SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART** **58**

Justice

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JUAN LUGO,

Plaintiff,

- v -

TEXWOOD INVESTMENT, INC.,

Defendant.

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INDEX NO. 158270/2019

MOTION DATE 08/08/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74 were read on this motion for SUMMARY JUDGMENT.

In this Labor Law action, plaintiff, a building porter, alleges that he was injured on September 6, 2017 while moving a dismantled hot water heater up a staircase in a commercial building. Defendant moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes the motion and cross-moves, pursuant to CPLR 3212, for summary judgment on the issue of liability under Labor Law § 240(1).

I. BACKGROUND

It is undisputed that defendant is the owner of the premises located at 850 Seventh Avenue in Manhattan (NY St Cts Elec Filing [NYSCEF] Doc No. 63 ¶ 4; NYSCEF Doc No. 73 ¶ 4).

Plaintiff testified at his deposition that he was employed as a porter at the premises by Cushman & Wakefield (NYSCEF Doc No. 48, plaintiff's tr at 9-10). On the date of the accident, Massiel Santana (Santana), the property manager, and Francisco Munoz (Munoz), the building superintendent, ordered plaintiff to assist Munoz with removing an old hot water heater from the basement of the premises (*id.* at 113-114). The hot water heater was a commercial 500-gallon

heater (*id.* at 137). Plaintiff testified that the hot water heater had to be moved because it was located where the new water pump for the sprinkler system was going to be placed (*id.* at 114), and that Santana ordered plaintiff to remove the water heater or he would be terminated (*id.* at 131).

Approximately one month before the accident, in early August 2017, plaintiff and a handyman cut the hot water heater in half, and they moved it aside (*id.* at 115, 138). The building was going to install a new fire suppression system, which was mandated by the state by March 2019 (*id.* at 122).

On the day of the accident, plaintiff and Munoz went to the basement (*id.* at 136). Plaintiff testified that there was a flight of seven steps leading to the subbasement, and that he needed to move the hot water heater up the stairs (*id.* at 140, 143). Plaintiff retrieved the hand truck, owned by defendant, and they put one of the pieces, which weighed between 250 and 300 pounds, on the hand truck (*id.* at 150, 154).

According to plaintiff, he pulled the hand truck from above, and Munoz pushed from below (*id.* at 155). They had only cleared the bottom step when the accident happened (*id.* at 158). Munoz suddenly, and without warning, let go of his end of the load (*id.*, ¶ 10). The hand truck suddenly dropped, and plaintiff held the handle to prevent the load from striking Munoz (*id.*, ¶ 11). Plaintiff testified that "[a]s soon as the wheels reached that second flight, [he] just felt something pull down," and he felt intolerable pain radiating down his spine to his right leg (*id.* at 159, 160-161). Plaintiff did not let go of the hand truck, but he sat down holding the handle of the hand truck (*id.* at 164-165). When he felt the pulling sensation, the hand truck rolled back down to the first step (*id.* at 170, 173).

After plaintiff told Munoz that he was hurt, he quarreled with Munoz and said that the particular item was too heavy and it was unsafe (*id.* at 176). Munoz responded that his job was "on the line" (*id.* at 177). After quarreling with Munoz, plaintiff and Munoz resumed moving the hot water heater up the stairway (*id.* at 179). They fashioned a pipe that they could run through the hot water heater (*id.* at 180). Plaintiff and Munoz used their bare hands to move the second piece of the hot water heater (*id.*).

Munoz testified that he was the building superintendent on the date of the accident (NYSCEF Doc No. 52, Munoz tr at 7), and plaintiff worked for him; Santana was the property manager (*id.* at 14). In September 2017, Santana asked him to remove a hot water heater from the lower-level basement (*id.* at 17). A contractor had previously cut up the hot water heater into at least four pieces (*id.* at 20). Munoz testified that he asked plaintiff to help him remove the hot water heater from the boiler room (*id.* at 23). Plaintiff was a porter, and his duties included assisting him with tasks while there (*id.* at 24).

Munoz further stated that they used a hand truck to take the pieces of the hot water heater out of the boiler room (*id.*). Plaintiff was at the top of the hand truck pulling the load, while Munoz was at the bottom pushing the load (*id.* at 29-30). Plaintiff did not object to this method of performing the task (*id.* at 28). According to Munoz, one of the pieces of the hot water heater weighed approximately 25 pounds (*id.* at 29). Munoz lifted the bottom and pushed it up (*id.* at 30). Munoz and plaintiff made four trips and they completed the removal of the hot water heater (*id.* at 32, 34). They rolled each piece, one at a time, to the courtyard (*id* at 33).

Munoz testified that at no time did he drop the hand truck (*id.* at 33). Plaintiff did not say that he strained any part of his body, and plaintiff did not sit down at any point (*id.* at 34-35). According to Munoz, they stopped for a few minutes in the courtyard after removing a piece of

the hot water heater (*id.* at 36). Plaintiff did not tell him that it was physically difficult for him to do the work (*id.* at 37), and he never complained that he had injured himself (*id.* at 40).

The next day, Santana told Munoz that plaintiff was out sick and that he was complaining that his back hurt (*id.* at 41, 42). In September 2017, there was no ongoing work for the sprinkler system (*id.* at 43), and the water pump for the sprinkler system was installed where the old hot water heater had been located (*id.* at 62, 63).

Defendant's chief executive officer testified that Cushman & Wakefield manages the building (NYSCEF Doc No. 49, Tam tr at 9-10). Defendant did not oversee any employees working in the building; Cushman & Wakefield supervised those employees (*id.* at 53).

Defendant's assistant secretary testified that he did not know whether the water heater was related to any other plumbing work or the installation of a water pump or a sprinkler system (NYSCEF Doc No. 57, Donovan tr at 9-10). He did not visit the building to inspect any work (*id.* at 46).

Plaintiff commenced this action on August 23, 2019, asserting three causes of action seeking recovery for violations of Labor Law §§§ 240(1), 241(6), and 200 and for common-law negligence (NYSCEF Doc No. 1).

II. DISCUSSION

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (*Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012] [internal quotation marks and citation omitted]). "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment" (*id.*). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in

admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). The court's function on a motion for summary judgment is "issue-finding, rather than issue-determination" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957] [internal quotation marks and citation omitted]).

A. Labor Law § 241(6) and § 200, and Common-Law Negligence

Plaintiff did not oppose dismissal of his Labor Law §§ 200 and 241(6) claims. Accordingly, these claims are dismissed as abandoned (*see Digirolomo v 160 Madison Ave LLC*, 194 AD3d 640, 641 [1st Dept 2021] [noting that "(t)he Labor Law § 241(6) claim as against Parkview is dismissed as abandoned, since plaintiffs did not oppose that part of Parkview's motion"]). Given that Labor Law § 200 is a codification of the common-law duty to provide a safe workplace (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]), his common-law negligence claim is also be dismissed.

B. Labor Law § 240(1)

Defendant argues that plaintiff was not performing an activity covered under the statute, as the disposal of debris cannot be considered a covered activity. Nor was plaintiff's activity ancillary to an enumerated activity because: (1) he was a porter employed by Cushman & Wakefield; (2) plaintiff was not employed by a company engaged in debris removal from construction sites; (3) the building was not an active construction site and no construction activity was occurring anywhere in the building; and (4) the installation of the sprinkler system had not yet begun at the time of the accident. Even if plaintiff was engaged in a protected activity, defendant contends, plaintiff cannot prove a violation of Labor Law § 240(1), as plaintiff did not fall and nothing fell on him.

Plaintiff contends that dismantling the water heater was part of a larger project to install a sprinkler system, which constitutes alteration of the building and is a covered activity under Labor Law § 240(1). Furthermore, plaintiff argues that his injury flowed directly from the application of the force of gravity.

In reply and in opposition to plaintiff's cross-motion, defendant argues that the dismantling and removal of the water heater was not an alteration within the meaning of section 240(1), as plaintiff did not make a significant physical change to the structure or configuration of the boiler room, and whether plaintiff's task was necessary or integral to the larger construction or alteration project improperly expands the intended ambit of the statute. Defendant further contends that plaintiff's accident was not caused by the absence or inadequacy of a safety device of the kind enumerated in the statute.

In reply, plaintiff asserts that his removal of the hot water heater constitutes the alteration of a structure, and the fact that the sprinkler system installation had not yet commenced is not dispositive. Further, plaintiff contends that the lack of any safety device constitutes a violation of section 240(1).

Labor Law § 240 (1) provides, in pertinent part, that:

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

"Labor Law § 240(1) imposes absolute liability upon an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure" (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). To establish liability under Labor Law § 240(1), the plaintiff must prove a violation of the statute

(i.e., that the owner or general contractor failed to provide adequate safety devices), and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]). "[T]he single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

Labor Law § 240(1) imposes the duty to protect workers engaged in "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." A "structure" is "any production or piece of work artificially built up or composed of parts joined together in some definite manner" (*Lewis-Moors v Contel of N.Y.*, 78 NY2d 942, 943 [1991] [internal quotation marks and citation omitted]).

The Court of Appeals has held that "'altering' within the meaning of Labor Law § 240(1) requires making a significant physical change to the configuration or composition of the building or structure" (*Joblon v Solow*, 91 NY2d 457, 465 [1998]). On the other hand, simple, routine activities such as maintenance and decorative modifications do not constitute activities protected by the statute (*see Saint v Syracuse Supply Co.*, 25 NY3d 117, 125 [2015]). In determining whether the plaintiff's work involved the "alteration" of a structure, courts should not "isolate the moment of injury and ignore the general context of the work" (*Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]).

Defendant has failed to establish prima facie entitlement to summary judgment dismissing plaintiff's Labor Law § 240(1) claim, as its focus on plaintiff's job title and the moment of injury are not dispositive (*see Prats*, 100 NY2d at 882). One month before plaintiff's accident, he disassembled the hot water heater to prepare for the installation of the sprinkler, and

on the date of the accident, he was removing the heater pieces to make room for the new system, both of which constitute alteration (*see Concepcion v 333 Seventh LLC*, 162 AD3d 493, 493 [1st Dept 2018] [plaintiff's reconfiguring sprinkler system to comply with fire code, including cutting, removing, and relocating pipes, valves, and installing components, constituted alteration within meaning of section 240(1)]; *Kharie v South Shore Record Mgt., Inc.*, 118 AD3d 955, 956 [2d Dept 2014] [dismantling free-standing shelves composed of component pieces attached in definite manner constituted alteration]; *Wade v Atlantic Cooling Tower Servs., Inc.*, 56 AD3d 547, 549 [2d Dept 2008] ["plaintiff's dismantling of the sprinkler system constituted the alteration of the structure within the meaning of Labor Law § 240 (1)"]; *see also Morales v City of New York*, 245 AD2d 431 [2d Dept 1997] [removal of old video screen before installation of new screen constitutes alteration of auditorium structure]). Moreover, plaintiff's work was not "a separate phase easily distinguishable from other parts of the larger construction [or alteration] project" (*Prats*, 100 NY2d at 881).

Furthermore, defendant has failed to demonstrate that the statute was not violated as a matter of law. Accepting plaintiff's version of the accident as true, defendant failed to provide plaintiff with proper protection against gravity-related risks associated with moving an extremely heavy object up a staircase, which led to plaintiff's injury (*see Agli v 21 E. 90 Apts. Corp.*, 195 AD3d 458, 458-459 [1st Dept 2021] [plaintiff entitled to partial summary judgment where he was injured while lowering steel bedplate weighing approximately 500 pounds down staircase on hand truck]; *Dirschneider v Rolex Realty Co. LLC*, 157 AD3d 538, 539-540 [1st Dept 2018] ["The record establishes a failure to provide plaintiff and his coworker with devices offering adequate protection against the gravity-related risks of moving an extremely heavy object down

a staircase, leading to the workers' loss of control over the object's descent and plaintiff's injuries"]).

However, plaintiff is not entitled to summary judgment on his Labor Law § 240(1) claim, as a "bona fide issue as to [plaintiff's] credibility exists" (*Rodriguez v Forest City Jay St. Assoc.*, 234 AD2d 68, 69 [1st Dept 1996]). The substantial inconsistencies between plaintiff's account and Munoz's account of the accident are "neither minor nor immaterial" (*see Muhammad v Hyman Constr.*, 216 AD2d 206, 206 [1st Dept 1995]). Thus, defendant "should have the opportunity to subject the plaintiff's testimonial account to cross-examination and have his credibility determined by the trier of fact" (*Manna v New York City Hous. Auth.*, 215 AD2d 335, 335-336 [1st Dept 1995]).

III. CONCLUSION

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted to the extent of dismissing plaintiff's Labor Law §§ 241(6), 200, and common-law negligence claims, and is otherwise denied; it is further

ORDERED that plaintiff's cross-motion for partial summary judgment on liability under Labor Law § 240(1) is denied; and it is further

ORDERED that the parties appear for a settlement/trial scheduling conference on August 7, 2024 at 9:30 am, at 71 Thomas Street, Room 305, New York, New York.

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4/12/2024
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**