Couillard v The Shaw Group, Inc.
2013 NY Slip Op 31807(U)
July 31, 2013
Supreme Court, New York County
Docket Number: 111969/2010
Judge: Arlene P. Bluth
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[* 1]
SCANNED ON 8/7/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH
Justice

PART 22

Index Number : 111969/2010
COUILLARD, KENNETH
vs.
THE SHAW GROUP
SEQUENCE NUMBER : 001
COMPEL

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______

The following papers, numbered 1 to 5, were read on this motion to/for compel / protective order + x-m

& Health Newborn Notice of Motion/Order to Show Cause — Affidavits — Exhibits | No(s). 1

Notice of x-m - affs.
Answering Affidavits — Exhibits | No(s). 2, 3, 4

Replying Affidavits | No(s). 5

Upon the foregoing papers, it is ordered that this motion is and cross-motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

Which covers Mot Seq 1-4

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

FILED
AUG 07 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/31/13

______, J.S.C.
HON. ARLENE P. BLUTH

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: MOTION IS: and cross-motion ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 22
--------------------------------------X
Kenneth Couillard and Francine Couillard,

Plaintiffs,

Index Number: 111969/2010

-against-

The Shaw Group, Inc., C.M. Camparetti, April A. Clark, and Women's Health Professionals, LLP,

Mot. Seq. 1-4

Defendants.
--------------------------------------X
Shaw Environmental & Infrastructure Engineering of New York, P.C. i/s/h/a The Shaw Group, Inc.,

Third-Party Plaintiff,

-against-

Newborn Construction, Inc.,

Third-Party Defendant.
--------------------------------------X

FILED
AUG 07 2013
COUNTY CLERK'S OFFICE
NEW YORK

Arlene P. Bluth, J.:

Women's Health Professionals, LLP (Women's Health) moves for an order compelling Newborn Construction, Inc. (Newborn) to produce additional witnesses for depositions and Newborn cross-moves for a protective order against these depositions (motion sequence # 1).

Plaintiffs move for an order, pursuant to CPLR 3212, granting summary judgment on liability against defendants and for a special preference, pursuant to CPLR 3403, and Women's Health cross-moves for summary judgment, pursuant to CPLR 3212, dismissing plaintiffs'

complaint and any cross claims against it and, alternatively, to transfer this action to Suffolk County (motion sequence # 2).

The Shaw Group, Inc. (Shaw) moves for summary judgment, pursuant to CPLR 3212, dismissing plaintiffs' complaint and any cross claims against it and Women's Health cross-moves for summary judgment on its cross claim for contribution against Shaw (motion sequence # 3).

Newborn moves for leave to amend to add cross claims against C.M. Camparetti (Camparetti), April A. Clark (Clark) and Women's Health and for summary judgment on these cross claims and Women's Health cross-moves for summary judgment dismissing the proposed cross claims of Newborn against it (motion sequence # 4).

The court heard oral argument on the record on the motions and cross motions on May 1, 2013 (Hearing). The motions and cross motions are consolidated for disposition and decided as noted below.

<u>Parties and Their Allegations</u>

Kenneth Couillard (plaintiff) was a foreman employed by Newborn and, on August 9, 2010, when he was at the intersection of Route 25 and Terry Road, Smithtown, New York (the Site), he was struck by a car driven by Clark (plaintiff March 1, 2011 EBT at 10, 13, 35, 66). Francine Couillard is suing for loss of services, arising out of the accident.

Clark was the driver of the car that struck plaintiff, Camparetti, her mother, was the owner of the car and Clark was driving it with her permission (Clark April 12, 2011 EBT at 76; Camparetti April 12, 2011 EBT at 5-7). Clark was working for Women's Health as a medical

assistant and, on the day of the accident, was transporting files from Women's Health's office in Smithtown to a satellite office in Stony Brook (Clark April 12 EBT at 12, 26, 30).

Women's Health was a medical practice, specializing in obstetrics and gynecology with a main office in Smithtown, with a file room, and a smaller office without storage capacity in Stony Brook (Gmystrasiewicz EBT at 12, 17, 21-23, 28-29).

Newborn was the general contractor with the New York State Department of Transportation (DOT) for certain road repair and construction work on Long Island (the Project) that included the Site (Vetrano EBT at 32, 78, 131; Moller EBT at 22; Schechner March 2, 2011 EBT at 77).

Shaw was an engineering firm hired to perform inspection service on behalf of DOT on the Project to monitor Newborn's compliance with the Project's requirements (Moller EBT at 29; Schechner November 28, 2011 EBT at 50).

Plaintiff contends that, on August 9, 2010, at approximately 3 p.m., while he was at another location on the Project, he was summoned by Kyle Schechner (Schechner), Shaw's inspector, and that when he arrived there, he had a meeting with Schechner and Abilio Salgado (Salgado), from North Star, a concrete subcontractor on the Project (plaintiff March 1, 2011 EBT at 48, 50, 52). He states that the purpose of the meeting was to discuss the next day's work at the Site, which was the construction of a new handicap ramp and that, in connection with this, plaintiff was taking measurements to determine the appropriate amount of concrete to be used (*id.* at 74, 77-78). It is undisputed that, at this time, Route 25 had been reopened to traffic and there was no crash attenuator truck or any other barricade on the highway, but that there were orange barrels on the side of the road.

Plaintiff states that, while he was bending over on the excavated area on the side of the highway, with his safety vest in his hand, he saw a car coming towards him and that he was struck by this car, driven by Clark, and suffered severe injuries including multiple fractured bones requiring the insertion of a steel rod in his right leg (*id.* at 82, 106-108, 135). He asserts that Schechner told him how to perform specific tasks on the Project, including placement of the attenuator truck, the orange safety barrels and signs, the instruction to take measurements at the Site, which tools to use, and that Schechner had the ultimate authority (*id.* at 37, 62; plaintiff March 2, 2011 EBT at 41-43; plaintiff November 7, 2011 EBT at 80, 97-98; Salgado EBT at 59).

Shaw alleges that it was the inspector on the Project, that the determination of safety devices, such as attenuator trucks, barrels and signs, their placement and usage was made by Newborn, the general contractor, and not by it (Schechner March 2, 2011 EBT at 65, 77, 80, 98, 101, 122-123; Schechner November 28, 2011 EBT at 34, 58, 89-90). It states that the safety equipment was either owned or leased by Newborn and that the meeting at the Site between plaintiff, Schechner and Salgado was not part of the work performed that day at the Site, but rather was to discuss the next day's work (Schechner March 2, 2011 EBT at 125, 136, 185; Schechner November 28, 2011 EBT at 48, 67).

Schechner states that he did not see the impact, but that he saw Clark's car coming off the road and that he and Salgado were able to jump out of the way, but that plaintiff, who was behind him, was struck (Schechner March 2, 2011 EBT at 146-147, 150).

Newborn alleges that it was the general contractor on the Project with the DOT, that Shaw was supervising it to ensure that its work was done according to specifications, that placement of safety devices for road construction would be determined by the inspector, Shaw,

and that Shaw had the final say on these matters (Vetrano EBT at 32, 57-60, 96-97, 99). It states that, in particular, Schechner was especially "hands on" with regard to these determinations (*id.* at 116, 169). It further states that measurements for projected concrete usage was usually done during the work day, when the lane would be closed to traffic and safety devices would be present (*id.* at 171-172, 174-175).

Clark alleges that, on August 9, 2010, she was working as a medical assistant for Women's Health and that she was driving from its Smithtown office after having picked up medical files in order to transport them to the Stony Brook office, so that the doctor at that office would be able to use them in his examination of the practice's patients that afternoon (Clark April 12, 2011 EBT at 11-12, 28-30, 45, 48; Gmyatrasiewicz EBT at 27-29, 89-90). She stated there was heavy stop-and-go traffic along Route 25, that the car in front of her stopped and that she swerved to the right off the road to avoid hitting it (Clark April 12, 2011 EBT at 62, 69, 72; Clark February 12, 2012 EBT at 32, 39, 60). She was uncertain as to her speed, but it was reported by others as "fast" (Salgado EBT at 28-29) or at 50 miles per hour (Doskoez EBT at 30). She further stated that she did not know the distance between her car and the car in front of her and that it might been a couple of inches (Clark April 12, 2011 EBT at 69-70). She also stated that it was only when she stopped that she realized she had struck plaintiff (*id.* at 69, 76). Clark asserts that, after the accident, she called her office, spoke to the manager and that a co-worker picked up the files to transport them to the Stony Brook office and replace her for the day (*id.* at 119, Clark February 12, 2012 EBT at 44).

Women's Health asserts that it is not responsible for Clark's conduct on the day of the accident (Hearing at 39-41). However, its office manager testified that medical files containing

necessary information including reports, patient history, test results and other information were regularly arranged by its file department in its Smithtown office, so that they could be transported to its Stony Brook office, which lacked storage capacity and that the files were necessary for the doctor's use in examining patients (Gmytrasiewicz EBT at 12, 17, 21-23, 27-29, 89-90). He further testified that the files would be arranged by the filing department the day before they were required, that they could not be taken home by employees the night before and that, after the accident, another employee went to the Site, picked up the files and transported them to the Stony Brook office (*id.* at 60, 64-66). Finally, Clark was paid for the time that she spent transporting the files on the day of the accident (Hearing at 12, 42-43).

Summary Judgment

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]).

Labor Law § 241 (6)

Labor Law § 241 provides:

> "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 [workers] ... [in accordance with rules promulgated by the Commissioner of Labor]."

A cause of action under Labor Law § 241 (6) must allege violation of a specific, rather than a general, safety standard set forth in the New York State Industrial Code (the Code) and that this violation was a proximate cause of the accident (*Ross v Curtis-Palmer Hydro-Elec. Co., Inc.,* 81 NY2d 494, 501-505 [1993]). Additionally, in contrast to Labor Law § 240 (1), violation of Labor Law § 241 (6) and a regulation under it does not warrant summary judgment and an owner or general contractor "may ... raise any valid defense ... including contributory and comparative negligence" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 [1998]; *Mercado v Caithness Long Is. LLC*, 104 AD3d 576, 577 [1st Dept 2013]).

Plaintiff has alleged a violation of the Code (12 NYCRR § 23-1.29) (the Barricade Rule), which provides as follows:

> "(a) Whenever any construction, demolition or excavation work is being performed over, on or in close proximity to a street, road, highway or any other location where public vehicular traffic may be hazardous to the persons performing such work, such work area shall be so fenced or barricaded as to direct such public vehicular traffic away from such area, or such traffic shall be controlled by designated persons.
> (b) Every designated person authorized to control public vehicular

> traffic shall be provided with a flag or paddle measuring not less than 18 inches in length and width. Such flag or paddle shall be colored fluorescent red or orange and shall be mounted on a suitable hand staff. Such designated person shall be stationed at a proper and reasonable distance from the work area and shall face approaching traffic. Such person shall be instructed to stop traffic, whenever necessary, by extending the traffic flag or paddle horizontally while facing the traffic. When traffic is to resume, such designated person shall lower the flag or paddle and signal with his free hand."

Labor Law § 200

Labor Law § 200 is a codification of common-law negligence and, to be held liable, a party must have the authority to control the activity that caused the plaintiff's injury (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877-878 [1993]). There is no liability under this section of the Labor Law for an owner or general contractor that exercises no supervisory control over the operation, where the purported defect or dangerous condition arose from the contractor's methods (*Lombardi v Stout*, 80 NY2d 290, 294 [1992]). "An implicit precondition to [the duty under Labor Law § 200] to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]; *Fiorentino v Atlas Park LLC*, 95 AD3d 424, 426 [1st Dept 2012]).

Common-Law Indemnity

Generally, common-law indemnity is a "restitution concept which permits shifting the loss" from a party held liable by virtue of its status to a party at fault (*Mas v Two Bridges Assoc.*, 75 NY2d 680, 690 [1990]). Merely having the authority to direct, control or supervise the work

is "not consistent with the equitable purpose underlying common-law indemnification ... [but, rather] the obligation to indemnify [is] on parties who were actively at fault in bringing about the injury" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374, 377 [2011]).

Respondeat Superior

Generally, a party has no duty to control the conduct of another party, so as to prevent harm to another, but "[c]ertain relationships ... may give rise to this duty. Under the doctrine of respondeat superior, ... an employer may be liable for acts of its employees in the course and scope of employment" (*D'Amico v Christie*, 71 NY2d 76, 88 [1987]). "An employee acts in the scope of his employment when he is doing something in furtherance of the duties he owes to his employer and where the employer is, or could be, exercising some control, directly or indirectly, over the employee's activities" (*Lundberg v State of New York*, 25 NY2d 467, 470 [1969]). While driving to and from work is generally not considered to be within the scope of employment for the purpose of respondeat superior liability, there is an exception "where the employee uses [her] car in furtherance of [her] work" (*Felberbaum v Weinberger*, 54 AD3d 717, 719 [2d Dept 2008]; *Dimitrakis v Bridgecom Intl., Inc.*, 70 AD3d 885, 887 [2d Dept 2010]).

Close Following and Short Stop

A driver traveling behind another vehicle has a duty to maintain a safe distance to avoid a potential collision and the failure to do so resulting in a a collision establishes a prima facie case of negligence (*Woodley v Ramirez*, 25 AD3d 451, 452 [1st Dept 2006]; *Mullen v Rigor*, 8 AD3d 104 [1st Dept 2004]). The burden then shifts to the driver "to come forward with an adequate

nonnegligent explanation for the accident" (*Cabrera v Rodriguez*, 72 AD3d 553, 553 [1st Dept 2010]; *Avant v Cepin Livery Corp.*, 74 AD3d 533, 534 [1st Dept 2010]).

Procedural Issues

Women's Health has sought to transfer this action to Suffolk County and identified five nonparty witnesses, Salgado, Garry Moller from DOT, Detectives Regensburg and Mahon and Lauren Doskoez, an eyewitness (Braverman affirmation dated January 11, 2013, ¶ 57). However, it has "failed to present 'affidavits or other proofs' from [the] material witnesses claiming that they would be inconvenienced by testifying in New York County" (*Manzari v Burrows*, 89 AD3d 440, 440 [1st Dept 2011] [internal citation omitted]; *Rosen v Uptown Gen. Contr., Inc.*, 72 AD3d 619, 620 [1st Dept 2010]). Ms. Doskoez testified that she would be moving to North Carolina, so she would be inconvenienced regardless of the venue of this action (Doskoez EBT at 8-9). Additionally, there has been extensive discovery and numerous conferences in this action and, in the absence of proof as to "the manner in which [the witnesses] would be inconvenienced by [venue in New York County]," Women's Health has failed to make the necessary showing and the portion of its cross motion to transfer venue to Suffolk County is denied (*Brown v Dawson*, 65 AD3d 980, 980 [1st Dept 2009]; *Margolis v United Parcel Serv., Inc.*, 57 AD3d 371, 371 [1st Dept 2008]).

Plaintiffs seek a special trial preference pursuant to CPLR 3403, based upon alleged indigency. However, plaintiff is receiving workers compensation payments of $1479 every 2 weeks and $1875 monthly from Social Security disability, amounting to $4833 per month (plaintiff May 17, 2012 EBT at 6; Hearing at 36). The general rule is that cases are tried "in the

order in which notes of issue have been filed" (CPLR 3403 [a]) and plaintiffs have not shown "imminent financial destitution ... which would justify the granting of this extraordinary privilege" (*Rago v Nationwide Ins. Co.*, 120 AD2d 579, 579 [2d Dept 1986]; *see also Srajer v Vanity Fair Mills,* 159 AD2d 286, 287 [1st Dept 1990]). Accordingly, the portion of plaintiffs' motion that seeks a special preference is denied.

Women's Health has moved to compel Newborn to produce Thomas Pike (Pike), Douglas Hoffner (Hoffner) and Amerigo Costa (Costa) for depositions. Pike was identified as Newborn's job superintendent, Hoffner as its safety consultant and Costa as a foreman who was at the Site earlier in the day (Vetrano EBT at 29, 80, 133, 135). However, they are no longer employed by Newborn and it "cannot be compelled to produce as a nonparty witness a former employee who is no longer under [its] control" (*Holloway v Cha Cha Laundry*, 97 AD2d 385, 386 [1st Dept 1983]; *Schneider v Melmarkets Inc.*, 289 AD2d 470, 471 [2d Dept 2001]). Therefore, the motion to compel is denied and Newborn's cross motion for a protective order is granted on the basis that it lacks control over these potential witnesses, without prejudice to the right of any party to seek their testimony as a nonparty witness. In light of the general rule that discovery should be "open and far-reaching," the court declines to find that such depositions would be not be useful in eliciting evidence relevant to the prosecution or defense of the issues in this case (*Lau v Margaret E. Pescatore Parking, Inc.*, 105 AD3d 594, 595 [1st Dept 2013] [internal citation omitted]).

Finally, Newborn seeks leave to amend to assert cross claims against Clark, Camparetti and Women's Health. Generally, leave to amend pleadings is freely granted, in the absence of prejudice (*Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]; *Robinson v Day*, 103 AD3d

584, 584 [1st Dept 2013]). Since no prejudice has been demonstrated, amendment is allowed.

Liability Issues

Both Shaw and Women's Health seek summary judgment dismissing the complaint and any cross claims based upon causation. The motions are essentially mirror images of each other in which Shaw claims that the sole cause of the accident was Clark's driving and Women's Health asserts that the sole cause of the accident was Shaw's failure to properly secure the Site and they each support their respective claim that it was not at fault with an expert's affidavit (Hearing at 28, 36-38). However, "conflicts in expert testimony present questions for the jury to resolve" (*Spoto v S.D.R. Constr.*, 226 AD2d 202, 204 [1st Dept 1996]). Put another way, "conflicting evidence [warrants] the denial of summary judgment ... since 'resolution of issues of credibility of expert witnesses and the accuracy of their testimony are matters within the province of the jury'" (*Griffin v Cerabona*, 103 AD3d 420, 421 [1st Dept 2013], quoting *Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 25 [1st Dept 2009]). Similarly, resolution of the apportionment issues between the parties is more properly left to the jury and, consequently, the portion of Shaw's motion that seeks summary judgment dismissing the complaint, the portion of Women's Health's motion that seeks summary judgment dismissing the complaint, the portion of Newborn's motion that seeks summary judgment on its cross claims and Women's Health's cross motion against Newborn are all denied.

Shaw also seeks dismissal of the Labor Law § 241 (6) claim against it based upon alleged violation of the Barricade Rule, and the Labor Law § 200 claim against it, contending that the Barricade Rule is inapplicable and that it was only an engineering inspector without supervisory

authority over plaintiff and the means and manner in which he conducted his work. Plaintiff seeks partial summary judgment on liability against Shaw, contending it was an agent for DOT and that it exercised authority in the Project over Newborn's workers, including plaintiff.

The purpose of the Barricade Rule is to provide protection to workers at a construction site where work is being performed "over, on or in close proximity to a ... road" (*see McGuiness v Hertz Corp.*, 15 AD3d 160, 161 [1st Dept 2005]; *Lucas v K.D. Dev. Constr. Corp.*, 300 AD2d 634, 635 [2d Dept 2002]; *Streeter v Kingston*, 2 Misc 3d 1007[A]*2-5, 2004 WL 624922 [Sup Ct, Onondaga County 2004}).

According to Shaw, the work day was over and there was merely a meeting at the Site to discuss the next day's work and consequently, removal of the attenuator truck, flaggers and other safety devices was proper, so that traffic in the right lane of Route 25 could be restored (Schechner March 2, 2011 EBT at 125, 136, 185; Schechner November 28, 2011 EBT at 48, 67; Salgado EBT at 20). On the other hand, plaintiff asserts that the work day was not over because he was ordered to the Site to take measurements to ascertain the necessary amount of concrete to be used the next day, that he was taking these measurements in accordance with Schechner's instructions at the time of the accident and that removal of the attenuator truck and other barricades was Shaw's determination (plaintiff March 1, 2011 EBT at 74, 77-78; plaintiff March 2, 2011 EBT at 41-43, plaintiff November 7, 2011 EBT at 80, 97-98). He also notes that measurements for concrete usage for the next day's work on the Project were usually done during the work day, when the safety devices were present (Vetrano EBT at 171-172, 174-175). The applicability of the Barricade Rule here is, therefore, a disputed issue of fact and dismissal of plaintiff's claim based upon violation of the Barricade Rule is denied.

The issue of Shaw's status as an agent of DOT for liability under Labor Law § 241(6) and its responsibility under Labor Law § 200 is dependent upon a determination of the degree of Shaw's control over the Project and over Newborn's workers and the means and manner of their work (*Russin*, 54 NY2d at 317; *Fiorentino*, 95 AD3d at 426; *Kittelstad v Losco Group, Inc.*, 92 AD3d 612, 612 [1st Dept 2012]; *Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 192-193 [1st Dept 2011]).

According to Shaw, it was an inspector, it had no authority over Newborn, the general contractor, and it did not exercise supervisory control over the means and manner in which either Newborn or other parties performed work on the Project (Schechner March 2, 2011 EBT at 65, 77, 80, 98, 101, 122-123; Schechner November 28, 2011 EBT at 22, 50, 90; Moller EBT at 21-23, 43, 47, 77, 80). In contrast, plaintiff alleges that Shaw had a more extensive role, that it determined the placement of the attenuator truck, barrels and signs, that it had the "final say" and that, in particular, Schechner was "hands on" in his supervisory role over the Project and in instructing Newborn's workers, including plaintiff, as to the performance of their work (plaintiff March 1, 2011 EBT at 37, 44, 50, 62, 74; plaintiff March 2, 2011 EBT at 41-43, 49; plaintiff November 7, 2011 EBT at 80, 97-98; Vetrano EBT at 57, 169; Salgado EBT at 59). Therefore, while Shaw has made its initial showing that it had no supervisory responsibility, plaintiff has raised a material issue of fact on this issue and, consequently, the portion of Shaw's motion that seeks dismissal of the Labor Law § 241 (6) claim and the Labor Law § 200 claim is denied.

The portion of plaintiff's motion that seeks partial summary judgment on liability against Shaw is also denied, as there are issues as to plaintiff's comparative fault in not wearing the safety vest, allegedly taking measurements at the Site in the absence of the safety devices instead

of waiting until the next day and his conduct at the Site in allegedly examining a battery left along the road (plaintiff March 1, 2011 EBT at 135; Salgado EBT at 34) (*see Rizzuto*, 91 NY2d at 350; *Mercado*, 104 AD3d at 577).

However, plaintiffs' motion for partial summary judgment on liability against Clark, Camparetti and Women's Health is based upon Clark's conduct in failing to keep an adequate distance between her car and the car in front of her to avoid an accident. According to plaintiff and other witnesses, Clark was traveling at an excessive rate of speed when she drove into the ditch where plaintiff, Salgado and Schechner were standing and while Schechner and Salgado were able to jump out of the way, Clark's car hit plaintiff (Doskoez EBT at 25, 30-31; Salgado EBT at 22, 24-26, 28-29; plaintiff March 1, 2011 EBT at 82; Schechner March 2, 2011 EBT at 146-147). Clark asserts that she swerved out of the way of the car in front of her to avoid an accident (Clark April 12, 2012 EBT at 69, 72; Clark February 12, 2012 EBT at 32, 39, 60). However, while she contends that she was going about 15 miles per hour, she stated that there was only a minimal distance between her car and the car in front of her (Clark April 12, 2011 EBT at 69-70). Accordingly, whether she was driving too fast or not leaving sufficient room to stop safely, she failed "to come forward with an adequate nonnegligent explanation for the accident" (*Cabrera*, 72 AD3d at 553). Camparetti is responsible, since she admits ownership of the car and that Clark was driving it with her permission (Vehicle and Traffic Law § 388).

Finally, plaintiffs' claim against Women's Health is based upon the fact that Clark was engaged in her employment in transporting medical files from Women's Health's Smithtown office to its Stony Brook office when her car struck plaintiff. Its office manager testified that files were arranged for pick up and transport by its employees, since the Stony Brook office

lacked storage capacity, that the files had to transported on the day they were used and that they were necessary for the doctor's use in his examination of patients (Gmytrasiewicz EBT at 12, 17, 21-23, 27-29, 60, 89-90). Plaintiff has established that Clark was "us[ing] [her] car in furtherance of [her] work" (*Felberbaum*, 54 AD3d at 719). To the extent that Gmystarsiewicz's subsequent statement "'clearly contradict [his] deposition testimony ... [it] can only be considered to have been tailored to avoid the consequence of [such earlier] testimony" and is deemed to be a feigned issue and is insufficient to defeat summary judgment (*Fernandez v VLA Realty, LLC*, 45 AD3d 391, 391 [1st Dept 2007]; *see also Washington v New York City Bd. of Educ.*, 95 AD3d 739, 740 [1st Dept 2012]).

Accordingly, the portion of plaintiffs' motion that seeks partial summary judgment on liability is granted as against Clark, Camparetti and Women's Health.

Order

It is, therefore,

ORDERED that Women's Health Professional, LLP's motion to compel (motion sequence #1) is denied and Newborn Construction, Inc.'s cross motion for a protective order is granted; and it is further

ORDERED that plaintiffs' motion for summary judgment on liability against defendants and for a special preference (motion sequence #2) is granted to the extent of granting summary judgment on liability as against C.M. Camparetti, April A. Clark and Women's Health Professionals, LLP and denying summary judgment as against The Shaw Group, Inc. and denying plaintiffs a special preference and denying the portion of Women's Health Professionals LLP's

cross motion for summary judgment dismissing plaintiffs' complaint and any cross claims against it and denying the portion of said party's cross motion to transfer the venue of this action to Suffolk County; and it is further

ORDERED that The Shaw Group, Inc.'s motion for summary judgment dismissing plaintiffs' complaint and any cross claims against it (motion sequence #3) and Women's Health Professionals, LLP's cross motion for summary judgment on its cross claim against The Shaw Group, Inc. are denied; and it is further

ORDERED that Newborn Construction, Inc.'s motion for leave to amend its answer to assert cross claims against C.M. Camparetti, April A. Clark and Women's Health Professionals, LLP and for summary judgment on these cross claims (motion sequence #4) is granted to the extent of permitting amendment and is otherwise denied and Women's Health Professionals, LLP's cross motion for summary judgment dismissing the cross claims of Newborn Construction, Inc. against it is denied.

This is the decision and order of the Court.

Dated: New York, New York
July 31, 2013

FILED
AUG 07 2013
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NEW YORK

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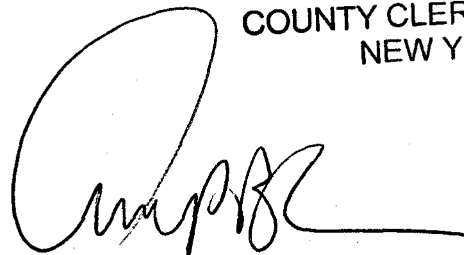

J.S.C. HON. ARLENE P. BLUTH