SHORT FORM ORDER

INDEX No. 06-8462
CAL. No. 11-02383OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 4-19-12 (#009)
MOTION DATE 4-26-12 (#010)
ADJ. DATE 7-18-12
Mot. Seq. # 009 - MD
 # 010 - XMD

SAMUEL GUZMAN,	**GORAYEB & ASSOCIATES, P.C.**
Plaintiff,	**Attorney for Plaintiff**
	199 William Street, Suite 1205
- against -	**New York, New York 10038**
FARRELL BUILDING CO. AND HELEN S. HIRSCH,	**MINTZER, SAROWITZ, ZERIS, LEDVA & MEYERS, LLP**
	Attorney for Defendant/Third-Party Plaintiff
	Farrell Building Company
Defendants.	**17 West John Street, Suite 200**
	Hicksville, New York 11801
FARRELL BUILDING COMPANY,	
Third-Party Plaintiff,	
- against -	
BAYVIEW BUILDING & FRAMING, CORP.,	
Third-Party Defendant.	

Upon the following papers numbered 1 to 33 read on this motion to compel; and this motion for partial summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers 11 - 28; Answering Affidavits and supporting papers 29 - 31; Replying Affidavits and supporting papers 32 - 33; Other plaintiff's memorandum of law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Farrell Building Co. for, inter alia, an order compelling plaintiff to respond to its request for additional discovery is denied; and it is further

ORDERED that the unopposed cross motion by plaintiff for partial summary judgment on the issue of liability under Labor Law §240 (1) is granted.

Plaintiff Samuel Guzman commenced this action for injuries sustained on January 31, 2006 while working at a construction site for a new single family home located at 1088 Mecox Road in Bridgehampton, Suffolk County, New York. Plaintiff allegedly was injured when he fell from the top of a wall located on the second floor of the home through the interior of the building to the unfinished basement level below. At the time of the accident, plaintiff was an employee of Bay View Custom Framing Inc., a subcontractor hired by Bayview Building and Framing Corp. ("Bayview") to perform framing services at the construction site. Bayview was hired by defendant Farrell Building Co. ("Farrell"), the general contractor for the construction project. Guzman brought this action against Farrell and codefendant Helen S. Hirsch, the owner of the building. By way of his complaint, plaintiff alleges causes of action against defendants for common law negligence, and for violations of Labor Law §§ 200 and 240 (1). The complaint also alleges a cause of action under Labor Law §241(6) based upon alleged violations of the Industrial Code.

Farrell joined issue asserting general denials, affirmative defenses, and cross claims against Hirsch and Bayview for contribution and contractual and common law indemnification. Farrell also commenced a third-party action against Bayview seeking the identical relief. The action was discontinued against defendant Hirsch, and by order of the court (J. Cohalan) dated December 30, 2010, Farrell was awarded summary judgment on its third-party complaint seeking contribution and/or indemnification against Bayview. On November 21, 2011, plaintiff filed the note of issue and certificate of readiness indicating the end of discovery in the action. Subsequently, Farrell allegedly received, from its investigator, several hundred photographs of plaintiff that were posted to Internet media websites such as Facebook, Hi5 and "Radio-Sammy.tk." Farrell then served plaintiff a notice to admit requesting, inter alia, admissions as to when certain photographs were taken. Plaintiff rejected Farrell's November 2010 request, asserting that discovery was complete and that he would object to the use or introduction of the photographs during trial.

Farrell now moves, pursuant to CPLR 3101(h), for an order "directing that plaintiff produce for inspection all computers used by plaintiff to post [ ] photographs, all hard drives, memory cards, cameras, and/or other media and/or storage devices pertaining to said photographs, as well as authorization to permit access to the plaintiff's Facebook [ ]Hi5 and Radio-Sammy.tk accounts." Plaintiff opposes the motion, arguing that Farrell failed to demonstrate that unusual and unanticipated circumstances developed after the filing of the note of issue warranting additional discovery in the action. Further, plaintiff cross-moves for partial summary judgment on the issue of liability with respect to his claim under Labor Law §240 (1).

The Uniform Rules for Trial Courts (22 NYCRR) §202.7 (a) provides that a motion relating to disclosure must be supported by an affirmation that counsel "has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." Further, the affirmation of good-faith effort "shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (22 NYCRR §202.7 [c]). In addition, 22 NYCRR §202.21 (e) provides, in relevant part, that within 20 days after service of a note of issue and certificate of readiness, any party to the action may move to vacate the note of issue "upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect." A party seeking additional discovery after expiration of the 20-day period provided in 22 NYCRR § 202.21(e), however, must show "unusual or unanticipated circumstances develop[ed] subsequent to the filing of the note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial

prejudice" (22 NYCRR §202.21[d]; *see* ***Utica Mut. Ins. Co. v P.M.A. Corp.***, 34 AD3d 793, 826 NYS2d 138 [2d Dept 2006]; ***Audiovox Corp. v Benyamini***, 265 AD2d 135, 707 NYS2d 137 [2d Dept 2000]).

Farrell's motion for an order directing plaintiff to produce for inspection all computers or media devices used to post photographs to his online media accounts, and granting it authorization to inspect said media accounts, is denied. Here, Farrell failed to provide a sufficient affirmation of a good faith detailing its efforts to resolve the issues raised by the motion (*see* 22 NYCRR §202.7 [a]). Farrell's affirmation merely states that it attempted to resolve the disclosure dispute but has been unable to do so. It does not indicate the time, place and nature of the consultation between the parties, or that good faith efforts were made to resolve the disclosure dispute (22 NYCRR §202.7 [c]; *see* ***Tine v Courtview Owners Corp.***, 40 AD3d 966, 838 NYS2d 92 [2d Dept 2007]; ***Cestaro v Chin***, 20 AD3d 500, 799 NYS2d 143 [2d Dept 2005]; ***Barnes v NYNEX, Inc.***, 274 AD2d 368, 711 NYS2d 893 [2d Dept 2000]). Moreover, the filing of a note of issue and certificate of readiness denotes the end of the discovery phase of litigation (*see* ***Arons v Jutkowtiz***, 9 NY3d 393, 411, 850 NYS2d 345 [2007]), and Farrell has failed to allege, much less demonstrate, that unusual or unanticipated circumstances developed after the filing of the note of issue which requires additional pretrial proceedings to prevent it substantial prejudice (22 NYCRR 202.21(e); *see* ***Utica Mut. Ins. Co. v P.M.A. Corp.***, *supra*; ***Audiovox Corp. v Benyamini***, *supra*; ***Marks v Morrison***, 275 AD2d 1027, 714 NYS2d 167 [4th Dept 2000]; ***Sims v Ferraccio***, 265 AD2d 805, 695 NYS2d 641 [4th Dept 1999]; ***Muller v Lustgarten***, 32 AD2d 898, 301 NYS2d 663 [1st Dept 1969]). Indeed,"[a] lack of diligence in seeking discovery does not constitute unusual or unanticipated circumstances warranting post-note of issue disclosure" (***Tirado v Miller***, 75 AD3d 153, 161, 901 NYS2d 358 [2d Dept 2010]; *see* ***Silverberg v Guzman***, 61 AD3d 955, 956, 878 NYS2d 177 [2d Dept 2009]; ***Audiovox Corp. v Benyamini***, *supra*).

Plaintiff's cross motion for partial summary judgment in his favor on the issue of liability under Labor Law §240 (1) is granted. Here, plaintiff argues that his injuries arose from a gravity-related accident, and that Farrell failed to provide him with any safety devices designed to prevent or break his fall. In support of his cross motion, plaintiff submits his own affidavit which states, among other things, that he fell more than thirty feet from the top of a narrow wall located on the second floor of the building to the unfinished basement level below, and that there were no rails, scaffolding or other safety equipment at the worksite to prevent or break his fall. The affidavit further states that plaintiff was required to stand on the wall in order to perform his work, and that he fell after suddenly losing his balance on its surface, which only measured 5 ½ inches wide. Farrell did not submit papers in opposition to the motion.

"Labor Law §240(1) imposes absolute liability upon an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure" (***Bland v Manocherian***, 66 NY2d 452, 459, 497 NYS2d 880 [2d Dept 1985]; *see* ***Sprague v Peckham Materials Corp.***, 240 AD2d 392, 658 NYS2d 97 [1997]; ***Greenberg v. City of New York***, 81 AD2d 284, 440 NYS2d 332 [2d Dept 1981]). Specifically, 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, 652 NYS2d 723 [1996]). To prevail on a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*see* ***Bland v Manocherian***, *supra*; ***Sprague v Peckham Materials Corp.***, *supra*). Section 240(1) of the Labor Law is liberally construed to accomplish the purpose for which it was formed, that is to "protect workers by placing the ultimate responsibility for safety practices

where such responsibility belongs, on the owner and general contractor or their agent instead of on workers, who are scarcely in a position to protect themselves from accident" (***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 513, 577 NYS2d 219 [1991], *quoting* ***Koenig v Patrick Constr. Corp.***, 298 NY 313, 319, 83 N.E. 2d 133 [1948]). Moreover, an owner, contractor or agent who breaches this duty may be held liable for damages regardless of whether it actually exercised any supervision or control over the work giving rise to the injury (***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]; ***Rocovich v Consolidated Edison Co.***, *supra*).

Plaintiff established his prima facie entitlement to summary judgment on the issue of liability by submitting evidence he was injured as a result of a gravity-related accident, and that Farrell's failure to ensure he was provided with safety devices designed to prevent or break his fall was the proximate cause of his injuries (*see* ***Striegel v Hillcrest Hgts. Dev. Corp.***, 100 NY2d 974, 768 NYS2d 727 [2003]; ***Bland v Manocherian***, *supra*; ***Henry v Eleventh Ave., L.P.***, 87 AD3d 523, 928 NYS2d 72 [2d Dept 2011]; ***Taeschner v M&M Restorations***, 295 AD2d 598, 745 NYS2d 41 [2d Dept 2002]). The burden, therefore, shifted to Farrell to demonstrate the existence of triable issues as to whether there was a statutory violation, or as to whether plaintiff's own acts or omissions were the sole cause of the accident (*see* ***Blake v Neighborhood Hous. Servs. of N.Y. City***, 1 NY3d 280, 285-286, 771 NYS2d 484 [2003]; ***Squires v Marini Bldrs.***, 293 AD2d 808, 809, 739 NYS2d 777, *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]). Farrell, which did not oppose the motion, failed to raise any such issue (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, *supra*; ***Blake v Guardino***, 35 AD2d 1022, 315 NYS2d 973 [1970]).

Plaintiff is directed to serve a copy of this order with notice of entry upon the Calendar Clerk of this Court. Upon such service, the Calendar Clerk is directed to place this matter on the Calendar Control Part calendar for the next available date.

The foregoing constitutes the Order of this Court.

Dated: October 3, 2012
Central Islip, NY

HON. HECTOR D. LASALLE, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION