SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **Hon. James E. d'Auguste** **PART 55**

Justice

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JOSE RENE AMENDANO FAJARDO,

Plaintiff,

- v -

ECLIPSE DEVELOPMENT, INC., EQUINOX 74TH STREET, INC.,1429 SECOND AVENUE ASSOCIATES LLP, PNV INDUSTRIES, LLC,

Defendants.

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INDEX NO. 161010/2018

MOTION DATE 01/27/2022, 08/11/2023

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

ECLIPSE DEVELOPMENT, INC., EQUINOX 74TH STREET, INC.,

Plaintiff,

-against-

PNV INDUSTRIES, LLC,

Defendant.

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Third-Party
Index No. 595304/2019

The following e-filed documents, listed by NYSCEF document number (Motion 003) 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 119, 144, 145, 146, 147, 148, 149, 150, 151, 187, 188, 189, 195, 196, 197, 198, 199, 200, 202

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 190, 191, 192, 193, 194, 201, 203

were read on this motion to/for SUMMARY JUDGMENT.

Motion sequence numbers 003 and 004 are hereby consolidated for disposition.

PROCEDURAL BACKGROUND

In this action, plaintiff, Jose Rene Amendano Fajardo, seeks damages for personal injuries he allegedly sustained on March 22, 2018. Plaintiff alleges that multiple large mirrors

(the "Mirrors") fell upon him while he was inside of a van (the "Van") parked at or around 1429 Second Avenue, New York, New York (the "Premises"). Plaintiff alleges that the Van was carrying the Mirrors as part of construction work at the Premises.

In motion sequence 003, defendants, Eclipse Development, Inc. ("Eclipse"), Equinox 74th Street, Inc. ("Equinox") and 1429 Second Avenue Association, LLC ("1429 Second") (collectively the "Equinox Defendants") move pursuant to CPLR 3212, for summary judgment in their favor dismissing plaintiff's complaint as against them. Plaintiff opposes and cross-moves to strike the Equinox Defendants' answers for failure to comply with prior discovery orders.

In motion sequence 004, plaintiff moves for summary judgment on his Labor Law § 240 (1) claim as against the Equinox Defendants.[1]

Plaintiff's cross-motion to strike the Equinox Defendants' answers (motion sequence 003)

Plaintiff moves to strike the Equinox Defendants' answers for failure to comply with prior discovery orders (motion sequence 003).

"[U]nless public policy is affronted, parties to a civil dispute are free to chart their own litigation course" (*See Chester Music Ltd. v Schott Musik Int'l GmbH & Co. (In re Estate of Stravinsky)*, 4 AD3d 75, 80 [1st Dept 2003] quoting *Mitchell v New York Hospital*, 61 NY2d 208, 214 [1984]). Further, striking an answer for failure to comply with discovery is the "ultimate penalty" and cannot be imposed absent "extreme conduct" (*Barlow v Skroupa*, 221 AD3d 482, 483 [1st Dept 2023] quoting *Pezhman v Department of Educ of the City of New York*, 95 AD3d 625, 626 [1st Dept 2012]).

[1] Plaintiff withdrew his Labor Law §§ 240 (2), 240 (3), 200 and common law negligence claims as part of his motion for summary judgment (Affirmation in support of plaintiff's motion and in opposition to defendant's motion at ¶ 3, NYSCEF Doc. No. 125).

Here, plaintiff argues that the Equinox Defendants failed to comply with prior orders of the Court requiring them to produce their witnesses for deposition. However, the Equinox Defendants subsequently produced their witnesses for deposition, allowing plaintiff to address the Equinox Defendants' motion for summary judgment and move for summary judgment on his Labor Law §240 (1) claim (Affirmation in support of plaintiff's cross-motion and in opposition to defendant's motion, NYSCEF Doc. No. 125).

As such, plaintiff's motion to strike the Equinox Defendants' answer is denied.

Plaintiff's Deposition Testimony (NYSCEF Doc. No. 85)

Plaintiff appeared for deposition on September 9, 2020. At the time of the subject accident, plaintiff was working for Savant Metals LLC ("Savant") (Plaintiff tr. at 11-12).

Plaintiff testified that Savant conducts residential remodeling work (*id.* at 25). He further testified that Milton Garay was the owner of Savant and plaintiff's manager on the worksite on the date of the accident (*id.* at 17, 19-20). Plaintiff did not know who Savant was working for at the time of the accident (*id.* at 43). He further testified that there was no general contractor on the worksite (*id.* at 49). Plaintiff testified that Garay told him that "the work would be placing mirrors in the gym" (*id.* at 37).

Plaintiff testified that the Van brought the Mirrors to the worksite and was parked in front of the doors of a gym (the "Gym") located at the Premises (*id.* at 29, 40). He testified that there were ten Mirrors in the Van, each approximately 102 inches long and 9-and-a-half inches wide, with each weighing 70 to 80 pounds (*id.* at 41). The Mirrors were placed against one of the Van's walls, taking up an entire side of the Van (*id.* at 41-42). Plaintiff did not know who loaded the Mirrors onto the Van (*id.* at 41).

Plaintiff testified that when he and the other workers arrived at the worksite, a man who "works for the gym" was also there (*id.* at 49-50). This man was inside of the Premises at the counter "where the receptionist[s] usually are" (*id.* at 50). Garay spoke to the man and told plaintiff that the man was going to close the gym (*id.*). Garay did not speak to anyone else from the Gym (*id.* at 51).

Plaintiff and the other workers "took out the tools and the glue that we would need to use" and brought them into the basement area of the building where they would be doing their work (*id.*). These tools included a suction device for holding the Mirrors in place and a caulking gun (*id.* at 43). After the workers left their materials in the basement, plaintiff spoke to a co-worker "because we were going to unload the mirrors" (*id.* at 45-46). Plaintiff testified that there were only three workers to unload the Mirrors (*id.* at 46). He further testified that he had previously unloaded similar mirrors, but that these prior jobs had more than three workers (*id.*).

After putting the materials in the basement, plaintiff went back to the street and spoke with a co-worker (*id.* at 51-52). Garay called the co-worker inside the building for about six to seven minutes (*id.* at 53). Plaintiff testified that "I asked [Garay] if I should go fix the glass and he said, 'yes, remove the doors first'" (*id.*). Plaintiff testified that "fix[ing] the glass" meant removing the band that secured the mirrors to the inside of the van, and that "remov[ing] the doors" meant opening the Van doors in order to unload the Mirrors (*id.* at 53-54). Plaintiff testified that no one other than Garay instructed him to prepare the Mirrors to be moved (*id. a*t 62).

When plaintiff went to the Van, the middle side door was already half open, but he had to open the rear doors in order to remove the Mirrors through them (*id.* at 54, 56-57). The rear doors were unlocked, and he was alone when he opened them (*id.* at 56-57).

Plaintiff testified that there were two adjustable cords (the "Cords") running horizontally across the Mirrors holding them together (*id.* at 58). After opening the Van's rear doors, plaintiff began untying the Cords (*id.* at 57). Immediately before the accident, plaintiff had removed one of the Cords and was rolling it up (*id.* at 60-61). The Mirrors were leaning against the side of the Van at an angle of approximately 35 degrees (*id.* at 63-64). Plaintiff testified that the Mirrors did not seem unstable (*id.*).

The accident occurred while plaintiff was standing in the Van (*id.* at 91). Plaintiff testified that he had been standing next to the Mirrors for approximately two to three minutes (*id.* at 63-64). He testified that he "[did not] know how, but the mirrors ended up on top of me " (*id.* at 60-61). The Mirrors struck plaintiff's head and he lost consciousness for approximately 30 seconds (*id* at 61-62). When he regained consciousness, the Mirrors were on top of him (*id.* at 61-62).

Deposition Testimony of Milton Garay, production manager for Savant (NYSCEF Doc. No. 86)

Milton Garay appeared for deposition on January 25, 2021. At the time of the accident, he was a production manager for Savant (Garay tr. at 11). He testified that Savant specializes in custom made mirrors, glass products, and delivery (*id.* at 9, 18). Savant did not normally hold any mirrors or glass products in stock (*id.* at 19). Upon request, it would order glass products and deliver them (*id.* at 19). Garay's responsibilities included following fabrication orders and supervising installation (*id.* at 11-12).

Garay testified that PNV Industries, LLC ("PNV") was a contracting company that does interior renovation work (*id.* at 62). PNV had a relationship with Savant, whereby PNV would order mirrors and glass products from Savant, though there was no written contract between the companies (*id.* at 49). Garay was not familiar with Eclipse (*id.* at 65).

Garay testified that Savant ordered the Mirrors from non-party, Sellmar Enterprises ("Sellmar") (*id.* at 19). There were approximately 12 to 15 individual mirrors (*id.* at 18), each a quarter-inch thick (*id.* at 60-61). The Mirrors' dimensions were each approximately 60 by 80 inches (*id.* at 61). Each mirror weighed approximately 100 pounds (*id.* at 61).

Garay testified that the Mirrors were vacuum packed and tied with "belts" that needed to be "unlock[ed]" in order to move the Mirrors (*id.* at 53). He further testified that unloading the Mirrors required multiple people as "unlocking" the Mirrors would always cause them to fall (*id.* at 53).

On the date of the accident, Savant sent three employees in the Van to pick up the Mirrors from a separate location (*id.* at 19-21). The Savant employees picked up the Mirrors at approximately 12:00 p.m. or 1:00 p.m., loaded them into the Van, and drove them to a Savant facility (*id.* at 19-23). Garay testified that he inspected the Mirrors after they arrived at the Savant facility and waited for PNV to come pick up the Mirrors from the facility (*id.* at 23).

Garay testified that at some time between 3:00 p.m. or 4:00 p.m., Eddie Velez from PNV called him requesting that Savant deliver the Mirrors to the Gym (the "Project") (*id.* at 15, 17, 24). Garay further testified that the delivery would be at approximately 10:30 p.m., as that was the time that workers would be permitted to enter the Premises (*id.* at 26).

Garay testified that the Project was only for Savant to deliver the Mirrors and "some boxes of silicon" to the Gym (*id.* at 15). The Project was a "one time" job and not a part of multiple deliveries (*id.* at 68). Garay further testified that PNV was not prepared for Savant to install the Mirrors (*id.* at 15). He testified that there was a "possibility [Savant] can do it," but that the installation of the Mirrors "was not really discussed" (*id.*).

At approximately 4:15 pm, Garay contacted plaintiff indicating that he had work for him (*id.* at 24-25). Plaintiff was not a Savant employee, but only hired specifically for the Project (*id.* at 39-40). Garay also contacted two Savant employees to assist with the Project (*id.* at 26).

The three workers drove to the Premises in the Van with the Mirrors, while Garay drove separately (*id.* at 27). They all arrived at the Premises at or around 9:35 p.m. (*id.* at 27-28, 32). Garay testified that upon arriving at the Premises he spoke to "the person in charge of the front desk" and asked for permission to bring the silicon boxes to the basement (*id.* at 32). Garay testified that the person at the front desk told him that he could deliver the silicon to the basement but not to do any work until 10:30 p.m. (*id.*).

Garay and the workers discussed delivering the Mirrors into the Gym and decided that they could not do it (*id.* at 28). They planned to deliver the silicone first and then wait to deliver the Mirrors (*id.*). While getting the silicon from the Van, Garay checked on the Mirrors and found that they were in good condition (*id.*).

Garay testified that there was a yoga studio and exercise area in the basement of the Gym (*id.* at 63). He testified that he saw "a wall ready to install the glass" and that he did not "see other products there" (*id.*at 63). He further testified that there was a wall "freshly prepared" for the installation of mirrors (*id.* at 63-64). Garay did not know whether PNV or anyone else was doing any work in this area (*id.* at 64).

After delivering the silicon, Garay concluded that it would be too difficult to bring the Mirrors to the basement with only four people (*id.* at 28-29). He and the workers had a meeting in the lobby of the Premises, and Garay called Velez to inform him that they could not deliver the Mirrors with only four people (*id.* at 29). Garay indicated to Velez that delivering the Mirrors would require at least seven people, and Velez told him that Velez would come to the

Premises at 10:30 p.m. to discuss the situation (*id.*). Garay further testified that Velez told him that he would bring more workers to the Premises (*id.* at 72).

Garay testified that he gave each of the workers ten dollars, told them to get lunch and to return at 10:30 p.m. to "see if we're going to do this job or not" (*id.* at 31). Garay testified that he was "really specific" with the workers that they were going to have a break and come back at 10:30 p.m. (*id.* at 55-56). He then sat down in the lobby and waited (*id.* at 31).

Garay testified that approximately 20 minutes later, he heard a "boom" and went to the Van (*id*. at 33). It was approximately 10:05 p.m. and Velez had not arrived at the Premises (*id.* at 34, 47). Garay saw that the Van's rear doors were open, and plaintiff was in the Van "with all of the glasses over him" (*id.* at 33).

Garay testified that he spoke to plaintiff immediately after the accident (*id.* at 38). Plaintiff said that he went into the Van on his own and unwrapped the Mirrors (*id.* at 43).

Garay testified that he did not speak to any of the workers about unloading the Mirrors and that they had not planned to do anything because there were only four of them (*id.* at 34). He further testified that he did not instruct plaintiff to prepare the Mirrors for delivery and that all the workers understood from the meeting in the lobby that they would leave and come back at 10:30 p.m. (*id.* at 35). Garay testified that the other workers could not have instructed plaintiff to prepare the Mirrors for delivery as they had left the Premises and did not return until after the accident (*id.* at 37-38).

Garay testified that Velez did not provide him with any instructions as to how the Mirrors should be loaded or unloaded from the Van, nor how many workers should be used on the Project (*id. at* 71-72). Garay further testified that he was the only one giving instructions on unloading the Mirrors from the Van (*id.* at 73).

Affidavit of Christopher Pagano, Senior Regional Manger Facilities – Northeast for Equinox Holdings, Inc., dated January 12, 2022 (NYSCEF Doc. No. 157)

Christopher Pagano prepared an affidavit, wherein he states that on the date of the accident, he was an area facilities manager for Equinox Holdings, Inc. ("Equinox Holdings") (Pagano affidavit at ¶ 1). Eclipse is a wholly-owned subsidiary of Equinox Holdings (Eclipse at ¶ 9).

On the date of the accident, Pagano was responsible for the maintenance, repair, renovation, and upkeep of the Gym (Pagano affidavit at ¶ 4). He further states that he is fully familiar with the work being performed at the Gym on the date of the accident (*id.*).

Pagano states that the work was necessary due to a water leak in the Premises that had damaged the yoga studio in the Gym (*id.* at ¶ 6). PNV provided Equinox Holdings with an estimate for repairing water damaged walls, which included installing new mirrors in the yoga studio (*id.*).

Pagano states that Eclipse is not involved in all construction work at Eclipse's clubs (*id.* at ¶ 9). Equinox Holdings' facilities department (the "Facilities Department") "administratively manages the repairs and maintenance of Equinox's facilities as performed by independent contractors" (*id.* at ¶ 3). Pagano states that the Facilities Department contracted and managed the work relating to the repair of the yoga studio on or around the date of the accident (*id.* at ¶ 9). He further states that Eclipse did not hire PNV (*id.* at ¶ 10).

Deposition Testimony of Jeremy Reese, former general manager of the Gym (NYSCEF Doc. No. 113)

Jeremy Reese appeared for deposition on January 25, 2021. At the time of the accident, he was the general manager of the Gym (Reese tr. at 11). He had no knowledge of PNV, Savant, Equinox, or plaintiff (*id.* at 22, 23, 25).

Reese testified that he did not work with Eclipse as it was not a part of the Facilities Department (*id.* at 78-79). He further testified that he "[doesn't] really have anything to do with [Eclipse]" (*id.*). He did not know if Eclipse had any employees at the time of the accident (*id.* at 79). Reese testified to his belief that Eclipse was a contracting company that did construction or renovation work at Equinox gyms (*id.* at 23-24).

Reese testified that on the date of the accident, there were mirrors "being delivered to be installed" in the Gym (*id. at* 13). These mirrors were intended to replace mirrors that were already in the Gym (*id.* at 14-15, 17). Reese did not recall the exact reasons why the mirrors (that were already in the Gym) were being replaced (*id.* at 15). He did not know if the mirrors that were delivered to the Gym on the date of the accident were ever installed (*id.* at 14, 17).

Deposition Testimony of Frances Pionegro, vice president of facilities for Equinox Holdings, Hudson Yards, New York City (NYSCEF Doc. No. 135, 136)

Frances Pionegro appeared for depositions on June 2 & 26, 2023. She testified that at the time of plaintiff's accident she was vice president of facilities for Equinox Holdings, Hudson Yards, New York City (Pionegro tr. at 7, 17). Pionegro testified that at the time of the accident the Gym was already up and running (*id.* at 24). She further testified that once an Equinox gym is built, the Facilities Department is responsible for addressing repairs to the gym (*id.* at 22).

Pionegro testified that that in early 2018, there was renovation work taking place in the Gym due to water damage (*id.* at 26-27). She further testified "[w]e had some studio damage. And I don't remember exactly what caused it, but I do know that we were expected to go in there and make the repairs" (*id* at 27).

Pionegro testified that PNV is a company that Equinox gyms use for alteration and renovation work (*id.* at 35). PNV does "general construction" work for Equinox gyms including painting and sheetrock, but not anything "trade specific" such as electrical or plumbing work (*id.*

at 36-37). Pionegro described PNV as a "decoration vendor" (*id.* at 37). She further testified that PNV was the contractor hired to assist in repairing water damage in the Gym's yoga studio (*id.* at 38-39).[2]

Affidavit of Vincent Ettari, P.E. (NYSCEF Doc. No. 164)

The Equinox Defendants submit an expert affidavit by Vincent Ettari. Ettari states that the Mirrors could not have fallen upon plaintiff (absent plaintiff removing the Cords) as the Mirrors were leaning against the wall of the Van at a 35-degree angle (Ettari affidavit at ¶¶ 42, 43, 54).[3]

Ettari further states that on September 4, 2023, he inspected the area of the Gym where the Mirrors were to be installed (*id.* at ¶ 61, 62). Based upon his examination, he concluded that the installation of the Mirrors would have constituted "[d]ecorative [a]ttachments to the [w]all" and does not fall within the scope of the Labor Law (*id.* at ¶ 63-66).

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

[2] The Court reviewed the deposition of Jennifer Rizzo, employee of Related Companies (NYSCEF Doc. No. 137) and an affidavit by David Zussman, vice-president of 1469 Second, dated January 12, 2022 (NYSCEF Doc. No. 89). As plaintiff withdrew his Labor Law §§ 240 (2), 240 (3), 200 and common law negligence claims, Rizzo's deposition and Zussman's affidavit do not speak to plaintiff's remaining claims against the Equinox Defendants.

[3] Ettari refers to plaintiff's expert affidavit of Stuart Sokoloff (NYSCEF Doc. No. 130), which is not otherwise referenced in the instant decision.

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]).

"[F]acts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012][internal quotation marks and citation omitted]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Plaintiff's Labor Law § 240 (1) claim

The Equinox Defendants move for summary judgment dismissing plaintiff's Labor Law § 240 (1) claims as against them (motion sequence 003). Plaintiff opposes and moves for summary judgment on these claims (motion sequence 004).

Labor Law § 240 (1), also known as the Scaffold Law, reads as follows:

"Scaffolding and other devices for use of employees

> 1. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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 upon owners, contractors and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work" (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]). Said liability applies to "injuries that are proximately caused by the failure to provide appropriate safety devices to workers subject to gravity-related risks" (*Ladd v Thor 680 Madison Ave LLC*, 212 AD3d 107, 111 [1st Dept 2022]).

Plaintiff argues that he is entitled to summary judgment on his Labor Law § 240 (1) claims as his accident involved a gravity-related risk and the Equinox Defendants' failure to provide adequate safety equipment was a proximate cause of the accident. Specifically, plaintiff alleges that the Mirrors constituted a gravity-related risk and that the Cords were insufficient to prevent the accident.

Here, plaintiff has established prima facie that he is entitled to summary judgment on his Labor Law § 240 (1) claims. Specifically, plaintiff has established prima facie that the Mirrors constituted a gravity-related risk and that the Cords were insufficient to prevent the Mirrors from falling.

Taken together, plaintiff and Garay's testimonies as to the Mirrors' weight and dimensions (Plaintiff tr. at 41; Garay tr. at 18, 60-61) establish prima facie that the Mirrors constituted a gravity-related risk (*See Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.,* 18 NY3d 1, 5 [2011] [Labor Law § 240 (1) does not categorically exclude accidents where injury is "caused by a falling object whose base stands at the same level as the worker"]; *Melendez v. Brown-United, Inc.*, 209 AD3d 437, 438 [1st Dept 2022] ["Although the base of the pipe may have been at the same level as plaintiff, the height differential cannot be described as de minimis given the amount of force the pipe was able to generate"]).

Further, plaintiff testified that the Cords were running across the Mirrors in the Van (Plaintiff tr. at 58) and Garay testified that the Mirrors were secured with belts and that unlocking the belts would cause the Mirrors to fall (Garay tr. at 53). Garay's testimony that the Cords secured the Mirrors from falling and plaintiff's testimony that the Cords failed to keep the Mirrors from falling establish prima facie that the insufficient Cords were a proximate cause of the accident.

The Equinox Defendants argue that they are not proper Labor Law defendants as the accident occurred in the Van and not on the Premises. Specifically, they argue that they are not "owners" under the Labor Law as they did not own or operate the Van, nor did they hire Savant.

There is no dispute that the Equinox Defendants are "owners" under the Labor Law as to the Premises. As such, the question of whether the Equinox Defendants are proper Labor Law defendants hinged upon the nature of plaintiff's work in connection with the Project/Premises and not whether the Equinox Defendants owned the specific vehicle where the accident occurred (*See Rodriguez v Riverside Ctr. Site 5 Owner LLC*, 231 AD3d 603, 603-604 [1st Dept 2024][Plaintiff's accident that occurred when he fell from a cement truck while cleaning it after delivering cement to a construction site, fell within the scope of Labor Law § 240 (1) as "plaintiff's washing the truck at the time of the injury was a continuation of his enumerated activity within the meaning of construction work under section 240, and his 'actions at the time of the injury were not separate or clearly distinguishable from his work'."][internal quotation marks and citation omitted]; *Rodriguez v Riverside Ctr. Site 5 Owner LLC*, 2025 NY Slip Op 04221, 1 [1st Dept 2025] recalling and vacating *Rodriguez v Riverside Ctr. Site 5 Owner LLC*, 234 AD3d 623 [1st Dept 2025]["Because plaintiff's work in delivering and unloading tiles to be used in the activity covered by Labor Law § 240(1) was 'necessary and incidental' to the protected activity" he was protected by Labor Law §§ 200, 240 (1) and 241 (6), "notwithstanding that he was not assigned to participate in the installation of the tiles"]; *Serrano v TED Gen. Contr.*, 157 AD3d 474, 475 [1st Dept 2018] [plaintiff was found to be a worker protected under Labor Law § 240 (1) "because he was making deliveries of construction materials to the worksite during an ongoing construction project"]).

The fact that the accident occurred inside of the Van does not imply that the Equinox Defendants are not proper Labor Law defendants (*See Rodriguez,* 231 AD3d at 603-604 [plaintiff entitled to summary judgment against owner of construction site where plaintiff's accident occurred on a cement truck owned by a third-party]; *Myiow v City of New York,* 143 AD3d 433, 436 [1st Dept 2016] [Plaintiff entitled to summary judgment on Labor Law § 240 (1) claim against owners of premise for accident that occurred on flatbed truck]; *Flores v Metropolitan Transp. Auth.*, 164 AD3d 418, 419 [1st Dept 2018] [Plaintiff entitled to summary judgment on Labor Law § 240 (1) claim against owners where plaintiff fell from a flatbed truck]).

Further, the Equinox Defendants' argument that they are not proper Labor Law defendants hinges upon a legally incorrect and unsupported conflation of vehicles with real property for the purposes of Labor Law § 240 (1). Specifically, they argue that if an accident occurred inside or on a vehicle, a party cannot be a proper Labor Law defendant (i.e. real property owners) unless they had an ownership interest in the vehicle.

The First Department has specifically determined that a plaintiff is entitled to summary judgment on his Labor Law § 240 (1) claim against the owner of a premises (the "Premises Owner") where the specific accident occurred in a vehicle that the Premises Owner did not own (*See Rodriguez,* 231 AD3d at 603-604 [plaintiff entitled to summary judgment against owner of construction site where plaintiff's accident occurred on a cement truck owned by a third-party]).

Further, the Equinox Defendants' conflation of vehicles with real property for the purpose of determining proper Labor Law defendants runs counter to the legislative intent of the Labor Law and is unsupported by either statute or caselaw.

> "The 'owners' who are contemplated by the Legislature under Labor Law § 240 (1) are those parties with a property interest who hire the general contractor. 'It is

> the party who, as a practical matter, has the right to hire or fire subcontractors and to insist that proper safety practices are followed" (*Frierson v Concourse Plaza Assocs.*, 189 AD2d 609, 611 [1st Dept 1993] quoting *Sweeting v Board of Coop. Educ. Servs.*, 83 AD2d103, 114 [4th Dept 1981] lv denied 56 NY2d 503 [NY 1982]).

In addition, it is well established that vehicles do not constitute real property (*See* Real Property Law § 2 ["The terms 'real property' and 'lands' as used in the first eight articles of this chapter are co-extensive in meaning with lands, tenements and hereditaments."]; General Construction Law § 40 ["The term real property includes real estate, lands, tenements and hereditaments, corporeal and incorporeal."]).

Further, none of the cases that the Equinox Defendants cite to in support of their argument stand for the position that vehicles are the equivalent of construction sites and/or real property for the purpose of defining "owners" within the scope of Labor Law § 240 (1). The Equinox Defendants cite to *Berner v Town of Cheektowaga*, (151 AD3d 1636, 1637 [4th Dept 2017]), and *Farruggia v Town of Penfield*, 119 AD3d 1320, 1321 [4th Dept 2014]). However, both *Berner* and *Farruggia* specifically refer to "owners" of real property and not vehicles (*Berner*, 151 AD3d at 1637 [defendant found not to be a proper Labor Law defendant because they were not the owner of a vacant home where the accident occurred]; *Farruggia* 119 AD3d at 1321 [defendant found not to be a proper Labor Law defendant because they were not the owner of the "landing area" where the accident occurred because they had "no other interest in or legal authority over the landing area, which was located entirely on… private property"]).

In particular, the Fourth Department's determination in *Farruggia* directly contradicts the Equinox Defendants' treatment of a vehicle as the equivalent of a construction site for the purposes of determining proper Labor Law defendants. In *Farruggia*, the plaintiff was operating a vehicle (a backhoe) that fell into a ravine (*Farruggia* 119 AD3d at 1320). The Fourth

Department's determination that the Town of Penfield was not a proper Labor Law defendant was based upon the town's lack of ownership interest in the area where the accident occurred (*Farruggia* 119 AD3d at 1321). The Fourth Department's determination in *Farruggia* was not based upon who owned the vehicle nor did they even address this issue.

The Equinox Defendants' argument that they must have an ownership interest in the Van in order to be a proper Labor Law defendant is based on a fundamentally incorrect conflation of vehicles with real property and is entirely without merit.[4] As such, they have failed to establish prima facie that they are not proper Labor Law defendants, nor have they created an issue of fact on this point.

The Equinox Defendants further argue that plaintiff's accident did not involve a gravity-related risk as the Mirrors were not being hoisted at the time of the accident and plaintiff was at the same elevation as the Mirrors when they fell upon him.

Although the height between a delivery vehicle and the ground does not constitute a gravity-related risk (*See Guido v Dormitory Auth. of the State of N.Y.,* 145 AD3d 591, 592 [1st Dept 2016] *citing Toefer v Long Is. R.R.,* 4 NY3d 399, 407-408 [2005]; *Lavore v Kir Munsey Park 020, LLC,* 40 AD3d 711, 712 [2d Dept 2007], *lv denied* 10 NY3d 701 [2008]), accidents that occur on a delivery vehicle may fall within the scope of Labor Law § 240 (1) where the gravity-related risk is unrelated to the distance between the vehicle and the ground (*see e.g. O'Brian,* 180 AD3d at 438 [the defendant was not entitled to summary judgment dismissing

[4] The Court further notes that the Equinox Defendants' conflation of vehicles with real property for the purpose of determining proper Labor Law defendants is also unworkable when applied to other potential Labor Law defendants. Labor Law §§ 200, 240 (1) and 241 (6) apply to contractors in addition to owners. In the context of the Labor Law, contractors are hired to perform work on construction sites, not specific vehicles. If, as argued by the Equinox Defendants, proper Labor Law defendants are determined based upon their relationships to specific vehicles and not the nature of the work performed in relation to a construction sites, contractors would be excluded from liability whenever an accident occurred in or near a vehicle regardless of the nature of the injury-producing work.

Labor Law § 240 (1) claim where the plaintiff "alleges that he was unloading windows from a tractor trailer when a stack of eight or nine windows that were stored vertically at an angle against the trailer wall tipped over and fell on him"]); *Flores,* 164 AD3d at 419 [the defendant was not entitled to summary judgment dismissing Labor Law § 240 (1) claim where the plaintiff "fell off a flatbed truck after a load of steel beams, without tag lines, was hoisted above him by a crane, and began to swing towards him"]; *Myiow,* 143 AD3d at 436 [the plaintiff was entitled to summary judgment on Labor Law § 240 (1) claim where he was injured while standing on a load of beams on top of a flatbed truck]).

Here, the accident did not occur while the plaintiff was actively unloading mirrors from the Van to the ground but while plaintiff was inside the Van (Plaintiff tr. at 91). Although plaintiff testified that he had opened the Van's rear doors and removed one of the Cords from the Mirrors prior to the accident, there is nothing in the record to suggest that the accident occurred while he was actively unloading the Mirrors from the Van to the ground. As such, plaintiff was on the same level as the Mirrors at the time of the accident.

Labor Law § 240 (1) does not categorically exclude accidents where injury is "caused by a falling object whose base stands at the same level as the worker" (*See Wilinski,* 18 NY3d at 5 [2011]; *Argueta v 39 W 23rd St. LLC,* 236 AD3d 564, 565 [1st Dept 2025][Plaintiff entitled to summary judgment on his Labor Law § 240 (1) claim where a metal post that was leaning against a truck fell on him. "Given the weight and length of the post and the distance it fell, this testimony established that plaintiff was exposed to an elevation-related risk"]; *Melendez,* 209 AD3d at 438; *O'Brian v 4300 Crescent L.L.C.,* 180 AD3d 437, 438 [1st Dept 2020] [Defendant not entitled to summary judgment dismissing Labor Law § 240 (1) claim where plaintiff "alleges

that he was unloading windows from a tractor trailer when a stack of eight or nine windows that were stored vertically at an angle against the trailer wall tipped over and fell on him"])

> "[T]he dispositive inquiry… does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker. Rather, the 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]).

As previously stated, plaintiff and Garay's testimonies as to the Mirrors' weight and dimensions established prima facie that the Mirrors constituted a gravity-related risk. Further, the Equinox Defendants have failed to establish prima facie that the Mirrors did not constitute a gravity-related risk nor have they created an issue of fact on this point.

The Equinox Defendants further argue that plaintiff's accident does not fall within the scope of the Labor Law as he was only engaged in transporting materials and not construction work at the time of the accident. They further argue that plaintiff's accident does not fall within the scope of the Labor Law as "the installation of decorative mirrors," does not constitute significant structural alteration (Equinox Defendants' memorandum of law in opposition to plaintiff's motion for summary judgment at 12, NYSCEF Doc. No. 186).

Labor Law § 240 (1) "applies to workers 'employed' in the 'erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure'" (*Stoneham v Joseph Barsuk, Inc.*, 41 NY3d 217, 220 [2023] *quoting Dahar v Holland Ladder & Mfg. Co.*, 18 NY3d 521, 524-525 [2012].

> "The analysis [of whether specific work falls within the scope of Labor Law §240 (1)] is not limited to the moment of injury, since 'it is neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the work'. Thus, even where the worker is engaged in a task that is 'ancillary' to work falling under one of the enumerated categories of covered work, he or she will be covered by the statute's protections where his work is 'an integral part' of the larger project.

(*Mananghaya v Bronx-Lebanon Hosp. Ctr.,* 165 AD3d 117, 124 [1st Dept 2018] citing *Saint v Syracuse Supply Co.*, 25 N.Y.3d 117, 124, 126 [2015]; *Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]; *Belding v Verizon N.Y., Inc.*, 65 AD3d 414, 415 [1st Dept 2009], *affd* 14 NY3d 75 [2010])

The installation of mirrors may fall outside the scope of the Labor Law where the evidence demonstrates that it "was not done in the context of construction, demolition or excavation work" (*See Rajkumar v Budd Contr. Corp.,* 77 AD3d 595, 595 [1st Dept 2010]).

Here, plaintiff has established that his work fell within the scope of the Labor Law to the extent that he was delivering the Mirrors to the Premises as part of an ongoing construction project on the Premises. Both plaintiff and Garay (Savant's production manager) testified that the accident occurred while Savant was attempting to deliver the Mirrors to the worksite (Plaintiff tr. at 29, 40; Garay tr. at 15, 17, 24, 26). Both Plaintiff and Garay further testified that the Van brought the Mirrors to the Premises (Plaintiff tr. at 43-44; Garay tr. at 27-28). Garay further testified that the wall in the yoga studio area of the Gym was "freshly prepared" for the installation of mirrors (Garay tr. at 63-64). Pionegro, the vice president of facilities for Equinox Holdings, Hudson Yards, New York City testified that in early 2018, there was renovation work taking place in the Gym due to water damage and that PNV was the contractor hired to assist in repairing water damage in the Gym's yoga studio (Pionegro tr. at 26-27, 38-39). In addition, Pagano, an area facilities manager for Equinox Holdings at the time of the accident, stated in his affidavit that the installation of mirrors was part of a larger job to repair water damage in the yoga studio (Pagano affidavit at ¶ 6).

Taken together, plaintiff's testimony, Garay's testimony, Pionegro's testimony and Pagano's statement establish that plaintiff's work at the time of the accident fell within the scope

of Labor Law § 240 (1) to the extent that delivering the Mirrors was part of an ongoing construction project on the Premises (*See Rodriguez v Riverside Ctr. Site 5 Owner LLC*, 231 AD3d 603, 603-604 [1st Dept 2024][Plaintiff's accident that occurred when he fell from a cement truck while cleaning it after delivering cement to a construction site, fell within the scope of Labor Law § 240 (1) as "plaintiff's washing the truck at the time of the injury was a continuation of his enumerated activity within the meaning of construction work under section 240, and his 'actions at the time of the injury were not separate or clearly distinguishable from his work'."][internal quotation marks and citation omitted]; *Rodriguez v Riverside Ctr. Site 5 Owner LLC*, 2025 NY Slip Op 04221, 1 [1st Dept 2025] recalling and vacating *Rodriguez v Riverside Ctr. Site 5 Owner LLC*, 234 AD3d 623 [1st Dept 2025]["Because plaintiff's work in delivering and unloading tiles to be used in the activity covered by Labor Law § 240(1) was 'necessary and incidental' to the protected activity" he was protected by Labor Law §§ 200, 240 (1) and 241 (6), "notwithstanding that he was not assigned to participate in the installation of the tiles"]; *Serrano v TED Gen. Contr.*, 157 AD3d 474, 475 [1st Dept 2018] [plaintiff was found to be a worker protected under Labor Law § 240 (1) "because he was making deliveries of construction materials to the worksite during an ongoing construction project"]).

The Equinox Defendants have failed to establish prima facie that the delivery of the Mirrors to the Premises was not part of an ongoing construction project, nor have they created an issue of fact on this issue. The Equinox Defendants cite to *Flores v ERC Holding LLC* (87 AD3d 419 [1st Dept 2011]) in support of the position that transporting materials is distinguished from construction work under the Labor Law. However, *Flores* is distinguishable from the instant action in that the *Flores* accident occurred at an "off-site storage yard" (*Flores*, 87 AD3d at 421) and not a worksite.

Further, the Equinox Defendants have failed to submit any proof in support of their position that the delivery of the Mirrors was not part of an ongoing construction project. The Equinox Defendants' argument on this point hinges upon their position that the installation of the Mirrors was purely cosmetic and not part of an ongoing construction project. However, they have not submitted any proof to establish that the renovation project was already complete when the Mirrors were being delivered to the Gym nor that the installation of the Mirrors was separate and apart form the construction project. In point of fact, Pagano specifically states that the Mirrors' installation was part of a project to repair water damage in the Gym's yoga studio (Pagano affidavit at ¶ 6).

The Equinox Defendants argue that Garay's testimony establishes that the wall repairs had already been completed at the time of the accident (Equinox Defendants' memorandum of law in opposition to plaintiff's motion for summary judgment at 13, NYSCEF Doc. No. 186). However, Garay only testified that the wall was "freshly prepared" and ready for the installation of mirrors (Garay tr. at 63-64). He gave no indication as to what "freshly prepared" meant nor did he give any physical description of the wall apart from this phrase. Further, Garay specifically testified that he did not know about the other work being done in the area where the Mirrors were to be installed (*id.* at 63).

In addition, Ettari's (Equinox Defendants' expert) affidavit is insufficient to establish prima facie that the repairs had been completed prior to the accident or create an issue of fact on this point. Ettari inspected the area (where the Mirrors were to be installed) on September 4, 2023, more than five years after the date of the accident. Ettari's observations of the walls of the yoga studio more than five years after the accident do not speak to whether the walls were fully repaired prior to the accident. As such, Ettari's observations from his September 4, 2023,

inspection do not establish prima facie that plaintiff's accident did not fall within the scope of Labor Law § 240 (1) nor create an issue of fact on this point.

It is undisputed that Savant brought the Mirrors to the Premises so that they could be installed in the Gym. Further, plaintiff has established that the delivery of the Mirrors was ancillary to the repair project.

The Equinox Defendants have failed to establish prima facie that the accident does not fall within the scope of Labor Law § 240 (1) on the basis that plaintiff was only delivering the Mirrors to the Premises nor have they created an issue of fact on this point.

As such, the Equinox Defendants have failed to meet their prima face burden on their motion for summary judgment dismissing Plaintiff's Labor Law § 240 (1) claim.

The Equinox Defendant argue in opposition to plaintiff's motion for summary judgment (motion sequence 004), but not in support of their motion for summary judgment (motion sequence 003), that there is an issue of fact as to whether the Mirrors required "securing for the purposes of the undertaking at the time they fell" and that Plaintiff "removed the bands securing the mirrors" prior to the accident (NYSCEF Doc. No. 186, Equinox Defendants' memorandum of law in opposition to plaintiff's motion for summary judgment at 9, 9 n 9).

Although the Equinox Defendants do not argue that plaintiff was recalcitrant, they do argue that there is an issue of fact as to whether the Cords were inadequate safety devices and thereby a proximate cause of the accident (*See Runner*, 13 NY3d at 603 ["[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"])

> "Even when a worker is not 'recalcitrant', we have held that there can be no liability under section 240 (1) when there is no violation and the worker's actions (here, his negligence) are the 'sole proximate cause' of the accident. Extending the statute to impose liability in such a case would be inconsistent with statutory

> goals since the accident was not caused by the absence of (or defect in) any safety device, or in the way the safety device was placed."

Blake v Neighborhood Hous. Servs. of N.Y. City, Inc., 1 NY3d 280, 290 [NY 2003]).

Plaintiff testified that there were two Cords holding the Mirrors together (plaintiff tr. at 58) and that he removed one of the Cords immediately prior to the accident (*id.* at 60-61). Garay testified that unlocking Cords would cause the Mirrors to fall (Garay tr. at 53). Taken together, said testimonies creates an issue of fact as to whether the Cords were adequate safety devices to prevent the Mirrors from falling had they both been locked at the time of the accident and whether plaintiff's removal of the Cords was the sole proximate cause of the accident.

As such, there is an issue of fact sufficient to deny plaintiff's motion for summary judgment on his Labor Law § 240 (1) claim.

Plaintiff's Labor Law § 241 (6) claim

Labor Law §241 (6) reads as follows:

> "Construction, excavation and demolition work
>
> . . .
>
> 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

"Labor Law § 241 (6) imposes a non-delegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of

Labor" (*Toussaint v Port Auth. of N.Y. & N.J.*, 38 NY3d 89, 93 [2022] [internal quotations marks and citations omitted]).

The non-delegable duty is absolute and "imposes liability upon a general contractor for the negligence of a subcontractor, even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502 [1993] [emphasis omitted]). "To establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision 'mandating compliance with concrete specifications'" (*Ennis v Noble Constr. Group, LLC*, 207 AD3d 703, 705 [2d Dept 2022], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 505).

Plaintiff does not oppose dismissal of his Labor Law § 241 (6) claims based upon any alleged violations other than Industrial Code §§ 23-1.7(a) and 23-2.1(a) (Affirmation in support of plaintiff's cross-motion and in opposition to defendant's motion at ¶ 42 (NYSCEF Doc. No. 105). Accordingly, those claims are dismissed as abandoned (*Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section."]).

As such, the only Labor Law § 241 (6) claims before the Court are based upon the Equinox Defendants' alleged violations of Industrial Code 23-1.7 (a) and 23-2.1 (a).

Industrial Code 23-1.7 (a)

Industrial Code 23-1.7 (a) is sufficiently specific to form a basis for liability pursuant to Labor Law § 241 (6) (*See Zuluaga v. P.P.C. Constr., LLC*, 45 AD3d 479, 480 [1st Dept 2007]) and reads as follows:

> "Protection from general hazards
>
> (a) Overhead hazards.
>
> > (1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot.
> >
> > (2) Where persons are lawfully frequenting areas exposed to falling material or objects but wherein employees are not required to work or pass, such exposed areas shall be provided with barricades, fencing or the equivalent in compliance with this Part (rule) to prevent inadvertent entry into such areas."

Labor Law § 241 (6) claims based upon violations of section 23-1.7 (a) are subject to dismissal where there is "no evidence establishing that the area where the accident occurred was not normally exposed to falling material or objects and therefore did not require overhead protection" (*See Salcedo v Sustainable Energy Options, LLC*, 190 AD3d 439, 440 [1st Dept 2021] [internal quotation marks omitted])

Here, plaintiff has not submitted any evidence suggesting that the interior of the Van was normally exposed to falling materials that would require overhead protection as contemplated by this provision.[5]

As such, the Equinox Defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 241(6) claim based upon an alleged violation of Industrial Code 23-1.7 (a).

[5] The Court notes that Plaintiff only addresses his Labor Law § 241(6) claim based upon section 23-1.7 (a) in his affirmation in support of plaintiff's cross-motion and in opposition to defendants' motion (motion sequence 003) (NYSCEF Doc. No. 105) and not in his affirmation in support of plaintiff's motion and in opposition to defendants' motion (motion sequence 004) (NYSCEF Doc. No. 125).

Industrial Code 23-2.1 (a)

Industrial Code 23-2.1 (a) is sufficiently specific to form a basis for liability pursuant to Labor Law § 241 (6) (*See Armental v 401 Park Ave. S. Assoc., LLC,* 182 AD3d 405, 407 [1st 2020]) and reads as follows:

Maintenance and housekeeping

"(a) Storage of material or equipment.

(1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.

(2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge."

Here, section 23-2.1 (a) (1) is inapplicable as the accident occurred in the Van (*See Kocurek v. Home Depot, U.S.A.P., Inc.,* 286 AD2d 577, 580 [1st Dept 2001] [Section 23-2.1 (a) is inapplicable to accident that occurred in a transportation trailer as it "does not constitute a storage area in the work site."]; *see also Rodriguez v D & S Bldrs., LLC,* 98 AD3d 957, 959 [2d Dept 2012] [12 NYCRR 23-2.1 (a) (1) is not applicable since the "accident occurred on a flatbed truck, not a passageway, walkway, stairway or other thoroughfare"]).

Plaintiff cites to *Fontaine v Juniper Assoc.* (67 AD3d 608 [1st Dept 2009]) in arguing that section 23-2.1 (a) can apply to accidents that occur in transport vehicles, such as the Van. However, *Fontaine* only addresses section 23-2.1 (a) (2) and not section 23-2.1 (a) (1). The *Fontaine* court determined that section 23-2.1 (a) (2) applied to an accident involving items falling from a transport vehicle (a flatbed truck) based upon the allegations that the items had

been placed so close to the edge of the truck that they endangered a worker standing at ground level below the vehicle (*Fontaine,* 67 AD3d at 609, *affg Fontaine v Juniper Assoc.,* 26 Misc 3d 493, 495-496 [2009 Sup Ct, Bronx County]). Said allegations fall within the scope of section 23-2.1 (a) (2), which prohibits the placement of objects along "any edge of a floor, platform or scaffold as to endanger any person beneath such edge."

Here, there are no allegations that plaintiff was beneath the edge of the Van at the time of the accident. Further, there is no basis to conclude that the placement of the Mirrors in relation to the edge of the Van was a proximate cause of the accident.

As such, the Equinox Defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim based upon an alleged violation of Industrial Code 23-2.1 (a) (2).

The parties' remaining arguments have been considered and found unavailing.

CONCLUSION AND ORDER

Accordingly, it is hereby

ORDERED that defendants, Eclipse Development, Inc., Equinox 74th Street, Inc. and 1429 Second Avenue Association, LLC's, (the "Equinox Defendants") motion for summary judgment pursuant to CPLR 3212 dismissing the complaint as against them (motion sequence 003) is granted to the extent that plaintiff's Labor Law § 241 (6) claims are hereby dismissed, plaintiff's Labor Law §§ 240 (2), 240 (3), 200 and common law negligence claims are withdrawn, and the motion is otherwise denied; and it is further

ORDERED that plaintiff, Jose Rene Amendando Fajardo's, cross-motion to strike the Equinox Defendants' answers is denied; and it is further

ORDERED that plaintiff's motion for summary judgment pursuant to CPLR 3212 as to liability in his favor on his Labor Law § 240 (1) claim (motion sequence 004) as against the Equinox Defendants is denied.

This constitutes the Decision and Order of the Court.

10/14/2025
DATE

James d'Auguste, J.S.C.

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