Vaccaro v 123 Washington, LLC
2019 NY Slip Op 30810(U)
April 2, 2019
Supreme Court, New York County
Docket Number: 155234/2012
Judge: Kelly A. O'Neill Levy
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KELLY O'NEILL LEVY
JSC

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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JOSEPH W. VACCARO,

Plaintiff,

- v -

123 WASHINGTON, LLC, ATLANTIC HOISTING & SCAFFOLDING, WESTSIDE BUILDERS, LLC, TISHMAN CONSTRUCTION CORP.,

Defendants.

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INDEX NO. 155234/2012

MOTION DATE 12/19/2018

MOTION SEQ. NO. 003

DECISION AND ORDER

----------X

123 WASHINGTON, LLC, ATLANTIC HOISTING & SCAFFOLDING, TISHMAN CONSTRUCTION CORP.,

Third-Party Plaintiffs,

- v -

FIVE STAR ELECTRIC CORP.,

Third-Party Defendant.

----------X

123 WASHINGTON, LLC, ATLANTIC HOISTING & SCAFFOLDING, WESTSIDE BUILDERS, LLC, TISHMAN CONSTRUCTION CORP.,

Second Third-Party Plaintiffs,

- v -

CONSTRUCTION AND REALTY SAFETY GROUP,

Second Third-Party Defendant.

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FIVE STAR ELECTRIC CORP.,

Third Third-Party Plaintiff,

- v -

NEW YORK CITY ACOUSTICS, INC.,

Third Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 130, 131, 132, 133, 134, 135

were read on this motion to/for SUMMARY JUDGMENT

HON. KELLY O'NEILL LEVY:

This is a Labor Law action arising out of a construction accident.

Plaintiff Joseph W. Vaccaro moves for an order (1) granting partial summary judgment on liability for his Labor Law § 240(1) claim, (2) granting partial summary judgment on liability for his Labor Law § 241(6) claim, (3) granting partial summary judgment on liability for his Labor Law § 200 claim, and (4) setting this matter down for a trial on plaintiff's damages. Third-party defendant Five Star Electric Corp. (hereinafter, Five Star) and second third-party defendant Construction and Realty Safety Group (hereinafter, CRSG) oppose. Defendants 123 Washington, LLC (hereinafter, 123 Washington), Atlantic Hoisting & Scaffolding (hereinafter, Atlantic), Tishman Construction Corp. (hereinafter, Tishman), and third third-party defendant New York City Acoustics, Inc. (hereinafter, NYCA) (collectively, cross-movants) oppose and cross-move for an order for summary judgment dismissing (1) the Labor Law § 241(6) claim, (2) the Labor Law § 200 and common-law negligence claims, and (3) all claims against Atlantic. Plaintiff opposes and Five Star partially opposes as to dismissal of the Labor Law § 200 and common-law negligence claims.

BACKGROUND

On March 24, 2010, plaintiff Joseph W. Vaccaro, a journeyman electrician, was allegedly injured at a construction site located at 123 Washington Street in Manhattan (hereinafter, the premises). Plaintiff alleges that, while pulling wire with a co-worker and walking backwards on the 34th floor of the premises, he tripped and stumbled after stepping into an uncovered "core

hole." Plaintiff was employed by Five Star at the time of the accident. 123 Washington was the owner of the premises. Tishman was hired by 123 Washington as the general contractor and construction manager for the premises.

Plaintiff testified that on the day of the accident, he was working with Michael Cullera, another Five Star electrician [May Deposition of Plaintiff (ex. 9 to the Brody aff.) at 30]. They were continuing the work they had previously been doing at the premises, which was pulling wires from floor to floor (*id.* at 34). On the day of the accident, they started working on the 35th or 36th floor and then moved down to the 34th floor (*id.* at 37). Mr. Cullera would stay in the electrical closet feeding out the wires to plaintiff, who would roll them out while stepping backwards to avoid them from getting tangled (*id.* at 40-41, 44). As plaintiff was pulling back the wires, his left foot stepped into a core hole up to his ankle (*id.* at 54, 151, 154). He did not see the hole prior to the accident (*id.* at 56). When his foot went into the core hole, he grabbed onto one of the planks covering the elevator shaft and prevented himself from falling (*id.* at 63, 152, 156). He approximated that the diameter of the core hole was either 15, 16, or 18-inches (*id.* at 147). He was wearing a size 12 construction boot (*id.* at 156). After his accident, Mr. Cullera allegedly assisted plaintiff and took him downstairs to Five Star's general foreman, Peter Abagnale's office to report the accident (*id.* at 64). Plaintiff, with Mr. Cullera's assistance, allegedly filled out an accident report and left it on Mr. Abignale's desk after their lunch break because Mr. Abignale was not present at the time (*id.* at 65).

Plaintiff later testified that during Five Star's site safety meetings, workers would raise concerns about uncovered holes at the premises numerous times [September Deposition of Plaintiff (ex. 10 to the Brody aff.) at 41]. He suggested that garbage carts that were wheeled in

on each floor of the premises would knock the wooden covers off the core holes (*id.* at 42). Plaintiff saw other core holes above and below the core hole in which he stepped (*id.* at 47). As he worked down the floors, he saw the same core hole in the same location, but some of the holes were covered and others were not (*id.* at 48). Lighting was not a factor in his accident (*id.* at 74). He also suggested that there may have been a piece of sheetrock covering the hole, which the heel of his foot may have kicked out of the way as he stepped backwards (*id.* at 95).

Michael Cullera submitted an affidavit in which he stated that he saw plaintiff's left foot in the core hole, up to his ankle [Affidavit of Michael Cullera (ex. E to the Ramos aff.) at ¶ 12]. He attested that he went down to Mr. Abagnale's office with plaintiff and helped him fill out the accident report (*id.* at ¶ 13-15).

Peter Abagnale, the general foreman for Five Star at the time of the accident, testified that core holes at the premises were usually covered, and if they were open, it was brought up to the safety employees or to Tishman [Deposition of Peter Abagnale (ex. 12 to the Brody aff.) at 19-20]. He testified that he never learned of how plaintiff's accident happened (*id.* at 40). He alleges that plaintiff never told him that he was injured nor did plaintiff ever come to his office to report an accident (*id.* at 51-53). Plaintiff never noticeably limped or showed any of signs of pain or injury (*id.* at 56). He never saw plaintiff's accident report (*id.* at 57).

Anson Orr, the site safety manager for CRSG, testified that CRSG was the subcontractor hired by Tishman to consult, inspect, report, document, and advise as to the safety of the premises [Deposition of Anson Orr (ex. 11 to the Brody aff.) at 15]. He stated that core holes at the premises had to be covered (*id.* at 61-62). He had informed Tishman that they had unprotected holes and he specifically observed uncovered holes on the 48th through the 54th

floors of the premises (*id.* at 89-90, 92). He documented his concerns in a daily log (*id.* at 18). He never saw a 15-inch core hole at the premises (*id.* at 135). He reported uncovered core holes throughout the premises from January through March of 2010 and he notified Tishman of these concerns in each report (*id.* at 139-140). Mr. Orr identified NYCA as the carpentry company that was responsible for covering the core holes (*id.* at 147-148).

Oskar Brecher, a manager for the developer, appeared on behalf of 123 Washington and testified that 123 Washington entered into a contract with Tishman for the development of the premises [Deposition of Oskar Brecher (ex. G to the Ramos aff.) at 10-11]. There was also a contract between Tishman and CRSG for site safety at the premises (*id.* at 16, 21).

Alexander Phillips, a project executive at Tishman, testified that he had seen CRSG's site safety manager's log during the duration of the construction at the premises [Deposition of Alexander Phillips (ex. H to the Ramos aff.) at 28]. He stated that it was Tishman's responsibility to correct hazards at the premises (*id.* at 53). The New York City Department of Buildings had issued violations to Tishman for holes not covered (*id.* at 64).

Michael Ceciliani, the president and owner of NYCA, testified that NYCA was a carpentry subcontractor of Tishman [Deposition of Michael Ceciliani (ex. 2 to the Prinsell aff.) at 8, 11]. NYCA would cover the holes in the floor with either plywood or plastic covers (*id.* at 13-14). NYCA would use plastic covers for holes 6-inches or smaller and would use plywood to cover larger holes (*id.* at 20-21). NYCA would inspect the premises to determine which holes needed to be covered (*id.* at 32).

Marc Resnick, a sub-foreman for Five Star, testified that he would expect his workers to inspect the area where they were working for any hazards [Deposition of Marc Resnick (ex. 4 to the Prinsell aff.) at 67-68].

Martin Hanley, the general foreman for Atlantic, testified that Atlantic worked on the exterior sidewalk bridge and exterior hoist of the premises [Deposition of Martin Hanley (ex. 5 to the Prinsell aff.) at 13]. He stated that Atlantic's workers did not work in the interior of the premises and did not have to walk through the interior of the premises to do their work at any time (*id.* at 20).

DISCUSSION

On a summary judgment motion, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that material factual issues exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or factual findings. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012).

Labor Law § 240(1) Claim

Plaintiff moves for partial summary judgment on the Labor Law § 240(1) claim.

Labor Law § 240(1), also known as the Scaffold Law (*Ryan v. Morse Diesel*, 98 A.D.2d 615, 615 [1st Dep't 1983]), provides, in relevant part:

> "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."

"'Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" *John v. Baharestani*, 281 A.D.2d 114, 118 (1st Dep't 2001) (quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501 [1993]).

> "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein."

Narducci v. Manhasset Bay Assoc., 96 N.Y.2d 259, 267 (2001); *Hill v. Stahl*, 49 A.D.3d 438, 442 (1st Dep't 2008); *Buckley v. Columbia Grammar & Preparatory*, 44 A.D.3d 263, 267 (1st Dep't 2007).

To prevail on a Labor Law § 240(1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries. *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 287 (2003); *Felker v. Corning Inc.*, 90 N.Y.2d 219, 224-225 (1997); *Torres v. Monroe Coll.*, 12 A.D.3d 261, 262 (1st Dep't 2004).

> "The "special hazards' [referred to in Labor Law § 240(1)] . . . do not encompass *any and all* perils that may be connected in some tangential way with the effects

> of gravity. Rather, the 'special hazards' referred to are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured'"

Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501 (1993) (citations omitted).

Plaintiff asserts that he provided with inadequate protection to shield him from harm at the elevated work site. Five Star asserts that Labor Law § 240(1) is inapplicable because the core hole was not big enough to pose a risk of a fall to the floor below, and thus it did not present an elevation-related hazard. Cross-movants assert that there is a question of fact as to how large the core hole was, and whether it was big enough to pose an elevation-related risk.

Plaintiff estimated that the core hole was between 15 and 18 inches in diameter (Plaintiff May tr. at 147). There is no other testimony that the core hole was smaller than 15 inches or larger than 18 inches in diameter. Mr. Orr testified that he never saw a 15-inch core hole at the premises (Orr tr. at 135), but that does not mean that a 15-inch core hole did not exist at the premises and is insufficient to raise an issue of fact as to the size of the core hole.

In *Carpio v. Tishman Constr. Corp. of N.Y.*, the plaintiff's foot backed up into a hole in the floor, causing his leg to fall three feet below the floor surface. *Carpio v. Tishman Constr. Corp. of N.Y.*, 240 A.D.2d 234, 234 (1st Dep't 1997). The hole was 10 to 14 inches wide, was not covered, and it appeared to be a core hole. *Id.* The court found that the plaintiff's work subjected him to an elevation-related risk covered by Labor Law § 240(1) and that he suffered injury because of the defendants' failure to fulfill their statutory duties. *Id.* at 235. The court held, "Plaintiff's partial fall through a hole at a construction site can hardly be characterized as only tangentially related to the effects of gravity." *Id.*

This case is similar to *Carpio*. Here, plaintiff's foot backed up into a core hole, which was larger than the hole in *Carpio*. Plaintiff was able to break his fall by grabbing onto a plank

on the elevator shaft, but this does not diminish the elevation-related hazard present. The court in *Carpio* found that the plaintiff was subjected to an elevation-related risk covered by Labor Law § 240(1). Here, plaintiff was subjected to the same risk, and therefore, Labor Law § 240(1) is applicable. Plaintiff was provided with inadequate protection to shield him from the elevation-related risks presented by the core hole at the premises. This lack of protection was the proximate cause of his injuries. Since the core hole was uncovered, plaintiff's foot went inside the hole, which caused him to get injured.

Thus, the court grants the branch of plaintiff's motion seeking partial summary judgment on his Labor Law § 240(1) claim.

Labor Law § 241(6) Claim

Plaintiff moves for partial summary judgment on the Labor Law § 241(6) claim. Cross-movants cross-move for dismissal of same.

Labor Law § 241(6) provides, in pertinent part, as follows:

> "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, [and] equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers. *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501-502. However, Labor Law § 241(6) is not self-executing, and to show a violation of this statute it must be shown that the defendant violated a specific,

applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety. *Id.*

Plaintiff cites a violation of Industrial Code § 23-1.7(b)(1)(i) which provides:

> **(b) Falling Hazard (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 safety railing constructed and installed in compliance with this part.

Industrial Code § 23-1.7(b)(1)(i) was never pled in either plaintiff's complaint or in his Bill of Particulars. Plaintiff cannot move for summary judgment on such a claim that was never pled. *See Griffiths v. FC-Canal, LLC*, 120 A.D.3d 1100, 1102 (1st Dep't 2014). Plaintiff never sought to amend his Bill of Particulars to include the newly cited section. Thus, the court denies the branch of plaintiff's motion for partial summary judgment on the Labor Law § 241(6) claim. Plaintiff may move for leave to amend his Bill of Particulars to include the cited Industrial Code section.

In cross-movants' motion to dismiss the Labor Law § 241(6) claim, cross-movants discuss Industrial Code § 23-1.7(e), which plaintiff originally pled in his Bill of Particulars. Plaintiff opposes dismissal of that claim, predicated on a violation of Industrial Code § 23-1.7(e). The court will consider the applicability of this regulation.

> **§ 23-1.7 Protection from general hazards.**
>
> ...
>
> (e) Tripping and other hazards.
>
> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
>
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

As a preliminary matter, Industrial Code §§ 23-1.7(e)(1) and (2) are sufficiently specific to sustain a claim under Labor Law § 241(6). *See Picchione v. Sweet Constr. Corp.*, 60 A.D.3d 510, 512 (1st Dep't 2009); *see also Licata v. AB Green Gansevoort, LLC*, 158 A.D.3d 487, 489 (1st Dep't 2018).

In *Urban v. No. 5 Times Sq. Dev., LLC*, the plaintiff stepped into a 10-12-inch gap between an entrance to a catwalk and the catwalk itself, and the court held that a 10-12-inch gap is not a condition that could cause tripping, and thus Industrial Code § 23-1.7(e)(1) was inapplicable. *Urban v. No. 5 Times Sq. Dev., LLC*, 62 A.D.3d 553, 554, 556 (1st Dep't 2009). Similarly, here, the 15-inch core hole is not a condition that could cause tripping. Therefore, Industrial Code § 23-1.7(e)(1) does not apply.

In *Romeo v. Property Owner (USA) LLC*, as the plaintiff was walking, a floor tile was dislodged, causing the plaintiff's right foot to fall through an opening and strike a sub-floor. *Romeo v. Property Owner (USA) LLC*, 61 A.D.3d 491, 491 (1st Dep't 2009). The court found that to the extent the plaintiff relied upon an Industrial Code § 23-1.7(e)(2) violation as a predicate for a Labor Law § 241(6) violation, the provision was inapplicable, as the plaintiff was not injured as a result of tripping over, or slipping on accumulated debris, dirt, tools or materials. *Id.* at 492. Similarly, here, plaintiff was not injured as a result of tripping over, or slipping on accumulated debris, dirt, tools or materials, as he stepped into a core hole. Thus, Industrial Code § 23-1.7(e)(2) is not applicable here.

Thus, the court grants the branch of cross-movants cross-motion seeking to dismiss the portion of the Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-1.7(e) and dismisses same.

Labor Law § 200 and Common-Law Negligence Claims

Plaintiff moves for partial summary judgment on the Labor Law § 200 claim and cross-movants cross-move for dismissal of same as well as the common-law negligence claim.

Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work' [citation omitted]." *Cruz v. Toscano*, 269 A.D.2d 122, 122 (1st Dep't 2000); *see also Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 316-317 (1981). Labor Law § 200(1) states, in pertinent part, as follows:

> 1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.

There are two distinct standards applicable to Labor Law § 200 cases, depending on whether the accident is the result of the means and methods used by the contractor to do its work, or whether the accident is the result of a dangerous condition. *See McLeod v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 A.D.3d 796, 797-798 (2d Dep't 2007). Here, the accident was the result of a dangerous condition, as there was approximately a 15-inch-wide core hole on the premises that had not been covered at the time of the accident.

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" *Cappabianca v. Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 144 (1st Dep't 2012); *Murphy v. Columbia Univ.*, 4 A.D.3d 200, 202 (1st Dep't 2004) (to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's

supervision and control over plaintiff's work, because the injury arose from the condition of the work place created by or known to contractor, rather than the method of the work). To provide constructive notice, the defect must be visible and apparent and exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it. *See Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 (1986).

Here, the general contractor, Tishman, had hired a site safety contractor, CRSG, to consult, inspect, report, document, and advise as to the safety of the premises (Orr tr. at 15). CRSG's site safety manager, Mr. Orr, had noticed core holes at the premises that had not been covered, and he had reported such concerns to Tishman (*id.* at 89-90, 92). Mr. Orr also kept a daily log, where he documented his concerns from January through March of 2010 (*id.* at 18, 139-140). Plaintiff also stated that during Five Star's site safety meetings, workers would raise concerns about uncovered holes at the premises numerous times (September Plaintiff tr. at 41).

The evidence is sufficient to establish that Tishman and 123 Washington had constructive notice of the dangerous condition, the uncovered core holes, at the premises within the three months prior to the accident. It is unclear whether Tishman had actual notice of the specific core hole where plaintiff was injured, but this is not necessary to establish liability under Labor Law § 200. Due to Tishman and 123 Washington's constructive notice of the dangerous condition, they are liable under Labor Law § 200.

Thus, the court grants the branch of plaintiff's motion seeking partial summary judgment on the Labor Law § 200 claim and denies the branch of cross-movant's cross-motion seeking dismissal of same.

Atlantic Hoisting & Scaffolding

Cross-movants move for dismissal of all claims against Atlantic. They assert that Atlantic was not an owner, general contractor, or statutory agent for liability under the Labor Law. This branch of the cross-motion was unopposed.

Martin Hanley, the general foreman for Atlantic, testified that Atlantic worked on the exterior sidewalk bridge and exterior hoist of the premises, Atlantic's workers did not work in the interior of the premises, and they did not have to walk through the interior of the premises to do their work at any time (Hanley tr. at 13, 20). Atlantic did not have any direct or indirect involvement in plaintiff's accident, nor is Atlantic statutorily liable for plaintiff's injuries.

Thus, the court grants the branch of cross-movants' cross-motion seeking dismissal of all claims against Atlantic and dismisses same.

The court has considered the remainder of the arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the branch of plaintiff Joseph W. Vaccaro's motion for partial summary judgment on liability for his Labor Law § 240(1) claim against defendants 123 Washington, LLC and Tishman Construction Corp. is granted; and it is further

ORDERED that the branch of plaintiff Joseph W. Vaccaro's motion for partial summary judgment on liability for his Labor Law § 241(6) claim is denied; and it is further

ORDERED that the branch of plaintiff Joseph W. Vaccaro's motion for partial summary judgment on liability for his Labor Law § 200 claim against defendants 123 Washington, LLC and Tishman Construction Corp. is granted; and it is further

ORDERED that the branch of defendants 123 Washington, LLC, Atlantic Hoisting & Scaffolding, Tishman Construction Corp., and third third-party defendant New York City Acoustics, Inc.'s cross-motion for summary judgment seeking dismissal of the portion of the Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-1.7(e) is granted and that portion of the claim is dismissed; and it is further

ORDERED that the branch of defendants 123 Washington, LLC, Atlantic Hoisting & Scaffolding, Tishman Construction Corp., and third third-party defendant New York City Acoustics, Inc.'s cross-motion for summary judgment seeking dismissal of the Labor Law § 200 claim is denied; and it is further

ORDERED that the branch of defendants 123 Washington, LLC, Atlantic Hoisting & Scaffolding, Tishman Construction Corp., and third third-party defendant New York City Acoustics, Inc.'s cross-motion for summary judgment seeking dismissal of all claims against Atlantic Hoisting & Scaffolding is granted and all claims against Atlantic Hoisting & Scaffolding are dismissed; and it is further

ORDERED that an immediate trial of the issues regarding damages shall be had before the court; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), and said Clerk shall cause the matter to be placed upon the calendar for such trial; and it is further

ORDERED that such service upon the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].

This constitutes the decision and order of the court.

4/2/19
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.
KELLY O'NEILL LEVY
JSC

CHECK ONE:	☐	CASE DISPOSED		☒	NON-FINAL DISPOSITION	
	☐	GRANTED	☐ DENIED	☒	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐ REFERENCE