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

PRESENT: HON. PAUL WOOTEN Justice

PART 7

CHRISTOPHER HARRIS,

Plaintiff,

- against-

ONE BRYANT PARK, LLC, ONE BRYANT PARK DEVELOPMENT PARTNERS, LLC, THE DURST MANAGER, LLC, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, CENTURY-MAXIM CONSTRUCTION CORP. and COMPONENT ASSEMBLY SYSTEMS, INC.,

Defendants.

INDEX NO. 101968/2008

MOTION DATE

MOTION SEQ. NO. 003

The following papers were read on this motion by the plaintiff for partial summary judgment and cross motion by the defendants for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☒ Yes ☐ No

In this personal injury/negligence action, the plaintiff moves for partial summary judgment on the complaint, and the defendants cross-move for summary judgment to dismiss the complaint (motion sequence number 003). For the following reasons, the motion is granted, and the cross motion is denied.

BACKGROUND

On August 20, 2007, plaintiff Christopher Harris (Harris), a construction worker employed by nonparty Empire City Iron Works (Empire City), was injured while working at a building (the building) located at One Bryant Park in the County, City and State of New York (*see* Notice of Motion, Goncalves Affirmation, ¶ 4). Although the moving papers herein do not spell out the defendants' roles with specificity, it appears that defendant One Bryant Park, LLC

(Bryant) is the building's owner, that defendant One Bryant Park Development Partners, LLC (Bryant Development) is the net lessee of the relevant portion of the building, and that defendant the Durst Manager, LLC (Durst) is the building's managing agent (*see* Notice of Motion, Exhibit 1 [collected pleadings]). It further appears that defendant Tishman Construction Corporation of New York (Tishman) was the general contractor, or "construction manager," that Durst hired to perform work at the building, and that defendants Century-Maxim Construction Corp. (Century-Maxim) and Component Assembly Systems, Inc. (Component Assembly) were subcontractors hired by Tishman (*Id.*). Evidently, Harris's employer, Empire City, was also a subcontractor. The parties have not presented any of the contracts supposedly governing these transactions, however.

At his deposition on September 21, 2009, Harris testified that, at approximately 9 A.M. on the day of his injury, he was standing on a metal grating that had been installed approximately 20-30 feet above the building's eighth floor as a de facto roof (*see* Notice of Motion, Exhibit 2 (Harris deposition), at 55, 68-70). Harris stated that he had gone there with two Empire City co-workers, Romel Ragnauth (Ragnauth) and Migdoel Torres (Torres), to look for grating clips that they needed in order to continue work that they had been engaged in earlier that morning, installing a similar grating that had been suspended above a stage in a theater located inside the building's third floor (*Id.* at 50-52, 55-58). Harris further stated that Ragnauth had located several boxes of these clips on top of a raised platform that stood atop the building's eighth floor grating/roof, noted that this platform was itself covered with a grating, and opined that it might have been erected there either as the housing for one of the building's elevator shafts, or for an air conditioning unit (*Id.* at 58-59). In any case, Harris stated that Ragnauth handed him down two boxes of clips from the top of the platform, and that he took them in his right hand while simultaneously reaching back with his left hand to pick up a bucket that they used to carry tools and spare clips (*Id.* at 60-64, 67). Harris then stated that he turned

to his left, pivoting on his left foot, and that he picked up his right foot, but put it down in a gap between the edge of the grating and the edge of the building (*Id.* at 65-66, 95-96). Harris described the gap variously as being between 10 inches to one foot wide, and large enough for a man to fall through (*Id.* at 72, 91). Harris stated that his leg went through the gap up to his thigh, and that he became caught in the gap with his arms hyperextended behind his head when his shoulders got pinned between the grating and the wall (*Id.* at 96-99). Ragnauth and Torres have each submitted affidavits that restate Harris's account, and aver that they then helped him out of the gap and accompanied him to street level to seek medical help (*see* Notice of Motion, Exhibits 6, 7).

Tishman was deposed on March 24, 2010 via one of its superintendents, Hector Quinones (Quinones), who stated that Component Assembly was the carpentry subcontractor, and that it was contractually responsible for making gaps such as the one that Harris fell through safe, either by covering them with plywood or by installing safety netting in them (*see* Notice of Motion, Exhibit 4, at 77-78). Quinones also opined that Component Assembly would have been notified of the need to cover the gap in question by the job site safety inspection subcontractor, nonparty Total Safety, Inc. (Total Safety) (*Id.* at 78-79, 80-82). Quinones did not produce the purported subcontracting agreements between Tishman and either Component Assembly or Total Safety, however.

Component Assembly was deposed on August 11, 2010 via one of its foremen, Joseph Lume (Lume), who acknowledged that Component Assembly was responsible for both installing drywall and for undertaking "general safety" measures (*see* Notice of Motion, Exhibit 5, at 13). Lume also acknowledged having attended weekly meetings at which inspectors from Total Safety informed him about unsafe conditions that Component Assembly would have to address (*Id.* at 20-25). Lume denied that Component Assembly was responsible for installing any safety features on or near the metal grating that Harris was standing on when he was injured, however

(*Id.* at 35-39).

Harris commenced this action on January 30, 2008 by filing a complaint that includes four causes of action based on theories of: 1) common-law negligence; 2) violation of Labor Law § 200; 3) violation of Labor Law § 240 (1); and 4) violation of Labor Law § 241 (6) (*see* Notice of Motion, Exhibit 1). Defendants served a combined answer on March 3, 2008, and discovery ensued (*Id.*). Now Harris moves for partial summary judgment on the portion of his complaint that alleges violations of Labor Law §§ 240 (1) and 241 (6), and defendants cross-move for summary judgment to dismiss all of Harris's Labor Law claims (motion sequence number 003).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist (*see e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 [1st Dept 2002]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see e.g. Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 [1st Dept 2003]). Because it deprives the litigant of his or her day in court, summary judgment is considered a drastic remedy which should only be employed when there is no doubt as to the absence of such triable issues (*see e.g. Andre v Pomeroy*, 35 NY2d 361 [1974]; *Pirrelli v Long Island R.R.*, 226 AD2d 166 [1st Dept 1996]). However, the court's reluctance to employ summary judgment "'only serve[s] to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated'" (*Blechman v I.J. Peiser's and Sons, Inc.*, 186 AD2d 50, 51 [1st Dept 1992] quoting *Andre v Pomeroy*, 35 NY2d at 364).

Plaintiff's Motion

Here, the first branch of Harris's motion seeks partial summary judgment on his claim that defendants allegedly violated Labor Law § 240 (1), which provides, in pertinent part, that:

> 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 Court of Appeals holds that the hazards contemplated by the statute "are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). The Court also notes that this statute "exists solely for the benefit of workers and operates to place the ultimate responsibility for safety violations on owners and contractors, not the workers" (*Sanatass v Consolidated Investing Co., Inc.*, 10 NY3d 333, 342 [2008]). Finally, the Court requires a "plaintiff to show that the statute was violated and that the violation proximately caused his injury" (*Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 39 [2004]).

Here, Harris begins by noting the Court of Appeals' holding in *Zimmer v Chemung County Performing Arts, Inc.* (65 NY2d 513, 521 [1985]), that "the failure to provide any protective devices for workers at the worksite establishes an owner or contractor's liability as a matter of law" (*see* Notice of Motion, Goncalves Affirmation, ¶¶ 22-23). Harris then argues that the gap that he fell through "was intended to be covered and the lack of a covering exposed [him] to a gravity related injury" (*Id.*, ¶ 24). Harris cites a quantity of Appellate Division, First Department, case law to support the proposition that even falling part way through a hole that

was not protected by safety devices is sufficient to establish a violation of Labor Law § 240 (1) (*Id.*, ¶¶ 29-31; *see e.g. Salazar v Novalex Contracting Corp.*, 72 AD3d 418 [1st Dept 2010]; *O'Connor v Lincoln Metrocenter Partners, L.P.*, 266 AD2d 60 [1st Dept 1999]; *Carpio v Tishman Constr. Corp. of New York*, 240 AD2d 234 [1st Dept 1997]). Defendants respond that the opening through which Harris partially fell was not a "hole," and that "the protections of Labor Law § 240 (1) do not extend to gaps ... through which a plaintiff could not possibly fall" (*see* Notice of Cross Motion, Ashnault Affirmation, ¶¶ 41-42). Defendants also cite a quantity of case law to support the proposition that a gap which is too small for a plaintiff to fall through does not present an elevation-related hazard that falls within the statute's protection (*Id.*, ¶¶ 45-52; *see e.g. Keavey v New York State Dormitory Authority*, 6 NY3d 859 [2006]; *Kulovany v Cerco Products, Inc.*, 26 AD3d 224 [1st Dept 2006]; *Urban v No. 5 Times Square Development LLC*, 2008 WL 620546, 2008 NY Slip Op 30551(U) [Trial Order] [Sup Ct, NY County 2008], affd' as mod 62 AD3d 553 [1st Dept 2009]). Harris's reply papers restate his original argument (*see* Goncalves Affirmation in Further Support, ¶¶ 5-9). Defendants' sur-reply papers do the same, at length, and reassert that it would have been impossible for Harris's entire body to have fallen through what they characterize as an eight-inch-wide gap (*see* Ashnault Affirmation in Further Support, ¶¶ 14-31). After reviewing all of the applicable case law, however, the court finds in favor of Harris.

In *Salazar v Novalex* (72 AD3d 418, *supra*), the most recent of any of the decisions cited by the parties herein, the Appellate Division, First Department considered the claim of a plaintiff workman who was injured while walking backwards and using a tool to spread out concrete in a building's basement, and whose right leg became caught in a trench that was approximately four feet deep, two feet wide and 10 to 15 feet long, while his torso remained at floor level. The First Department held that the floor, which had been dug so that a second workman could lay underground piping below it, presented a "gravity-related" risk because of the elevation

differential (*Id.* at 420). In so holding, the First Department particularly relied on its earlier decision in *Carpio v Tishman* (240 AD2d 234, *supra*), which involved a plaintiff who, while extending a paint roller to paint a ceiling, looked up and had his leg fall three feet down into a 10 to 14-inch-wide shaft in the surface of the floor. In both cases, the First Department considered the depth and length of the opening into which the plaintiff stepped when assessing the overall dimensions of the opening, rather than merely keying its size, because the key factor in determining whether a plaintiff was working "at an elevation" for Labor Law § 240 (1) purposes is the "'difference between the elevation level of the required work and a lower level'" (*Id.* at 235, quoting *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). The First Department also noted a quantity of precedent, cited in the dissent, that focused instead on the actual size of the hole and whether it was physically large enough for a plaintiff to fall through, but rejected it on the ground that:

> Absent any Court of Appeals precedent to the contrary, *Carpio* remains the law of this Department. Indeed, as this Court recognized in *Carpio*, the Labor Law "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed." Thus, we are constrained to afford protection thereunder wherever that is consistent with Court of Appeals authority, and not to limit the statute's scope as the dissent urges (*Salazar*, 72 AD3d at 422 [internal citation omitted]).

In the case at bar, the deposition testimony and photographic evidence show that there was a 20 to 30 foot drop beneath the gap that Harris fell in, and that it ran for the entire length of the building. Its' exact width was not established, although Harris described it both as being between 10 and 12 inches wide, and large enough for a man to fall through. Under the holding of *Salazar v Novalex*, however, the court concludes that such a gap presented an elevation related risk, and, as such, entitled Harris to the protection of the safety measures specified in Labor Law § 240 (1) as a matter of law. The court also finds that defendants' attempt to characterize the gap as a negligible eight-inch opening is of doubtful veracity, given that it was evidently wide enough for Harris's arms and shoulders to become pinned behind him when he

fell into it. This factual doubt also militates against relying on the "size of the hole" precedent that defendants cite herein, and that the First Department found to be inapposite in *Salazar v Novalex*. Thus, the court concludes that Harris has established that defendants violated Labor Law § 240 (1) by failing to provide any safety devices to guard against the elevation-related risk that was posed by the gap into which he fell.

Regarding the issue of proximate causation, Harris certainly alleges that his injuries were caused solely by his falling into the unprotected gap on the building's roof/grating (*see* Notice of Motion, Exhibit 1 (complaint), ¶¶ 51-52, 62, 72, 81). Defendants do not contest this point. However, Harris attempts to support his proximate cause allegations with the argument that the absence of safety devices at a work site constitutes de facto proof that an injured plaintiff was not the sole proximate cause of his own injuries (*see* Notice of Motion, Goncalves Affirmation, ¶¶ 38-39). Harris cites a quantity of case law that the court finds to be inapposite, since it all involved plaintiffs who fell from unsecured ladders at worksites where there were no other safety devices present (*see e.g. Vargas v New York City Tr. Auth.*, 60 AD3d 438 [1st Dept 2009]; *Vega v Rotner Mgt. Corp.*, 40 AD3d 473 [1st Dept 2007]; *Peralta v American Tel. and Tel. Co.*, 29 AD3d 493 [1st Dept 2006]; *Torres v Monroe College*, 12 AD3d 261 [1st Dept 2004]). Here, of course, no ladder was involved in Harris's injuries. For their part, defendants respond that Harris was guilty of comparative negligence (*see* Notice of Cross Motion, Ashnault Affirmation, ¶¶ 68-70). However, this argument is also inapposite because comparative negligence is not a defense to a Labor Law § 240 (1) claim, and the court rejects it on that ground (*see e.g. Williams v 520 Madison Partnership*, 38 AD3d 464, 465 n 2 [1st Dept 2007], citing *Samuel v Simone Dev. Co.*, 13 AD3d 112 [1st Dept 2004]). Thus, in light of Harris's unrebutted deposition testimony and the affidavits of Ragnauth and Torres, the court concludes that Harris has established the proximate causation element of his claim also. Therefore, the court finds that Harris is entitled to partial summary judgment, on the issue of liability only, on

his cause of action against defendants for violation of Labor Law § 240 (1), and that his motion should be granted to that extent.

The second branch of Harris's motion seeks partial summary judgment on his claim that defendants allegedly violated Labor Law § 241 (6), which provides, in pertinent part, that:

> 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:
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> ***
>
> 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.

In *Ross v Curtis-Palmer Hydro-Electric Co.* (81 NY2d 494, 505 [1993]), the Court of Appeals held that, in order to prevail on a Labor Law § 241 (6) claim, a plaintiff must demonstrate that, in addition to proving that he or she was engaged in activity covered by the statute, the defendant violated a provision of the Industrial Code that proscribes a specific duty of care. In his complaint and bill of particulars, Harris identified 12 NYCRR 23-1.15, 23-1.16, 23-1.17, 23-1.19, 23-1.24, 23-1.7, 23-5 and certain provisions of OSHA as having been violated by defendants (*see* Notice of Motion, Exhibit 1 (complaint), ¶ 57; (bill of particulars), ¶ 4). In his moving papers, however, Harris only raises argument with respect to 12 NYCRR 23-1.7 (b) (1) (i) *(see* Notice of Motion, Goncalves Affirmation, ¶¶ 33-35). Thus, at the outset, the court deems that Harris has abandoned his reliance on the other provisions, and declines to review them[1] (*see e.g. Musillo v Marist College*, 306 AD2d 782, 783 [3d Dept 2003]).

> 12 NYCRR 23-1.7 (b) (1) (i) provides as follows:
> (b) Falling hazards.
> (1) Hazardous openings.
> (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a

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[1] For their part, defendants argue that none of the other Industrial Code or OSHA provisions that Harris cites applies to the facts of this case. *See* Notice of Cross Motion, Ashnault Affirmation, ¶¶ 34-40. However, given Harris's evident abandonment of the intent to rely on these provisions, the court need not reach defendants' arguments.

> safety railing constructed and installed in compliance with this Part (rule).

Here, Harris argues that the facts disclose that the gap into which he fell was a "hazardous opening" within the statutory definition (*see* Notice of Motion, Goncalves Affirmation, ¶¶ 33-35). Harris cites *Olsen v James Miller Marine Serv.* (16 AD3d 169, 170 [1st Dept 2005]) for the two propositions that "[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing," and that the duty of care imposed by 12 NYCRR 23-1.7 (b) (1) (i) is sufficiently specific to support a Labor Law § 241 (6) claim. Defendants first respond with a variant of their previous argument; i.e., that the gap in which Harris was injured was not a "hazardous opening" within the statute's meaning, because it was not large enough for him to have fallen all the way through (*see* Notice of Cross Motion, Ashnault Affirmation, ¶¶ 29-33). Defendants cite the Appellate Division, First Department's, decision in *Messina v City of New York* (300 AD2d 121 [1st Dept 2002]) to support this argument. However, the First Department declined to adopt both this interpretation of 12 NYCRR 23-1.7 (b) (1) (i) and the precedential value of the *Messina* holding in the context of Labor Law § 241 (6) claims in *Salazar v Novalex Contracting Corp.* (72 AD3d at 422-423). Therefore, this court also rejects defendants' statutory argument. Defendants next argue that the evidence at bar discloses an issue of fact as to whether Harris was guilty of comparative negligence with respect to his accident (*see* Notice of Cross Motion, Ashnault Affirmation, ¶¶ 69-70). However, a review of defendants' papers reveals that this "evidence" consists entirely of their counsel's speculation that "given [Harris's] familiarity with the location of the accident ... plaintiff's comparative negligence is a substantial factor in this case." It is axiomatic that "an attorney's affirmation ... is of no probative value in opposition to a motion for summary judgment" (*Ramnarine v Memorial Center for Cancer and Allied Diseases*, 281 AD2d 218, 219 [1st Dept 2001]). Further, "'averments merely stating conclusions, of fact or of law, are insufficient' to 'defeat summary judgment'" (*Banco Popular North America v Victory Taxi*

Management, Inc., 1 NY3d 381, 383-384 [2004] [internal citations omitted]). Therefore, the court also rejects defendants' comparative negligence argument as unsupported. Accordingly, the court concludes that Harris has adequately established the elements of his Labor Law § 241 (6) claim, finds that the second branch of Harris's motion should be granted to the extent of awarding him partial summary judgment, on the issue of liability only, on that claim.

Defendants' Cross Motion

As previously mentioned, defendants' cross motion seeks summary judgment dismissing all of Harris's complaint that is based on defendants' purported violations of the Labor Law. However, the court has already determined that Harris is entitled to partial summary judgment on so much of his complaint as alleges violations of Labor Law §§ 240 (1) and 241 (6). As a result, the court now also determines that so much of defendants' cross motion as seeks summary judgment to dismiss those claims should be denied.

The balance of defendants' cross motion seeks summary judgment dismissing Harris's claim that they violated Labor Law § 200. It is well settled that Labor Law § 200 is the statutory codification of the common-law duty that is imposed on owners and/or general contractors to provide construction workers with a safe work site (*see e.g. Perrino v Entergy Nuclear Indian Point 3, LLC*, 48 AD3d 229, 230 [1st Dept 2008], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). In *Ortega v Puccia* (57 AD3d 54, 60-61 [2d Dept 2008]), the Appellate Division, Second Department, cogently summarized the law governing Labor Law § 200 as follows:

> Labor Law § 200 (1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work ...
>
> Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed. These two categories should be viewed in the disjunctive.
>
> Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the

> dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident.
>
> By contrast, when the manner of work is at issue, "no liability will attach to the owner solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed." Rather, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work [internal citations omitted].

Here, defendants argue that Harris cannot establish either variety of Labor Law § 200 claim. Harris responds, however, that his claim is based on the theory of a "defective condition in the workplace," and not on the "means and methods" of his work (*see* Goncalves Affirmation in Further Support, ¶ 27). Therefore, the court will confine itself to reviewing the arguments that bear on that theory.

Defendants first cite the Appellate Division, First Department's, decision in *Bombero v NAB Constr. Corp.* (10 AD3d 170 [1st Dept 2004]) for the proposition that Labor Law § 200 claims are subject to dismissal whenever the hazard alleged is one that is readily observable (*see* Notice of Cross Motion, Ashnault Affirmation, ¶¶ 12-14). Harris does not address this argument in his reply papers. However, the court notes that, in *Tighe v Hennegan Constr. Co., Inc.* (48 AD3d 201, 202 [1st Dept 2008]), the Appellate Division, First Department discussed the limitations of the *Bombero* rule, holding:

> [t]hat the hazard at issue - debris accumulated as a result of the demolition - was readily observable does not absolve [defendant] of liability, because the hazard was not inherent in the work being performed by plaintiff, an electrician, at the time of the accident.

Further, in *Imtanios v Sachs* (44 AD3d 383, 387 [1st Dept 2007]), the First Department explained that:

> the concept of an "inherent" hazard involves a risk that is particular to that job, such as a sanitation worker's or UPS driver's obligation to lift heavy items, or a construction site inspector's need to traverse steel reinforcement bars in order to inspect them. The risk of the presence on the floor of discarded property is only "inherent" in plaintiff's job as a building porter to the same extent

> that it is inherent in the life of any person working in or passing through the building. This hazard should be distinguished from a particular risk inherent in undertaking a particular job, and cases applicable to such particular inherent risks are not controlling ... [internal citations omitted].

In the case at bar, it is clear that Harris was not engaged in securing the eighth floor roof grating at the time of his injury; instead, the deposition testimony and affidavits agree that he was merely engaged in looking for parts and materials necessary to do his job on the third floor. Under this circumstance, the court does not believe that it is reasonable to find that there was an "inherent" risk of falling through the floor while searching for such materials. Certainly, defendants have not advanced any such rationale to support their argument. Therefore, the court finds that *Bombero* does not apply, and rejects defendants' first argument.

Next, defendants argue that they neither exercised supervision and control over Harris's work, nor did they create, or have actual or constructive notice of, the condition that caused his injury (*see* Notice of Cross Motion, Ashnault Affirmation, ¶¶ 15-28). The court notes that the former argument only applies to Labor Law § 200 claims of the "means and manner" variety, and that Harris's claim is not of this variety. Therefore, the court discounts that point of defendants' argument as irrelevant. With respect to the issue of notice, defendants specifically allege that "there is no evidence from which defendants' constructive notice of any sort of hazard on the eighth floor can be reasonably inferred" (*Id.*, ¶ 27). Harris disputes this, and replies that the deposition testimony of Quinones and Lume shows that both Tishman and Component Assembly had employees who did inspect the eighth floor roof/grating and who would had to have noticed the absence of any safety protections there around the gap at its edge (*see* Goncalves Affirmation in Further Support, ¶ 30; Exhibits 4, 5). Defendants reply that none of those employees supervised or controlled Harris's work. However this is clearly no defense because it does not speak to the issue of constructive notice. The court instead agrees with Harris that the deposition testimony is sufficient to create an issue of fact as to

whether defendants had constructive notice of the unsafe conditions that existed at the portion of the worksite where Harris was injured. Therefore, the court rejects defendants' argument, and finds that there is sufficient evidence to sustain Harris's Labor Law § 200 claim at this juncture. Accordingly, the court finds that defendants' cross motion should be denied.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of plaintiff Christopher Harris is granted to the extent that said plaintiff is awarded partial summary judgment on the issue of liability only on his causes of action for violation of Labor Law §§ 240 (1) and 241 (6), awith the issue of the determination of damages reserved for the trial of this action; and it is further,

ORDERED that the cross motion, pursuant to CPLR 3212, of defendants One Bryant Park, LLC, One Bryant Park Development Partners, LLC, The Durst Manager, LLC, Tishman Construction Corporation of New York, Century-Maxim Construction Corp. and Component Assembly Systems, Inc. is, in all respects, denied; and it is further,

ORDERED that the balance of this action shall continue.

This constitutes the Decision and Order of the Court.

Dated: 8-8-11

Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**
Check if appropriate: ☐ **DO NOT POST**