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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 30

Index Number : 112474/2006

FERNANDEZ, KEITH

vs

ONE BRYANT PARK

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 2/25/08

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

JUN 11 2008

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

The within motion and cross motion are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the part of plaintiff's motion which seeks summary judgment on his Labor Law § 240 (1) cause of action is denied; and it is further

ORDERED that the part of plaintiff's motion which seeks summary judgment on his Labor Law § 241 (6) cause of action is granted; and it is further

ORDERED that the part of defendants' cross motion which seeks summary judgment dismissing the complaint is denied; and it is further

ORDERED that the part of defendants' cross motion which seeks vacatur of the note of issue is denied; and it is further

FOR THE FOLLOWING REASON(S):

Dated: _____

_____ J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate ☐ DO NOT POST ☐ REFERENCE

ORDERED that the remainder of defendants' cross motion is granted, and plaintiff shall produce the most current X-rays of his injured wrist, forearm, elbow and shoulder for review by defendants' designated physicians within 20 days of the service of this order with notice of entry, and shall submit to a physical examination by Dr. Martin Posner as soon as defendants can schedule the examination, which scheduling shall not be unduly delayed; and it is further

ORDERED that trial of this matter is stayed pending the completion of discovery; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendants.

Dated 6/10/08 ENTER: J.S.C.

HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 3]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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KEITH FERNANDEZ,

Plaintiff,

-against-

Index No. 112474/06

ONE BRYANT PARK LLC, TISHMAN CONSTRUCTION CORPORATION OF MANHATTAN and TISHMAN CONSTRUCTION CORPORATION OF NEW YORK,

Defendants.

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Carol R. Edmead, J.:

This action arises from a construction site accident which occurred on August 21, 2006, at a building being erected at One Bryant Park/1111 Sixth Avenue in Manhattan. Plaintiff, then employed as a laborer by non-party Century Maxim Construction Co. (Century Maxim), a cement subcontractor, was injured when he fell approximately 35 feet to a sub-basement through an exposed design opening[1] on the first floor. According to the Construction Management Agreement between defendants Tishman Construction Corporation of New York (Tishman) and One Bryant Park LLC (One Bryant Park), the subcontract between One Bryant Park/Tishman and Century Maxim, and the contract between One Bryant Park/Tishman and Total Safety Consultants, LLC (Total Safety), One Bryant Park was the owner of the property, and Tishman was the construction

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[1]A "design opening" is one "made for mechanical purposes, and design[ed] as part of the structural or concrete work to provide access for piping, duct work, or plumbing" (Quinones Depo., at 29).

manager for the project, acting as One Bryant Park's agent. The Construction Management Agreement clarifies that One Bryant Park was actually the tenant under a ground lease with the New York State Urban Development Corporation d/b/a Empire State Development Corporation as landlord.

In this motion sequence number 003, plaintiff moves, pursuant to CPLR 3212, for summary judgment on the issue of defendants'[2] liability under Labor Law §§ 240 (1) and 241 (6). Defendants cross-move: (1) pursuant to CPLR 3212, for summary judgment dismissing the complaint; (2) pursuant to section 202.21 (e) of the Uniform Rules for New York State Trial Courts, to vacate the note of issue and certificate of readiness; (3) pursuant to CPLR 3124 and 3126, for an order compelling plaintiff to supply all outstanding discovery, or precluding plaintiff from providing elements of his case at trial for which particulars have not been provided; and (4) pursuant to CPLR 2201, for an order staying the trial until after the completion of discovery.

The complaint asserts causes of action sounding in common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6). In his bills of particulars, plaintiff asserts violation of Industrial Code (12 NYCRR Part 23) § 23-1.7 (b) (1) (i) as the basis for his Labor Law § 241 (6) claim.

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[2]By stipulation dated November 16, 2006, the action was discontinued with prejudice as against defendant Tishman Construction Corporation of Manhattan.

Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). "'Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers'" *Santiago v Filstein*, 35 AD3d 184, 186 [1st Dept 2006], quoting *Winegrad*, 64 NY2d at 853). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson*, 39 AD3d at 306, citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). "The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues" (*Sheehan v Gong*, 2 AD3d 166, 168 [1st Dept 2003], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Plaintiff's Motion

Labor Law § 240 (1)

"Labor Law § 240 (1) provides special protection to those engaged in the 'erection ... of a building or structure'" (*Prats v Port Authority of New York and New Jersey*, 100 NY2d 878, 880 [2003]). It was designed "to prevent those types of accidents in which the ... 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*" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501 [1993]). The statute imposes absolute liability upon owners, contractors, and their agents for injuries to workers that were proximately caused by the failure to provide safety devices necessary to protect the workers from elevation-related risks and hazards, such as "falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*id.* at 501). "In order to establish prima facie entitlement to judgment as a matter of law on a cause of action pursuant to Labor Law § 240 (1), a plaintiff must provide evidence that the statute was violated and that the violation was the proximate cause of his or her injuries" (*Woszczyna v BJW Associates*, 31 AD3d 754, 755 [2d Dept 2006]).

Defendants maintain that they are not subject to the strictures of the statute because plaintiff has not proven that

One Bryant Park is the owner, or that Tishman was an agent of the owner. This contention is unpersuasive, because the contracts involved all identify One Bryant Park as the owner and Tishman as its agent. Moreover, even if defendants had argued that One Bryant Park was just a tenant, as indicated by the Construction Management Agreement, it would be unavailing. Under section 240 (1), the term "owner" includes owners in fee (*Gordon v Eastern Railway Supply*, 82 NY2d 555, 560 [1993]), as well as "a 'person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit' [citation omitted]" (*Zaher v Shopwell, Inc.*, 18 AD3d 339, 339 [1st Dept 2005]; *see also Walp v ACTS Testing Labs, Inc./Division of Bureau Veritas*, 28 AD3d 1104, 1104-1105 [4th Dept 2006] ["'The term "owner" as used in (sections 240 [1] and 241 [6]) is not limited to titleholders, but also encompasses one who "has an interest in the property," such as a lessee ..., who contracted for or otherwise has the right to control the work' (citations omitted)"]; *Murphy v Sawmill Construction Corp.*, 17 AD3d 422, 424 [2d Dept 2005] ["owner" includes "those who have an interest in property, such as easement holders and lessees"]; *Lynch v City of New York*, 209 AD2d 590, 591 [2d Dept 1994] ["owner" includes "those entities with interests in the property which have the right, as a practical matter, to hire and fire the subcontractors and to insist that proper safety practices are followed"];

Frierson v Concourse Plaza Associates, 189 AD2d 609 [1st Dept 1993] [same]). Both One Bryant Park and Tishman, as tenant/owner and agent, fall within the coverage of Labor Law §§ 240 (1) and 241 (6).

Defendants' second contention is that plaintiff was the sole proximate cause of his injuries.

> Where a "plaintiff's actions [are] the sole proximate cause of his injuries, ... liability under Labor Law § 240 (1) [does] not attach" [citations omitted]. Instead, the owner or contractor must breach the statutory duty under section 240 (1) to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries. These prerequisites do not exist if adequate safety devices are available at the job site, but the worker either does not use or misuses them

(*Robinson v East Medical Center, LP*, 6 NY3d 550, 554 [2006]; *see also Blake v Neighborhood Housing Services of New York City*, 1 NY3d 280, 290 [2003] ["if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation"]).

The safety device which would have prevented plaintiff's fall was a proper cover for the opening. It is hotly contested whether a proper cover was in place at the time of the accident (plaintiff contends that it was absent), or whether plaintiff

himself removed the cover and then inadvertently fell into the opening (defendants' position). The evidence before the court raises material questions of fact concerning how the accident occurred and whether plaintiff was the sole proximate cause of his injuries.

Plaintiff avers that on the day of the accident, he was assigned to assist Century Maxim carpenters, bringing material, taking down forms, moving equipment and doing general cleanup (Plaintiff's 12/7/07 Aff., ¶ 3). In performing its cement work, Century Maxim erects wood forms into which the cement is poured, and after the cement is dry, the forms are stripped from the hardened concrete. This process leaves debris, including scraps of wood and plywood (*id.*, ¶ 4). Part of plaintiff's job that day was to pick up 12-foot two-by-fours, called ribs, that had been used as part of the cement forms, and return them to a rack at the far end of the first floor (*id.*, ¶ 6). Plaintiff asserts that as he was carrying two ribs toward the rack, he fell through an uncovered opening in the floor, and fell 35 feet to the sub-basement, suffering injuries (*id.*, ¶ 7; Plaintiff's Depo., at 113). According to plaintiff, there were no markings or barricades to warn of the opening, and he did not remove the plywood cover over the opening, or any other full sheet of plywood (*id.*, ¶ 8; Plaintiff's Depo., at 113). No witness has testified that he or she actually saw plaintiff remove the

plywood cover over the opening (Quinones Depo., at 65).

Defendants marshal the following evidence in support of their claim that plaintiff himself was the sole proximate cause of his accident by his removing the cover from the opening and then stepping through the hole. Tomasz Dering, who was Total Safety's safety and loss control consultant on site that day, attests that after learning of plaintiff's injury, he immediately went to the first floor to inspect the opening through which plaintiff fell. He found an opening three-quarters exposed, with a plywood cover covering the remaining quarter. To him, it appeared that the cover had been lifted and shifted (Dering Aff., ¶ 6). In examining the plywood, he saw that it was "properly marked" with "X HOLE X"; that it was the proper size and shape to protect the opening; and that the plywood had two cleats[3] on the bottom side (*id.*, ¶ 7). Dering testified that because of the cleats, the cover had to have been intentionally lifted out of the opening; it could not have been moved inadvertently (*id.*, ¶ 10).

Century Maxim's labor foreman, Michael O'Sullivan, attested that, even though he assigned plaintiff to clean up the concrete, debris and other material on the first floor, the things he would have been cleaning up would not have been the

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[3]"Cleats" are two-by-fours nailed to the bottom of a plywood cover to ensure a snug fit and to prevent horizontal movement or displacement of a cover (Dering Aff., ¶ 8).

size of the plywood cover for the opening (O'Sullivan 12/12/07 Aff., ¶¶ 4-5). According to O'Sullivan, he specifically told plaintiff, as a member of his crew, that he should not pick up anything if he did not know what was underneath it, and he also warned him not to walk on anything but concrete (*id.*, ¶ 8). Prior to the accident, O'Sullivan had seen a cover over the opening that was marked "X HOLE X". After the accident, O'Sullivan went to the first floor and saw that the cover had the same markings (*id.*, ¶ 7).

Century Maxim's deck foreman, Michael Carmody, was also on site on the day of plaintiff's accident. In fact, he was on the first floor approximately 20 minutes before plaintiff and his co-worker arrived. According to Carmody, he did not see any openings that were not properly covered, and he would have noticed an uncovered opening of the size that plaintiff fell through. If there had been any uncovered openings, he would not have allowed Century Maxim laborers to work there (Carmody 12/18/07 Aff., ¶¶ 5, 8). After the accident, he went back up to the first floor. An investigation was underway, and he was shown a cover which he was told had covered the opening. It was an eight-by-four foot plywood sheet, on the top of which "HOLE" had been spray-painted (*id.*, ¶ 10).

The documentary evidence follows. In Tishman's Incident Report, the description of the "Circumstances

surrounding the Occurrence" is "after removing plywood covering a hole in the 1st floor slab the employee fell through the hole to the floor below approx. 25-30 feet" (Defendants' Cross Motion, Ex. G, Response to Preliminary Conference Order).

The C-2 form indicates that when he was injured, plaintiff was "Lifting plywood protection off of a hole in the floor," and that how the accident occurred was "After removing the plywood covering the hole in the floor, the employee fell through the hole to the floor below approx 25-30 feet" (*id.*).

In the NYCDOB Worker Fell Incident Report, the "DOB Action Details" cited, among other violations, "Failure to comply with safety requirement, at time of inspection [approximately 15 minutes after plaintiff fell], approximately 32" x 77" hole was covered with unsecured ply board which was not clearly marked 'HOLE'." Under "Worker Fell Incident Information," the "Worker Fell Cause" is listed as "Construction Equipment Failure," and the "Worker Fell Details" were "A worker who was cleaning and sweeping the [*sic*] removed a piece of unsecured plywood which was being used the [*sic*] cover open hole in the floor, said worker accidentally steped [*sic*] in the hole and fell approx 35ft to sub-cellar. ... Inspector Rose issued three ECB violations for failure to follow safety requirements during construction operations" (Defendants' Cross Motion, Ex. K).

The New York City Department of Buildings Incident

Emergency Report gives the "Incident Description" as "hole not clearly marked or protected." The "Probable Cause" of the accident is listed as "Human Error," with the "Details" being "Labor person was cleaning and lift up approx 32" x 77" ply board that covered hole not clearly marked and step into hole an[d] fell approx 35' to sub cellar level" (*id.*).

The ECB violation states, "on inspection construction worker fell due unsafe construction practices, such as unsecure/unmarked hole coverings" (*id.*).

The New York City Department of Buildings Notice of Violation and Hearing lists, under "Violating conditions observed": "Failed to comply with safety requirements during buildings operation as per 23-203. On inspection approx 32" x 77" hole was covered with ply board not clearly marked or nailed to concrete floor to protect from approx 35' drop to sub cellar level. Labor was cleaning in the area of unmarked hole and removed cover and fell approx 35'." The remedy for the violation is shown as, "Comply with safety requirements provide clear markings and fixed covers" (*id.*).

Because triable issues of fact exist, the part of plaintiff's motion which seeks summary judgment on his Labor Law § 240 (1) claim must be denied.

Labor Law § 241 (6)

"All contractors and owners and their agents" are subject to Labor Law § 241 (6). Thus, as indicated above, both One Bryant Park and Tishman are held to its mandates. The statute "imposes a nondelegable duty upon an owner or general contractor to see to it that the construction ... operations are conducted so as to provide for the reasonable and adequate protection of the workers" (*Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 271 [1st Dept 2007]).

> To establish liability under the statute, a plaintiff must specifically plead and prove the violation of an applicable Industrial Code regulation. The Code regulation must constitute a specific, positive command, not one that merely reiterates the common law standard of negligence. The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury [internal citations omitted]

(*ibid.*). The duty is imposed "regardless of the absence of control, supervision, or direction of the work" (*Romero v J & S Simcha, Inc.*, 39 AD3d 838, 839 [2d Dept 2007]). A finding that a party has violated Labor Law § 241 (6), however, is only some evidence of negligence; it does not result in absolute liability or a finding of negligence as a matter of law (*see e.g. Ramputi v Ryder Construction Co.*, 12 AD3d 260, 261 [1st Dept 2004]), and a plaintiff's comparative negligence is a valid defense to the claim (*see Spages v Gary Null Associates*, 14 AD3d 425, 426 [1st

Dept 2005]).

Plaintiff relies on only one section of the Industrial Code as his basis for his section 241 (6) claim, 12 NYCRR 23-1.7 (b) (1) (i), which provides:

> (b) Falling hazards.
> (1) Hazardous openings.
> (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).

This section of the Industrial Code has been found specific enough to support a Labor Law § 241 (6) claim (*see e.g. Cun-En Lin v Holy Family Monuments*, 18 AD3d 800 [2d Dept 2005]; *Schiulaz v Arnell Construction Corp.*, 261 AD2d 247 [1st Dept 1999]).

It is uncontested that there was no safety railing around the opening through which plaintiff fell. Thus, the issue is whether the cover which defendants allege was in place was "a substantial cover fastened in place."

Although defendants cite to various OSHA provisions as indications that they fulfilled the requirements of section 23-1.7 (b) (1) (i), OSHA regulations do not apply in a Labor Law § 241 (6) claim. The relevant provisions are only those of New York's Industrial Code. In discussing section 23-1.7 (b) (1) (i), defendants argue that

> the Industrial Code does not define the word "cover" nor does it provide any directives as to the type of markings to be used on the cover. The cases interpreting the Industrial Code have therefore relied upon the provisions of OSHA for guidance regarding the manner in which the cover is to be secured and the manner in which the cover is to be marked

(Kutner 1/18/08 Affirm., ¶ 132). However, defendants fail to cite any cases which use OSHA regulations to "interpret" the Industrial Code. Therefore, the court declines to accept defendants' invitation to consider OSHA regulations in determining this matter.

Section 23-1.7 (b) (1) (i) clearly requires that "a substantial cover [be] fastened in place." Although there is some disagreement about whether the plywood covering was cleated, nowhere is it alleged that the cover was "fastened in place," nor has any case law been cited for the proposition that cleating constitutes "fastening" of a cover. Rather, defendants themselves make it clear that cleating merely "ensure[s] that the cover fits snuggly [*sic*] into the opening and prevents horizontal movement or displacement of the cover" (Dering 12/5/07 Aff., ¶ 8). In fact, they contend that cleating is better than nailing a cover to the floor.

> In the construction industry, cleating is preferred to mechanical fastening. A cleated cover allows a trade access to a design opening so that work can be performed and the cover can simply be put back into place afterwards and immediately secured against

> inadvertent movement by the cleats. Where mechanical fastening is employed, the cover has to be refastened. If the party that unfastens the cover does not have the tools required to re-fasten it (i.e., a nail gun), the hole can remain improperly covered because the cover will not be secured against horizontal movement until it can be re-fastened with a nail gun. If cleats are utilized, the cover can be put back into place and secured immediately

(*id.*, ¶ 9).

Defendants' arguments are unpersuasive. Whether plaintiff lifted the cover or not, it is clear that his accident did not occur because the cover shifted horizontally. He fell precisely because the cover was not "fastened" in place. Defendant's contention that cleating is preferred in the industry because it is more convenient, and that the use of "mechanical fastening" subjects workers to the risk that other workers may negligently fail to properly fasten the cover in place after finishing whatever they needed to do in the opening, is unpersuasive in the face of the serious injuries that could be suffered if the safety measures are not complied with as required by the Industrial Code.

Because there is no question that defendants failed to comply with Industrial Code § 23-1.7 (b) (1) (i), and that this failure was a proximate cause of plaintiff's injury, that part of plaintiff's motion which seeks summary judgment against defendants on his Labor Law § 241 (6) claim is granted.

Defendants' Cross Motion

In accordance with the discussion of plaintiff's Labor Law §§ 240 (1) and 241 (6) claims, the parts of defendants' cross motion which seek summary judgment dismissing these claims are denied.

Labor Law § 200 and Common-Law Negligence

"Labor Law § 200, the codification of the common law negligence standard, imposes a duty upon an owner or general contractor to provide construction site workers with a safe place to work" (*Buckley*, 44 AD3d at 272).

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of a dangerous condition, and when the accident is the result of the means and methods used by the contractor to do its work (*see e.g. McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 41 AD3d 796 [2d Dept 2007]).

"If the allegedly dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, liability does not attach under the common-law or under Labor Law § 200" (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 620 [2d Dept 2008]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]; *Buckley*, 44 AD3d at 272).

> Where ... a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a general contractor may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition

(*Keating v Nanuet Board of Education*, 40 AD3d 706, 708 [2d Dept 2007]; *see also Verel v Ferguson Electric Construction Co.*, 41 AD3d 1154, 1156 [4th Dept 2007] [defendant must show "that it did not create the dangerous condition or that it lacked control over the premises and lacked actual or constructive notice of the dangerous condition"]; *McLeod*, 41 AD3d at 798; *Dowd v City of New York*, 40 AD3d 908, 910 [2d Dept 2007]).

Here, it cannot be determined at this juncture whether the accident occurred because of a dangerous condition (an uncovered, unmarked, unbarricaded opening), or whether it resulted from plaintiff's means and methods (removing the cover himself). Hence, that part of defendants' cross motion which seeks summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action is denied.

Vacate the Note of Issue and Certificate of Readiness; Compel Plaintiff to Supply Outstanding Discovery; Stay Trial Until After Completion of Discovery

The note of issue in this case was filed on June 14, 2007. Subsequent court orders permitted post-note of issue discovery. Defendants now seek vacatur of the note of issue, an

order compelling plaintiff to submit to a physical examination by Dr. Martin Posner, and to provide current X-rays of plaintiff's injured wrist, forearm, elbow and shoulder, and an order staying the trial of this matter until the completion of discovery. It is clear that the only reason that this part of the cross motion was necessary is because plaintiff has refused to submit to an examination by Dr. Posner, who "is one of the experts defendants intend to rely upon in defending the damages aspects of this lawsuit" (Kutner 1/18/08 Affirm., ¶ 151), and because he has not provided current X-rays, as agreed.

The court sees no reason to vacate the note of issue, since the outstanding discovery is so limited in scope, and can be readily disposed of. Plaintiff is directed to produce the most current X-rays of his injured wrist, forearm, elbow and shoulder for review by defendants' designated physicians within 20 days of the service of this order with notice of entry, and is further directed to submit to a physical examination by Dr. Martin Posner as soon as defendants can schedule the examination, which scheduling shall not be unduly delayed. Trial of this matter is stayed pending the completion of discovery.

CONCLUSION

Accordingly, it is

ORDERED that the part of plaintiff's motion which seeks summary judgment on his Labor Law § 240 (1) cause of action is

denied; and it is further

ORDERED that the part of plaintiff's motion which seeks summary judgment on his Labor Law § 241 (6) cause of action is granted; and it is further

ORDERED that the part of defendants' cross motion which seeks summary judgment dismissing the complaint is denied; and it is further

ORDERED that the part of defendants' cross motion which seeks vacatur of the note of issue is denied; and it is further

ORDERED that the remainder of defendants' cross motion is granted, and plaintiff shall produce the most current X-rays of his injured wrist, forearm, elbow and shoulder for review by defendants' designated physicians within 20 days of the service of this order with notice of entry, and shall submit to a physical examination by Dr. Martin Posner as soon as defendants can schedule the examination, which scheduling shall not be unduly delayed; and it is further

ORDERED that trial of this matter is stayed pending the completion of discovery; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendants.

Dated: June 10, 2008

ENTER:

C.Roboinson Edmead, J.S.C.

HON. CAROL EDMEAD