At an IAS Term, Part 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 20th day of November, 2023.

P R E S E N T:

HON. JOY F. CAMPANELLI,
Justice.

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ALEKSANDR SVETLICHNYY,

Plaintiff,

-against-

CORNELL UNIVERSITY,
WEILL CORNELL MEDICINE,
JOAN & SANFORD I. WEILL MEDICAL COLLEGE,
BOARD OF MANAGERS OF THE 515 EAST 71ST STREET LEASEHOLD CONDOMINIUM,
CORNELL REAL PROPERTY SERVICES, INC., ET ANO.,

Defendants.

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AND RELATED THIRD-PARTY ACTION

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DECISION AND ORDER

Index No. 525005/20

Mot. Seq. Nos. 3-4

| The following e-filed papers read herein: | NYSCEF Doc Nos.: |
|---|---|
| Notice of Motion/Cross Motion, Affirmations (Affidavits), with Exhibits Annexed | 88-104; 108-122, 124 |
| Affirmations (Affidavits) in Opposition and in Reply, with Exhibits Annexed | 125-126; 127-128; 130 |

In this action to recover damages for personal injuries, defendants/former third-party plaintiffs Cornell University, Joan & Sanford I. Weill Medical College (also named herein as Weill Cornell Medicine), Board of Managers of the 515 East 71st Street Leasehold Condominium, and Cornell Real Property Services, Inc. (collectively, "defendants") jointly move for an order dismissing all claims of plaintiff Aleksandr Svetlichnyy ("plaintiff") against each of them, whereas plaintiff cross-moves for partial summary

judgment on the issue of liability on his Labor Law §§ 240 (1) and 241 (6) claims as against defendants (motion [mot.] sequence [seq.] number [no.] 3 and 4, respectively).[1]

**Summary**[2]

On December 23, 2017 (the "accident date"), plaintiff, a helper employed by the since-dismissed third-party defendant GRR Cooling Experts Inc. ("GRR"), was injured when he was struck in the face by a 220-pound (or 100-kilogram)[3] one-half-sized piece of the extant evaporator coil which his coworkers at GRR were about to remove from a commercial HVAC unit in the third-floor mechanical room of defendants' place of business, in order to replace the extant coil with a new coil. The HVAC unit, which resembled a large box, was about 8.2 feet (or 2.5 meters) long and approximately 8.2-9.8

[1] The remaining defendant, New York Society for the Relief of the Ruptured and Crippled Maintaining the Hospital for Special Surgery, was dismissed from this action by stipulation, dated May 12, 2021 (NYSCEF Doc No. 94). The third-party action was discontinued in its entirety by stipulation, dated May 17, 2022 (NYSCEF Doc No. 97).

[2] The summary is based on the deposition testimony of plaintiff on July 19, 2022 and July 22, 2022 (NYSCEF Doc Nos. 98-99, respectively) and of defendants' representative Aleksandr Gershberg on October 24, 2022 (NYSCEF Doc No. 100). The Court disregarded plaintiff's post-deposition affidavit (NYSCEF Doc No. 102) as an attempt to create a feigned issue of fact designed to avoid the consequences of his earlier deposition testimony – the inference that is particularly apt here because plaintiff's counsel extensively questioned his own client at the second deposition session in an attempt to establish additional circumstances of the accident (Plaintiff's July 29, 2022 EBT tr at page 57, line 9 to page 61, line 20) (*see Saitta v Marsah Props., LLC*, 211 AD3d 1062, 1065 [2d Dept 2022]; *Garcia-Rosales v Bais Rochel Resort*, 100 AD3d 687 [2d Dept 2012], *lv denied* 20 NY3d 858 [2013]; *see also Haxhia v Varanelli*, 170 AD3d 679, 682 [2d Dept 2019]; *Choi Ping Wong v Innocent*, 54 AD3d 384, 385 [2d Dept 2008]; *Mayancela v Almat Realty Dev., LLC*, 303 AD2d 207, 208 [1st Dept 2003]). For the same reason, the Court disregarded defendants' proffer of the Feb. 27, 2023 affidavit of Senior Project Manager Rustam Galyanurov of the since-dismissed plaintiff's employer (NYSCEF Doc No. 102). Drafted and submitted by defendants' counsel, Galyanurov's affidavit was specifically tailored to meet the case law requirements of routine maintenance – the result that weighted most heavily in their favor.

[3] *See* Plaintiff's July 19, 2022 EBT tr at page 75, lines 18-19.

feet (or 2.5 to 3 meters) tall. Two months prior to the accident, one of defendants had hired GRR to remove the extant evaporator coil and replace it with a new evaporator coil. The extant evaporator coil had been malfunctioning (but nonetheless working) for at least several months, whereas the HVAC unit (with the exception of the extant evaporation coil) had been functioning properly.[4] Immediately before the work was started, the HVAC unit had been working.[5] The HVAC unit had to be shut down for at least 20 minutes in preparation for the coil removal and replacement.[6]

Shortly before the accident, a GRR foreman overseeing the work, together with his helper (the "foreman's helper"), had climbed on top of the HVAC unit. The foreman and his helper, while standing on top of the HVAC unit, cut the extant evaporator coil in half with a metal saw. Then, the foreman and his helper handed down one half of the extant evaporator coil to plaintiff and two other workers, all of whom were standing on the floor next to the HVAC unit. As the foreman and his helper were moving the other half of the evaporator coil in preparation for lowering it to plaintiff and the other workers on the floor, that portion of the evaporator coil (weighing, as noted, approximately 220 pounds or 100 kilograms) unexpectedly struck plaintiff in the nose, making him fall backward on the mechanical room floor.

On December 15, 2020, plaintiff timely commenced this action against defendants (among others) for personal injuries which he allegedly sustained in the accident

[4] *See* Gershberg's EBT tr at page 31, lines 2-21; page 48, line 21 to page 49, line 22.

[5] *See* Gershberg's EBT tr at page 35, lines 10-13.

[6] *See* Gershberg's EBT tr at page 38, lines 8-15.

approximately three years earlier on December 23, 2017. Plaintiff asserted claims under: (i) Labor Law § 240 (1), as well as Labor Law § 241 (6) (to the extent predicated on, among others, 12 NYCRR § 23-1.8 [c] [1] ["Personal protective equipment" – "Protective apparel" – "Head protection"]); (ii) Labor Law § 200/common-law negligence; and (iii) Labor Law § 241-a (incorrectly cited as Labor Law § 242-a in ¶ 129 of the complaint).

After discovery was completed and a Note of Issue was filed on January 3, 2023, the aforementioned motion and cross motion, each for summary judgment, were served on March 2, 2023 and June 21, 2023, respectively (NYSCEF Doc No. 88 and 108). On September 27, 2023, the Court heard oral argument, reserving decision.

Although plaintiff's cross motion is untimely, having been made more than 60 days after the filing of the Note of Issue,[7] the Court may nonetheless consider it because "a timely motion for summary judgment was made on nearly identical grounds" (*Grande v Peteroy*, 39 AD3d 590, 591-592 [2d Dept 2007]). "In such circumstances, the issues raised by the untimely . . . cross motion are already properly before the court and thus, the nearly identical nature of the grounds may provide the requisite good cause (*see* CPLR 3212 [a]) to review the untimely . . . cross motion on the merits" (*id*. at 592). Accordingly, the Court will consider plaintiff's cross motion on the merits (*see Jenkin v Cadore*, 185 AD3d 558, 561 [2d Dept 2020]; *Whitehead v City of NY*, 79 AD3d 858, 860 [2d Dept 2010]).

[7] Kings County Supreme Court Uniform Civil Term Rules generally require (in Part C, § 6) that "motions for summary judgment may be made no later than sixty (60) days after the filing of a Note of Issue."

**Discussion**[8]

*I. Labor Law §§ 240 (1) Claim*

Labor Law § 240 (1) applies when an employee is engaged in (among other activities) "the . . . repairing . . . of a . . . structure." Plaintiff further relies on Labor Law § 241 (6), which "applies to construction, excavation, or demolition work" (*Nusio v Legend Autorama, Ltd.*, 219 AD3d 842, 845 [2d Dept 2023]). Construction work is defined in 12 NYCRR § 23-1.4 (b) (13) as including the "erection, alteration, *repair, maintenance* . . . of . . . structures" (emphasis added).

The crux of this case is whether plaintiff was involved in *repair* (and thus, his work was *within* the scope of Labor Law §§ 240 [1] and 241 [6]) or, alternatively, whether he was involved in *routine maintenance* work (and thus his work was *outside* the scope of those provisions). "In determining whether a particular activity constitutes 'repairing,' courts are careful to distinguish between *repairs* and *routine maintenance*, since routine maintenance work performed in a nonconstruction, nonrenovation context is not a covered activity" (*Nooney v Queensborough Pub. Lib.*, 212 AD3d 830, 832 [2d Dept 2023] [internal citations and quotation marks omitted; emphasis added]). To separate *repair* from *routine maintenance*, "courts will consider such factors as [i] whether the work in question was occasioned by an isolated event as opposed to a recurring condition; [ii] whether the object being replaced was a worn-out component in something that was otherwise operable; and

[8] The recitation of the well-established standard of review in the summary judgment context has been omitted in the interest of brevity (*see e.g. Stonehill Capital Mgt., LLC v Bank of W.*, 28 NY3d 439, 448 [2016]).

[iii] whether the device or component that was being fixed or replaced was intended to have a limited life span or to require periodic adjustment or replacement" (*Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc.*, 118 AD3d 524, 526-527 [1st Dept 2014] [internal citations and quotation marks omitted]).

The evidence submitted by defendants in support of the branch of their motion which is for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim, as well as the evidence submitted by plaintiff in support of the branch of his cross motion which is for partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim, failed, in each instance, to eliminate triable issues of fact as to whether, at the time of the accident, plaintiff was engaged in a Labor Law § 240 (1) protected activity such as *repair* or, alternatively, whether he was engaged in *routine maintenance*, which is outside the purview of Labor Law § 240 (1) (*see Washington-Tatum v City of NY*, 205 AD3d 976, 978 [2d Dept 2022]; *Hamm v Review Assoc., LLC*, 202 AD3d 934, 936 [2d Dept 2022]; *Cantalupo v Arco Plumbing & Heating, Inc.*, 194 AD3d 686, 688 [2d Dept 2021]; *Roth v Lenox Terrace Assoc.*, 146 AD3d 608, 608 [1st Dept 2017]; *see also Dahlia v S&K Distrib., LLC*, 171 AD3d 1127, 1128-1130 [2d Dept 2019]; *cf. Manfredonia v 750 Astor LLC*, 217 AD3d 573, 573-574 [1st Dept 2023]).

*II. Labor Law § 241 (6) Claim*

The scope of Labor Law § 241 (6) is governed by 12 NYCRR 23-1.4(b)(13), which defines construction work to include "[a]ll work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures". *Pittman v. S.P. Lenox Realty, LLC*, 91 AD3d 738, 937 NYS2d 101[2d Dept

2012]. "Although the applicability of Labor Law § 241 (6) is not limited to building sites, the work in which the plaintiff was engaged must have affected the structural integrity of the building or structure or have been an integral part of the construction of a building or structure." *Cantalupo v. Arco Plumbing & Heating, Inc.*, 194 AD3d 686, 148 NYS3d 224 [2d Dept 2021]. Here, the Court finds that plaintiff was not involved in an activity within the ambit of Labor Law § 241 (6).

*III. Labor Law § 200/Common-Law Negligence Claim*

Turning to plaintiff's Labor Law § 200/common-law negligence claim, the Court starts with the hornbook principle that "Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). "An implicit precondition to this duty . . . is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]). "Where the alleged defect or dangerous condition arises from the [contractor's] methods and the owner . . . exercise[s] no supervisory control over the operation, no liability attaches to the owner . . . under the common law or under Labor Law § 200" (*Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 850 [2d Dept 2006], *lv dismissed* 8 NY3d 841 [2007]).

Here, plaintiff was injured from the manner in which his coworkers were removing the extant evaporator coil, rather than as a result of any dangerous condition in the mechanical room (*see Ferrero*, 33 AD3d at 850). Defendants established, prima facie, that

they lacked authority to supervise or control the means and method of plaintiff's work on the subject premises (*see Hamm*, 202 AD3d at 939). In opposition to defendants' prima facie showing of entitlement to judgment as a matter of law regarding the Labor Law § 200/common-law negligence claim, plaintiff offered no evidence that defendants exercised any supervisory control over the work then performed by plaintiff or by any other members of his employer's crew at the time of the accident, or had any input into how the extant evaporator coil was to be removed and replaced (*see Ferrero*, 33 AD3d at 851). Rather, all work in the mechanical room at the time of the accident was supervised by plaintiff's foreman and his employer's manager (*see Mohammed v Islip Food Corp.*, 24 AD3d 634, 637 [2d Dept 2005]; *Salinas*, 2 AD3d at 623). Accordingly, dismissal of plaintiff's Labor Law § 200/common-law negligence claim is warranted, as more fully set forth in the decretal paragraphs below.

*III. Labor Law § 241-a Claim*

Finally, Labor Law § 241-a ("Protection of workmen in or at elevator shaftways, hatchways and stairwells")[9] does not apply to this action. Plaintiff did not address that statute in either his cross motion or opposition papers. Because uncontested allegations are deemed admitted in the context of motion practice, dismissal of such claims was, in effect, conceded by plaintiff (*see John William Costello Assocs. v Standard Metals Corp.*, 99 AD2d 227, 229 [1st Dept 1984] ["facts appearing in the movant's papers, which the

[9] As noted, plaintiff's complaint (in ¶ 129) mistakenly cites Labor Law § 241-a as Labor Law § 242-a.

opposing party does not controvert, may be deemed to be admitted"], *appeal dismissed* 62 NY2d 942 [1984]).

**Conclusion**

Accordingly, it is

**ORDERED** that defendants' motion for summary judgment seq. 003 is *granted to the extent* that: (i) plaintiff's Labor Law § 241 (6) claim, (ii) his Labor Law § 200/common-law negligence claim, and (iii) his Labor Law § 241-a claim, are all *dismissed* without costs and disbursements; and the remainder of their motion is denied; and it is further

**ORDERED** that in plaintiff's motion seq. 004 for partial summary judgment on the issue of liability on his Labor Law §§ 240 (1) and 241 (6) claims is *denied in its entirety*; and it is further

**ORDERED** that for the avoidance of doubt, the action shall continue on plaintiff's Labor Law § 240 (1) claim; and it is further

**ORDERED** that to reflect the prior stipulated dismissal of defendant New York Society for the Relief of the Ruptured and Crippled Maintaining the Hospital for Special Surgery (as well as the prior stipulated dismissal of the third-party action), the caption is amended to read in its entirety as follows:

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ALEKSANDR SVETLICHNYY,

Plaintiff,

-against- Index No. 525005/20

CORNELL UNIVERSITY,
WEILL CORNELL MEDICINE,
JOAN & SANFORD I. WEILL MEDICAL COLLEGE,

BOARD OF MANAGERS OF THE 515 EAST 71ST STREET
LEASEHOLD CONDOMINIUM, and
CORNELL REAL PROPERTY SERVICES, INC.,

Defendants.
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; and it is further

**ORDERED** that defendants' counsel is directed to electronically serve a copy of this decision and order with notice of entry on plaintiff's counsel and to electronically file an affidavit of service thereof with the Kings County Clerk; and it is further

**ORDERED** that the parties are reminded of their next scheduled, *in-person* appearance in JCP-1 on January 5, 2024, at 10:00 am.

This constitutes the decision and order of the Court.

E N T E R,

J. S. C.