Rhodes-Evans v 111 Chelsea LLC
2006 NY Slip Op 30599(U)
April 4, 2006
Supreme Court, New York County
Docket Number: 117397/03
Judge: Emily Jane Goodman
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SCANNED ON 4/25/2006

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

PRESENT: EMILY JANE GOODMAN PART 17

Justice

0117397/2003

RHODES-EVANS, DOROTHEA
VS
111 CHELSEA LLC

SEQ 1

SUMMARY JUDGMENT

NO. ______

ON DATE ______

ON SEQ. NO. ______

ON CAL. NO. ______

The following papers, numbered 1 to ______ on to/for ______

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

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached

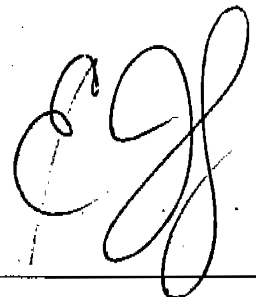
FILED

APR 25 2006

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 4/4/06



EMILY JANE GOODMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17
---------------------------------------x
DOROTHEA RHODES-EVANS,

Index No.
117397/03

Plaintiff,

-against-

Motion Sequence Nos.
001 & 002

111 CHELSEA LLC, BLACKACRE CAPITAL GROUP,
MALLOR PARKING and 111 EIGHTH AVENUE
PARKING, LLC,

Defendants.
---------------------------------------x
111 CHELSEA LLC and BLACKACRE CAPITAL
GROUP,

Third-Party Plaintiffs,

-against-

ALLEGIANCE TELECOM, INC., and XO
COMMUNICATIONS, Successor in interest to
Allegiance Telecom, Inc.,

Third-Party Defendants.
---------------------------------------x

FILED
APR 25 2006
NEW YORK
COUNTY CLERK'S OFFICE

EMILY JANE GOODMAN, J.:

In this action to recover monetary damages for an alleged workplace injury, motion sequence numbers 001 and 002 are consolidated for disposition.

In motion sequence number 001, defendants 111 Chelsea LLC (Chelsea) and Blackacre Capital Group (Blackacre) seek summary judgment dismissing plaintiff's complaint. Additionally, Chelsea

seeks contractual indemnification as against defendant 111 Eighth Avenue Parking, LLC (Eighth Avenue Parking).

In motion sequence number 002, Eighth Avenue Parking seeks summary judgment dismissing plaintiff's complaint and all cross claims as against it.

For the reasons stated below, plaintiff's common-law negligence and Labor Law § 200 claims are dismissed as against Chelsea. Additionally, all of plaintiff's claims as against Blackacre are dismissed. Plaintiff voluntarily withdraws Labor Law §§ 200, 240 (1), and 241 (6) claims against Eighth Avenue Parking (see Plaintiff's Aff In Opp ¶ 4), however that part of Eighth Avenue Parking's motion that seeks dismissal of plaintiff's common-law negligence claims is denied. Finally, Chelsea is entitled to contractual indemnification as against Eighth Avenue Parking.

Background

Plaintiff, a field technician in the employ of non-party Verizon, alleges that, on April 27, 2001, she was injured while working in the parking garage on the lower level of the building situated at 111 Eighth Avenue, New York, New York. According to plaintiff, she was called to the location to provide an upgrade in phone service to third-party defendant, building tenant Allegiance Telecom, Inc. (Allegiance), and that as part of the upgrade, she was checking on the telephone wires that ran along

the upper part of the garage wall. Plaintiff alleges that she was high up on a ladder, working on the wiring, when the ladder she was standing on shifted. According to plaintiff, she attempted to avoid falling by grabbing onto some horizontal cable, which shifted her weight, causing her to twist and injure her back.

Plaintiff seeks recovery as against Chelsea and Blackacre, the alleged building owners, and as against Eighth Avenue Parking, the entity to which the parking garage was leased, for common-law negligence, and for violations of Labor Law §§ 200, 240 (1), and 241 (6).[1] In the third-party action, Chelsea and Blackacre seek common-law and contractual indemnification as against Allegiance.

As part of its motion for summary judgment dismissing the complaint, Blackacre contends that it has no ownership interest in the building at 111 Eighth Avenue, New York, New York, and that, therefore, all claims as against it must be dismissed.

Discussion

Blackacre has proffered evidence to this court that it did not own, operate, or manage the property at issue. Such evidence includes sworn affidavits, a copy of the deed to the property, and the New York City recording of such deed. See Affirmation in

[1] As previously noted, Plaintiff withdrew all her claims against Eighth Avenue Parking, except as to common-law negligence.

Opposition, Exht. A, B. Plaintiff's proffered evidence to show that Blackacre was a part owner of the property included the testimony of James Coffey (Coffey), general manager of the company that manages the building at 111 Eighth Avenue, New York, New York. According to Coffey's Examination Before Trial (EBT) testimony, he stated: "Q: Have you ever heard of the entity known as Blackacre Capital Group? A: Yes. Q: Are they also a part owner? A: Yes." See Coffey EBT, at 14. Additionally, included in the papers proffered to support Blackacre's motion to dismiss plaintiff's complaint is a separate affidavit of Coffey (see Exht. E), which states, in part, that "[o]n April 27, 2001, ... Blackacre Capital Group had an ownership interest in the building located at 111 Eighth Avenue."

However, Coffey, who was general manager of the company that the building ownership hired to manage the building,[2] retracted his statement concerning Blackacre's ownership interest, explaining that his statement was based on his erroneous assumption (see Defendant Chelsea and Blackacre Reply Affirm ¶ 6, citing Affirm In Opp & Reply Affirm, Ex B).[3] In any event,

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[2] According to Coffey, his duties included rent collection and supervision of building operations. See Coffey, EBT at 11.

[3] Because Chelsea and Blackacre submitted the Coffey Affidavit on reply, in connection with motion seq 001, the Court allowed plaintiff a sur-reply. In that reply, Plaintiff unpersuasively maintains that Blackacre should be estopped from denying ownership based on unspecified evidence. Plaintiff further argues that despite the deed indicating that Chelsea is

Coffey's belief as to ownership of property is not the best evidence, and would not raise an issue of fact in light of the deed to the property. Therefore, that portion of the motion that seeks to dismiss plaintiff's complaint against Blackacre for lack of an interest in the subject property is granted.

Summary Judgment

To obtain summary judgment, a movant must establish entitlement to a court's directing judgment in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320 (1986). "[I]t must clearly appear that no material and triable issue of fact is presented" (Glick & Dolleck, Inc. v Tri-Pac Export Corp., 22 NY2d 439, 441 [1968]), because summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the existence of a triable issue or when the issue is even arguable. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

Common-Law Negligence and Labor Law § 200 Claims

To establish a prima facie case of common-law negligence, a plaintiff is required to establish that: (1) a defendant either created or had notice of the alleged dangerous or defective condition, and (2) that the alleged dangerous condition was the

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the owner, Blackacre should not be granted summary judgment dismissing it from the action given the complicated corporate relationships involved between it and affiliates of Chelsea. See Plaintiff Reply Affirm.

proximate cause of the injury. See Pouso v City of New York, 177 AD2d 560 (2d Dept 1991). An owner and a general contractor's duty to maintain a safe workplace under the common-law is codified in Labor Law § 200. See Gasper v Ford Motor Co., 13 NY2d 104 (1963).

Similarly, in the context of a Labor Law case, if a defective condition is alleged to be the cause of a worker's injuries, the worker must proffer evidence that the owner or contractor either caused the dangerous condition or had actual or constructive notice of it. See Higgins v 1790 Broadway Assocs., 261 AD2d 223 (1st Dept 1999); see also Balaj v Equitable Life Assur. Soc. of U.S., 211 AD2d 487 (1st Dept), lv denied 85 NY2d 811 (1995).[4]

An owner or contractor cannot escape any such liability just because a defective condition may be open and obvious. See Westbrook v WR Activities-Cabrera Markets, 5 AD3d 69 (1st Dept 2004).

Eighth Avenue Parking

Plaintiff here contends that as part of her work upgrading the telephone service for Allegiance, she went to the garage, and that, because the wiring she had to work on was elevated, she retrieved a ladder she found in the garage and set it up on the

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[4] Supervision and control of the injured worker is not required to make out a claim that a defective condition existed. See Murphy v Columbia University, 4 AD3d 200 (1st Dept 2004).

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ground below the wiring. According to plaintiff, the ground in that portion of the garage was littered with debris, and she stated that she and a parking attendant spent approximately a half hour clearing as much of the debris from the area as they could. Plaintiff avers that after clearing most of the debris from the area, she set up the ladder, and was standing on it looking at the telephone wires when the ladder moved and she was injured. See Plaintiff Examination Before Trial (EBT), at 44, 52-54.

It is unclear from the testimony whether plaintiff contends Eighth Avenue Parking had actual and/or constructive notice of the debris in the garage.[5] However, such a distinction need not be made at this time. Although two employees of Eighth Avenue Parking assert that they never saw any construction debris in the garage, they do admit that it is the parking attendants' duty to clean up the garage. See Yezid Gomez EBT, at 31; see also EBT of Fred Araque (Araque), parking attendant supervisor. Additionally, plaintiff testified that she had previously complained about the debris to garage employees. See Plaintiff's

[5] "To constitute constructive notice, a defect must be visible and apparent[,] and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." Gordon v American Museum of Natural History, 67 NY2d 836, 837 (1986). Additionally, constructive notice "must be of the specific condition and of its specific location." Canning v Barney's New York, 289 AD2d 32, 33 (1st Dept 2001).

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EBT, at 51. The EBT testimony proffered is sufficient to raise questions of fact as to whether Eighth Avenue Parking had notice of the debris upon which plaintiff allegedly placed the ladder, causing the accident.[6]

Eighth Avenue Parking additionally asserts that it is entitled to summary judgment dismissing the complaint because it did not supervise plaintiff's work. Supervision and control of the injured worker's methods by an owner or general contractor are prerequisites to liability under Labor Law § 200 if the accident is the result of a subcontractor's methods. See Candela v City of New York, 8 AD3d 45 (1st Dept 2004); see also Comes v New York State Elec. and Gas Corp., 82 NY2d 876, 877 (1993); Mitchell v New York University, 12 AD3d 200 (1st Dept 2004). If the accident is the result of the worker's methods, an owner or general contractor must have "the authority to control the activity bringing about the injury to enable it to avoid or correct the unsafe condition." Russin v Louis N. Picciano & Son, 54 NY2d 311, 317 (1981).[7] However, because plaintiff is alleging

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[6] This court notes that open and obvious conditions, such as the debris plaintiff allegedly encountered on the day of her accident, do not negate the garage's duty to keep the area safe; they only go to the issue of plaintiff's comparative negligence, if any. See Orellana v Merola Associates, Inc., 287 AD2d 412 (1st Dept 2001).

[7] The owner or general contractor must perform more than a "general duty to supervise the work and ensure compliance with safety regulations." De La Rosa v Philip Morris Management Corp., 303 AD2d 190, 192 (1st Dept 2003); see also Vasiliades v

that the defective condition in the garage was the cause of her accident, supervision and control of her work were not required.

For the reasons stated above, that portion of defendant Eighth Avenue Parking's motion for summary judgment that seeks dismissal of plaintiff's common-law negligence claim is denied.

Chelsea

Plaintiff's common-law negligence and Labor Law § 200 claims are dismissed as against Chelsea, the admitted building owner. Plaintiff has proffered no evidence that Chelsea either caused or had constructive or actual notice of the condition that allegedly caused plaintiff's accident; nor did Chelsea have supervision or control over plaintiff's work. Therefore, that portion of Chelsea's motion that seeks to dismiss plaintiff's common-law negligence and Labor Law § 200 claims is granted.

Labor Law § 240 (1) Claims

Under Labor Law § 240 (1), owners, general contractors, and their agents who fail to provide or erect the safety devices necessary to give proper protection to a worker involved in the erection, demolition, repair, alteration, painting, cleaning or

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Lehrer McGovern & Bovis, Inc., 3 AD3d 400 (1st Dept 2004); Reilly v Newireen Associates, 303 AD2d 214 (1st Dept 2003), lv denied 100 NY2d 508 (2003). "[M]onitoring and oversight of the timing and quality of the work is not enough to impose liability under section 200[citations omitted][n]or is a general duty to ensure compliance with safety regulations or the authority to stop work for safety reasons." Dalanna v City of New York, 308 AD2d 400, 400 (1st Dept 2003).

pointing of a building or structure are absolutely liable when that worker sustains injuries proximately caused by that failure. See Rocovich v Consolidated Edison Co., 78 NY2d 509 (1991); see also Rizzo v Hellman Elec. Corp, 281 AD2d 258 (1st Dept 2001).

There is no question here that the hazard that plaintiff encountered was related to gravity's effects. Plaintiff was injured when she attempted to stop herself from falling from a ladder. See Fernandes v Equitable Life Ass. Soc., 4 AD3d 214 (1st Dept 2004) (it "does not avail defendants that plaintiff did not actually fall off the ladder but instead was injured in preventing himself from falling"). However, Chelsea asserts that it cannot be held liable under Labor Law § 240 (1) because: (a) plaintiff was engaged in the splicing of wires, an activity that did not involve erection, demolition, repair, alteration, painting, cleaning or pointing of a building or structure, (b) plaintiff's employer, Verizon, was not hired by Chelsea, and had no knowledge of Verizon's work, nor the ability to prevent it, and (c) it was not the owner of the cable box.

Unlike the cable worker in Abbatiello v Lancaster Studio Associates (3 NY3d 46 [2004]), plaintiff was not engaged in a routine maintenance of telephone cables. Routine maintenance takes place when the work involves component replacement or adjustment necessitated by normal wear and tear. See Esposito v New York City Indus. Development Agency, 1 NY3d 526 (2003). It is

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uncontroverted that plaintiff was working on the wires as a part of a telephone upgrade for the building tenant, Allegiance. It has previously been held that stripping the insulation on cable wires is considered an alteration for the purposes of Labor Law § 240 (1). See Sarigul v New York Telephone Co., 4 AD3d 168 (1st Dept), lv denied 3 NY3d 606 (2004). Similarly, splicing cable as part of a telephone upgrade is an alteration for the same purposes. See also Bedassee v 3500 Synder Ave. Owners Corp., 266 AD2d 250 (2d Dept 1999) (installation of cable wire in building is an alteration for the purposes of Labor Law § 240 (1)).

More troublesome is Chelsea's additional contention that it is entitled to dismissal of plaintiff's Labor Law § 240 (1) claims because Verizon was not hired by either the building owner or its agent, and because it had no knowledge of Verizon's presence or ability to prevent the work, citing Abbatiello v Lancaster Studio Associates, 3 NY3d 46 (2004). That case held that a building owner could not be liable under Labor Law § 240 where it was "wholly unaware" of the worker's presence and was "powerless" to determine which cable company would maintain the facilities on its premises. This case represented a limited departure from the general rule that an owner is liable under Labor Law § 240, even where that owner did not contract for the work or is not possession of the land (see Spagnuolo v Port Authority of New York and New Jersey, 8 AD3d 64 [1st Dept 2004]),

because issues as to whether the owner has "contracted for the work or benefited from it are legally irrelevant" (Gordon v Eastern Ry. Supply, Inc., 82 NY2d 555 [1993]). Here plaintiff maintains, and Chelsea does not dispute, that it was aware of Verizon's presence, that Verizon actually obtained permission to enter from Chelsea's managing agent Insignia ESG, that a form granting access to Verizon was signed between Insignia ESG and the tenant requesting the upgrade wherein a floor plan of the work was attached, and that Insignia ESG arranged for its engineers to accompany Verizon to the worksite. Accordingly, unlike Abbatiello, Chelsea was not "wholly" unaware of the work. Moreover, the Court in Abbatiello determined that there was no "nexus between the owner and the worker, whether by a lease agreement ... or property interest (see Abbatiello, 3 NY2d at 51). Here a lease exists between Chelsea and Eighth Avenue Parking which provides for access to utility companies, and presumably, although not proffered, a lease exists between Chelsea and the tenant who ordered the cable upgrade, which resulted in the tenant signing the request for access form with Insignia ESG authorizing Verizon's access. Chelsea's citation Sariqul v New York Telephone Co., 4 AD3d 168, supra, does not dictate a contrary result. In Sariqul, the Court held that a telephone company that owned the telephone pole was not be liable under Labor Law § 240 (1) as an owner because it did not own the

cable line (which was owned by Cablevision Systems Corp) and "did not hire or even know of the retention of Amplified, for whom plaintiff worked at the time of the occurrence." To the contrary, here there is evidence that Chelsea knew of the work being performed. Thus, that portion of the motion that seeks dismissal of plaintiff's Labor Law § 240 (1) claims against Chelsea is denied.

Labor Law § 241 (6) Claims

Labor Law § 241 (6) provides that "[a]ll 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." The section requires owners and contractors at a construction site 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-Electric Co., 81 NY2d 494, 501-502 (1993).

Chelsea seeks dismissal of plaintiff's Labor Law § 241 (6) claims first, because it maintains that plaintiff was not involved in any of construction, excavation, or demolition. Pursuant to 12 NYCRR 23-1.4, the definitions that apply to the safety rules and regulations as promulgated by the Department of

Labor, "construction" includes "[a]ll work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures." This court has held above that the work plaintiff was performing at the time of her alleged injury was that of alteration. Therefore, plaintiff's activity falls within that covered under Labor Law § 241 (6).

Plaintiff is then required to set forth any sections of the Industrial Code that she contends are predicates for liability (see Reilly v Newireen Associates, 303 AD2d 214, supra), and "must demonstrate that the violation [of the Industrial Code] was a proximate cause of the injury." Padilla v Frances Schervier Housing Development Fund Corp., 303 AD2d 194, 196 (1st Dept 2003).

In the instant action, plaintiff alleges violations of Industrial Code sections 12 NYCRR 23-1.5, 23-1.7, and 23-1.21 of the Industrial Code.

"Only a violation of the State Industrial Code and regulations promulgated by the State Commissioner of Labor may serve as a basis for liability under that statutory section." Heller v 83rd Street Investors Ltd. Partnership, 228 AD2d 371, 372 (1st Dept), lv denied 88 NY2d 815 (1996); see also Messina v City of New York, 300 AD2d 121 (1st Dept 2002). Additionally, general provisions of the Industrial Code, which do not mandate

compliance with concrete specifications, are insufficient to support claims under Labor Law § 241 (6). See Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494, supra; see also Hawkins v City of New York, 275 AD2d 634 (1st Dept 2000).

The first regulation that plaintiff cites to support her Labor Law § 241 (6) claims is 12 NYCRR 23-1.5, which sets forth the general responsibilities of employers, and requires "reasonable and adequate" protection, as well as that machinery be kept in "good repair" and "safe." Those "generic directives ... are insufficient as predicates for section 241 (6) liability." Maldonado v Townsend Ave. Enterprises, 294 AD2d 207 (1st Dept 2002).

Plaintiff next seeks to predicate Labor Law § 241 (6) liability upon 12 NYCRR 23-1.7. The only possible subsection that may be applicable to the facts of this action is subsection (e), which includes regulations regarding tripping and other hazards. Within that subsection, is included the following regulation: "(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." Subsection (e) is sufficiently specific to support a Labor Law § 241 (6) claim (see Murphy v Columbia University, 4 AD3d 200, supra). Although that

subsection has been commonly interpreted to apply to tripping hazards, see Roman v Hudson Telegraph Associates, 15 AD3d 227 (1st Dept 2005), and the plaintiff did not trip, the regulation applies to both "Tripping and other hazards" (emphasis added). The parties have not addressed the issue of whether the accident allegedly occurred as a result of "other hazards." Therefore, the purported violation cannot be dismissed at this time (see e.g., Singh v Young Manor, Inc., 2005 NY App Div LEXIS 12920 [1st Dept 2005] [12 NYCRR 23-1.7 (e) applies where plaintiff "stepped" on a nail near a pile of debris]).

Finally, plaintiff seeks to predicate her Labor Law § 241 (6) claims upon Industrial Code § 23-1.21. That section is sufficiently specific to support a Labor Law § 241 (6) claim. See De Oliveira v Little John's Moving, Inc., 289 AD2d 108 (1st Dept 2001). However, there are questions of fact as to whether the regulation is applicable to the facts at issue in this action. The Regulation states that, if a worker is "between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means." See 12 NYCRR 23-1.21 (b) (4) (iv). Plaintiff herein contends that when her accident occurred, she was on the second rung from the top of the ladder, looking at fiber optic cables that were 12 to 15 feet off the

ground. See Plaintiff's EBT, at 40-41, 57. Because it is unclear from the proffered evidence as to exactly at what height plaintiff was working when she allegedly had her accident, that portion of Chelsea and Blackacre's motion that seeks to dismiss plaintiff's Labor Law § 241 (6) claims is denied.

Common-Law and Contractual Indemnification

Chelsea and Blackacre seek an order that Chelsea is entitled to summary judgment on its cross claims for common-law and contractual indemnification as against Eighth Avenue Parking.

Because common-law indemnity can be had against an actual wrongdoer only by one who is vicariously liable (see Curley v Gateway Communications, Inc., 250 AD2d 888 [3d Dept 1998]), and at this point in this action, it is not clear who, if anyone, in this action is liable, a determination of common-law indemnification is premature. Therefore, that portion of the motion seeking an order of common-law indemnification is denied.

Chelsea and Blackacre additionally seek an order that Chelsea is entitled to contractual indemnification as against Eighth Avenue Parking, pursuant to the December 30, 1998 Garage Lease between Chelsea's predecessor, 111 Eighth Avene, LLC, and Eighth Avenue Parking (the Garage Lease).

Article 30, section 30.1 (a) of that lease states:

"Tenant shall indemnify, defend, protect and hold harmless

each of the Indemnitees from and against any and all Losses to which any Indemnitee may (except insofar as it arises out of the gross negligence or willfull misconduct of any such Indemnitee in the operation and maintenance of the Building) be subject or suffer by whether by reason of, or by reason of any claim for, or any injury to, or death of, any person or persons or damage to property ... or otherwise arising from or in connection with the use of, or from any work or thing whatsoever done in, any part of the Garage (other than by such Indemnitee)."

Although Eighth Avenue Parking contends that this Garage Lease clause is violative of General Obligations Law § 5-322.1, in that it allows recovery by the negligent party for its own negligence, the contract language indicates otherwise. Although it is true that full indemnification agreements run afoul of General Obligations Law § 5-322.1 proscriptions (see Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co., 89 NY2d 786 [1997]), in that a clause that holds the indemnitee harmless for its own negligence is unenforceable (see Linarello v City University of New York, 6 AD3d 192 [1st Dept 2004]), the language of Section 30.1 (a) of the Garage Lease at issue states indemnification will occur only for the use of the garage "other than by such Indemnitee." Because that language does not provide for

indemnification of the owner if the owner is negligent, it does not violate General Obligations Law § 5-322.1.

Because there is no question that Chelsea, as the successor to 111 Eleventh Avenue, LLC is an "Indemnitee" within the meaning of the Lease, and this court has already held above that Chelsea is entitled to summary judgment dismissing plaintiff's claim that it was negligent, this court grants that portion of Chelsea's motion that seeks an order of contractual indemnification.

Failure to Procure Insurance

In its motion for summary judgment dismissing all cross claims, Eighth Avenue Parking seeks dismissal of Chelsea and Blackacre's claim that Eighth Avenue Parking failed to procure liability insurance as required by the Garage Lease. However, it has been brought to the attention of this court that such coverage is the subject of the action, Wausau Business Ins. Co. v Zurich American Ins. Co., 04 CV 3534 [DAB] now pending before the Southern District Court of the State of New York. Any decision of this court as to whether Eighth Avenue Parking breached any such Garage Lease provision is, therefore, held in abeyance until a decision of District Court in the above action regarding the enforceability and applicability of the procurement of insurance portion of Article 12 of the December 20, 1998 lease.

Accordingly, it is hereby

ORDERED that defendant 111 Eighth Avenue Parking, LLC's

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motion for summary judgment seeking dismissing plaintiff's Labor Law §§ 200, 240 (1), and 241 (6) claims is moot, having been withdrawn by plaintiff, and is otherwise denied; and it is further

ORDERED that defendants 111 Chelsea, LLC and Blackacre Capital Group's motion is granted to the extent that with respect to Blackacre the complaint is dismissed in its entirety, and as to Chelsea, plaintiff's common-law negligence and Labor Law § 200 claims are dismissed, and Chelsea is entitled to contractual indemnification as against 111 Eighth Avenue Parking, LLC, and is otherwise denied.

This Constitutes the Decision and Order of the Court.

Dated: April 4, 2006

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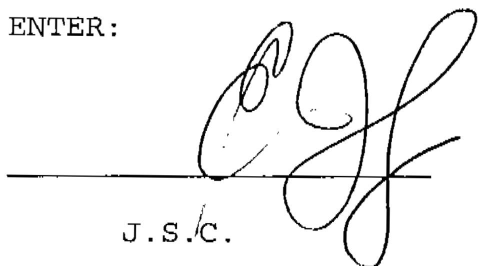

J.S.C.

EMILY JANE GOODMAN

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