[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **MARCY S. FRIEDMAN** PART 57

Justice

Index Number : 115471/2004
ANGAMARCA, JORGE
VS
HOUSING DEVELOPMENT FUND
Sequence Number : 004
SUMMARY JUDGMENT

INDEX NO. 115471/04
MOTION DATE
MOTION SEQ. NO. 004
MOTION CAL. NO.

his motion #/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause — Affidavits — Exhibits~~ and Cross-motion ...	1, 2
Answering Affidavits — Exhibits	3-5
Replying Affidavits	6

Cross-Motion: ☒ Yes ☐ No

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

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

Dated: 6/18/08

MARCY S. FRIEDMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

JORGE ANGAMARCA and BLANCA A. GUGUANCELA ENCOLADA,

Plaintiff(s),

Index No.: 115471/2004

- against -

DECISION/ORDER

NEW YORK CITY PARTNERSHIP HOUSING DEVELOPMENT FUND COMPANY, INC., CITYWIDE CONTRACTORS LLC., NOVALEX CONTRACTING LLC., JEFFERSON TOWNHOUSES, LLC.,

Defendant(s).

In this Labor Law action, plaintiff sues for injuries arising from a fall at a construction site on October 30, 2003. Defendant Citywide Home Building Corp ("Citywide") moves for leave to file a late motion for summary judgment dismissing plaintiff's complaint, and for other relief. By separate motion, defendants New York City Partnership Housing Development Fund Company, Inc. ("Development Fund"), Novalex Contracting LLC ("Novalex"), and Jefferson Townhouses, LLC ("Jefferson") (collectively, the "Jefferson defendants") move for the same relief. Plaintiff cross-moves for summary judgment as to liability against defendants. Co-plaintiff Blanca Guguancela Encolada cross-moves for summary judgment on her derivative claims against defendants. By separate motion, Citywide moves for summary judgment on its indemnification claims against third-party defendant Roadrunner Construction Corp. ("Roadrunner"). The Jefferson defendants cross-move for the same relief against Roadrunner.

As a threshold matter, the court finds that defendants demonstrate good cause for their

filing of late summary judgment motions as a result of the fact that depositions of two key witnesses, Christian Angamarca and Jose Flavio Urgiles, were not held until after the note of issue was filed. Thus, the court will entertain the motions for summary judgment (see Butt v Bovis Lend Lease LMB, Inc., 47 AD3d 338 [1st Dept 2007]) and plaintiff's also untimely but related cross-motion. (See James v Jamie Towers Hous. Co., 294 AD2d 268 [1st Dept 2002], affd 99 NY2d 639 [2003].)

Plaintiff's accident occurred at a site for construction of new residential townhouses. Development Fund was the owner and Jefferson was the developer of the project. Novalex was the general contractor, and contracted with Citywide for carpentry work. Citywide in turn subcontracted for carpentry work with Roadrunner, plaintiff's employer.

It is undisputed that plaintiff fell from a height, and landed on the second floor of a townhouse under construction. It is further undisputed that plaintiff's accident was unwitnessed and that, as a result of the accident, plaintiff has amnesia as to the circumstances of his fall. (See P.'s Dep. at 115.) The parties sharply dispute how plaintiff fell. Plaintiff contends that he fell through an uncovered skylight on the roof down to the second floor. Defendants contend that plaintiff can only offer speculation as to the cause of his fall or, in the alternative, that plaintiff was the sole proximate cause of his fall. Defendants also suggest that plaintiff did not fall through an opening in the roof but, rather, fell off a "lull lift," a device that was being used at the time of the accident to transport plywood to the roof.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d

557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

Labor Law 240(1)

Labor Law § 240 (1) provides:

> All contractors and owners and their agents, * * * 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.

"The purpose of the section is to protect workers by placing the 'ultimate responsibility' for worksite safety on the owner and general contractor, instead of the workers themselves." (Gordon v Eastern Ry. Supply, Inc., 82 NY2d 555, 559 [1993]; Rocovich v Consolidated Edison Co., 78 NY2d 509 [1991].) "Thus, section 240(1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury." (Gordon, 82 NY2d at 559.)

It is further settled that "[w]hen the circumstances of a worker's task create a risk related to an elevation differential, a basis for the imposition of liability under Labor Law § 240(1) is established. Where the furnished protective devices fail to prevent a foreseeable external force from causing a worker to fall from an elevation, that worker is entitled to judgment as a matter of law under the statute." (Cruz v Turner Constr. Co., 279 AD2d 322, 322-323 [1st Dept 2001]

[internal quotation marks, brackets and citation omitted]; Dunn v Consolidated Edison Co., 272 AD2d 129 [1st Dept 2000].) However, where there is conflicting evidence as to how the plaintiff fell, a triable issue may exist "as to whether plaintiff's injury was attributable to a failure on defendants' part to provide adequate protective devices or was solely attributable to plaintiff's own conduct." (Petrocelli v Tishman Constr. Co., 19 AD3d 145 [1st Dept 2005].)

On this record, plaintiff makes a prima facie showing that he fell through a hole in the roof. Plaintiff submits the testimony of his co-worker, Christian Angamarca, who was working on the roof of another townhouse in the row several houses away (see C. Angamarca Dep. at 37-38) and who saw plaintiff soon after the accident. He testified that he learned of the accident "when the guys downstairs screamed that someone had an accident and when I heard that Jorge fell I started running to the roof where he was working and when I saw him through the opening of the skylight I saw he was laying down on the second floor." (Id. at 40.) As defendants correctly point out, when subsequently asked whether the openings in the roof were covered or uncovered, he stated they were covered. (Id. at 42.) However, on further questioning, he reaffirmed that the skylight was not covered and that he saw plywood next to the opening. (Id. at 43.) Contrary to defendants' contention, this inconsistency does not demonstrate as a matter of law that Mr. Angamarca's testimony was tailored to raise a triable issue of fact but, rather, raises an issue for the jury as to his credibility.

In opposition, defendants fail to eliminate triable issues of fact as to whether plaintiff fell through an open hole in the roof. The court notes that there is testimony that contradicts Christian Angamarca's as to whether the skylight was covered. Flavio Urgiles, plaintiff's co-worker, testified that there were two holes in the roof (the hatch and the skylight) and that they

were both covered before and after the accident. (See Urgiles Dep. at 36, 87.) However, neither witness' testimony was incredible on its face, and it is not the court's role on this summary judgment motion to resolve issues of credibility. (See Capelin Assocs. v Globe Mfg. Corp., 34 NY2d 338 [1974].) Nor is there photographic evidence that resolves the dispute. While Novalex' supervisor, Simon Leykin, testified that he took photographs a few minutes after the accident (see Leykin Dep. at 37-38), these photographs were taken from the ground floor (id. at 37), not from the second floor under the skylight through which plaintiff allegedly fell. Moreover, as Leykin acknowledges, the photographs do not show where on the floor plaintiff landed. (See id. at 75, 78; Photographs, Ex. R to Citywide motion.)[1]

While plaintiff's proof will necessarily be difficult due to the lack of eyewitnesses and his own amnesia, this is not a case in which the cause of the accident is wholly speculative. (Compare Custer v Cortland Hous. Auth., 266 AD2d 619 [3d Dept 1999], lv denied 94 NY2d 761 [2000].) It is well settled that "to support the jury's verdict, the evidence – viewed in the light most favorable to plaintiff – must support plaintiff's view of the cause of the injury over the opposing view. Plaintiff need not refute remote possibilities; it is enough for plaintiff to show facts and conditions from which the negligence of defendant may be reasonably inferred." (Bernstein v City of New York, 69 NY2d 1020, 1022 [1987] [internal citation omitted]. See also McNally v Sabban, 32 AD3d 340 [1st Dept 2006].) Here, if the jury credits Christian

[1]There was testimony from witnesses besides Urgiles and Christian Angamarca regarding the covering of the holes. However, it was not conclusive. Novalex's supervisor initially testified only that the hatch was closed but did not address the skylight through which plaintiff allegedly fell until later in his testimony (See Leykin Dep. at 39, 52-53, 95.) Carlos Miranda, Roadrunner's owner, testified that he observed that the skylight was covered after plaintiff's accident. However, he stated that he did not know whether it was covered only after plaintiff fell. (See Miranda Dep. at 55.)

Angamarca's testimony that he saw plaintiff after the accident beneath the open skylight, the jury may then draw a reasonable inference, to support a finding of liability, that the accident was caused by an elevation-related hazard.

As defendants further point out, "[t]he law does not require that plaintiff's proof positively exclude every other possible cause of the accident but defendant's negligence." (Schneider v Kings Highway Hosp. Ctr., Inc., 67 NY2d 743, 744 [1986] [internal quotation marks and citations omitted].) "Where the facts proven show that there are several possible causes of an injury, for one or more of which the defendant was not responsible, and it is just as reasonable and probable that the injury was the result of one cause as the other, plaintiff cannot have a recovery, since he has failed to prove that the negligence of the defendant caused the injury." (Lynn v Lynn, 216 AD2d 194, 195 [1st Dept 1995] [internal quotation marks and citation omitted].)

Here, however, defendants merely speculate that it is equally likely that plaintiff was standing upon a load of plywood being hoisted from the street to the roof by a lull lift, and that he fell off the lull lift. (Leykin Dep. at 96 ["guessing" that plaintiff may have fallen from the lull lift].) In support of this contention, defendants point out that on previous occasions, Roadrunner employees had been seen riding the lull lift to the roof rather than using ladders to gain access, and had been admonished not to do so because the practice was unsafe. (See id. at 98, 143-144.) Defendants also cite Urgiles' testimony that plaintiff fell at the same time that materials fell off the lull lift. (See Urgiles Dep. at 34.) However, defendants fail to submit evidence from any witness that plaintiff was observed on the lift prior to his accident. Indeed, Urgiles testified to the contrary that plaintiff was working on the roof with him prior to the accident, and that

plaintiff was not riding the lull lift at the time of the accident. (See Urgiles Dep. at 34-36, 71-72.) Urgiles also testified that the load on the lull lift was "down there" – i.e., near the ground – when the load fell off the lift. (See id. at 70-71.) Nor do defendants submit evidence to show how plaintiff could have fallen from the lift onto the second floor of the townhouse. It is undisputed that the front facade was framed but not finished, and the braces were only 14.5" apart. (See Dep. of Karl Gockel [Citywide's Construction Manager] at 66.) In the absence of evidence tending to show that plaintiff was on the lift at the time of his accident, or that the lift was sufficiently high off the ground for plaintiff to have fallen from it onto the second floor, defendants fail to demonstrate as a matter of law that it is more probable than not that plaintiff fell from the lift rather than through the skylight.

Finally, defendants do not demonstrate as a matter of law that plaintiff was the sole proximate cause of his injuries. In support of this contention, defendants rely solely on speculation among the workers that plaintiff may have needed plywood for his work and mistakenly removed a piece of plywood covering the hole rather than using another piece of plywood near the hole. Urgiles testified that prior to the accident, plaintiff needed more wood for the wall on which he was working, and told Urgiles to get more material from the forklift. (Urgiles Dep. at 36.) He also testified there were three pieces of plywood on the roof – two covering the holes and another piece next to one of the holes. (Id. at 36.) Although he did not see the accident, he speculated that while plaintiff was waiting for the lift to bring the wood, he may have made a "mistake," grabbed the plywood over the hole, and fallen. (Id.)

It is well settled that the defendant has the burden of proving that the plaintiff's own acts were the sole cause of the accident. (Blake v Neighborhood Hous. Servs. of New York City,

Inc., 1 NY3d 280, 289 n 8 [2003]; Balbuena v New York Stock Exch., 49 AD3d 374 [1st Dept 2008].) Here, defendants fail to meet this burden, as they do not submit any competent evidence that plaintiff removed the covering from the skylight.

There is also testimony in this record that the plywood over the skylight was not properly secured, and was placed over the hole without being fastened (see Urgiles Dep. at 22, 24) or with inadequate nails. (See C. Angamarca Dep. at 158-161.) If plaintiff were to prevail on such proof at the trial, an issue would exist, even if plaintiff removed the plywood, as to whether defendants' failure to provide sufficient protection contributed to plaintiff's accident. (See Torres v Monroe Coll., 12 AD3d 261 [1st Dept 2004]; Valensisi v Greens at Half Hollow, LLC, 33 AD3d 693 [2d Dept 2006].)

The court has considered defendants' remaining contentions and finds them without merit. Accordingly, the branches of the parties' motions and cross-motions seeking summary judgment on plaintiff's section 240(1) claim must be denied.

Labor Law 241-a

Labor Law section 241-a provides that:

> Any men working in or at elevator shaftways, hatchways and stairwells of buildings in course of construction or demolition shall be protected by sound planking at least two inches thick laid across the opening at levels not more than two stories above and not more than one story below such men, or by other means specified in the rules of the board.

There is testimony that the skylight opening through which plaintiff allegedly fell was located over the stairwell. (See Leykin Dep. at 126.) Given the triable issues of fact as to whether plaintiff in fact fell through the skylight, the branches of the parties' motions seeking

summary judgment on plaintiff's Labor Law section 241-a claim must be denied. (See Schneider v Hanover E. Estates, Inc., 237 AD2d 274 [2d Dept 1997], lv dismissed 91 NY2d 849.)

Labor Law 241(6)

Labor Law §241(6) provides:

> All contractors and owners and their agents * * * shall comply with the following requirements:
> 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

It is well settled that this statute requires owners and contractors and their agents " 'to provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 [1993].) In order to maintain a viable claim under Labor Law §241(6), however, the plaintiff must allege a violation of a provision of the Industrial Code that mandates compliance with "concrete specifications," as opposed to a provision that "establish[es] general safety standards." (Id. at 505.) "The former give rise to a nondelegable duty, while the latter do not." (Id.)

Citywide contends that the Industrial Code provisions relied upon by plaintiff are either too general to support liability under this section, or are inapplicable on the facts. Although plaintiff cites numerous Industrial Code provisions in his bill of particulars, on this motion he relies only on three provisions.

First, plaintiff cites section 23-1.7(b)(1)(i) which requires that every hazardous opening into which a person may step or fall be "guarded by a substantial cover fastened in place or by a

safety railing." This section is sufficiently specific to support a section 241(6) claim. (See Olsen v James Miller Mar. Serv., Inc., 16 AD3d 169 [1st Dept 2005].) As held above, however, triable issues of fact exist as to whether plaintiff's accident was proximately caused by defendants' failure to provide a securely fastened cover over the skylight opening.

Plaintiff also alleges that defendants violated sections 23-1.7(b)(1)(ii) and (iii) which require barriers, safety rails or other protective measures around areas which are required to be left open by work in progress. These sections are inapplicable, as this is not a case in which plaintiff contends that the opening through which he fell was deliberately left open in order to permit work to be done.

Plaintiff further alleges a violation of section 23-1.8(c)(1) which requires a safety hat to be provided to "[e]very person required to work or pass within any area where there is a danger of being struck by falling objects or materials or where the hazard of head bumping exists." This section is also sufficiently specific to support liability under section 241(6). (See Bornschein v Shuman, 7 AD3d 476 [2d Dept 2004].) However, the section is not applicable on the facts, as plaintiff does not claim that he was struck by a falling object or exposed to objects that could cause head bumping.

Finally, plaintiff relies on section 23-1.11(c) which requires that "[a]ll nails shall be driven full length and shall be of the proper size, type, length and number to provide the required strength at all joints." Plaintiff makes no showing that this section is applicable on the facts of this case in which plaintiff alleges that protection over a hole was not securely fastened, not that a joint failed.

Labor Law 200 and Common Law Negligence Claims

Labor Law §200 is a codification of the common law duty imposed upon an owner or contractor to provide construction workers with a safe place to work. (See Comes v New York State Elec. and Gas Corp., 82 NY2d 876 [1993].) An implicit precondition to this duty "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." (See Russin v Picciano & Son, 54 NY2d 311, 317 [1981].) Thus, "[w]here the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200." (Comes, 82 NY2d at 877. See Ross, 81 NY2d at 505 [same for general contractor].) It is further settled that neither a general right to supervise nor a duty to enforce general safety standards amounts to the control necessary to impose liability under Labor Law §200 or a common law negligence claim. (See Torres v Morse Diesel Intl., Inc., 14 AD3d 401 [1st Dept 2005]; Buccini v 1568 Broadway Assocs., 250 AD2d 466 [1st Dept 1998]. See also Vaneer v 993 Intervale Ave. Hous. Dev. Fund Corp., 5 AD3d 161 [1st Dept 2004].)

On this record, defendants make a prima facie showing that they did not exert sufficient supervision or control over plaintiff in order to be found liable under section 200. In opposition, plaintiff fails to raise a triable issue of fact. Plaintiff and Urgiles each testified that they received all of their instructions about their work from their Roadrunner supervisors Luis and Carlos Miranda. (See P.'s Dep. at 39-40, 197-200; Urgiles Dep. at 40, 75.) Roadrunner's Carlos Miranda testified that Novalex would "tell us what kind of job we would – we had to do" (C. Miranda Dep. at 14), and that Citywide and Novalex would "tell us to be careful and all the holes that were open, make sure they were covered and all of that." (Id. at 15.) This testimony is

insufficient to raise a triable issue of fact as to whether defendants supervised and controlled plaintiff's work. (See Geonie v OD & P NY Ltd., 50 AD3d 444 [1st Dept 2008]; Hughes v Tishman Constr. Corp., 40 AD3d 305 [1st Dept 2007].) Accordingly, plaintiff's claims under Labor Law section 200 and for common law negligence against defendants should be dismissed.

Contractual and Common Law Indemnification Claims

Citywide and the Jefferson defendants move for summary judgment on their contractual and common law indemnification claims against plaintiff's employer, Roadrunner. The "Hold Harmless" section of the contract between Citywide and Roadrunner provides in pertinent part:

> [T]he Subcontractor [Roadrunner] agrees to indemnify, defend and hold the contractor [Citywide] and property owner, their agents and employees, harmless from all claims, damages, losses, liabilities, suits, judgments and actions for bodily injury and property damage, including but not limited to legal fees, disbursements and expenses, arising out of or resulting from the Work performed by the subcontractor its employees and/or agents, provided that nothing herein shall require a subcontractor to indemnify or hold harmless an indemnitee hereunder to the extent such claim is caused by the negligence of such indemnitee.

(Citywide's Indemnification Motion, Ex. F.) Thus, the contract provides for indemnification when a claim arises out of Roadrunner's work, even though Roadrunner has not been negligent. (See Brown v Two Exch. Plaza Partners, 76 NY2d 172 [1990]; Correia v Professional Data Mgt., Inc., 259 AD2d 60 [1st Dept 1999].)

As discussed in connection with Citywide's motion to dismiss plaintiff's Labor Law § 200 claim, Roadrunner fails to raise a triable issue of fact in opposition to Citywide's prima facie showing that the accident arose out of Roadrunner's work at the site, and that Citywide was not negligent and did not supervise or control plaintiff's work. Roadrunner contends that questions exist as to whether Citywide or another contractor, Northridge, was working at the site on the

date of the accident. (See Roadrunner Opp. to Citywide's Motion, ¶ 17.) This contention is irrelevant as to whether the accident arose out of Roadrunner's work. In any event, Roadrunner fails to submit evidence to show that defendants were negligent. Moreover, Roadrunner's contention that the contract is invalid is without merit. Mr. Miranda, Roadrunner's owner, does not dispute that he signed the contract. His conclusory assertion that he did not understand English or understand what he was signing is not a bar to enforcement of the contract. (See Maines Paper & Food Svc., Inc. v Adel, 256 AD2d 760 [3d Dept 1998]; Kenol v Nelson, 181 AD2d 863 [2d Dept 1992].)

Similarly, Development Fund, Novalex, and Jefferson demonstrate that they were not actively negligent in causing plaintiff's accident, and that any liability to plaintiff is therefore purely vicarious. In opposition, Roadrunner fails to raise a triable issue of fact as to whether the Jefferson defendants are beneficiaries of its contract with Citywide. Indeed, the contract between Citywide and Roadrunner expressly provides for indemnification by Roadrunner of the owner and its agents.

Accordingly, third-party plaintiffs' claims against Roadrunner for contractual indemnification should be granted as to liability. In light of the court's holding, it need not address third-party plaintiffs' claims for common law indemnification.

Co-Plaintiff's Derivative Claims

In light of the triable issues of fact as to plaintiff Angamarca's claims, the cross-motion of his spouse, co-plaintiff Blanca Encolada, for summary judgment on her derivative claims must also be denied.

Claims against Citywide

While Citywide's motion requests summary judgment dismissing any counterclaims and cross-claims against it, Citywide does not address or submit evidence to support dismissal of those claims. This branch of Citywide's motion will accordingly be denied.

Bifurcation

Defendants move to bifurcate the liability and damages portions of trial. Plaintiff opposes bifurcation, arguing that the evidence of his injuries is entwined with defendant's liability. In the exercise of the court's discretion and on the record, this motion is denied. (See Sommer v Pierre, 2008 NY Slip Op 04219 [1st Dept 2008]; Watanabe v Sherpa, 44 AD3d 519 [1st Dept 2007].)

It is accordingly hereby ORDERED that Citywide's motion is granted to the following extent: Plaintiff's Labor Law § 241(6) claim is dismissed against it, except to the extent that such claim is based on Industrial Code § 23-1.7(b)(1)(i); and plaintiff's Labor Law §200 and common law negligence claims are dismissed against it; and it is further

ORDERED that the Jefferson defendants' motion is granted to the following extent: Plaintiff's Labor Law § 241(6) claim is dismissed against them, except to the extent that such claim is based on Industrial Code § 23-1.7(b)(1)(i); and plaintiff's Labor Law §200 and common law negligence claims are dismissed against them; and it is further

ORDERED that plaintiff Angamarca's motion for summary judgment is denied; and it is further

ORDERED that plaintiff Blanca Guguancela Encolada's motion for summary judgment is denied; and it is further

ORDERED that third-party plaintiff Citywide's motion for contractual indemnification is

granted to the extent that Citywide is granted judgment as to liability against Roadrunner on its contractual indemnification claim, with an assessment of damages to be held at the time of trial; and it is further

ORDERED that the motion of second third-party plaintiffs Development Fund, Novalex and Jefferson for contractual indemnification is granted to the extent that second third-party plaintiffs are granted judgment as to liability against Roadrunner on their contractual indemnification claims, with an assessment of damages to be held at the time of trial.

This constitutes the decision and order of the court.

Dated: New York, New York
June 18, 2008

MARCY FRIEDMAN, J.S.C.