At an IAS Term, Part 94 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 10th day of August, 2021.

P R E S E N T:

HON. PAMELA L. FISHER,
Justice.

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SERGIO PACHECO,

Plaintiff,

-against- Index No.: 505880/18

ONE HUDSON YARDS OWNER LLC, HUDSON YARDS CONSTRUCTION LLC and GILBANE BUILDING COMPANY,

Defendants.

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ONE HUDSON YARDS OWNER LLC, HUDSON YARDS CONSTRUCTION LLC and GILBANE BUILDING COMPANY,

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Third-Party Plaintiffs,

-against-

BOIES SCHILLER FLEXNER LLP and MILBANK LLP d/b/a MILBANK, TWEED, HADLEY & McCOY, LLP,

Third-party Defendants.

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The following e-filed papers read herein:	NYSEF Doc. Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	42-43, 76-77,
Opposing Affidavits (Affirmations)	84, 105
Affidavits/ Affirmations in Reply	149, 155
Other Papers:	

Upon the foregoing papers, plaintiff Sergio Pacheco moves for an order, pursuant to CPLR 3212, granting partial summary judgment in his favor with respect to liability on his Labor Law §§ 240 (1) and 241 (6) causes of action against defendants (motion sequence number 2). Third-party defendant Boies Schiller Flexner LLP (Boies Schiller) moves for an order: (1) pursuant to CPLR 603 and 1010, granting dismissal or severance of the third-party action as against it; or, alternatively, (2) pursuant to 22 NYCRR 202.21 (d) and (e), vacating the note of issue and certificate of readiness filed in the primary action; or, alternatively (3) pursuant to 22 NYCRR 202.21 (d), staying the primary action from being placed on the trial calendar until completion of discovery in the third-party action (motion sequence number 4).

Plaintiff's motion (motion sequence number 2) is granted to the extent that plaintiff is granted partial summary judgment with respect to liability on his Labor Law § 240 (1) claim as against defendant/third-party plaintiff One Hudson Yards Owner LLC (Hudson Owner) only. Plaintiff's motion is otherwise denied.

Boies Schiller's motion (motion sequence number 4) is granted only to the extent that the parties are directed to complete any remaining discovery required with respect to the third-party action in an expedited manner and with any and all outstanding discovery to be completed on or before November 30, 2021 and is otherwise denied. This denial of the portion of the motion seeking severance of the third-party action is made without prejudice to any party moving to sever the third-party action in the event that the parties are unable to adhere to an expedited discovery schedule.

BACKGROUND

In this action premised upon common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6), plaintiff alleges that he suffered injuries on March 5, 2018 when a scaffold shoring post that had been left leaning against the supporting structure for the overhead protection covering the loading dock fell onto him. The loading dock at issue was located at a building that was under construction and owned by defendant Hudson Owner. Hudson Owner hired defendant Gilbane Building Company (Gilbane) to act as the general contractor for the construction of the building's core, shell, curtain wall and mechanicals, and Gilbane, in turn, subcontracted with non-party All-Safe LLC (All-Safe) to build and maintain the temporary structures used during the construction, including the loading dock, the material lifts, overhead safety and pedestrian sheds. Defendant Hudson Yards Construction LLC (Hudson Construction) was the construction manager for the core and shell of the building. [1] Boies Schiller was a tenant that leased the 14th through 16th floors of the building from Hudson Owner, and third-party defendant Milbank LLP d/b/a/ Milbank, Tweed, Hadley & McCloy, LLP, (Milbank Tweed) was a tenant that leased the 30th through 38th floors of the building from Hudson Owner. Boies Schiller and/or Milbank Tweed hired Structure Tone, LLC (Structure Tone),[2] to act as the general contractor for the tenant buildout of their floors of the building upon the completion of Gilbane's work on those floors. Structure Tone

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[1] The court notes that no party has presented any evidentiary proof with respect to Hudson Construction's role in the project. Council for Hudson Construction, however, admits that Hudson Construction was the construction manager for constructing the core and shell of the building (Malecki, Aff. at ¶¶ 13 and 56).

[2] Plaintiff and Structure Tone have filed a stipulation of discontinuance dated 8/23/18 (NYSCEF doc. No. 13), signed by counsel for plaintiff and Structure Tone, stating that the action has been discontinued as against Structure Tone without prejudice.

thereafter hired LAB Plumbing Company & Heating Co., Inc., (LAB Plumbing) to perform plumbing work for the tenant buildout. Plaintiff was employed by LAB Plumbing as a plumber's helper.

On the date of the accident, LAB Plumbing had received a large shipment of pipes and other plumbing supplies that the truck driver had unloaded from the truck and placed on the building's loading dock. LAB Plumbing's supervisor tasked plaintiff with the job of counting the material delivered to ensure that LAB Plumbing received what was ordered, and with assisting his coworkers in loading the supplies onto pipe trees[3] and pallet jacks[4] so that his coworkers could take the supplies up the material hoists to the floors on which LAB Plumbing was working. According to his testimony, at the time of the accident, plaintiff was standing on the loading dock area near the hoist holding onto an empty pallet jack he intended to take up on the material hoist. While plaintiff was waiting for two or three of his coworkers to maneuver a pipe tree onto the hoist before entering the hoist with the pallet jack, two shoring posts that had apparently been left leaning against the framework for the overhead protection fell and struck plaintiff in the shoulder and neck area. Plaintiff stated that he did not notice the posts before they fell on him.

Plaintiff, in his testimony, estimated that each of the posts weighed 120 to 160 pounds. While Terrance Peret, one of plaintiff's coworkers who was present when the accident occurred, estimated at his non-party deposition that each post weighed

[3] Plaintiff's coworker, Terrance Peret, described a pipe tree as a specialized cart used to carry pipe.
[4] From plaintiff's testimony, it is evident that a pallet jack is a kind of a hand truck used to carry pallets.

approximately 80 pounds, Ivan Moore, Gilbane's general superintendent, who arrived at the accident location shortly after the accident, estimated at his deposition that the posts each weighed approximately 120 to 150 pounds. None of the deposition witnesses gave an estimated height for the posts. However, photographs of the posts taken shortly after the accident by Peret show that the posts are taller than the top of the cage surrounding the material hoists, suggesting that the posts are at least 8 to 10 feet tall. Of note, photographs of the accident location show that the accident occurred in an area of the loading dock that had overhead protection, and that this area was separated from other areas of the building by sheeting and the framework for the overhead protection.

Peret's testimony regarding the accident, despite some differences relating to plaintiff's task at the time of the accident, is largely consistent with plaintiff's testimony. Peret, like plaintiff, did not notice the posts before they fell on plaintiff. Peret, however, asserted that only one of the posts fell, and that the other was still leaning against the overhead protection frame after the accident occurred.

Moore, in his testimony for Gilbane, stated that the posts at issue belonged to All-Safe, which had been doing work modifying an area of the loading dock across from where plaintiff was working the night before the accident and had apparently left the posts on the loading dock. While Moore could not speak to whether All-Safe was the entity that left the posts standing up, according to Moore, the posts should have been stored lying down rather than standing on end leaning against something, and, if they were left standing up, they should have been secured in some manner to prevent them

from falling over. Moore did not witness the accident, but was nearby when it happened, and heard a sound consistent with the posts falling over and hitting the loading dock.

DISCUSSION

LABOR LAW DEFENDANTS

Gilbane and Hudson Construction oppose the plaintiff's motion on the ground, among others, that they are not proper defendants for purposes of Labor Law §§ 240 (1) and 241 (6). In this regard, defendants allege that while they were responsible for the construction of the core and shell of the building, they did not hire plaintiff's employer, Lab Plumbing, and thus, did not have the authority to supervise Lab Plumbing or its workers. For a defendant to be held liable as a contractor or a statutory agent of the owner or a contractor under sections 240 (1) and 241 (6), the defendant must have had the authority to supervise or control the activity that brought about the injury (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]). Liability, however, cannot be predicated solely on a defendant's authority over the area and activity that gave rise to the injury. Rather, a defendant, to be held liable, must also have had authority to supervise and control the particular work in which plaintiff was engaged in at the time of the accident (*see Coque v Wildflower Estates Devs., Inc.*, 31 AD3d 484, 488 [2d Dept 2006]; *Kwoksze Wong v New York Times Co.*, 297 AD2d 544, 548-549 [1st Dept 2002]; *see also Giovanniello v E.W. Howell, Co., LLC*, 104 AD3d 812, 813 [2d Dept 2013]; *but see Wellington v Christa Constr. LLC*, 161 AD3d 1278, 1279-1280 [3d Dept 2018]).

While plaintiff has submitted the deposition testimony of Moore, Gilbane's witness, which shows that Gilbane retained responsibility for checking the loading dock in order to ensure that it was maintained in a safe manner, Moore also stated that Gilbane did not have the right to review the method or manner of the work performed by entities hired by the tenants. Plaintiff has submitted no evidentiary proof relating to Hudson Construction's authority over the relevant work. Since plaintiff's proof fails to show that Gilbane or Hudson Construction had the authority to supervise plaintiff's work at the time of the accident, plaintiff has failed his initial burden of demonstrating that Gilbane or Hudson Construction are proper defendants for purposes of Labor Law §§ 240 (1) and 241 (6) (*see Coque*, 31 AD3d at 488; *Kwoksze Wong*, 297 AD2d at 548-549; *see also Giovanniello*, 104 AD3d at 813). Plaintiff's motion with respect to Gilbane and Hudson Construction must thus be denied regardless of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

On the other hand, since Hudson Owner admitted in its answer that it was the owner of the property at issue, it may be held liable under Labor Law §§ 240 (1) and 241 (6) (*see Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 338-342 [2008]; *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 560 [1993]).

LABOR LAW § 240 (1)

Labor Law § 240 (1) imposes absolute liability on owners and contractors or their agents when their failure to protect workers employed on a construction site from the risks associated with falling objects proximately causes injury to a worker (*see Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Narducci v Manhasset*

Bay Assoc., 96 NY2d 259, 267-268 [2001]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). For a defendant to be held liable under Labor Law § 240 (1), a plaintiff's injuries must be "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]; *see Wilinski*, 18 NY3d at 10). With respect to accidents involving falling objects, the "plaintiff must show more than simply that an object fell causing injury to a worker" (*Narducci*, 96 NY2d at 268; *see also Fabrizzi v 1095 Ave. of Ams., L.C.C.*, 22 NY3d 658, 663 [2014]). A plaintiff must show that, at the time the object fell, it was "being hoisted or secured" (*Narducci*, 96 NY2d at 268) or "required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]; *see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758 [2008]) and that the object fell "because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268; *see Fabrizzi*, 22 NY3d at 663). "While a plaintiff is not required to present evidence as to which particular safety devices would have prevented the injury . . . the risk requiring a safety device must be a foreseeable risk inherent in the work" (*Niewojt v Nikko Constr. Corp.*, 139 AD3d 1024, 1027 [2d Dept 2016] [citation omitted]; *see Carlton v City of New York*, 161 AD3d 930, 932 [2d Dept 2018]; *cf. Fabrizi*, 22 NY3d at 663).

Initially, there is no real factual dispute that plaintiff was struck by shoring posts that had been left leaning against the frame for the overhead protection. Although plaintiff and Peret both testified that they did not notice the posts on the loading dock before it/they struck plaintiff, the circumstantial evidence here rules out other possible

causes for the accident. This evidence includes the manner with which the post(s) struck plaintiff; the existence of the overhead protection above the loading dock; the fact that the frame for the overhead protection and sheeting separated the loading dock from other areas of the building; plaintiff's testimony that other trades were not working in the immediate area of the accident; and Moore's testimony that All-Safe had performed its work involving the modification of the loading dock area during the night before the accident. As such, there is no reasonable view of the evidence to suggest that the posts fell from any other location (*cf. Podobedov v East Coast Constr. Group, Inc.*, 133 AD3d 733, 735-736 [2d Dept 2015]).[5]

In light of the photographs showing the height of the posts and the deposition testimony estimating that they each weighed from 80 to 160 pounds, plaintiff has demonstrated, prima facie, that he was subject to a physically significant elevation differential (*see Wilinski*, 18 NY3d at 10; *Outar*, 5 NY3d at 732; *Tropea v Tishman Constr. Corp.*, 172 AD3d 450, 451 [1st Dept 2019], *affirming* 2017 WL 6731869, *2 [U] [Sup Ct, New York County 2017]; *Rutkowski v New York Convention Ctr. Dev. Corp.*, 146 AD3d 686, 686 [1st Dept 2017]; *Pritchard v Tully Constr. Co., Inc.*, 82 AD3d 730, 730-731 [2d Dept 2011]; *Cardenas v One State St., LLC*, 68 AD3d 436, 437-438 [1st Dept 2009]; *Mendoza v Bayridge Parkway Assoc., LLC*, 38 AD3d 505, 506 [2d Dept 2007]; *cf. Kuhn v Giovanniello*, 145 AD3d 1457, 1458 [4th Dept 2016]).

[5] While counsel for defendant, in the affirmation in opposition, argues that plaintiff has failed to demonstrate the need for a securing device, he states that the posts had been left leaning on the frame for the overhead protection (Malecki, Aff. at ¶ 78).

Plaintiff has also demonstrated, prima facie, that the posts were objects that required securing for the purposes of the undertaking. In this vein, the photographs of the posts clearly show that they would be unstable if left standing on their ends. Morevoer, Moore testified that the posts should have been stored lying down rather than standing on end leaning against something, and, if they were left standing up, they should have been secured in some manner to prevent them from falling over (*see Outar*, 5 NY3d at 732, *affg* 286 AD2d 671, 672-673 [2d Dept 2001]; *Wellington*, 161 AD3d at 1281; *Andresky v Wenger Constr. Co., Inc.*, 95 AD3d 1247, 1249 [2d Dept 2012]; *Coque*, 31 AD3d at 488; *Orner v Port Auth. of N.Y. & N.J.*, 293 AD2d 517, 517-518 [2d Dept 2002]; *cf. Wilinski*, 18 NY3d at 11; *Garbett v Wappingers Cent. Sch. Dist.*, 160 AD3d 812, 815 [2d Dept 2018]; *but see Millette v Tishman Constr. Corp.*, 144 AD3d 1113, 1115 [2d Dept 2016]; *Seales v Trident Structural Corp.*, 142 AD3d 1153, 1156 [2d Dept 2016]). Such evidence relating to the nature of the posts renders the facts here distinguishable from cases such as *Millitte* and *Seales*, which addressed the storage of sheetrock, a material that, because of its shape, is undoubtedly less precarious to store upright than the shoring posts at issue here (*see Millette*, 144 AD3d at 1115; *Seales*, 142 AD3d at 1156; *see also Wiley v Marjam Supply Co., Inc.*, 166 AD3d 1106, 1109 [3d Dept 2018], *lv denied* 33 NY3d 908 [2019]).

Even assuming and considering Moore's supposition that the accident would not have occurred unless someone bumped into the posts causing same to fall, such a view of the evidence, contrary to defendants' contentions, would not have negated the need for a securing device or have constituted a superseding cause of the accident. In this regard,

the accident occurred on the heavily trafficked area of the loading dock next to the material hoists, rendering it readily foreseeable that the unsecured shoring posts could be knocked over by a worker accessing the lifts or by material or equipment being moved through the area (*see De Haen v Rockwood Sprinkler Co.*, 258 NY 350, 352-354 [1932]; *Devoy v City of New York*, 192 AD3d 665, 667-668 [2d Dept 2021]; *Raia v Berkeley Coop. Towers Section II Corp.*, 147 AD3d 989, 992 [2d Dept 2017]; *Lopez-Dones v 601 West Assoc., LLC*, 98 AD3d 476, 478-479 [2d Dept 2012]; *Alomia v New York City Tr. Auth.*, 292 AD2d 403, 405 [2d Dept 2002]). Additionally, since both plaintiff and Peret testified that they did not notice the posts until they fell, and since there is no evidence in the record suggesting that it was plaintiff who improperly placed the posts in a precarious position on the loading dock, plaintiff has demonstrated, prima facie, that his actions were not the sole proximate cause of the accident (*see Escobar v Safi*, 150 AD3d 1081, 1083 [2d Dept 2017]; *McLean v Tishman Constr. Corp.*, 144 AD3d 534, 535 [1st Dept 2016]; *Gabrus v New York City Hous. Auth.*, 105 AD3d 699, 700 [2d Dept 2013]; *cf. Quattrocchi v F.J. Sciame Constr. Corp.*, 44 AD3d 377, 381-382 [1st Dept 2007], *affd* 11 NY3d 757 [2008]).

Accordingly, plaintiff has demonstrated his prima facie entitlement to summary judgment with respect to liability on his Labor Law § 240 (1) cause of action. In opposing the motion, defendants have failed to demonstrate the existence of any factual issues with respect to the happening of the accident or the need for section 240 (1) safety device under the circumstances of this case. Defendants also assert that the motion must be denied because discovery has not been completed with respect to the third-party

action. Defendants, however, have failed to provide an evidentiary basis to suggest that discovery might lead to relevant evidence or that facts justifying the denial of the motion are within the exclusive knowledge and control of the plaintiff (*see Martin v County of* Westchester, 194 AD3d 1036, 1037 [2d Dept 2021]; *Chen v City of New* York, 194 AD3d 904, 905 [2d Dept 2021]; *Mayorga v 75 Plaza LLC*, 191 AD3d 606, 608 [1st Dept 2021]). Indeed, even assuming that defendants are correct in their assertion that the third-party defendants may be proper Labor Law defendants, they have failed to identify how the third-party defendants would possess any evidence bearing on the need for section 240 (1) safety devices, or how the potential liability of the third-party defendants would have any bearing on defendants' own liability. Defendants' mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying summary judgment (*see Chen*, 194 AD3d at 1037). Plaintiff is thus entitled to summary judgment in his favor with respect to liability against Hudson Owner.

LABOR LAW § 241 (6)

With respect to his Labor Law § 241 (6) cause of action, plaintiff relies on 12 NYCRR 23-2.1 (a) (1) and (2), which provide, with respect to the storage of material or equipment, that:

> "1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.
>
> "(2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight

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

The Appellate Division, Second Department has held that 12 NYCRR 23-2.1 (a) (1) only applies if the accident occurs in a "passageway, walkway, stairway, or other thoroughfare" (*see Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 844 [2d Dept 2014]; *Desena v North Shore Hebrew Academy*, 119 AD3d 631, 634-635 [2d Dept 2014]; *Rodriguez v D&S Builders, LLC*, 98 AD3d 957, 959 [2d Dept 2012]; *Grygo 1116 Kings Highway Realty, LLC*, 96 AD3d 1002, 1003 [2d Dept 2012], *lv denied* 20 NY3d 859 [2013]; *Cody v State of New York*, 82 AD3d 925, 928 [2d Dept 2011]; *see also Wiley*, 166 AD3d at 1109; *but see Slowe v Lecesse Constr. Servs., LLC*, 192 AD3d 1645, 1646 [4th Dept 2021]; *Rodriguez v DRLD Dev., Corp.*, 109 AD3d 409, 410 [1st Dept 2013]). In view of the Second Department's reading of section 23-2.1 (a) (1) and caselaw holding that a construction site's loading dock and freight elevator area do not constitute a "passageway, walkway, stairway, or other thoroughfare" for purposes of section 23-2.1 (a) (1) (*see Barrios v Boston Props. LLC*, 55 AD3d 339, 340 [1st Dept 2008]), section 23-2.1 (a) (1) is inapplicable to the facts here. Additionally, section 23-2.1 (a) (2) is inapplicable here because nothing in the record suggests that the shoring posts fell because the material on the loading dock exceeded the carrying capacity of the loading dock platform or that plaintiff was beneath the edge of a "floor, platform or scaffold" at the time of the accident (*see Desena*, 119 AD3d at 635).

Accordingly, plaintiff has failed to may make a prima facie showing that a specific Industrial Code section is applicable to the facts here (*see Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 349-350 [1998]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dept 2017]), and, as such, this portion of plaintiff's motion with respect to his Labor Law § 241 (6) calimust be denied regardless of the sufficiency of the opposition papers (*see Winegrad*, 64 NY2d at 853).

BOIES SCHILLER'S MOTION TO DISMISS/SEVER

Boies Schiller contends that it is entitled to an order dismissing or severing the third-party action because it will be severely prejudiced absent severance. In this connection, Boies Schiller alleges that it has not yet had an opportunity to obtain discovery, because the third-party action was commenced nearly 18 months after the main action was commenced, and the other parties have completed their discovery relevant to the main action. This court has the discretion to sever a third-party action under such circumstances (*see Whippoorwill Hills Homeowners Assn., Inc. v Toll at Whippoorwill, L.P.*, 91 AD3d 864, 865 [2d Dept 2012]; *Meczkowski v E.W. Howell Co., Inc.*, 63 AD3d 803, 804 [2d Dept 2009]; CPLR 603 and 1010). However, given that the determination of Boies Schiller's liability on the third-party indemnification and contribution claims will involve factual and legal issues common with those in the main action, this court finds that "a single trial is appropriate in the interest of judicial economy and to avoid the possibility of inconsistent verdicts" (*Herrera v Municipal Hous. Auth. of City of Yonkers*, 107 AD3d 949, 949 [2d Dept 2013]; *see Barrett v New York City Health & Hosps. Corp.*, 150 AD3d 949, 951 [2d Dept 2017]; *Boeke v Our Lady of Pompei*

School, 73 AD3d 825, 826 [2d Dept 2010]). Moreover, while defendants delayed commencement of the third-party action, it was commenced before the initial note of issue (which has since been vacated) was filed, and within the time allowed by the court in the Final Conference Part Order (Schneier, J.H.O.) dated November 7, 2019. Prejudice to Boies Schiller will be avoided by this court's direction that the parties work out an expedited discovery schedule requiring completion of discovery relating to the third-party action by November 30, 2021 and plaintiff will suffer no significant prejudice because, in reviewing the documents filed on NYSCEF, it does not appear that plaintiff has filed a note of issue as of August 5, 2021.[6] This denial of the motion to sever is made with leave to renew in the event that the parties are not able to adhere to an expedited discovery schedule.

This constitutes the decision and order of the court.

ENTER

J.S.C.

Hon. Pamela L. Fisher, J.S.C.

[6] The initial note of issue was filed on December 16, 2019, and was vacated by an order (Knipel, J.) dated September 11, 2020. This September 11, 2020 order directed that plaintiff provide certain discovery and required that the note of issue be filed on or before April 23, 2021. The court notes that the parties are to appear in the Note of Issue – Final Conference Part on October 6, 2021.