d 733, 655 N.Y.S.2d 118 (3rd Dep't 1997)(Plaintiff assisted a fellow employee for roofing work on a windy day; the other employee decided not to secure a ladder used to gain access to roof, even though the employer instructed plaintiff and the fellow employee to secure the ladder to building, rope was available for that purpose, and another worker on site offered to fabricate a securing bracket to fasten to the building to secure the ladder; as plaintiff descended the ladder from the roof, the ladder tipped and propelled plaintiff to the ground; employer's general instruction to secure the ladder, the presence of rope somewhere on worksite, and an offer to fashion a securing

bracket [which was not equivalent to providing a safety device] did not make plaintiff a recalcitrant worker, especially as plaintiff was assisting the other worker who decided there was no need to secure the ladder to the building).

⁹⁵ Szuba v. Marc Equity Properties, Inc., 19 A.D.3d 1176, 798 N.Y.S.2d 813 (4th Dep't 2005)(Plaintiff fell as he was cutting vent holes into the felt of a new roof of a house owned by defendants; the recalcitrant worker defense did not apply and plaintiff's motion for partial summary judgment on the Labor Law §240[1] claim was granted).

⁹⁶ See, e.g., Stolt v. General Foods Corp., 81 N.Y.2d 918, 597 N.Y.S.2d 650, 613 N.E.2d 556 (1993)(Plaintiff was injured when he fell from a ladder; the ladder had been broken about a week earlier, and plaintiff had been instructed not to climb it unless someone else was there to secure it for him; plaintiff attempted to climb the ladder without assistance when his supervisor left the work area; the "recalcitrant worker" defense did not apply).

⁹⁷ Gordon v. Eastern Ry. Supply, Inc., 82 N.Y.2d 555, 606 N.Y.S.2d 127, 626 N.E.2d 912 (1993)(Plaintiff was injured while cleaning the exterior of a railroad car with a hand-held sandblaster; defendant claimed plaintiff was repeatedly instructed to use a scaffold, not a ladder, when sandblasting railroad cars; an "instruction by an employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not a 'safety device' in the sense that plaintiff's failure to comply with the instruction is equivalent to refusing to use available, safe and appropriate equipment... [e]vidence of such instructions does not, by itself, create an issue of fact sufficient to support a recalcitrant worker defense"; plaintiff was not a recalcitrant worker); Andino v. BFC Partners, L.P., 303 A.D.2d 338, 756 N.Y.S.2d 267 (2d Dep't 2003)(Plaintiff fell from a scaffold erected in an air shaft after a rope supporting the scaffold snapped; summary judgment was granted to plaintiff on the issue of Labor Law §240[1] liability). An "instruction by the employer or owner to avoid using unsafe equipment... is not itself a 'safety device'." Stolt v. General Foods Corp., 81 N.Y.2d 918, 597 N.Y.S.2d 650, 613 N.E.2d 556 (1993)(Plaintiff was injured when he fell from a ladder; the ladder had been broken about a week earlier, and plaintiff had been instructed not to climb it unless someone else was there to secure it for him; plaintiff attempted to climb the ladder without assistance when his supervisor left the work area; the "recalcitrant worker" defense did not apply).

⁹⁸ Hagins v. State, 81 N.Y.2d 921, 597 N.Y.S.2d 651, 613 N.E.2d 557 (1993)(Worker was repeatedly told not to walk across abutment; recalcitrant worker defense denied); Hoffmeister v. Oaktree Homes, Inc., 206 A.D.2d 921, 615 N.Y.S.2d 177 (4th Dep't 1994)(Plaintiff's disregard of instruction not to go onto cross-beam to remove tarpaulin is insufficient to support recalcitrant worker defense); Madigan v. United Parcel Service, Inc., 193 A.D.2d 1102, 598 N.Y.S.2d 634 (4th Dep't 1993)(Owner's instruction to employees not to walk on rod cages was not "safety device"). An "instruction by the employer or owner to

avoid... engaging in unsafe practices is not itself a 'safety device'." Stolt v. General Foods Corp., 81 N.Y.2d 918, 597 N.Y.S.2d 650, 613 N.E.2d 556 (1993)(Plaintiff was injured when he fell from a ladder; the ladder had been broken about a week earlier, and plaintiff had been instructed not to climb it unless someone else was there to secure it for him; plaintiff attempted to climb the ladder without assistance when his supervisor left the work area; the "recalcitrant worker" defense did not apply).

⁹⁹ Grant v. Gutchess Timberlands Inc., 214 A.D.2d 909, 625 N.Y.S.2d 716 (3rd Dep't 1995)(Worker who fell off of roof, even though foreman instructed him to stay away from roof, was not a "recalcitrant worker").

¹⁰⁰ Scorza v. CBE, Inc., 231 A.D.2d 564, 647 N.Y.S.2d 278 (2d Dep't 1996)(Plaintiff fell off a scaffold when a plank upon which he was standing broke; proof that plaintiff placed a rotten plank on the scaffold when he was told to use a safe plank did not create a factual question as to whether he was a recalcitrant worker; plaintiff's motion for partial summary judgment on section 240 liability granted).

¹⁰¹ Singh v. Barrett, 192 A.D.2d 378, 596 N.Y.S.2d 45 (1st Dep't 1993)(Plaintiff fell through a floor to a floor below when a rotted joist gave way; plaintiff's motion for partial summary judgment on issue of Labor Law §240 liability was granted even though defendant claimed plaintiff was told not to proceed until safe equipment was provided, safety planks were available at the work site, and plaintiff ignored the admonition).

¹⁰² Baum v. Ciminelli-Cowper Co., Inc., 300 A.D.2d 1028, 755 N.Y.S.2d 138 (4th Dep't 2002)(Plaintiff fell into an elevator shaft while welding stabilizer clips to the steel framework; plaintiff's foreman's direction to plaintiff to wear a hard hat, safety belt, and lanyard did not create a triable fact issue to support a recalcitrant worker defense, as "defendants asserted only that they gave... instructions" and did not show that plaintiff refused to use the provided safety devices).

¹⁰³ Enright v. Buffalo Technology Building "B" Partnership, 278 A.D.2d 927, 718 N.Y.S.2d 764 (4th Dep't 2000)(Plaintiff fell when a ladder he was using slid away from a building; recalcitrant worker defense did not apply merely because plaintiff was instructed to use a scaffold but instead used a ladder).

¹⁰⁴ Balthazar v. Full Circle Const. Corp., 268 A.D.2d 96, 707 N.Y.S.2d 70 (1st Dep't 2000)(Plaintiff fell when the base of a ladder on which plaintiff was working allegedly had no rubber safety shoes to provide traction and failed to prevent the ladder from slipping; plaintiff was not a recalcitrant worker, as he was never offered any appropriate safety devices, and there were no means other than the defective ladder for him to perform his work; the fact that the ladder belonged to the construction manager and plaintiff allegedly had been instructed to use only plaintiff's employer's equipment did not make plaintiff a recalcitrant worker, as the

alleged instruction was not specifically targeted at the ladder from which plaintiff fell).

¹⁰⁵ Gordon v. Eastern Ry. Supply, Inc., 82 N.Y.2d 555, 606 N.Y.S.2d 127, 626 N.E.2d 912 (1993)(Plaintiff was injured while cleaning the exterior of a railroad car with a hand-held sandblaster; defendant claimed plaintiff was repeatedly instructed to use a scaffold, not a ladder, when sandblasting railroad cars; an “instruction by an employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not a ‘safety device’ in the sense that plaintiff’s failure to comply with the instruction is equivalent to refusing to use available, safe and appropriate equipment... [e]vidence of such instructions does not, by itself, create an issue of fact sufficient to support a recalcitrant worker defense”; plaintiff was not a recalcitrant worker).

¹⁰⁶ Davidson v. Ambrozewicz, 12 A.D.3d 902, 785 N.Y.S.2d 149 (3rd Dep’t 2004)(Plaintiff was working on a bucket truck when the boom of the truck collapsed, dropping plaintiff to the ground; plaintiff’s alleged violation of his employer’s instruction not to use the bucket hoist on the truck did not allow defendant to escape Labor Law §240[1] liability using the recalcitrant worker defense).

¹⁰⁷ Balthazar v. Full Circle Const. Corp., 268 A.D.2d 96, 707 N.Y.S.2d 70 (1st Dep’t 2000)(Plaintiff fell when the base of a ladder on which plaintiff was working allegedly had no rubber safety shoes to provide traction and failed to prevent the ladder from slipping; plaintiff was not a recalcitrant worker, as he was never offered any appropriate safety devices, and there were no means other than the defective ladder for him to perform his work).

¹⁰⁸ Powers v. Lino Del Zotto and Son Builders Inc., 266 A.D.2d 668, 698 N.Y.S.2d 74 (3rd Dep’t 1999)(Plaintiff showed that, while normal procedure for installation of a beam required using a stepladder, all jobsite stepladders were in use, so plaintiff decided to install the beam by using a sawhorse; testimony from plaintiff’s supervisor that stepladders were available at the job site that day and he instructed plaintiff not to install the beam by himself, not to stand on a sawhorse, and to use a stepladder did not raise a factual issue as to recalcitrant worker, as the supervisor did not claim he actually provided plaintiff with a safety device or indicate where it was located or that it was in place; supervisor’s instruction to plaintiff “to wait a few minutes until [he] could assist him” and plaintiff’s failure to comply with that instruction did not make plaintiff a recalcitrant worker; plaintiffs’ motion for summary judgment on the issue of liability under Labor Law §240[1] was granted).

¹⁰⁹ Davis v. Board of Trustees, 240 A.D.2d 461, 658 N.Y.S.2d 648 (2d Dep’t 1997).

¹¹⁰ Crespo v. Triad, 294 A.D.2d 145, 742 N.Y.S.2d 25 (1st Dep’t 2002).

¹¹¹ Morin v. Machnick Builders, Ltd., 4 A.D.3d 668, 772 N.Y.S.2d 388 (3rd Dep't 2004)(Plaintiff, a painter, claimed an extension ladder on which he was working slid away from the building as the ladder rested on a sidewalk, causing him to fall; a coworker claimed he warned plaintiff not to use the ladder on the icy sidewalk and advised that if plaintiff decided to climb the ladder he should tie it down or brace it against a truck to secure it, and that plaintiff told him he would place a sheet of plywood under the ladder; no scaffolding, lift platform, rope, harness, or similar safety device was available at the site; the recalcitrant worker defense did not apply).

¹¹² Vona v. St. Peter's Hosp. of the City of Albany, 223 A.D.2d 903, 636 N.Y.S.2d 218 (3rd Dep't 1996)(Worker was covering the armature of a door as part of asbestos abatement work, and although a foreman specifically directed the worker to obtain a ladder to perform the work, the worker instead stacked two five-gallon pails on top of one another to reach top of door; the pails tipped, causing the worker to fall; issue of fact existed as to Labor Law §240 liability, as the foreman did not direct the worker to a specific ladder as he was not sure precisely where one could be located and plaintiff claimed not to have seen an operable step ladder within ten feet from and plainly visible from the spot where plaintiff fell; plaintiff's motion for partial summary judgment on Labor Law §240 liability denied).

¹¹³ Tennant v. Curcio, 237 A.D.2d 733, 655 N.Y.S.2d 118 (3rd Dep't 1997)(Plaintiff assisted a fellow employee for roofing work on a windy day; the other employee decided not to secure a ladder used to gain access to the roof, even though the employer instructed plaintiff and the fellow employee to secure the ladder to the building, rope was available for that purpose, and another worker on site offered to fabricate a securing bracket to fasten to the building to secure the ladder; as plaintiff descended the ladder from the roof, the ladder tipped and propelled plaintiff to the ground; employer's general instruction to secure the ladder, the presence of rope somewhere on the worksite, and an offer to fashion a securing bracket [which was not equivalent to providing a safety device] did not make plaintiff a recalcitrant worker, especially as plaintiff was assisting the other worker who decided there was no need to secure the ladder to the building).

¹¹⁴ Jastrzebski v. North Shore School Dist., 223 A.D.2d 677, 637 N.Y.S.2d 439 (2^d Dep't 1996), *aff'd*, 88 N.Y.2d 946, 647 N.Y.S.2d 708, 670 N.E.2d 1339 (1996)(Supervisor told plaintiff to get down off of ladder; after plaintiff descended, supervisor told plaintiff the ladder was "no good" and, pointing to a scaffold in place at the site, directed plaintiff to use the scaffold; plaintiff indicated assent to the directive, but then re climbed ladder as soon as supervisor turned back and started to walk away, and then fell off of the ladder; plaintiff could have used the assembled scaffold when ordered to do so by the supervisor, and the supervisor gave plaintiff very specific orders not to use the ladder and to use the available scaffold; plaintiff's motion for partial summary judgment on Labor Law §240

liability denied).

¹¹⁵ Cahill v. TBTA, 4 N.Y.3d 35, 790 N.Y.S.2d 74, 823 N.E.2d 439 (2004)(In the course of greasing coil rod ties inside a form wall, plaintiff fell to the ground as he attempted to ascend the form while wearing a safety harness; while the harness was designed to be directly attached to a safety line, no such safety line was available to plaintiff; plaintiff had to use the harness' own positioning hook to inch his way up the form by releasing the hook, climbing up, and reconnecting the hook to the form; three weeks earlier, after a foreman observed plaintiff improperly climbing a form, plaintiff was told not to use his positioning hook to climb and was instructed how to use the lanyards on his safety harness by attaching them to an available safety line on the form; plaintiff could be found by a jury to have been recalcitrant, even though there was no safety line at the time of the accident where plaintiff wanted to ascend, as plaintiff nevertheless used the positioning hook that was connected to a harness to ascend the form; the jury could find plaintiff to have been recalcitrant even though there was a lapse of weeks between the instructions and his disobedience of them; plaintiff's motion for summary judgment was denied).

¹¹⁶ Landgraff v. 1579 Bronx River Avenue, LLC, 18 A.D.3d 385, 796 N.Y.S.2d 58 (1st Dep't 2005)(Plaintiff was atop a scaffold to cut and remove a length of elevated metal pipe with an electric saw, when the pipe fell and swung against the scaffold, causing the scaffold to flip over and the trapped worker to fall; the recalcitrant worker defense did not apply, as plaintiff was not provided with any safety device such as a sling, pulley, or safety belt that could have prevented his fall).

¹¹⁷ Balthazar v. Full Circle Const. Corp., 268 A.D.2d 96, 707 N.Y.S.2d 70 (1st Dep't 2000)(Plaintiff fell when the base of a ladder on which plaintiff was working to install a fire sprinkler system allegedly had no rubber safety shoes to provide traction and to prevent the ladder from slipping; plaintiff was not a recalcitrant worker, as he was never offered any appropriate safety devices, and there were no means other than the defective ladder for him to perform his work; "[p]laintiff was never offered appropriate safety devices, and there were no means other than the defective ladder for him to reach the mezzanine level to install the sprinklers").

¹¹⁸ Podbielski v. KMO-361 Realty Associates, 294 A.D.2d 552, 742 N.Y.S.2d 664 (2d Dep't 2002)(Decedent fell from a scaffold missing guardrails from three of its sides; decedent was wearing a safety belt but the belt was not tied to a safety line; "rope grabs" used to connect a worker's safety belt to the safety lines was not in evidence at the job site immediately after the accident; decedent's failure to attach his safety harness to a safety line using a rope grab did not support a recalcitrant worker defense since defendants did not provide decedent with rope grabs).

