Murillo v NYC Partnership Hous. Dev. Fund Co., Inc.
2015 NY Slip Op 30617(U)
April 17, 2015
Supreme Court, New York County
Docket Number: 105451/11
Judge: Doris Ling-Cohan
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[* 1]

EA 4/21/15 IC

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DORIS LING-COHAN _____ PART 36
Justice

Index Number : 105451/2011
MURILLO, FREDY ORLANDO
vs
NEW YORK CITY PARTNERSHIP
Sequence Number : 003
QUASH SUBPOENA, FIX CONDITIONS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for quash subpoena

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2

Answering Affidavits — Exhibits _____ | No(s). 3

Replying Affidavits _____ | No(s). 4

Upon the foregoing papers, it is ordered that this motion to quash is decided in accordance with the attached memorandum decision.

(consolidated for disposition with Motion Seq 001 + 002)

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
APR 22 2015
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
APR 21 2015
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Dated: 4-17-15

_____, J.S.C.
HON. DORIS LING-COHAN

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

FILED

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

----------X

FREDY ORLANDO MURILLO,

Plaintiff,

-against-

Index No. 105451/11

NYC PARTNERSHIP HOUSING DEVELOPMENT FUND COMPANY, INC., BANTA HOMES CORP., BLUESTONE EAST 118TH STREET REALTY, LLC, CALVERT LANCASTER DEVELOPERS LLC, and PERIMETER BRIDGE & SCAFFOLD CO., INC.,

Motion Sequence Nos. 001, 002 & 003

Defendants.

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NYC PARTNERSHIP HOUSING DEVELOPMENT FUND COMPANY, INC., BANTA HOMES CORP., BLUESTONE EST 118TH STREET REALTY, LLC, and CALVERT LANCASTER DEVELOPERS LLC., and PERIMETER BRIDGE & SCAFFOLD CO., INC.,

Third-Party Plaintiffs,

-against-

Third-Party
Index No. 590638/11

DIG N POUR CONSTRUCTION SERVICES, LLC,

Third-Party Defendant.

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NYC PARTNERSHIP HOUSING DEVELOPMENT FUND COMPANY, INC., BANTA HOMES CORP., BLUESTONE EAST 118TH STREET REALTY, LLC, and CALVERT LANCASTER DEVELOPERS LLC,

Second Third-Party Plaintiffs,

-against-

Second Third-Party
Index No. 590720/13

DIG N POUR CONSTRUCTION SERVICES, LLC,
DIG N POUR SITE DEVELOPMENT CORP., and
NAPLES CONSTRUCTION CORP.,

Second Third-Party Defendants.
----------X

DORIS LING-COHAN, J.:

Motion sequence numbers 001, 002, and 003 are consolidated for disposition.

In this action for personal injuries alleging violations of the Labor Law, plaintiff Fredy Orlando Murillo alleges that while he was standing on a scaffold installing guardrails, the scaffold collapsed, causing him to fall off the scaffold. Defendants NYC Partnership Housing Development Fund Co., Inc. (NYC Fund), Banta Homes Corp. (Banta), Bluestone East 118th Street Realty, LLC, and Calvert Lancaster Developers LLC (Calvert) move for a further deposition of plaintiff, as a result of additional Industrial Code sections alleged in plaintiff's supplemental bill of particulars and in plaintiff's expert disclosure both served after his deposition, as well as due to objections made during the course of plaintiff's deposition (motion sequence number 001). Plaintiff moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability against defendants NYC Fund, Banta, and Calvert under Labor Law §§ 240 (1) and 241 (6) based on violations of 12 NYCRR 23-1.7 (b) (1) (iii) (b) and (c), 12 NYCRR 23-5.1 (c) (1), 12 NYCRR 23-5.1 (h), and 12 NYCRR 23-5.13 (b) (motion sequence number 002). Plaintiff also moves, pursuant to CPLR 3103 and 2304, to quash a subpoena served by defendants for a nonparty deposition of David Turcios (motion sequence number 003).

BACKGROUND

This action arises out of a construction site accident that occurred on July 30, 2010 at 1885 Lexington Avenue, New York, New York (the premises). Defendant NYC Fund is an affiliate of nonparty NYC Partnership Development Corporation, a nonprofit organization that works with public and private entities to develop affordable housing. NYC Fund takes title to certain properties under development and then transfers title to the property back to the developer. On July 27, 2008, Calvert, as the developer of the project, hired Banta as a general contractor to perform construction work on the premises. Banta hired third-party defendant Dig N Pour Construction Services, LLC (Dig N Pour), plaintiff's employer, to perform excavation and concrete work and to create concrete walls.

Plaintiff testified at his deposition[1] that when he arrived at the job site on the date of this accident, his supervisor, David Turcios told him that "protection" was needed on the scaffolds (Plaintiff 7/16/13 EBT tr at 76). The scaffolding had already been set up running along the perimeter of the worksite (*id.* at 78, 93). The scaffolding on the site was supported by triangular wood brackets that were attached to vertical pieces of plywood (Plaintiff 7/19/13 EBT tr at 43, 45). Plaintiff was going to be putting up guardrails on the scaffold which were to be installed in order to keep workers from falling and to give them a place to tether off to (*id.* at 49-50). Plaintiff identified a diagram at his deposition that represented a similar scaffold to the one on which he was working (Myers Affirmation in Support, Exhibit U). However, plaintiff stated that his scaffold was smaller than the one represented in the diagram because it only had two to three

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[1] The court cites to the transcript of plaintiff's July 19, 2013 deposition, unless otherwise indicated.

planks as the walkway (*id.* at 42-43).

In preparation for his work, plaintiff and a co-worker named Gilberto gathered two-by-fours from around the worksite (*id.* at 61-62). Plaintiff leaned a 10-foot long "form" made of plywood, iron, and steel against a column (*id.* at 60). To create the guardrail, plaintiff took the two-by-fours and secured them to vertical posts made of wood (*id.* at 53). As he was securing the first two-by-four with a hammer, the triangle bracket that was supporting the side of the scaffold upon which he was working "came off" and that side of the scaffold began to tip (*id.* at 74-75). As the right side tipped, plaintiff fell off the scaffold (*id.* at 75). Plaintiff was struck in the head by a piece of wood and landed in an excavated hole face up (*id.* at 82). Plaintiff alleges that, as a result of the accident, he injured, *inter alia*, his right elbow, right hand, and right wrist (verified bill of particulars, ¶¶ 8-9). Plaintiff seeks to recover for lost wages, and claims that he has been unable to work since the date of the accident (*id.*, ¶¶ 13, 15). In a supplemental bill of particulars, plaintiff further alleges that he suffered a traumatic brain injury as a result of the accident and is totally disabled (Supplemental Bill of Particulars, ¶¶ 8-9).

This action was commenced against NYC Fund, Banta, Bluestone East 118th Street Realty, LLC, Calvert, and Perimeter Bridge & Scaffold Co., Inc. (Perimeter), seeking recovery under Labor Law §§ 240, 241 (6), and 200 and for common-law negligence. Defendants subsequently commenced third-party actions against, *inter alia,* Dig N Pour. Dig N Pour has not appeared in this action.

By order dated July 26, 2013, the court directed plaintiff's deposition to take place as to liability on August 13, 2013, and as to plaintiff's damages on or before September 26, 2013. By stipulation of discontinuance dated August 23, 2013, plaintiff discontinued this action against

Perimeter. Plaintiff filed the note of issue and certificate of readiness in this action on October 25, 2013.

DISCUSSION

"[T]he 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" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). "On a motion for summary judgment, issue-finding, rather than issue-determination, is key" (*Shapiro v Boulevard Hous. Corp.*, 70 AD3d 474, 475 [1st Dept 2010]). 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]).

A. Plaintiff's Motion for Partial Summary Judgment Under Labor Law §§ 240 (1), (3) and 241 (6)

1. Labor Law § 240 (1)

Plaintiff moves for partial summary judgment under Labor Law § 240 (1) against NYC Fund, Calvert, and Banta. According to plaintiff, NYC Fund was the titleholder of the premises, and Calvert also acted as an "owner" under the Labor Law because it hired Banta to perform construction work at the construction project and had a property interest in the land, pursuant to a regulatory agreement filed with the Office of the City Register. Plaintiff further contends that he is entitled to judgment because he testified that the scaffold collapsed, and he was not the sole

proximate cause of his accident.

In opposition, defendants contend that plaintiff's motion should be held in abeyance until the further deposition of plaintiff as to the questions that he refused to answer and until the nonparty deposition of David Turcios can be completed. Alternatively, defendants argue that plaintiff's motion must be denied because he has not submitted evidence in admissible form, since none of the four transcripts of plaintiff's deposition is signed by plaintiff. In addition, defendants contend that there are issues of fact as to how plaintiff's accident occurred, relying on an e-mail dated July 30, 2010 from dignpour@aol.com, to Bluestone's[2] project manager, David A. Recino, which states that:

> "On 7/30/2010 at 11:30 A.M., a laborer was climbing up a 6 foot scaffold frame when he lost his balance and fell to the ground- thus injuring his elbow and knee. 911 was called and as a precautionary measure, he was taken to the hospital with superficial wounds.
>
> At the time of the fall, he was wearing a safety harness which the EMS cut off of his person before placing him in an ambulance. He never reached the top of the scaffolding, he fell en route"

(Gordon Affirmation in Opposition, Exhibit B). As further support for this argument, defendants also submit Banta's Supervisor's Investigation & Report of Incident dated July 30, 2010, which was completed by Jozef Greczek, Banta's assistant project superintendent on the construction project, which states that plaintiff "[f]ell while climbing ladder," and that plaintiff fell on the "[g]round floor" while "climbing to elevated scaffold" (*id.*, Exhibit D; Saperstein aff, ¶ 3). Regarding the cause of the incident, the report states "not sure – need to talk with Fred who was injured. I was not on site during the incident. Need to get more facts from injured person" (*id.*).

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[2]Defendants state that Banta is also known as Bluestone.

In addition, defendants rely on an uncertified OSHA Form 301 Injuries and Illnesses Incident Report, which was prepared by Greczek and Stephen Lorenz, Dig N Pour's foreman, which states that plaintiff was injured on July 30, 2010, while "climbing ladder" and that plaintiff "fell off the ladder while climbing" (*id.*, exhibit D). Defendants further contend that there are issues of fact as to whether plaintiff was the sole proximate cause of his accident because Dig N Pour provided a safety harness and rope to be used when plaintiff was working at an elevation, which plaintiff failed to use.

Contrary to defendants' contention, plaintiff has submitted evidentiary proof in admissible form sufficient to support his motion for summary judgment (*see* CPLR 3212 [b]). Although plaintiff submitted unsigned transcripts of his deposition, they are certified by the court reporter as accurate and defendants did not challenge their accuracy. Under these circumstances, the First Department has determined that unsigned deposition transcripts may be considered on a motion for summary judgment (*see* CPLR 3116 [a]; *Franco v Rolling Frito-Lay Sales, Ltd.*, 103 AD3d 543, 543 [1st Dept 2013]; *Sass v TMT Restoration Consultants Ltd.*, 100 AD3d 443, 443 [1st Dept 2012]; *Bennett v Berger*, 283 AD2d 374, 375 [1st Dept 2001]; *Zabari v City of New York*, 242 AD2d 15, 17 [1st Dept 1998]). Moreover, even an unsigned and uncertified transcript is admissible where, as here, it "was submitted by the party deponent himself and, therefore, was adopted as accurate by the deponent" (*Franco*, 103 AD3d at 543 [internal quotation marks and citation omitted]).

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

> "All contractors and owners and their agents . . . [engaged] 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 so as to give proper protection to a person so employed."

Labor Law § 240 (1) imposes absolute liability on owners, contractors, and their agents for failing to provide proper protection to workers on a construction site which proximately causes an injury (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662 [2014]). To establish liability under Labor Law § 240 (1), the plaintiff must prove a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices), and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]). "[T]he single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

The legislative intent behind the statute is to place ultimate responsibility for safety practices on owners and general contractors, rather on workers, who "are scarcely in a position to protect themselves from accident" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citations omitted]). Thus, the negligence of the injured worker is not a defense to liability (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]).

Initially, it is undisputed that NYC Fund is the titleholder of the premises (Martin EBT tr at 8-9). There is also no dispute that Banta was hired as the general contractor on the project (Saperstein EBT tr at 10). As such, NYC Fund and Banta may be held liable pursuant to Labor Law § 240 (1).

Here, plaintiff has also shown that Calvert, the developer, constitutes an "owner" pursuant to the statute, and defendants do not argue otherwise. "The term has been held to encompass 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" (*Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]). By regulatory agreement dated June 27, 2008, Calvert was to obtain, by future agreement, equitable and future interests in the land (Myers affirmation in support, exhibit R). Calvert also hired Banta to perform the construction work (*id.*, exhibit Q).

"Labor Law § 240 (1) requires that safety devices such as ladders be so 'constructed, placed and operated as to give proper protection' to a worker" (*Klein v City of New York*, 89 NY2d 833, 834-835 [1996]). "In cases involving ladders or scaffolds that collapse or malfunction for no apparent reason, we have . . . continued to aid plaintiffs with a presumption that the ladder or scaffolding device was not good enough to afford proper protection" (*Blake*, 1 NY3d at 289 n 8).

Plaintiff has made a prima facie showing of entitlement to summary judgment. Plaintiff testified that as he was securing a two-by-four to create the guardrail, the triangle bracket that was supporting the side of the scaffold on which he was working "came off" and that side of the scaffold began to tip, causing him to fall (Plaintiff 7/19/13 EBT tr at 53, 74-75, 82, 92). Plaintiff's supervisor, David Turcios, states that plaintiff was standing on a section of the scaffold approximately 50 feet away from him, and that he observed the section of the scaffold upon which plaintiff was working tip downward (Turcios aff, ¶ 9). The triangular bracket on the other side of the section of the scaffold remained attached to the plywood foundation form (*id.*).

The court rejects defendants' argument that summary judgment is premature under Labor

Law § 240 (1). CPLR 3212 (f) provides that "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just." This is especially so when the opposing party had not had a reasonable opportunity for disclosure prior to making the motion (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 103 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]). "A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (*Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [1st Dept 2000]; *see also Ruttura & Sons Constr. Co. v Petrocelli Constr.*, 257 AD2d 614, 614 [2d Dept 1999], *lv dismissed and denied in part* 93 NY2d 956 [1999]).

> "To avail oneself of CPLR 3212 (f) to defeat or delay summary judgment, a party must demonstrate that the needed proof is within the exclusive knowledge of the moving party, that the claims in opposition are supported by something other than mere hope or conjecture, and that the party has at least made some attempt to discover facts at variance with the moving party's proof"

(*Voluto Ventures, LLC v Jenkins & Gilchrist Parker Chapin LLP*, 44 AD3d 557, 557 [1st Dept 2007] [citations omitted]; *see also Leichter v Cambridge Dev., LLC*, 90 AD3d 557, 559 [1st Dept 2011]; *Cruz v Otis El. Co.*, 238 AD2d 540, 540 [2d Dept 2003] ["A party who claims ignorance of critical facts to defeat a motion for summary judgment (*see*, CPLR 3212 [f]), must first demonstrate that the ignorance is unavoidable and that reasonable attempts were made to discover the facts which would give rise to a triable issue"]).

Defendants have not shown that they made reasonable efforts to obtain Turcios' deposition, or that Turcios' address was in the exclusive knowledge of plaintiff. While

defendants claim that they did not know that Turcios was an eyewitness to the accident, plaintiff testified at his deposition on July 19, 2013 that Turcios was at the site when the accident occurred (Plaintiff 7/19/13 EBT tr at 19, 86). Moreover, Banta's own accident report identifies Turcios as a witness to the accident (Gordon Affirmation in Opposition, Exhibit D). Plaintiff filed the note of issue and certificate of readiness in this action on October 25, 2013. Additionally, the questions that plaintiff refused to answer at his September 26, 2013 deposition relate to his injuries, not the circumstances surrounding the accident.

Defendants also argue that there are issues of fact as to the manner in which the accident happened. "Where credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, questions of fact exist making summary judgment inappropriate" (*Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 [1st Dept 2012]).

Although defendants rely on an e-mail dated July 30, 2010 from Dig N Pour (Gordon Affirmation in Opposition, Exhibit B), the e-mail is unsworn, and, it is unclear who the author of the e-mail was or where the author obtained the information about the accident; thus, such email is inadmissible. In addition, Greczek, the preparer of Banta's Supervisor's Investigation & Report of Incident, states that he is unsure why the accident happened because he was not on site during the accident, and it is unclear how Greczek learned about the accident (*id.*, Exhibit D). Therefore, the portions of Banta's accident report stating that plaintiff "[f]ell while climbing ladder" are not in admissible form for purposes of this summary judgment motion (*see Matter of Leon RR*, 48 NY2d 117, 122 [1979]; *cf. Buckley v J.A. Jones/GMO*, 38 AD3d 461, 462-463 [1st Dept 2007]). Moreover, the uncertified OSHA Form 301, which also states that plaintiff "fell off

the ladder while climbing," appears to have been completed by Greczek and Lorenz, who were not witnesses to the accident (*id.*, Exhibit E). Therefore, the OSHA report is also not in admissible form (*see Hernandez v Town of Hamburg,* 83 AD3d 1507, 1508 [4th Dept 2011], *rearg denied* 86 AD3d 934 [4th Dept 2011], *lv denied* 17 NY3d 717 [2011] [uncertified, unsigned, and heavily redacted OSHA form was inadmissible]). While hearsay may in some instances be sufficient to defeat summary judgment, hearsay is the only evidence submitted in opposition (*see O'Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010]), and defendants do not provide an acceptable excuse for failing to submit evidence in admissible form (*see Shapiro v Butler*, 273 AD2d 657, 660 [3d Dept 2000]).

Finally, defendants have failed to raise an issue of fact as to whether plaintiff was the sole proximate cause of his accident, since he allegedly failed to use a safety harness.

> "Liability under section 240 (1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident. In such cases, plaintiff's own negligence is the sole proximate cause of his injury"

(*Gallagher v New York Post*, 14 NY3d 83, 88 [2010], citing *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]). Nevertheless, if "a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" (*Blake*, 1 NY3d at 290).

As noted recently by the First Department, "[t]he sole proximate cause defense generally applies where the worker misused, removed, or failed to use an available safety device that would have prevented the accident, or knowingly chose to use an inadequate device despite the availability of an adequate device" (*Boyd v Schiavone Constr. Co., Inc.*, 106 AD3d 546, 548 [1st Dept 2013]; *see e.g. Gallagher,* 14 NY3d at 88 [ironworker was not the sole proximate cause of

his accident where there was no evidence in the record that he knew where to find other safety devices or that he was expected to use them]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 555 [2006] [plaintiff's choice to use a six-foot ladder that he knew was too short for the work and standing on ladder's top cap were the sole proximate cause of his accident]; *Montgomery v Federal Express Corp.*, 4 NY3d 805, 806 [2005] [plaintiff was sole proximate cause of his accident where he stood on an inverted bucket; since ladders were readily available, plaintiff's "normal and logical response" should have been to go get a ladder]; *Cahill*, 4 NY3d at 40 [a jury could have concluded that worker was the sole proximate cause of his accident when he was injured while climbing without a safety line, where safety lines had been made available to him and he had been instructed to use them several weeks before the accident]). "To raise a triable issue of fact as to whether a plaintiff was the sole proximate cause of an accident, the defendant must produce evidence that adequate devices were available, that the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained" (*Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 402-403 [1st Dept 2013], citing *Cahill*, 4 NY3d at 40).

Defendants cite plaintiff's deposition testimony indicating that he had previously used a safety harness on the job site, and that he brought his harness with him on the date of the accident (Plaintiff 7/19/13 EBT tr at 31, 37-39). Plaintiff testified that the purpose of the guardrail (which he was installing) was to prevent the workers from falling off the scaffold, and to provide a place where they could tether off with their harnesses (*id.* at 50). However, even if safety harnesses were available on the job site, defendants have not shown that he was expected to use them for his work, and that he chose not to use them for no good reason. Therefore, plaintiff cannot be

deemed the sole proximate cause of his accident (*see Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 884 [1st Dept 2012] ["Even if other ladders were available at the job site, there was no showing that plaintiff was expected, or instructed, to use those ladders and for no good reason chose not to do so"]; *Torres v Our Townhouse, LLC*, 91 AD3d 549, 549 [1st Dept 2012] [even if ladder might have been in chassis under truck at the work site, worker was not sole proximate cause of his accident where there was no evidence presented that he knew where the ladder was or that he knew that he was expected to use it and for no good reason chose not to do so]). Accordingly, plaintiff's motion for partial summary judgment under Labor Law § 240 (1) is granted as to liability against NYC Fund, Banta, and Calvert.

2. *Labor Law § 241 (6)*

Labor Law § 241 states that:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> ***
>
> "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 "*nondelegable* duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety'" to construction workers (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]). To establish liability under

Labor Law § 241 (6), the plaintiff "'must specifically plead and prove the violation of an applicable Industrial Code regulation'" (*Garcia v 225 E. 57th St. Owners, Inc.*, 96 AD3d 88, 91 [1st Dept 2012], quoting *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]). The violation must constitute a "specific, positive command," and must also be a proximate cause of the accident (*Buckley*, 44 AD3d at 271).

Again, defendants argue that plaintiff's motion for partial summary judgment is premature because they seek a further deposition of plaintiff on the grounds that plaintiff served a supplemental bill of particulars after his deposition which alleges numerous violations of the Industrial Code. However, defendants have not demonstrated that a further deposition of plaintiff will lead to relevant evidence as to their liability under Labor Law § 241 (6) (*see Bailey*, 270 AD2d at 157). Prior to plaintiff's depositions, plaintiff served a bill of particulars alleging violations of 12 NYCRR 23-1.7 and subpart 23-5 *et seq.* (Verified Bill of Particulars, ¶ 15). Plaintiff also testified at his deposition on July 19, 2013 as to the type of scaffold that he was working on (Plaintiff 7/19/13 EBT tr at 43, 45, 53), and identified a diagram that resembled the scaffold that he was working on (*id.* at 42; Myers Affirmation in Support, Exhibit U). Moreover, plaintiff stated that, as he was in the process of securing one of the pieces of wood to make the guardrail, the right triangle that supports the scaffold platform "came off," causing him to fall (*id.* at 71-72, 74-75).

"The interpretation of [an Industrial Code] regulation presents a question of law, but the meaning of specialized terms in such a regulation is a question on which a court must sometimes hear evidence before making its determination" (*Morris v Pavarini Constr.*, 9 NY3d 47, 51 [2007]; *see also Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002]).

12 NYCRR 23-1.7 (b) (1) (iii) (b) and (c)

12 NYCRR 23-1.7 (b) provides as follows:

"(b) Falling hazards.

(1) Hazardous openings.

***

(iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows:

***

(*b*) An approved life net installed not more than five feet beneath the opening; or

(*c*) An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage"

(12 NYCRR 23-1.7 [b]). Section 23-1.7 (b) (1) has been held to be sufficiently concrete to support a Labor Law § 241 (6) cause of action (*Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904, 906 [1st Dept 2011]; *Olsen v James Miller Mar. Serv., Inc.*, 16 AD3d 169, 171 [1st Dept 2005]). Courts have held that the safety measures in section 23-1.7 (b) "'bespeak of protections against falls from an elevated area to a lower area through openings large enough for a person to fit'" into (*Bell v Bengomo Realty, Inc.*, 36 AD3d 479, 480 [1st Dept 2007], quoting *Messina*, 300 AD2d at 123). Section 23-1.7 (b) (1) "applies to hazardous openings of significant depth and size" (*Pietrowski v ARE-East Riv. Science Park, LLC*, 86 AD3d 467, 469 [1st Dept 2011]; *see also D'Egidio v Frontier Ins. Co.*, 270 AD2d 763, 765 [3d Dept 2000], *lv denied* 95 NY2d 765 [2000]).

In this case, even though there was a height differential between the edge of the scaffold

and the hole into which plaintiff fell, plaintiff did not fall through an opening. Therefore, section 23-1.7 (b) (1) does not apply in this case (*see Pope v Safety & Quality Plus, Inc.*, 74 AD3d 1040, 1041 [2d Dept 2010], *lv dismissed* 15 NY3d 862 [2010] [section 23-1.7 (b) (1) was inapplicable where worker fell from unguarded edge of elevated concrete platform while walking and talking to foreman]; *Godoy v Baisley Lbr. Corp.*, 40 AD3d 920, 924 [2d Dept 2007] [section 23-1.7 (b) (1) did not apply where plaintiff was working on an elevated loading dock and fell through unsecured doors to ground 20 feet below]). Accordingly, plaintiff's motion for partial summary judgment under the statute based on section 23-1.7 (b) (1) is denied. Upon a search of the record (*see* CPLR 3212 [b]), plaintiff's Labor Law § 241 (6) claim is dismissed insofar as it is based on this regulation.

12 NYCRR 23-5.1 (c) (1)

Section 23-5.1 (c) (1) states that "[e]xcept where otherwise specifically provided in this Subpart, all scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use" (12 NYCRR 23-5.1 [c] [1]). The First Department has held that this section is insufficiently specific to support a Labor Law § 241 (6) claim (*see Mutadir v 80-90 Maiden Lane Del LLC*, 110 AD3d 641, 643 [1st Dept 2013]; *Susko v 337 Greenwich LLC*, 103 AD3d 434, 436 [1st Dept 2013]). Accordingly, plaintiff's motion for summary judgment based on section 23-5.1 (c) (1) is denied, and upon a search of the record, his section 241 (6) claim is dismissed as predicated on this provision.

12 NYCRR 23-5.1 (h)

Section 23-5.1 (h), which provides that "[e]very scaffold shall be erected and removed under the supervision of a designated person" (12 NYCRR 23-5.1 [h]), has been held to be a

specific command which could result in liability pursuant to Labor Law § 241 (6) (*Atkinson v State of New York*, 49 AD3d 988, 989 [3d Dept 2008]). A "designated person" is defined in the Industrial Code as "[a] person selected and directed by an employer or his authorized agent to perform a specific task or duty" (12 NYCRR 23-1.4 [b] [17]).

Plaintiff argues, relying on his expert affidavit from Kathleen Hopkins, R.N., CSSM, that the fact that the scaffold bracket failed shows that the scaffold bracket was not erected under the supervision of a designated competent and qualified person. In opposition, defendants contend that Hopkins' opinion is made without the support of any admissible testimony or evidence, and that there is no record evidence as to how or by whom the scaffold was erected.

Plaintiff has failed to establish that section 23-5.1 (h) was violated as a matter of law, or that such violation was a proximate cause of his injuries. Hopkins merely speculates that the scaffold was not erected under the supervision of a designated person. "An expert may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion" (*Rosato v 2550 Corp.*, 70 AD3d 803, 805 [2d Dept 2010]; *see also Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 714-715 [1st Dept 2005]). Plaintiff testified that when he arrived on site, the scaffolding was already set up (Plaintiff 7/16/13 EBT tr at 78, 93). Thus, there are triable issues of fact as to whether the scaffold was erected under the supervision of a designated person. Accordingly, plaintiff is not entitled to summary judgment under Labor Law § 241 (6) based upon a violation of 12 NYCRR 23-5.1 (h).

12 NYCRR 23-5.13 (b)

Section 23-5.13, entitled "Carpenters' portable bracket scaffolds," states in subsections

(a) and (b) that:

> "(a) Construction of brackets. Each supporting bracket of a carpenters' portable bracket scaffold shall consist of a triangular portable frame constructed of wood not less than two inches by three inches in cross-section or shall be constructed of metal of equivalent strength. The members of such brackets shall be properly fitted and securely joined.
>
> "(b) Bracket installation. Each such bracket shall be attached to the wall of a building or other structure by means of a bolt not less than five-eighths inch in diameter. Such bolt shall extend through such wall and shall be secured to develop the required strength. The brackets shall be spaced not to exceed eight feet, center to center. Where the use of five-eighths inch diameter bolts for such installation is impractical, such brackets shall be secured by whaler cleats or metal ties equivalent in strength to five-eighths inch diameter bolts"

(12 NYCRR 23-5.13 [b]).

Plaintiff contends that section 23-5.13 (b) was violated, based on Hopkins' expert opinion that the fact that the scaffold bracket failed shows that the bracket was not bolted through the concrete form. Defendants argue that Hopkins reached her conclusion without inspecting the scaffold and without any evidence as to how the brackets were secured.

Plaintiff has failed to demonstrate that this section was violated, or that any violation was a proximate cause of his injuries. Hopkins' opinion that the scaffold was not bolted as required is speculative and conclusory, and does not address whether whaler cleats or metal ties were used. Therefore, plaintiff's motion for partial summary judgment based on section 23-5.13 (b) is denied.

3. Labor Law § 240 (3)

Subdivision (3) of Labor Law § 240 states that: "[a]ll scaffolding shall be constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use." Plaintiff argues that defendants violated section 240 (3) because the carpenters'

bracket scaffold failed to support even the intended load, let alone four times the anticipated load. Defendants did not oppose this branch of plaintiff's motion. Nonetheless, even though the scaffold on which plaintiff was working tipped and caused him to fall (Plaintiff 7/19/13 EBT tr at 74-75), plaintiff has offered nothing more than conclusory statements that the scaffold was not "constructed to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use" (*see Kyle v City of New York*, 268 AD2d 192, 199 [1st Dept 2000]). Thus, plaintiff is not entitled to summary judgment based on Labor Law § 240 (3).

B. Defendants' Motion for a Further Deposition of Plaintiff

Defendants move for a further deposition of plaintiff on the grounds that plaintiff has alleged additional Industrial Code violations in a second supplemental bill of particulars and in an expert disclosure which was served after plaintiff's deposition.[3] Defendants also seek review of the objections raised at plaintiff's deposition on September 26, 2013.

As discussed above, defendants have not shown a basis to redepose plaintiff as to any violations of the Industrial Code. The balance of defendants' motion for a further deposition of plaintiff is, in effect, an application to compel plaintiff to answer questions at his deposition to which he had objected (*see Caraballo v New York Hosp.*, 170 AD2d 190, 190 [1st Dept 1991]). CPLR 3101 (a) requires full disclosure of all evidence material and necessary in the prosecution or defense of an action (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-407 [1968]). The Uniform Rules for the Conduct of Depositions state that "[a] deponent shall answer questions at

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[3]Plaintiff argues that defendants did not submit an affidavit of good faith. However, by so-ordered stipulation dated October 31, 2013, the court permitted defendants to seek a further deposition by motion to be filed within 30 days of the date of the order (Rava affirmation in support, exhibit A).

a deposition, except: (a) to preserve a privilege or right of confidentiality; (b) to enforce a limitation set forth in an order of a court; or (c) when the question is plainly improper and would, if answered, cause significant prejudice to any person" (22 NYCRR 221.2).

1. The First Instruction Not to Answer

Defendants' counsel asked plaintiff, "Do you have the receipts for the taxis?" (Plaintiff 9/26/13 EBT tr at 255:19-20). Plaintiff's counsel stated "[w]e are not making any claim for reimbursement for those costs, so I will make an objection. Tell him not to answer" (*id.* at 255:21-24). Defendant's counsel then stated, "Yes?", to which plaintiff's counsel replied, "Yes" (*id.* at 255:24-256:2). Defendant's counsel stated, "Okay, let's mark it" (*id.* at 256:3-4).

Plaintiff argues that this question is irrelevant, immaterial, and unnecessary because he is not seeking reimbursement for this expense. However, relevance objections are not grounds for blocking a question under the Uniform Rules for the Conduct of Depositions. Plaintiff also does not claim that the question fell within one of the categories in 22 NYCRR 221.2. In any event, plaintiff's answer to this question may go to his credibility, which is relevant to his damages. Accordingly, the first instruction not to answer was improper.

2. The Second Instruction Not to Answer

Defendants' counsel also asked, "Since you were in the United States but prior to the accident, did you have a primary care doctor, a doctor you would see for problems?" (Plaintiff 9/26/13 EBT tr at 266:2-5). Plaintiff's counsel stated "Again objection to that question. I'm going to advise the witness not to answer that question" (*id.* at 266:6-8). Defendant's counsel responded "Let's mark that for a ruling" (*id.* at 266:9-10).

Plaintiff argues that this question has nothing to do with plaintiff's injuries sustained as a

result of the accident or the specialty doctors he saw as a result. Plaintiff asserts that he has given countless authorizations for medical records from all treating physicians and facilities for injuries sustained by the accident. However, as discussed above, relevance objections are not among the enumerated bases under which a deponent may not answer a question. In any case, given that plaintiff is claiming that he is unable to return to work and is seeking lost wages resulting from the accident, this is a proper line of inquiry. Plaintiff does not claim that the question seeks privileged information, information limited by a prior court order, or seeks plainly improper information that would cause significant prejudice, which are the only appropriate grounds for objection as provided in the rules. *See* 22 NYCRR 221.2.

Therefore, the second instruction not to answer was inappropriate.

3. The Third Instruction Not to Answer

Defendants' counsel inquired of plaintiff, "And while you lived in Honduras, did you always live in Yorito or did you live in other parts of Honduras?" (Plaintiff 9/26/13 EBT tr at 267:4-6). Plaintiff's counsel stated "I will again object as to there being no basis as to relevancy to these questions" (*id.* at 267:7-9). After defendant's counsel stated, "I'm getting to it" (*id.* at 267:10), plaintiff's counsel said, "You can ask about doctors," again repeated his objection, and advised plaintiff not to answer (*id.* at 267:11-12, 267:15, 267:18-19). Defendants' counsel's question was marked for a ruling (*id.* at 267:20-21).

Plaintiff argues that this question is palpably improper, irrelevant, immaterial, and unnecessary because plaintiff's residence before he moved to the United States has no connection to the accident he experienced, the physical harm he suffered, or the cognitive impairment he suffered. Nevertheless, relevance objections are not among the enumerated reasons under which

a deponent may refuse to answer a question. At any rate, defendants' counsel stated that she was to going to connect her question to plaintiff's injuries and damages. Plaintiff has also failed to demonstrate that the question was plainly improper and would cause significant prejudice. Thus, the third instruction not to answer was improper.

4. The Fourth Instruction Not to Answer

Defendants' attorney asked plaintiff, "While in school in Yorito, did you take any type of tests like the ones you took at Dr. Brown's office?" (Plaintiff 9/26/13 EBT tr at 267:25-268:3). Plaintiff's counsel stated, "I will object. I will advise him not to answer. It's an improper and unfair question" (*id.* at 267:4-6). The question was marked for a ruling (*id.* at 267:7-8).

Plaintiff argues that defendants' question is unduly burdensome, palpably improper, irrelevant, unfair, and prejudicial because it asks plaintiff to analyze and comment on a medical treatment on which he has no expertise. In addition, plaintiff contends that his tests in elementary school in Honduras are irrelevant, and the quality of plaintiff's education and plaintiff's intellectual capacity have not been put into issue.

Again, plaintiff has not demonstrated that the question was plainly improper and would cause him significant prejudice. Moreover, any objection as to relevancy at a deposition under the Uniform Rules is unfounded. Plaintiff may answer questions about tests that he took based upon his own knowledge. Plaintiff's answer to this question may lead to subsequent questions that may have an impact on plaintiff's claimed injuries. Therefore, plaintiff's counsel again improperly directed his client not to answer this question.

5. The Fifth Instruction Not to Answer

Defendants' counsel asked plaintiff, "At any time while you were in school in Yorito, did

they ever tell you what writing level you were on?" (Plaintiff 9/26/13 EBT tr at 268:20-22). Plaintiff's counsel then stated, "Lay a foundation to see if there's any such classification in Honduras for a writing level" (*id.* at 268:23-25). Defendant's counsel asked, "Are you directing him not to answer?," to which plaintiff's counsel replied, "The question in that form, yes. Let's step outside" (*id.* at 268:2-6).

Plaintiff contends that this question is prejudicial, unduly burdensome, and irrelevant, because his writing level correlates to his intellectual capacity, not his cognitive ability which allegedly suffered as a result of the accident. Plaintiff has not demonstrated that this question is plainly improper and would cause him any significant prejudice, if such question were answered, as required. *See* 22 NYCRR 221.2. Moreover, plaintiff has not shown that he was entitled to refuse to answer this question for any other enumerated reason provided in 22 NYCRR 221.2. Given that plaintiff is claiming a complete inability to work, defendants should be entitled to ask him about his writing level. Thus, the fifth instruction not to answer was again improper.

6. The Sixth Instruction Not to Answer

Defendants' counsel asked plaintiff, "I would like to just go back to Yorito. Do you know approximately what the population is in Yorito? Is it a small town, is it a big town or something else?" (Plaintiff 9/26/13 EBT tr at 270:14-17). Plaintiff's counsel stated, "I will object as far as the size of the town and the population. Objection" (*id.* at 270:18-20). The question was then marked for a ruling (*id.* at 270:21). Plaintiff's counsel then said, "I would like to read that motion," to which defendants' counsel responded that "You know you are not allowed to object and tell him not to answer" (*id.* at 270:4-271:2). After plaintiff's counsel stated that "[t]here's a lot of case law since the change in the rules that supports my position and my

objections," defendants' counsel said, "That's fine. We will take it all up" (*id.* at 270:3-7).

Plaintiff argues that this question is "palpably irrelevant," since it has nothing to do with plaintiff's cognitive abilities or current physical injuries. This argument is unpersuasive. As previously noted, relevance objections are not among the enumerated grounds under 22 NYCRR 221.2, and plaintiff does not claim that he was entitled not to answer the question for any other reason. After plaintiff answers this question, defendants' counsel may ask subsequent questions which may impact on plaintiff's claimed inability to work. Therefore, the sixth instruction by plaintiff's counsel not to answer was again not appropriate.

7. *The Seventh Instruction Not to Answer*

The following exchange took place at plaintiff's deposition on September 26, 2013.

"Q: Now, since you have a Social Security number, isn't that correct?

"[Plaintiff's counsel]: I will object.

"[Defendants' counsel]: He testified about the Social Security number the last time.

"[Plaintiff's counsel]: Whatever he testified earlier, it's my position any questions regarding his Social Security number are improper. I'm going to advise him not to answer.

[Defendants' counsel]: And that is definitely going to be marked.

[Plaintiff's counsel]: Let me add a footnote to my last objection. According to the order, this deposition today is about injuries according to the judge's order.

[Defendants' counsel]: And I asked that as a foundation question to ask my injury question.

[Plaintiff's counsel]: You can ask your injury question without knowing the Social Security number.

[Defendants' counsel]: I don't want his Social Security number. I don't really need to know his Social Security number.

[Plaintiff's counsel]: I don't know it. And if he has one, I don't want to know it" (Plaintiff 9/26/13 EBT tr at 271:18-272:21).

Defendants argue, citing *Balbuena v IDR Realty LLC* (6 NY3d 338 [2006]), that the existence of plaintiff's Social Security number is relevant. Plaintiff counters that defendants' demand for plaintiff's Social Security number does not have to be disclosed because Social Security numbers are confidential and private information, and there has been no showing why this information is necessary and indispensable. Plaintiff's argument is without merit. Defendants' counsel asked whether plaintiff had a Social Security number, not what plaintiff's Social Security number was. Depending on plaintiff's answer to this question, defendants' counsel may then ask additional questions about why he does not have a Social Security number. A worker's immigration status may be a legitimate factor in litigating a lost wages claim (*see Balbuena*, 6 NY3d at 362). Moreover, significantly, plaintiff does not claim that he may refuse to answer this question for any other ground in 22 NYCRR 221.2. Accordingly, the seventh instruction not to answer was again improper.

8. The Eighth Instruction Not to Answer

Defendants' counsel asked plaintiff, "My question to you was: When you used your left hand to show me what of your arm hurt you, you started from your elbow and moved down your forearm into your wrist and into your hand, is that right?" (Plaintiff 9/26/13 EBT tr at 283:9-13). When defendants' counsel stated, "Let him answer the question" (*id.* at 283:14-15), plaintiff's counsel stated, "I'm objecting to your question because he said his whole arm hurts, so let me finish" (*id.* at 283:16-18). Defendants' counsel then said, "No, you are not doing the speaking objection" (*id.* at 283:19-20). Plaintiff's counsel then stated on the record that, "How far he put

his left hand up along the right arm is your perception, but he's talking to you and communicating to you what is hurting him" (*id.* at 283:21-25). The question was then marked for a ruling (*id.* at 284:2-4).

Plaintiff argues that this question was asked and answered; plaintiff had already testified that his entire arm was damaged and extensively testified to the portion of his arm that was hurt. However, plaintiff's refusal to answer this question does not fall within the enumerated grounds under 22 NYCRR 221.2. While plaintiff claims that he previously testified that his entire arm was damaged, defendants may ask plaintiff about the direction of the pain in his arm. Therefore, plaintiff's counsel's instruction not to answer this question was improper.

C. Plaintiff's Motion to Quash the Subpoena for the Nonparty Deposition of David Turcios

Plaintiff moves to quash defendants' subpoena served on April 1, 2014 for the nonparty deposition of David Turcios, plaintiff's supervisor at Dig N Pour. Plaintiff argues that discovery has been stayed pursuant to CPLR 3214 (b) since he moved for summary judgment on December 23, 2013 and the motion is still *sub judice*. Plaintiff further argues that as the note of issue has been filed, defendants cannot demonstrate "unusual or unanticipated circumstances" since: (1) plaintiff testified that Turcios was a witness to the accident at his deposition on July 19, 2013, and (2) Banta's supervisor's incident report identifies Turcios as a witness to the accident.

Defendants argue that there is a discrepancy between plaintiff's version of how the accident occurred and the e-mail dated July 30, 2010 from plaintiff's employer, which states that plaintiff fell while he was climbing up a scaffold and was wearing a safety harness at the time of the accident. According to defendants, they were unable to subpoena Turcios for a deposition

because defendants did not have any contact information for Turcios. Defendants also maintain that the first time that Turcios' contact information was available to them was in his affidavit in support of plaintiff's motion for summary judgment, and that Dig N Pour has not appeared in this action. Defendants also point out that, in defendants' demand for witness information, plaintiff's prior counsel responded that plaintiff was unaware of the identity of any witnesses to the occurrence. Moreover, Banta's supervisor's incident report does not provide any contact information for Turcios.

CPLR 3214 (b) states that "[s]ervice of a notice of motion under rule 3211, 3212 or section 3213 stays disclosure until determination of the motion unless the court orders otherwise." Plaintiff served his motion for partial summary judgment on December 23, 2013. Defendants served a subpoena for Turcios' deposition on April 1, 2014. Therefore, disclosure was automatically stayed by plaintiff's service of his motion for partial summary judgment (*see Dimatteo v Cosentino*, 71 AD3d 1430, 1432 [4th Dept 2010]; *Marcantonio v Picozzi*, 70 AD3d 655, 656 [2d Dept 2010]). Although the stay is automatic, the court can direct discovery if there is a legitimate need for the discovery (*see Reilly v Oakwood Hgts. Community Church*, 269 AD2d 582, 582 [2d Dept 2000]).

22 NYCRR 202.21 (d) provides that "[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings." To conduct disclosure after the filing of the note of issue, defendants must demonstrate "unusual or unanticipated circumstances," which "develop[ed] subsequent to the filing of a note of issue,"

and require additional disclosure to prevent "substantial prejudice" (*Madison v Sama*, 92 AD3d 607, 607 [1st Dept 2012]; *Ahroner v Israel Discount Bank of N.Y.*, 79 AD3d 481, 483 [1st Dept 2010]; *Schroeder v IESI NY Corp.*, 24 AD3d 180, 181 [1st Dept 2005]). A lack of diligence in seeking discovery does not constitute "unusual or unanticipated circumstances" (*Colon v Yen Ru Jin*, 45 AD3d 359, 359-60 [1st Dept 2007]).

Defendants have not shown a legitimate need for the discovery here. Defendants only claim that they need Turcios' deposition as to their liability. Defendants did not move to vacate the note of issue pursuant to 22 NYCRR 202.21 (e) or move to conduct additional pretrial discovery pursuant to 22 NYCRR 202.21 (d). Rather, defendants served a subpoena for Turcios' deposition on April 1, 2014, five months after the note of issue was filed on October 25, 2013, and three months after plaintiff's motion for summary judgment was made on December 23, 2013. Therefore, plaintiff's motion to quash the subpoena for Turcios' deposition is granted (*see Sklarz v Crabtree*, 35 AD3d 260, 261 [1st Dept 2006]; *Bojkovic v JLT Assoc.*, 278 AD2d 46, 47 [1st Dept 2000]; *White v Bronx Lebanon Hosp. Ctr.*, 240 AD2d 212, 212 [1st Dept 1997]).

CONCLUSION

Accordingly, it is

ORDERED that defendants' motion (motion sequence number 001) for a further deposition is granted to the extent that *plaintiff shall appear for a further deposition on a date agreed upon by the parties which is within 30 days from service of a copy of this order with notice of entry*, and answer all questions improperly blocked by plaintiff's counsel and any follow-up questions regarding plaintiff's injuries; and it is further

ORDERED that plaintiff's motion (motion sequence number 002) for partial summary

judgment is granted under Labor Law § 240 (1) on the issue of liability against defendants NYC Partnership Housing Development Fund Company, Inc., Banta Homes Corp., and Calvert Lancaster Developers LLC, with the issue of plaintiff's damages to await the trial of this action, and is otherwise denied; and it is further

ORDERED that prior to the deposition, plaintiff's counsel shall read 22 NYCRR 221.2; and it is further

ORDERED that, upon a search of the record, plaintiff's Labor Law § 241 (6) claim is dismissed insofar as it is predicated on 12 NYCRR 23-1.7 (b) (1) (iii) (b), (c) and 12 NYCRR 23-5.1 (c) (1); and it is further

ORDERED that plaintiff's motion (motion sequence number 003) to quash the subpoena for the deposition of nonparty David Turcios is granted.

Dated: April 17, 2015

Doris Ling-Cohan, J.S.C.

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