At an IAS Term, Part 81 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 6th day of January, 2023.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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VICTOR A. SIGENZA ZUNIGA,

Plaintiff,

-against-

625 HALSEY, LLC., and D&G CONSTRUCTION NY INC.,

Defendants.

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624 HALSEY LLC,

Third-Party Plaintiff,

-against-

D&G CONSTRUCTION NY INC.,

Third-Party Defendant,

----------X

D&G CONSTRUCTION NY INC.,

Second Third-Party Plaintiff,

-against-

RM CONSTRUCTION AND DEVELOPMENT CORP,

Second Third-Party Defendant.

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D&G CONSTRUCTION NY INC.,

Third Third-Party Plaintiff,

-against-

AREVALOS CONSTRUCTION CORP.

Third Third-Party Defendant,

Index No. 525911/2018

DECISION AND ORDER
Motions Sequence #3, #4, #5

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625 HALSEY LLC,

Fourth Third-Party Plaintiff

-against-

RM CONSTRUCTION AND DEVELOPMENT CORP. and AREVALOS CONSTRUCTION CORP.

Fourth Third-Party Defendants.
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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)	
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	140-147, 148-164, 185-209
Opposing Affidavits (Affirmations)	177, 182, 212-217, 220-223, 224-230, 253
Reply Affidavits (Affirmations)	232-236, 238-242, 244-248
Memoranda of Law	210, 237, 243, 249

After a review of the papers and oral argument, the Court finds as follows:

Plaintiff Victor A. Siguenza Zuniga (the "Plaintiff") alleges causes of action pursuant to New York State Labor Law §§ 240(1) and 241(6) against Defendants 625 Halsey, LLC (the Defendant "Halsey") and D&G Construction NY Inc. (the Defendant "D&G") (collectively the "Defendants"). Plaintiff contends that on November 30, 2018, he was working at a new building construction site at 625 Halsey Street, Brooklyn, New York (the "Premises"). The Premises was purportedly owned by Defendant Halsey and the construction was purportedly being performed by Defendant D&G as general contractor. While working at the Premises, Plaintiff alleges that a bucket filled with cement fell from a scaffold at an elevated height and struck Plaintiff causing him serious injuries.

Plaintiff's Note of Issue was filed on November 6, 2021. Defendants moved (motion sequences #1 and #2) for orders vacating the Note of Issue. Plaintiff now cross-moves (motion

sequences #3 and #4) for an order of severance pursuant to CPLR 603 and 1010 and opposes Defendants' motions. Plaintiff seeks to have the Second, Third, and Fourth Third-Party actions severed from this action. Plaintiff argues that the Second, Third, and Fourth Third-Party actions are independent of the Plaintiff's claims pursuant to New York State Labor Law, which purportedly occurred on the construction site at the Premises. Plaintiff contends that in order to avoid confusion and delay, the motion to sever should be granted. The Honorable Lawrence Knipel, J.S.C. granted motion sequences #1 and #2 and vacated the Note of Issue and provided a new Note of Issue date of December 23, 2022. Plaintiff also moves (motion sequence #5) for summary judgment on the issue of liability relating to Plaintiff's Labor Law 240(1) and 241(6) claims against the Defendants.

The Defendants and the Third and Fourth Third-Party Defendant Arevalos Construction Corp. ("Arevalos") oppose the motion contending that the motion is premature as they have been deprived the opportunity of taking the depositions of at least two individuals who are believed to have information relating to material issues of fact exist.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it "should only be employed when there is no doubt as to the absence of triable issues of material fact." *Kolivas v. Kirchoff*, 14 AD3d 493, 787 N.Y.S2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341 [1974]. The proponent for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316 [1985]. "In determining a motion for summary judgment, evidence

must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party." *Adams v. Bruno*, 124 AD3d 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 AD3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 538 N.Y.S.2d 837 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 610 N.Y.S.2d 50 [2d Dept 1994]. However, "[a] plaintiff is no longer required to show freedom from comparative fault in establishing his or her *prima facie* case..." if they can show "...that the defendant's negligence was a proximate cause of the alleged injuries." *Tsyganash v. Auto Mall Fleet Mgmt., Inc.*, 163 AD3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2d Dept 2018]; *Rodriguez v. City of New York*, 31 NY3d 312, 320, 101 N.E.3d 366, 371 [2018].

Labor Law § 240(1)

Labor Law § 240 (1) is designed to protect employees on construction sites from elevation-related risks. This section provides that:

> All contractors and owners and their agents ... who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other

> devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

"Labor Law 240(1) provides exceptional protection for workers against the special hazards that arise when the work site itself is either elevated or positioned below the level where materials are being hoisted." *Walker v. City of New York*, 72 A.D.3d 936, 937, 899 N.Y.S.2d 322, 323 [2nd Dept, 2010]. In order to prevail on a Labor Law 240 (1) cause of action, "[a] plaintiff must establish that the statute was violated and that the violation was a proximate cause of his [or her] injuries" *Delahaye v Saint Anns School*, 40 AD3d 679, 682, 836 N.Y.S.2d 233 [2d Dept 2007]; *see Berg v. Albany Ladder Co., Inc.,* 10 NY3d 902, 904, 861 N.Y.S.2d 607 [2008]; *Robinson v. East Med. Ctr., L.P.*, 6 NY3d 550, 814 N.Y.S.2d 589 [2006]. "Liability may, therefore, be imposed under the statute only where the "plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." *Nicometi v. Vineyards of Fredonia, LLC*, 25 N.Y.3d 90, 97, 30 N.E.3d 154, 158 [2015].

The Plaintiff directs the Court to both statutory and common law authority supporting his contention that the failure to provide necessary overhead protection and suitable devices that serve to prevent an unsecured object from falling from an elevated height upon workers is *prima facie* entitlement to summary judgment on a Labor Law 240(1) claim. Plaintiff contends that his proof supports his 240(1) claim. In support of his application, the Plaintiff relies on the deposition of the Plaintiff, Ran David, and Johanna Vega, and the affidavit of Maria Dolores Dutan Pomaquiza. During his deposition testimony, the Plaintiff confirmed that he was working for three days at the Premises before the alleged accident occurred. (See Plaintiff's EBT, NYSCEF Document 199, Page 54). When asked who gave him directions or instructions on what to do during those three days the Plaintiff stated, "Edwin Boliva Arevalos." (Id. Page 55). When asked to describe what he was doing during the three days at the Premises, Plaintiff stated, "I was mixing the cement in the

machine to make the bricks to take them up to the -- yeah, I was mixing the cement in the machine, and it's carried in the wheelbarrow up to the site." (Id. Page 60). He further confirmed that the construction project "was a building" and that "it was just on the first floor." (Id. Pages 60-61). Plaintiff stated that "I was at the same site making the mix with the machine" and would have to carry it in a wheelbarrow for "like six or eight meters." (Id. Page 62). When asked if he ever stood on a scaffold or a ladder while working at the site, Plaintiff stated that "I was always on the ground because I was working mixing the cement to make the bricks." (Id. Page 63). He further stated that he "was mixing the cement in the machine and taking it over in the wheelbarrow to the scaffold and putting it in the pulley to get it up to the scaffold." (Id. Pages 64-65). When asked to clarify "pulley" Plaintiff stated, "[n]o. Rather it was bucket with a stick to mix the cement to put it up on the bricks." (Id. Page 65). When asked how Plaintiff got the bucket up onto the scaffold, he stated "[f]rom the ground level, I lifted it up about four feet and then the other person grabbed it and took it up higher." (Id.). Plaintiff further confirmed that "[t]here was four or five people on top of this scaffold working" and one of these people was "Maria Dutan." (Id. Pages 69-70). When asked to describe what Plaintiff was doing prior to the accident he stated that, "I was squatting down, bending over to get the bucket to lift it up to the scaffold so they could put the bricks in when something hit me on my head and back, and I fell forward." (Id. Page 72). Plaintiff confirmed that he wore a hard hat "[a]ll the time." (Id. Page 74). Plaintiff stated that the cement filled buckets weighed "[a] hundred to -- 80 to 100 pounds rather." (Id. Page 75). When asked to confirm which scaffold the bucket fell from that hit the Plaintiff, he stated "[f]rom the six-foot one" and that he did not see the bucket prior to it falling. (Id. Page 76). When asked if he had seen buckets sitting on the scaffold prior to the accident, the Plaintiff stated "I remember there were more buckets on top." (Id. Page 86). When asked what other items were on the scaffold with the cement filled

buckets prior to his accident, the Plaintiff stated, "[t]here was wood and the people that were up top there." (Id. Page 86). When asked where those people were situated on the four and six foot scaffold, the Plaintiff stated that "[t]here were people on the six-foot scaffold. But the four-foot scaffolding was empty." He confirmed that he lost consciousness "[f]or about ten seconds more or less." (Id. Page 102). When asked about how the wood planks were secured, the Plaintiff stated that "[t]hey're just resting on top of the metal seated on top of the metal." (Id. Page 118).

During his deposition testimony, Ran David stated that "I am one of the partners" of Defendant Halsey. (See Ran David EBT, NYSCEF Document 201, Page 7). Mr. David stated that "[w]e just open this company to purchase. My brother opened this company to build this project." (Id. Page 10). Mr. David confirmed that when the property was purchased "[i]t was empty lot" and the intent was "[t]o build the project." (Id. Page 16). Mr. David further confirmed that "D&G Construction [was hired] to build the project." (Id. Page 18). When asked if he would visit the construction site, he stated, "I used to go once in two weeks, three weeks." (Id. Page 29). Mr. David confirmed that the contract provided that D&G was to furnish and provide all of the construction and other services required, including all work, labor, services, material and equipment required for the renovation and construction of real property located at the Premises. (Id. Page 21). When asked whether Halsey hired any workers individually to do work at the Premises, other than its engagement of D&G, Mr. David stated, "[n]o." (Id. Page 37).

During Johanna Vega's deposition testimony, she stated that, "I'm president D and G Construction" … "[s]ince September 2017." (See Johanna Vega EBT, NYSCEF Document 202, Page 9). Ms. Vega confirmed that D&G had "[b]etween two and three" employees who were "[s]ite managers." (Id. Pages 13-14). When asked to describe the duties and responsibilities of the site managers, she stated "[t]hey would go to the site, take a couple of pictures, confirm if there

was any subcontractors in the building, if there was any activities going on, and send a couple of pictures. And that was it. It was pretty much to keep the office updated if there was any activity or not on the site" (Id. Pages 15-16). She confirmed that the site managers would visit the site "not more than twice a week." (Id. Page 16). When asked whether a site manager would coordinate the work between the different subcontractors as to when and where certain subcontractors should work, she confirmed "[s]ometimes, yes." (Id. Page 17). Ms. Vega confirmed that D&G Construction was hired to be the general contractor for the project at the Premises. (Id. Page 23). Ms. Vega stated that, "[w]e were responsible 100 percent for the construction of the new building from excavation, foundation to complete and finished building including Certificate of Occupancy." (Id. Page 29). Ms. Vega confirmed that subcontractors "were required to follow our instructions" (Id. Page 34). Ms. Vega stated that "we weren't responsible for the supervision. Every subcontractor that entered the site was responsible for safety of their employees. So it was more -- it was more where we were responsible making sure they have the material of -- making sure they, that the site is -- has what they need, that there is activity going on. The safety wise, it wasn't in our scope. It would be passed down to the subcontractors whoever was working there." (Id. Pages 34-35). Ms. Vega stated that "[n]o, we did not" perform or supervise the assembly of the scaffolding at the Premises. (Id. Page 62). When asked whether D&G Construction directed any supervisors of a subcontractor working on the block wall to provide netting or other overhead protection around the scaffolding, she stated, "I don't think so. I don't know. I'm not sure." (Id. Page 72). When asked whether D&G Construction ever gave any specific directions to the subcontractor working on the block wall indicating that any buckets or containers that may contain cement were to be properly secured on the scaffolding, she stated, "[n]ot sure." (Id. Page 73).

In her affidavit, Maria Dolores Dutan Pomaquiza stated that, "[o]n November 30, 2018 I was working for RM Construction and Development Corp., at the construction site located at 625 Halsey Street, Brooklyn, New York with my co-worker Victor Siguenza Zuniga. On November 30, 2018, I was working on a six-foot scaffold with other workers doing cement work, building a wall. Victor was on the ground level. He was mixing the cement and placing it in buckets. He would then pass the buckets up to a four foot scaffold and then the buckets were taken up by the other workers to the six foot scaffold. There were several buckets filled with cement on the six-foot scaffold. There was no safety nets or barriers placed around the six-foot scaffold above where Victor was required to work. At one point Victor stopped passing the buckets of cement and I went to the end of the six-foot scaffold to see why. I looked down and saw Victor on the ground and he appeared to be in a lot of pain. I also saw a bucket that had been filled with cement sitting on the six-foot scaffold that had fallen to the ground. That bucket was on its side and the cement spilled out onto the ground. I also saw another bucket that appeared to have been filled with cement also on the ground. Victor was crouching down and could not get up and he said he had been struck by a bucket filled with cement that had fallen from the six-foot scaffold. Someone called 911 and an ambulance came and took Victor to the hospital." (See Affidavit Maria Dolores Dutan Pomaquiza, NYSCEF Document 203, Paragraphs 2-10).

The Defendants oppose the motion. Specifically, the Defendants contend that the motion is premature as discovery has not been completed and that the depositions of two parties may provide material issues of fact as to how the alleged accident occurred. Further, the Defendants rely upon statements made in medical records that purportedly contradict the Plaintiff's version of the accident provided in his deposition testimony. In reply, the Plaintiff argues that the statements relied upon in the medical records are inadmissible hearsay. The Plaintiff contends that the medical

records submitted by the Defendants were not certified (*see* CPLR 4518 [c]) and since the records constituted the only evidence in opposition to Plaintiff's motion, the records should not be considered. See *I.A. v. Mejia*, 174 AD3d 770, 771-722, 105 N.Y.S.3d 103 [2d Dept 2019]; see also *Alpha Invs., LLC v. McGoldrick*, 151 AD3d 800, 802, 59 N.Y.S.3d 33 [2d Dept 2017]. Defendants also argue that the motion is premature as the deposition testimony of Maria Dutan and Arevalos Construction's witness, Edwin Arevalos, have not been completed.

Defendant D&G commenced a Third Third Party action against Third and Fourth Third Party Defendant Arevalos Construction Corp. on October 6, 2021 after the Plaintiff testified that "Edwin Bolivar Arevalo[s]", the owner of Arevalos Construction, hired him and that he was in charge. The Defendants also argue that the motion is premature as they have not had the opportunity to take Mr. Arevalos's deposition testimony. However, the Defendants are unable to explain how his testimony would raise a material issue of fact. On March 31, 2022, Defendant Halsey served an audio disc containing a recorded statement by Edwin Arevalo. On April 22, 2022, Defendant Halsey served a transcript of the recorded statement. Plaintiff argues that the recorded statement is inadmissible hearsay as Mr. Arevalos's statement was unsworn. Notwithstanding this, insofar as the statement was provided by Defendant Halsey in support of Halsey's contention that the motion was premature, the statement reflects that Mr. Arevalos stated that he was not at the site when the alleged accident occurred and that he was informed about what transpired after the accident. Mr. Arevalos has not provided an affidavit in opposition.

As an initial matter, the "motion was not premature since the defendant[s] failed to demonstrate that discovery might lead to relevant evidence or that facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff." *Turner v. Butler*, 139 AD3d 715, 716, 32 N.Y.S.3d 174, 175 [2d Dept 2016]. "The mere hope or

speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion." *Lopez v. WS Distribution, Inc.*, 34 AD3d 759, 760, 825 N.Y.S.2d 516 [2d Dept 2006]. "A party who claims ignorance of critical facts needed to defeat a motion for summary judgment (see, CPLR 3212f) must first demonstrate that the ignorance is unavoidable, and that reasonable efforts were made to discover the facts which give rise to a triable issue (see, *Kenworthy v Town of Oyster Bay*, 116 AD2d 628, 629)." *Rothbort v. S.L.S. Mgt. Corp.*, 185 AD2d 806, 807, 587 N.Y.S.2d 555 [2d Dept 1992]. The Defendants' "contention that summary judgment was premature because discovery was incomplete and only the plaintiff had been deposed is without merit" *Gillani v. 66th St. Woodside Prop., LLC*, 63 AD3d 678, 679, 879 N.Y.S.2d 727 [2d Dept 2009].

Labor Law 240(1)

"[F]alling object liability and Labor Law 240(1) is not limited to cases in which the falling object is in the process of being hoisted or secured." *Hensel v. Aviator FSC, Inc.,* 198 AD3d 884, 156 N.Y.S.3d 98, 101 [2d Dept 2021], quoting *Quattrocchi v. F.J. Sciame Const. Corp.,* 11 N.Y.3d 757, 759, 896 N.E.2d 75, 76 [2008]. In *Hensel*, the Court found that a 200 pound board that slipped off an already raised forklift, which struck the Plaintiff at ground level, entitled the Plaintiff to a summary judgment award pursuant to Labor Law 240(1), as the forklift did not provide "load guides and/or guard rails" that could have constrained the boards as they were being moved off the forklift. In this case there was no indication that the buckets were secured or that the scaffold had guard rails preventing the buckets from falling, which was a "hazard contemplated under Labor Law 240(1)…" *Hensel v. Aviator FSC, Inc.,* 198 AD3d 884, 156 N.Y.S.3d 98, 101 [2d Dept 2021]; *see also Sarata v. Metro. Transp. Auth.,* 134 AD3d 1089, 23 N.Y.S.3d 281 [2d Dept 2015]

[defective netting]; *Escobar v. Safi,* 150 AD3d 1081, 1082, 55 N.Y.S.3d 350, 352 [2d Dept 2017] [both a falling object being hoisted and a falling object as a consequence of it being unsecured are events covered by Labor Law 240(1)]. The testimony of the Plaintiff together with the affidavit of Ms. Pomaquiza established that an unsecured bucket filled with cement fell from a six foot high scaffold and struck the Plaintiff during his act of passing buckets up to workers on a scaffold. The Defendants have not shown that the bucket was secured or that other overhead protection was maintained in the relevant area. Accordingly, in relation to his Labor Law 240(1) claim the Plaintiff's motion is granted.

Labor Law § 241 (6) imposes on owners and contractors a non-delegable duty "to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed." *Perez v. 286 Scholes St. Corp.*, 134 AD3d 1085, 1086, 22 N.Y.S.3d 545, 546 [2d Dept 2015]; *Lopez v. New York City Dept. of Envtl. Protection,* 123 AD3d 982, 983, 999 N.Y.S.2d 848, 850 [2d Dept 2014]. To establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision mandating compliance with concrete, or clear, specifications. *See Misicki v. Caradonna*, 12 NY3d 511, 515, 882 N.Y.S.2d 375, 377 [2009]; *Ross v. Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 505, 601 N.Y.S.2d 49, 55 [1993]; *La Veglia v. St. Francis Hosp.*, 78 AD3d 1123, 912 N.Y.S.2d 611 [2d Dept, 2010]; *Pereira v. Quogue Field Club of Quogue, Long Is.*, 71 AD3d 1104, 898 N.Y.S.2d 220 [2d Dept 2010].

Turning to the merits of the Plaintiff's claim made pursuant to Labor Law 241(6), the Court finds that the Plaintiff has met his *prima facie* burden. "Labor Law § 241(6) protects only those workers engaged in duties connected to the inherently hazardous work of construction, excavation, or demolition." *Moreira v. Ponzo*, 131 A.D.3d 1025, 16 N.Y.S.3d 813 [2d Dept 2015]. Labor Law

241(6) imposes vicarious liability on building owners where there is a violation of an Industrial Code provision that proximately causes injury to a worker at a construction, excavation or demolition site. "[T]he protections of Labor Law § 241(6) are inapplicable outside of the context of construction, demolition, or excavation." *Alberici v. Gold Medal Gymnastics*, 197 A.D.3d 540, 542, 152 N.Y.S.3d 704, 707 [2d Dept 2021]; *see Esposito v. New York City Indus. Dev. Agency*, 1 NY3d 526, 528, 770 N.Y.S.2d 682; *Nagel v. D & R Realty Corp.*, 99 NY2d 98, 100-101, 752 N.Y.S.2d 581. Plaintiff alleges that Defendants violated 12 NYCRR 23-2.1(a); 23-5.1(j)(2) and 23-1.7(a)(1)-(2).

Industrial Code Section 23-2.1(a)(2) provides in part that "[m]aterial 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." This section has been held to be sufficiently specific to support a cause of action under Labor Law 241(6). *Ginter v. Flushing Terrace, LLC*, 121 AD3d 840, 844, 995 N.Y.S.2d 95 [2d Dept 2014]; *Fontaine v. Juniper Assoc.*, 67 AD3d 608, 609, 888 N.Y.S.2d 409 [2nd Dept 2009]. The Plaintiff has not shown that the bucket was placed in a manner that is described in this section. As such the Plaintiff has not met his burden.

Industrial Code Section 23-5.1(j)(2) provides in part that "[a]ll scaffolds under which any person is likely to work or pass shall be provided with a wire mesh screen." This section has been held to be sufficiently specific to support a cause of action under Labor Law 241(6). *Debennedetto v. Chetrit*, 190 AD3d 933, 936, 140 N.Y.S.3d 569 [2nd Dept 2021]. Ms. Pomaquiza stated in her affidavit that there were "…no safety nets or barriers placed around the six foot scaffold…" There is no showing by the Defendants that this protection was provided.

Industrial Code Section 23-1.7(a)(1) provides in part that "[e]very place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided

with suitable overhead protection". It also states that "[s]uch overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. " This section has been held to be sufficiently specific to support a cause of action under Labor Law 241(6). *Parrales v. Wonder Works Construction Corp.*, 55 AD3d 579, 582, 866 N.Y.S.2d 227 [2d Dept 2008]; *Jicheng Liu v. Sanford Tower Condominium, Inc.*, 35 AD3d 378, 379, 828 N.Y.S.2d 101 [2d Dept 2006]. The Plaintiff has not shown that this provision was applicable and that the requirements were not complied with. As such the Plaintiff has not met his burden.

Industrial Code Section 23-1.7(a)(2) provides in part that "[w]here persons are lawfully frequenting areas exposed to falling material or objects but wherein employees are not required to work or pass, such exposed areas shall be provided with barricades". This section is sufficiently specific to support a cause of action under Labor Law §241(6). *Jicheng Liu v. Sanford Tower Condominium, Inc.*, 35 AD3d 378, 379, 828 N.Y.S.2d 101 [2d Dept 2006]; *Mulvihill v. Brooklyn Law School*, 22 Misc.3d 1114(A), 880 N.Y.S.2d 874 [Sup. Court Kings County 2009]. The Plaintiff has not shown that this section was applicable and that the requirements were not met. As such the Plaintiff has not met his burden.

Motion Sequence #3 and #4 (Severance)

The Court denies Plaintiff's motions to sever made pursuant to CPLR 603 and 1010. "The grant or denial of a request for severance is a matter of judicial discretion, which should not be disturbed on appeal absent a showing of prejudice to a substantial right of the party seeking severance." *Chiarello v. Rio*, 101 AD3d 793, 797, 957 N.Y.S.2d 133, 137 [2d Dept 2012]. In the instant matter, Plaintiff has not shown that the he would be prejudiced by continuing the matter as

one action. *See Zili v. City of New York*, 105 AD3d 949, 950, 963 N.Y.S.2d 684, 685 [2d Dept 2013]. The motion is denied.

Based on the foregoing, it is hereby ORDERED as follows:

Plaintiff's motions (motion sequence #3 and #4) to sever are denied.

The Plaintiff's motion for summary judgment on the issue of liability (motion sequence #5), as it relates to the Plaintiff's Labor Law 240(1) claim is granted, and as to Plaintiff's 241(6) claim relating to Industrial Code provision 23-5.1(j)(2), the court finds that this provision was violated. All other relief sought is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK
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[*15]