SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

DAN RODRIGUEZ

INDEX NO. 150464-2019

MOT. DATE

- v -

MOT. SEQ. NO. 3&4

FAWN EAST FOURTH STREET LLC et al

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS Doc. No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS Doc. No(s)._____
Replying Affidavits ECFS Doc. No(s)._____

In this personal injury action, plaintiff seeks to recover for personal injuries he sustained while working as a plumber's assistant when a hot water heater fell onto him. Plaintiff now moves for summary judgment in his favor on his Labor Law § 240[1] claim and to preclude deposition testimony from non-party witness William Nasert (motion sequence 3). Defendants Fawn East Fourth Street LLC ("Fawn East") and Citi-Urban Management Corp. ("Citi-Urban") also move for summary judgment dismissing plaintiff's complaint (motion sequence 4). Issue has been joined and the motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available. The motions are hereby consolidated for the court's consideration and disposition in this single decision/order. The court's decision follows.

The relevant facts are mostly undisputed. Defendants own and manage the premises located at 326 East 4th Street in New York, New York (the "premises"). On October 12, 2018, plaintiff was working at the premises as a plumber's assistant for non-party Genuine Plumbing when the accident occurred. At the time of the accident, Genuine Plumbing had been hired to replace the hot water heater at the premises (the "project"). Plaintiff's foreman was named Billy, whose full name is William Nasert. Genuine Plumbing produced Nasert, a mechanic under its employ, pursuant to defendants' subpoena calling for production of Thomas Loria on April 29, 2019.

At his deposition, Nasert explained that to complete the project, the old water heater had to be uninstalled and removed from the premises and a new water heater brought into the premises and "hook[ed] up [to] the gas, flue, water".

On the date of the accident, the new heater was unloaded by a delivery person onto the sidewalk using a hand truck. Two straps secured the heater to the hand truck and the heater was packaged in

Dated: 1/27/23

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is Mot. Seq #4 ☒ GRANTED Mot Seq #3 ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

cardboard and plywood packing materials. There were about three or four Genuine Plumbing employees at the premises on the date of plaintiff's accident, including plaintiff, who then removed the heater from its packing materials. In addition, there were two welders who removed a cast iron entry door so that the heater could be brought onto the premises.

The heater was between four and six feet high and about a foot to a foot and a half in diameter. According to Nasert, the heater weighed 80 to 100 pounds. Plaintiff, however, testified at his deposition that the heater weighed 600 pounds because "[i]t said it on the box, well on the boiler itself.".

After discarding the packing materials, the heater was loaded onto a two-wheeled metal cart owned by Genuine Plumbing which was about four feet high with a bottom platform about one square foot in size. The heater was secured to the cart with one strap. According to Nasert, it was standard to transport a heater in this manner.

Plaintiff testified at his deposition that the heater then tipped forward and fell onto him as follows:

> I was directed to hold on to one of the hand truck handles while the other assistant was on my left side. Billy [Nasert] and I don't know who the other person's name was in front of the boiler, tipped the boiler forward in order for it to be angled for us to roll it down the steps, causing the boiler then to I guess hit my face first or hit my chest first, I don't know. Once I hit the floor, I lost consciousness for maybe five, ten seconds. I don't really recall. Like I said, I don't really know how long it was or how long it lasted. But it felt like I kinda like woke myself up, brought myself back into life. I closed my eyes, I opened my eyes and I saw the handlebar of the hand truck right next to my face. I looked slightly down like this, I saw my hand on top of my chest right here covering my ribs.

There is no dispute that plaintiff received all of his instructions from Nasert and that defendants did not direct Genuine Plumbing or plaintiff's work and did not supply any tools or materials for the project. Plaintiff's complaint asserts causes of action for violation of Labor Law §§ 200, 240[1] and 241[6] as well as for common law negligence.

DISCUSSION

At the outset, plaintiff asserts that Nasert's deposition testimony should be precluded because "[d]efendant's never noticed the deposition of non-party witness William Nasert, Instead, they noticed the deposition of Thomas Loria [on behalf of Genuine Plumbing] and then performed a bait and switch at the time of the deposition." Said deposition took place on April 29, 2019, and defendants maintain that Nasert's testimony should not be precluded because plaintiff has suffered no prejudice and the notice requesting production of Loria was not wilful or contumacious. Defense counsel further states: "[i]ndeed, given that Genuine Plumbing only notified the undersigned shortly before the scheduled deposition about its unilateral decision to substitute Mr. Nasert in place of Mr. Loria, Defendants barely had any more notice of the change in deponents than Plaintiff did."

As defense counsel correctly points out, plaintiff has not identified any authority which supports the proposition he advances, to wit, that a non-party deposition noticed years prior to a summary judgment motion should be precluded from being offered into evidence merely because the notice requested a different employee than the employee that the non-party ultimately produced. Otherwise, the court finds that there is no prejudice to plaintiff by the substitution and the court will therefore consider Nasert's deposition testimony.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary

judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Labor Law § 240[1]

Labor Law § 240[1], which is known as the Scaffold Law, imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v. Eastern Railway Supply, Inc.*, 82 NY2d 555 [1993]). The statute provides in pertinent part as follows:

> All contractors and owners and their agents, ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a premises 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 protects workers from "extraordinary elevation risks" and not "the usual and ordinary dangers of a construction site" (*Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841 [1994]). "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)" (*Narducci v. Manhasset Bay Associates*, 96 NY2d 259 [2001]).

Section 240[1] was designed to prevent accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person (*Runner v. New York Stock Exchange, Inc.*, 13 NY3d 5999 [2009] quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). The protective devices enumerated in Labor Law § 240 [1] must be used to prevent injuries from either "a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991]).

The court agrees with defendants that plaintiff was not engaged in Section 240[1] category of work and therefore this statute is inapplicable. Section 240[1] applies to "erection, demolition, repairing, altering, painting, cleaning or pointing of a premises or structure..." Plaintiff was replacing and installing a hot water heater. Plaintiff argues that his work was "part of an overall project which included removing an existing entry door", but this fact does not transform the work for which Genuine Plumbing was hired into a repair or alteration of the premises as the Legislature intended Section 240[1] to apply to.

Plaintiff's counsel cites *Gaston v. Trustees of Columbia Univ., in City of N.Y.* (190 AD3d 551 [1st Dept 2021]), but this case is distinguishable. In *Gaston*, the First Department stated that there was a triable issue of fact as to whether the plaintiff therein was engaged in protected work because the larger project involved "removing portions of the boilers via blowtorches and installation of new components by welding". Here, the old water heater was disconnected and removed from the premises and a new water heater was to be brought into the premises and reconnected. This is merely routine maintenance to which Section 240[1] does not apply. Plaintiff's counsel points to the welders who removed the cast iron door from the premises, but the court finds that the welders' work lacks a sufficient nexus to plaintiff's injury-producing work to transform the project into a repair or alteration of the premises within the meaning of Section 240[1]. It was not plaintiff's job to remove the cast iron door. Rather, another entity was hired to perform this work. Accordingly, defendants' motion is granted to the extent that plaintiff's

Section 240[1] claim is severed and dismissed. The court declines to consider the parties' remaining arguments on this claim as moot.

Labor Law § 241 [6]

Defendants argue that plaintiff's Section 241[6] claim should also be dismissed because he was not engaged in a protected category of work and his accident did not arise from a violation of the Industrial Code. Labor Law § 241[6] imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure that:

> [a]ll 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 scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57th Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]).

The court again agrees with defendants that plaintiff's injury-producing work, replacing and installing a hot water heater, does not fall within the categories of work to which Section 241[6] applies, to wit, "construction, excavation or demolition work". Indeed, plaintiff does not offer any substantive opposition to this branch of defendants' motion. Therefore, defendants' arguments are conceded on this claim. Accordingly, defendants' motion as to Section 241[6] is granted and this claim is also severed and dismissed.

Labor Law § 200 and common law negligence

Finally, defendants move for summary judgment dismissing plaintiff's Section 200 and common law negligence claim. Labor Law § 200 codifies the common law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Comes v. New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993]). There are two categories of Labor Law § 200 and common law negligence claims: injuries arising from dangerous or defective premises conditions and injuries arising from the manner or means in which the work was performed (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]). In order to demonstrate a *prima facie* case under the former category, a plaintiff must prove that the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v. Highpoint Asoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]). Where the injury was caused by the manner of the work, the owner or general contractor will be liable if it exercised supervisory control over the work performed (*Foley v. Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476 [1st Dept 2011]).

Here, there can be no dispute that plaintiff's Section 200 and negligence claim arose from the means and methods of his work, which Defendants did not control. Therefore, defendants' motion as to this claim must also be granted.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion sequence 3 is denied in its entirety; and it is further

ORDERED that defendants' motion sequence 4 for summary judgment dismissing plaintiff's complaint is granted, plaintiff's complaint is dismissed and the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 1/27/23
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.