

Luciano v Rim Realty Corp.

2009 NY Slip Op 30478(U)

February 27, 2009

Supreme Court, Kings County

Docket Number: 23874/03

Judge: Bert A. Bunyan

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At an IAS Term, Part 8 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27th day of February, 2009.

P R E S E N T:

HON. BERT A. BUNYAN,

Justice.

-----X

JOEL LUCIANO,

Plaintiff,

- against -

Index No. 23874/03

RIM REALTY CORP., K & P GAMES, INC.,
GAME EXPRESS, INC., BYUNG WOO CHOI AND
FORDHAM GAME MART, INC.,

Defendants.

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The following papers numbered 1 to 18 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1-6_____
Opposing Affidavits (Affirmations)_____	7-10_____
Reply Affidavits (Affirmations)_____	11-15_____
_____ Affidavit (Affirmation)_____	_____
Other Papers <u>Memoranda of Law</u> _____	16-18_____

Upon the foregoing papers, defendant RIM Realty Corp. (RIM) moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint of plaintiff Joel Luciano (plaintiff) and all cross-claims insofar as asserted against it, and for indemnification against defendants K & P Games, Inc., (KP), Game Express, Inc. (Game Express), Mr. Byung Woo

Choi (Mr. Choi) and Fordham Game Mart, Inc. (Fordham) (the Choi defendants). The Choi defendants move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross-claims asserted against them. Plaintiff cross-moves for an order, pursuant to CPLR 3126, to strike the answers of RIM and the Choi defendants for spoliation of evidence and to stay the current motion practice to permit him to inspect the electrical panel and meter involved in the subject accident.¹

Facts and Procedural History

This is an action for personal injuries allegedly sustained by plaintiff on September 29, 2000 while he was attempting to repair a circuit breaker at Game Express, a retail video store located at 1464 Rockaway Parkway in Brooklyn. In September, 2000, RIM was the owner of the one-story building where the accident took place and Mr. Choi or Game Express was the lessee. Shareholders which owned both KP and Game Express operated Game Express and the rent was paid by Game Express through KP's main office.

On the morning of the accident, Game Express' store manager, Donnie Nahatoo, arrived at the store and turned on the fluorescent overhead lights by flipping six circuit breakers in the electrical panel box located in the middle of the store behind the counter. He was instructed by Mr. Choi to turn the lights on in this manner because there were no light switches on the wall.

¹ By order dated April 30, 2008, this court granted this branch of plaintiff's cross-motion. On May 16, 2008, an inspection was conducted by plaintiff's expert, Mr. Gerald Sloboda, who was accompanied by Mr. Brian Hurley, an attorney employed by the firm representing plaintiff.

Mr. Nahatoo testified that all of the lights came on except a few in the rear of the store, even though the circuit breaker [*sic*] was in the “on” position. Mr. Nahatoo contacted Mr. Choi, told him that the lights were not working, and was instructed by Mr. Choi to call an electrician. Mr. Nahatoo contacted plaintiff’s employer, non-party Citiwide Electrical, to make the repair. When plaintiff and his assistant arrived at the store, another store employee told them what was wrong and showed them the lights and the circuit breakers.²

Noting that the overhead fluorescent lights toward the back of the store were off, plaintiff climbed his ladder, tested the lights with his voltage tester, and determined that there was no current going to the lights. He then opened the panel box behind the counter to see whether any breakers³ were tripped. None of the breakers were tripped, meaning they were all in the “on” position.

Plaintiff then removed the cover to the panel box with a screwdriver and observed a three-phase panel box, meaning the box consisted of main wires that fed the panel box with electricity, with the source of power coming from the meter downstairs. Each phase had 120 volts. Plaintiff checked each phase with his voltage tester to see if the phases were working, and concluded that the panel box was “perfectly fed,” that “one of the phases was

²Plaintiff received on-the-job training as a mechanic electrician at Citiwide for two years from unlicensed electricians at Citiwide. He received written materials in addition to his training. After his two-year training period, he made service calls every day as a mechanic electrician, assisted by a helper. Citiwide provided plaintiff with a van, tools and a uniform, but he was not provided with any protective gear. Plaintiff did not graduate high school.

³ Plaintiff testified that breakers are usually slim, and have a lever position, an on-off position, and a trip position. He said they trip when there is any type of short or overheating.

not down,” and that “that was not a cause of [that] section of the lights being off.”

Plaintiff next tested the circuit breakers individually with his voltage tester to ensure that each breaker was sending current to where it was supposed to and to check that none of the breakers had tripped internally. He found that one breaker “was not giving out power,” meaning there was no voltage or power coming out of that breaker. He assumed that the breaker was “bad” and “was the one that fed the lights that were out,” so he sent his assistant to his truck to get a new breaker.

In the meantime, plaintiff tried to re-set the breaker by turning it off and then turning it back on. He then tested the breaker to see if there was any current coming out. With his left hand, he placed one prong of his voltage tester (which contained two prongs), on the neutral bar or ground in the panel box, and with his right hand he touched the other prong to the screw where the breaker feeds the circuit or where the “power comes out of the breaker.” According to plaintiff, he “got stuck” with his tester; he “could not come off the breaker [he] was testing,” and he was “electrocuted in the box.” He tried to remove the tester but was unable to do so. After a few seconds, he heard humming coming from the box. After the humming, for approximately 20 seconds, sparks started coming out of the box, which went onto his arms. Then there was a big flash, the “power got out” and plaintiff was released. The flash burned plaintiff’s face and “everything.” Plaintiff opened his eyes and took off his baseball cap because it was on fire. He then walked toward the light at the front door, and told his assistant to call an ambulance because his eyebrow was hanging

from his face, his arms were “black, [and] crisp,” and his hands were black.

Plaintiff commenced the instant action against RIM, KP and Game Express on or about June 27, 2003, asserting negligence and violations of Labor Law §§ 200 and 241(6).

On or about September 12, 2003, plaintiff served a supplemental summons and amended verified complaint adding defendants Mr. Choi and Fordham. Plaintiff’s bill of particulars alleges, among other things, that defendants were negligent in the ownership, operation, management and repair of the subject electrical box in that they failed to, among other things, alleviate, inspect, repair, and warn of the dangerous condition, which was the proximate cause of plaintiff’s injuries. Subsequently, the parties were deposed and plaintiff filed his note of issue on or about May 3, 2007. Thereafter, defendants made the instant motions, which are presently before this court.

Labor Law § 200/Common-law Negligence

RIM and the Choi defendants separately move for summary judgment dismissing the complaint and all cross-claims asserted against them. In so moving, RIM argues that plaintiff cannot recover under Labor Law § 200 and/or common-law negligence on the grounds that: 1) plaintiff was injured while attempting to repair the defective circuit breaker he was retained to repair; 2) it (RIM) did not supervise or control the manner or method of plaintiff’s work and did not have notice of the allegedly defective condition; and 3) plaintiff cannot prove that there was a defective condition because RIM’s expert electrician, Leonard Wharton, Ph.D., P.E., concluded, with a reasonable degree of engineering certainty, that the

subject panel board and its component were not defective; that no defect in the electrical supply or wiring caused or contributed to the accident; that the wearing out of a circuit breaker in a lighting panel is an anticipated event, and not a defect of the electrical system, [because] a circuit breaker in a lighting circuit is a mechanical device that has a limited number of operations in its useful life; that exposure of potentially dangerous voltage, once the panel box cover is removed, is not a defect and is expected if the panel box's supply breaker is not tripped; that there was no hidden defect in the equipment that led to plaintiff's injuries - plaintiff was probing the voltage at the output screw of a breaker that was expected to carry an operating voltage, he knew it could carry an operating voltage since that was the reason he was probing it; and that the incident was caused either by a safety failure in the test device used by plaintiff or an unsafe procedure used by plaintiff in conducting his test.

In support of their own motion for summary judgment dismissing the complaint, the Choi defendants first argue that the complaint must be dismissed against KP since Mr. Choi testified that KP is merely a distributor of computer games and software, does not have an ownership or leasehold interest in the premises, and did not employ any workers at Game Express. Defendants also assert that the complaint must be dismissed against Fordham since Mr. Choi testified that Fordham is the operator of a different store located on Fordham Road in the Bronx, with no connection to the premises.

As to plaintiff's Labor Law § 200/common-law negligence claim, defendants argue

that plaintiff has failed to identify the allegedly dangerous condition or demonstrate that they had actual or constructive notice of it. In this regard, they assert that the evidence demonstrates that on the morning of the accident, a certain fluorescent light fixture was not working, that plaintiff's employer was called to identify and fix it, and that plaintiff was in the process of identifying the problem when his accident occurred.

In opposition to defendants' motions to dismiss his Labor Law § 200/common-law negligence claim, plaintiff argues, without differentiating among RIM and the Choi defendants, that there are issues of fact as to whether the defendants created or had actual or constructive notice of the conditions which gave rise to his accident. Specifically, plaintiff asserts that the Consolidated Edison inspection records of the site after the accident, the only records contemporaneous with the event, state that there was a defective meter and that tampering was suspected. Plaintiff also notes that Mr. Nahatoo admitted using the circuit breakers as light switches. Based upon the expert affidavit of Gerald Sloboda, a union electrician, plaintiff asserts that his expert concluded that defendants' misuse of breakers as light switches was a substantial cause of the occurrence. Specifically, Mr. Sloboda opines that the breakers installed in the electrical panel:

“were improperly used as branch circuit switches for lighting. [W]hen . . . persons try to control lighting circuits using a breaker as a switch on a routine basis, they are unaware of the true nature of a breaker's inner workings and the fact that this type of repeated use of a breaker not intended for this purpose can create defects in the system.”

Plaintiff also points to the following experts from Mr. Sloboda's affidavit regarding the

alleged misuse of the breakers:

“The use of the breakers in this electrical panel on a daily basis as a means to turn on and off branch lighting circuits is neither a common nor an approved method of controlling lighting. The designed purpose of electrical panels and their breakers is to protect the branch circuits from overloads, malicious grounds, or short circuits. In my opinion, based upon my training and experience in the field, that overuse of the breaker mechanism can lead to failure of the breaker as well as failure of the internal buss. A breaker has a three position function, on/off and a middle position known as trip. The internal mechanical set up has a temperature sensitive spring which is activated in the case of an overload of current or a direct short circuit. This is the designed purpose of circuit breakers, to protect the premises from fire caused by a defect within the circuit.

“The panel in question showed signs that there have been replacement breakers of different manufacturers installed in the past leading one to conclude that this was an ongoing problem. This panel has been described as a stab lock configuration. This is when one side of a breaker fits into a designated slot on the load side and the buss side fits into a spring loaded attachment on the hot buss, alternating in phases, as in three phases A, B, C. This configuration balances out the load demands on the panel. Over time and after excessive use, the tensile strength of the female buss portion where the male fitting on the breaker makes contact will loosen causing a failure, as in a loosened or loss of contact with the buss. The improper overuse of the breakers as switches for which they were not intended may create or facilitate this type of loosening and a resultant instability in the panel.”

Plaintiff also asserts - based upon Mr. Sloboda's expert affidavit - there were further defects in the electrical system which contributed to the occurrence, including a failure to have a proper working mechanical ground, and the improper placement of the panel box too close to the counter, which possibly violated code clearances. With respect to the alleged lack of

proper grounding, plaintiff notes the following from his expert's affidavit:

“All the devices which comprise or are components of the electrical system, including, but not limited to the panel boxes, conduits and switches, must be bonded or grounded (sometimes referred to as a mechanical ground). This mechanical bond or ground is earth. In order to establish this bonding or ground, a connection must be made on the street side of the system with approved wire and connectors from the water main to the electrical feed for the building and thereafter, all components of the systems must be appropriately bonded.

In the process of repairing a defective breaker, Mr. Luciano encountered a catastrophic failure of a mechanical ground, and/or internal buss failure, that would not be readily seen while in the process of testing an individual breaker. It should be noted that Mr. Luciano testified that he had never performed any electrical work at this location in the past. While in the process of final testing before replacement Mr. Luciano became frozen and stuck, unable to move because of the current flowing through him. *This could be attributable to a variety of factors including the nature of the debris or other materials surrounding the incorrectly located panel, the damage to the electrical panel and system caused by the daily overuse of the branch circuit breakers, as well as a failure of the internal buss system or a failure of the mechanical ground or bond.* There is nothing in the materials I reviewed to indicate that this occurrence was the result of the failure of plaintiff to follow proper procedures. It should be further noted that the Con Edison records with respect to its investigation of the occurrence indicated that there was defective meter equipment. The record further indicates that there was a suspicion of tampering. It is clear that there was a significant defect in the system which did not arise out of plaintiff's actions immediately before the occurrence (emphasis added).

Plaintiff further points to his expert's contention that placement of the panel behind the counter may have violated the electrical code and contributed to the occurrence. The

expert states that:

“Mr. Nahatoo states on pages 28-31 of his transcript that the person or persons who have the responsibility to energize the store lighting would have to enter the darkened premises and find the panel in question without sufficient light to identify the correct breakers, or to know if any of them were in a tripped position, indicating a problem with that circuit. This is not an acceptable situation when performing any function on a live panel board. On the morning of the occurrence, he stated that he turned the breaker to an “On” position where it remained but the lights did not turn on in the location controlled by that breaker [39-40]. It should be further noted that this panel board was behind a counter, Code clearances require at least 3' of clearance in front of a panel. This requirement may not have been met, thus making a repair potentially dangerous because of contact with surrounding objects. It would also pose a potential danger to persons frequenting the store. Depending upon the nature of the objects surrounding the live panel, it could cause a person in contact with the live panel to become grounded out.”

Plaintiff next argues that defendants' expert affidavit should be disregarded as non-probative and speculative on the following grounds: 1) it is based upon a [March 7, 2006] inspection of “a panel box as it existed six years after the occurrence and subsequent to the post-incident repairs;” 2) it is contradicted by the Con Edison records indicating that the meter was defective, suspected of tampering, and required repair or replacement; 3) it relies almost exclusively on inspection of a panel box which plaintiff's expert says does not match the description of the panel in the deposition testimony; 4) there is no evidence that plaintiff failed to use proper equipment or procedures to test voltage, and defendant's expert concedes that he did not inspect plaintiff's tester; 5) defendant's expert did not address

testimony of defense witnesses which established that there was a continuing overuse of circuit breakers as light switches which led to possible damage to the panel, and overlooked evidence which showed that the lack of a proper mechanical ground may have resulted in turning plaintiff into a ground; 6) defendant's expert cannot say with certainty that none of the wiring in the panel he examined in 2006 had been replaced; 7) is it not significant that plaintiff did not trip the panel board's supply breaker while conducting his examination of the panel; tripping the panel board's supply breaker would have impeded plaintiff's examination; and 6) plaintiff would have been protected while working on the panel had the panel been properly grounded.

Plaintiff also asserts that he was not injured by a condition he was retained to repair (a branch circuit which prevented the lights from operating in a portion of the store) but that his injuries were sustained "as a result of defective conditions in the electrical system which, according to plaintiff's expert, arose from damage to the panel from misuse of the breakers and a defect in the mechanical ground," which was allegedly created by defendants.

RIM replies that plaintiff has failed to rebut its claim that plaintiff did not make a *prima facie* showing under the Labor Law. In this regard, RIM argues that while plaintiff claims that it created or had notice of the condition that caused his injury, plaintiff has failed to explain how Mr. Nahatoo's testimony demonstrates that it is responsible, as an out-of-possession landlord, for a condition on the premises of which it had no notice. RIM also contends that the testimony of plaintiff's expert fails to address how the use of the electric

panel by RIM's tenants imposes liability upon it. RIM concludes that plaintiff has ignored the arguments it made in support of its motion to dismiss, and but for citing general summary judgment principles, has failed to oppose this branch of its motion.

RIM also disputes plaintiff's claim that its expert affidavit is speculative. In this regard, RIM argues that its expert based his opinion mainly on personal on-site inspection of the subject premises and panel board. Specifically, RIM notes that by switching on and off breakers, Dr. Wharton located a breaker that controlled the circuits for the rear storeroom lights and the middle ceiling lights, and concluded that this was the breaker position functionally described by the plaintiff that had been involved in this incident. He also found no indication that any of the wiring in the panel board had been replaced. Thus, RIM asserts that it has presented evidence that the panel was not significantly altered from the time of the accident.

Relying upon a April 1, 2008 reply affidavit of its expert, RIM next argues, at great length, that the court should disregard the affidavit of plaintiff's expert because his opinions regarding a myriad of issues are not based on generally accepted engineering principles. Thus, RIM asserts that Mr. Sloboda's affidavit is speculative, insufficient to defeat summary judgment, and fails to establish a causal connection between any of its acts or omissions and plaintiff's injuries. Based upon its second expert affidavit, RIM sets forth the following arguments:

Causation

- the affidavit fails to establish a causal connection between any act or omission by RIM and the injuries plaintiff allegedly sustained or between any defective condition in the panel box and plaintiff's injuries.
- the affidavit fails to set forth a chain of events to explain how the accident occurred.
- the affidavit references causation only with respect to peripheral events unconnected to events that may have caused plaintiff's injury.

Electrical Equipment

- the affidavit fails to establish pursuant to accepted engineering principles that the electrical equipment on the premises malfunctioned in such a way to cause plaintiff's injuries.
- the affidavit discusses the electrical equipment without explaining the source of electrical current or the function of the breakers, the significance of internal [bus] failure, and makes an unsubstantiated claim that the panel board was not properly grounded, and that it caused "arc damage."

Source of electric energy and current

- the affidavit incorrectly states that plaintiff could have encountered a failure of a mechanical ground *or* an internal buss failure or both, but there must be a dual failure (it is not an either/or situation since the effect requires both conditions) and the affidavit does not make this showing;
- the affidavit states that plaintiff became "frozen" because of a current flowing through him. The expert claims this could be attributed to a number of factors, including debris surrounding the panel, damage to the electrical panel caused by daily use of the circuit breakers, and failure of the internal bus system or a failure of the mechanical ground. However, in order for an electric current to flow through plaintiff, the current must have had a source point for entry and a sink point for exit, i.e. two different conductors running at different voltages. Mr. Sloboda identified possible sources of electrical current as (1) damage to the electrical panel and system caused by the daily overuse of the circuit breakers and a failure of the internal bus system and (2)

a person in contact with a live panel. Mr. Sloboda also identified the following possible sink points as (1) debris or other materials surrounding the incorrectly located panel and (2) the nature of the objects surrounding the live panel . . . to be grounded out. However, for electrical equipment to be a source of electrical current flowing through plaintiff, he would have to have contacted both the failed conductive equipment and a conductive sink. This means that two parts of plaintiff's body would have to be in actual contact with electrical conductors or very near them, so by implication, Mr. Sloboda's affidavit effectively acknowledges that plaintiff allowed unprotected parts of his body to come into contact with electrical conductors in two different places which, if true, is extremely irresponsible conduct for a professional electrician;

- the evidence suggests that plaintiff caused the current flow through his own actions when he tested the energized conductor and the electrical neutral conductor of the circuit with prongs in each hand;

- plaintiff's testimony does not establish causation since even if he became temporarily paralyzed, this does not demonstrate that the current caused his injuries since an electric current can cause a person to become incapable of movement without inflicting burns.

Switching duty breakers in "lighting and branch circuit panelboards.

- the affidavit states that breakers are not customarily intended to be used as light switches and using them in this manner requires special precautions and markings. However, the panelboard was designed to accommodate breakers that were switched on and off daily (called switching duty breakers). The affidavit states that the tensile strength of the panelboard's female bus portion will loosen and fail as a result of excessive use over time, but does not state that such loosening occurred. If it occurred, other circuit breakers used for switching lights would have experienced similar "overuse" and panelboard instability requiring panelboard replacement, but the panelboard was not replaced.

Plaintiff's inability to establish "internal buss failure"

- the affidavit states that plaintiff was injured in the course of an "evolving fault" which in this case is a fault to the ground followed by a phase-to phase fault resulting from an alleged panelboard failure. If such an evolving fault occurred, it would have permanently disabled the panelboard and required

complete replacement before the system could be placed back into service. The affidavit states that overuse of the breaker mechanism can lead to failure of the breaker as well as failure of the internal buss. While Mr. Sloboda speculates that the panelboard was replaced based upon photographs, the photographs show that only the cover had been replaced, not the panelboard. Further, if the panelboard had been damaged, Con Edison would not have switched on the power the morning after the event. While the affidavit states that before the stores could be put back on line, an electrical contractor was hired to repair the panel, there was no permit issued for this purpose, which is evidence that the panelboard did not suffer an internal bus fault failure. Further, the accumulation of six different types of circuit breakers inside the panelboard shows its longevity and the fact that it was not replaced and did not suffer internal bus failure. Finally, failure of the panelboard would have been obvious from the visible arc damage, discoloration, heat damages and melting of metal parts.

Bonding and grounding

- the affidavit's claim that the panelboard was not properly bonded or grounded is not supported by evidence or engineering principles because 1) Mr. Sloboda assumes that there was a ground fault and that but for the fact that there was no bonding, the main breaker would have tripped sooner and prevented plaintiff's injuries. However, the circuit protective device main breaker did not have the capability of tripping on a ground fault. It could not respond, bonding or not. Alleged failure to respond is not a proof of no bonding.
- Also, the protective devices in the circuit cannot be expected to protect a mechanic from personal injuries caused by contacting sources of higher voltage and grounding himself out in an unsafe manner. The protective devices were not provided with the capability to detect a personnel ground fault and act fast enough to limit the energy that could injure a person.
- the affidavit inaccurately implies that the circuit breakers' functions in the panelboard included three functions (to energize the circuit, to disengage the circuit, and to trip in case of a short circuit, a malicious ground, and/or an overload exceeding the rate of the breaker). In fact, the breakers in the panelboard did not trip from a malicious ground fault. The circuit interrupters involved did not have a ground fault trip capability and were not required to have it.

Burns and arc damage

- the affidavit claims that the electrical equipment on which plaintiff was working created an arc of electricity, which caused his injury.⁴ But Mr. Sloboda's account of the arc damage does not comport with accepted engineering principles. Specifically, inspection and photographs revealed no heat damage, erosion, or re-solidified metal droplets (evidence of arcing) on or within the equipment so it is unlikely that arcing caused burns 2-4 feet away from the electrical equipment since these burns would have been caused by some other heat source, such as faulty or inappropriate testing equipment or an unsafe procedure.

Inadequate Process of Elimination

- the affidavit does not consider that at the time of the accident: 1) plaintiff was holding test prongs, one in his left hand and one in his right hand, one touching a breaker and the other touching a neutral; 2) that plaintiff was using test equipment; 3) that plaintiff may have caused his accident by using defective equipment or employing defective procedures;

- the affidavit uses generalities to dismiss plaintiff's possible contribution to the accident;

- the affidavit does not consider that after plaintiff identified the failed breaker, he tested the failed breaker again, exposing him to unnecessary risk of injury in running unnecessary testing in an energized open panelboard;

- the affidavit does not explain why plaintiff was burned;

- plaintiff could have made the panelboard safer by shutting off its main breaker, or he could have cut off all of its electric power by shutting off the main disconnect switch in the basement;

- plaintiff may have allowed his body to contact live panelboard components that he had himself exposed, which the affidavit does not address.

⁴ Mr. Wharton explains that an electric arc is the passage of electric current through the air. It involves an intense flame-like emission of light (the electric arc) that is much hotter than a regular flame. It is this intense light that one sees in the arc welding of metal. It is usually accompanied by the melting of the metal conductors that support the arc current.

In a reply affirmation and in further support of his cross-motion, plaintiff submits another affidavit of his expert (Mr. Sloboda), who states that it is essential that he be permitted to inspect the panel box because the conclusions made by Dr. Wharton in his April 1, 2008 affidavit (detailed immediately above) were based almost exclusively upon his examination of the panel box. Mr. Sloboda further comments that:

- the presence of at least six different types of circuit breakers shows there were repeated failures of other breakers in the panel which may contribute to the instability of the workings of the internal buss and other integral parts of the panel;
- there is no evidence that, even though the panel would support breakers that are switched on and off daily (SWDs), that they were the type of breakers being used in the panel to control the lights in the store at the time of the accident;
- the use of breakers as light switches is neither common nor an approved method of controlling lighting, the overuse of the breaker mechanism can lead to failure of the breaker or failure of the internal buss;
- Dr. Wharton concludes that the cover of the panelboard, rather than the panel board itself, had been replaced. However, he does not consider the possibility that the internal component parts of the panelboard, such as the internal buss, were replaced after the accident but not the panelboard. If these components were replaced, then Dr. Wharton's opinion stating that the internal buss did not undergo failure and that there was no evidence of visible damage to the internal bus [sic] is meaningless;
- While Dr. Wharton assumes that all electrical work performed at the premises was done pursuant to a permit, work is performed without permits, and it cannot be assumed that permits were issued for all work on this panel.

In an affirmation in further opposition to defendants' motions and in support of his cross-motion, plaintiff notes that his expert inspected the electrical equipment in May, 2008 and annexes his expert's third affidavit, dated July 9, 2008, and photographs taken during the inspection. Relying upon his expert's affidavit, plaintiff makes the following arguments:

The internal bus works, but not the panel box itself, were replaced after the occurrence

Plaintiff asserts that while Mr. Wharton's opinion was predicated largely upon his assumption that the panelboard had never been replaced, and that therefore there was no damage to its internal components as a result of the accident, Mr. Sloboda previously stated that it was common practice to make a repair by replacing the internal bus works yet leaving the panel box in place, which his inspection confirmed. According to Mr. Sloboda, "the entire inner bus works of the panel box had been replaced." He states that the person who made the repair after the accident "took a Siemens Panel with 24 Slot Capacity," removed the internal bus works, and "then installed these Siemens internal bus works into the existing General Electric 42 slot capacity panel back box at Game Express." He said this was:

"done to facilitate a quick repair, because there would be no need to cut out the existing GE panel and disconnect all the branch circuit wiring and associated conduits and removal of the feeder conduit. At this point the old existing GE panel cover could no longer be used because of dimensions of the new bus works would not match the dimensions of the old bus works, one being 24 slotted and the other being 42 slotted. This would have been an acceptable means of repair if it were done according to code and consideration of the panel dimensions.

However, that did not occur.”

To further support his contention that the internal bus works were replaced, Mr.

Sloboda opines that:

“(Based upon photograph # 14), the present position of the bus works is lower in the panel box than originally designed and not attached to the welded studs on the panel back box. Notice should be taken of the outline (soot markings) of the original bus works above the feeder cables. This further confirms that new bus works from a different panel box were installed in the existing box after the subject event”

“Photograph # 15 clearly shows the original panel back box welded mounting studs not being used. This is further confirmation of my opinion that a new set of bus works was jury rigged in the existing panel back box to facilitate a quick repair of the damaged bus works after a blow out of one or more phases.”

Mr. Sloboda concludes with a “reasonable degree of certainty” that there was a catastrophic failure of the bus works in this panel which was not the fault of anything that [plaintiff] did in his performance.”

There Was Not a Proper Disconnect System in Place in the Building to Permit a Safe Repair

Mr. Sloboda observed that the building electrical system did not have a proper disconnect system in place to permit the safe repair of the panel. With respect to his inspection of the electrical equipment in the basement, Mr. Sloboda states that:

“During my inspection, I was able to observe a violation which explains why the power to both stores was lost immediately after the occurrence. Photographs # 3 shows the 1 ½ feeder conduit for Game Express which is a direct run to the panel box in the

Game Express store. There is no means of a disconnect from the street feeder other than the main disconnect, which is a shared load between the two stores. One cannot isolate the bus work source of power at one store from the other store. This would explain why the loss of power in the Game Express store resulted in a loss of power to the other store.

These photos show that there is a shared street feeder coming off the load side of the main disconnect switch located to the right in the photos. A tap of the three phases and the neutral was made in the trough to separate the meters from one to the other. Each meter reads the amount of current being used for each store separately. When the incident happened, the failure of one or more phases resulted in the loss of power to both stores. This failure of power to the other store happened because there is no separate fused protection in the system. Photo # 2 clearly shows the meter pan box labeled NO FUSES IN THIS CABINET. *This further bolsters my conclusion that there was a blowout involving one or more phases. The applicable code provisions as well as established practice in the field requires a separate means of disconnect from each meter to facilitate repair or replacement without interference from one to the other. That was clearly not the case here. The violations in the system would have made it impossible for plaintiff to turn off the power in the Game Express store without turning off the power in the other store (emphasis added).*

The Absence of a Mechanical Ground Contributed to the Accident

Mr. Sloboda states that the electrical system in the building lacked a proper mechanical ground which was only partially indicative of the dangerous condition of the electrical system. Mr. Sloboda states:

“[A]ll the devices contained in an electrical installation must be grounded to earth. This is not the case here now and . . . this dangerous violation existed at the time of the [accident] and contributed to what occurred.”

The Branch Wiring in the Game Express Panel Was the Wiring Which Existed at the Time of the Occurrence and Was in Violation [of] Proper and Safe Practice and Applicable Code Provisions

Mr. Sloboda found multiple flaws in the branch wiring and conduit in the panel box. He observed sliced branch circuit wiring, loose and unprotected wires in the panel raceway, improper labeling of branch circuits, and the use of unapproved breaker types for daily switches. Mr. Sloboda opines that these components of the system were not replaced after the accident and were the actual conditions in the box when plaintiff entered the panel to repair one of those improperly installed breakers. He further states that plaintiff could not have been aware of the hidden conditions and improper wiring, as follows:

“Photographs # 21, #22, #23, and #24 are submitted as evidence that the panel raceway was used as a splice box. It should be noted that there are spliced wires coming off some of the breakers as seen in the photos #21 and 22. This is not accepted industry standard because it creates a means for the possibility of a back feed and unbalanced naturals. This is a dangerous condition resulting in any one phase supplying a load above its designed rating causing the bus to heat up to a point of failure. NOTE: A balanced load is achieved by creating a set consisting of 3 separate phases and one neutral (return leg). It is against the New York City and the National Electrical Codes to splice 2 or more wires off a single breaker and distribute the load to separate locations. Again, this is not industry standard because it can create unbalanced loads or back feeds. This condition can also be viewed in Photo # 16.

It is my opinion as an experienced electrician that the branch wiring is original and was not replaced when the new bus works were installed. This was done to facilitate a quick repair, because there would be no need to cutout the existing GE panel and disconnect all the branch circuit wiring and associated conduits.”

Plaintiff asserts that there is no indication that Dr. Wharton removed the panel cover to inspect the branch wiring.

The Breakers Which Controlled the Lighting Were Improper

Mr. Sloboda concluded that the breakers used to control the daily use of the lights in the store at the time of the accident were the same breakers presently there. Thus, he concludes that while the panel might have supported breakers which could have been used on a daily basis as a light switch, such breakers were not installed in the panel on the day of the accident.

Plaintiff concludes that Mr. Sloboda's inspection of the panel box has refuted the conclusory assertions of Dr. Wharton, and that the defective conditions existed in the panel box and the electrical systems, which were the proximate cause of the subject accident. Plaintiff asserts that he followed proper procedures and that there is no evidence that his tester was defective.

In a supplemental reply affirmation, RIM argues that Mr. Sloboda's July 8, 2008 (detailed immediately above) affidavit is not based upon generally accepted engineering principles, is speculative and insufficient to defeat its motion for summary judgment. Specifically, RIM annexes a third affidavit of its expert, Mr. Wharton, made after his inspection of the subject electrical equipment. Mr. Wharton makes the following arguments with respect to Mr. Sloboda's most recent affidavit:

Causation

- the affidavit does not establish a causal connection between any act or omission by RIM and plaintiff's injuries

-it fails to identify a specific defect within the electrical box that created an electrical arc;

- it does not establish causation between any dangerous condition in the panelboard and plaintiff's injuries;

- it does not set forth a chain of events to explain how the accident occurred.

Internal Bus Works

- the affidavit is inconsistent and inaccurate in asserting that buses had burned out yet no branch circuit breakers - which were clamped on to the buses were replaced. If a bus had burned out it would have damaged branch circuit breakers clamped on it;

- the affidavit states that an outline of "soot markings" on the back of the panel box confirms that the internal bus works were replaced. However:

- inspection of the "deposit pattern" behind the bus work assembly does not come from "soot" from a busbar burnout;

- Mr. Sloboda has not established that the deposit is soot from the alleged busbar burnout and not dust deposits;

- the original branch circuit breakers and branch wiring show no evidence of soot from the alleged "catastrophic event;"

- the post fire inspections show no fire or arc-related damage to the branch circuit wiring, branch circuit breakers, to the inside the enclosure, or to the feeder cables or bus work assembly.

On this issue, Dr. Wharton concludes with a reasonable degree of engineering certainty that the bus work assembly did not fail in any way, that there was no burn out of the bus phases and that no fault occurred in the bus work assembly. Further, he asserts that Mr. Sloboda has not stated to a reasonable degree of engineering or scientific certainty that the alleged

busbar burnout occurred, nor explained the cause thereof.

Feeder Cables

- the affidavit states that the feeder cables were replaced after the blowout in the panel and that the copper wire feeder cables that ran from the basement to the panelboard upstairs on the sales floor were removed and replaced because they were damaged by a fire in the basement. However:

- this conclusion is illogical because the feeder cables in the basement were running under ambient temperature conditions and were protected from electrical overload heating by fuses;
- the affidavit does not allege that the feeder cables were damaged in the panelboard enclosure, which is illogical because if the buswork assembly was replaced after one or more bus phases burned out, the insulation of the cables attached to the phases would have also been heat damaged;
- there is no scientific basis for determining the age of the feeder cables' insulation from its appearance.

Absence of an Electrical Ground

- the affidavit alleges that the electrical system in the building lacked a proper mechanical ground but fails to provide evidence from the inspection that the building lacked a proper ground, such as field notes, photographs, or measurements of the resistance-to-ground of the system;
- the electric meter work in the basement passed a New York City Building Electrical inspection in January, 2001, casting doubt on Mr. Sloboda's conclusion that the system was not grounded;
- the affidavit fails to mention a causal connection between the lack of grounding and plaintiff's injuries.

Branch Wiring

- the affidavit refers to a loose wire in the panel raceway seen in photograph #23, claims that there are multiple flaws in the branch wiring and conduit in the panel box, and states that these conditions were present when the accident occurred and remained after the alleged installation of the new internal bus works. However, nothing in the affidavit establishes that these were the same conditions of the panel box on the date of the accident, that any of these wires

had any causal connection to plaintiff's injuries, and there is no evidence of arcing or arcing damage. Thus, any allegations of loose wires contributing to plaintiff's injuries must be disregarded.

Safe Repair

- the affidavit states that there was no proper disconnect system in place in the building electrical system to permit the safe repair of the panel. However, any alleged deficiencies in provisions for disconnecting the power in the base cannot be causally related to plaintiff's accident because plaintiff testified that he intended the power to remain on to determine the condition of the suspect branch circuit breaker.

The Choi defendants submit two separate reply affirmations, arguing in both that plaintiff's causes of action under Labor Law § 200 and common-law negligence must be dismissed. In their first reply affirmation, they contend that there is no evidence which connects the defective meter (which was in the basement) with plaintiff's accident, nor does Mr. Sloboda make such a claim. Defendants also note that the use of circuit breakers as light switches, which Mr. Sloboda claims caused a defective condition, is not attributable to them because Mr. Choi testified that the use of breakers as switches was a condition which existed when he rented the premises and that he did not make any changes to the electrical system when he first took the lease. Further, defendants argue that Mr. Sloboda concedes that circuit breakers can be used as light switches and that Mr. Nahatoo's testimony demonstrates that the panel box was intended to be used in this manner. Defendants also assert that Mr. Sloboda opines that plaintiff's accident could be attributable to a variety of factors (debris or other materials around the panel, damage to the panel caused by overuse

of the circuit breakers, failure of the internal bus system, or failure of the mechanical ground), which demonstrates that plaintiff cannot attribute the accident to one particular cause, and has thus failed to raise sufficient issues of fact to defeat summary judgment.

In their second reply affirmation, defendants first argue that plaintiff's Labor Law § 200 claim must be dismissed as to them because neither Mr. Choi nor Game Express supervised plaintiff's work. Defendants also argue that Mr. Sloboda continues to offer only speculation in his third affidavit with respect to the conditions which may have existed at the time of the accident. Noting that Mr. Sloboda states in his first affidavit that misuse of the breakers as switches may create weaknesses to other mechanisms in the panel box, defendants point out that Mr. Sloboda concedes that breakers can be used as light switches as long as they contain special markings. According to Mr. Sloboda, Mr. Nahatoo's testimony indicates that there were no markings. However, defendants note that Mr. Nahatoo merely testified that some of the breakers had red markers, which were present before and after the accident, and that the inside of the panel box looked the same before and after the accident. Defendants also note that while Mr. Sloboda stated that Mr. Nahatoo testified that there was a problem with the lighting in the store a week before the accident, he subsequently clarified that the lights had not gone out before the accident.

Defendants further contend that:

- Mr. Sloboda's inspection of the panel box eight years after the accident must be viewed as speculative;
- there is no basis for Mr. Sloboda's claim that the soot markings are evidence of a fire occurring at the time of the accident;

- there is no basis for Mr. Sloboda's claims that numerous conditions which presently exist also existed at the time of the accident;
- Mr. Sloboda lacks expert qualifications:
 - he has not submitted a CPLR 3101(d) expert witness exchange;
 - he does not offer any forensics credentials;
 - he proffers his opinion "to a reasonable degree of professional certainty" or "to a reasonable degree of certainty."

The Choi defendants assert that Mr. Sloboda's affidavits are insufficient to raise an issue of fact, and that even were the court to accept Mr. Sloboda's claim that the use of breakers as light switches was a cause of the accident, it is clear that none of the Choi defendants created the condition. They also reiterate that plaintiff has failed to raise an issue of fact with respect to the liability of KP and Fordham.

This branch of RIM's motion for summary judgment dismissing plaintiff's Labor Law § 200 and/or common-law negligence claim is granted. "Where an injury arises from an alleged dangerous and defective condition on property, the owner 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" (*Padovano v Teddy's Realty Assoc., Ltd.*, 56 AD3d 444, 447 [2008]). "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 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” (*Ortega v Puccia*, 57 AD3d 54, 61 [2008]).

Here, RIM has made a *prima facie* showing that it did not supervise or control plaintiff’s work. In this regard, the record reveals that plaintiff arrived with his assistant and performed the work without any supervision from either of the defendants. Moreover, RIM’s principal, Mr. Heiny, testified that he was not even aware of the accident until after it occurred.

RIM has also made a *prima facie* showing that it did not create or have actual notice of any defective electrical condition in the store. Specifically, Mr. Heiny testified that RIM was not provided with any records with respect to maintenance of the building or any electrical certificates for work or modifications which were done to the premises; that RIM did not retain an electrical contractor to work on the premises; Mr. Heiny was not aware of any modifications by its tenants to the electrical wiring on the premises; that when Mr. Heiny visited the store, the lights were working; and that prior to the incident, RIM did not receive any complaints about the premises, nor was it advised of any New York City violations. In addition, Mr. Choi testified that when he was present at the store on a daily basis, there were never any electrical problems that required a repair; that from the time RIM purchased the building up until the time of the accident, neither he nor anyone from Game Express or KP made any complaints to RIM regarding the electrical system of the building; and that prior the accident, there was never a problem with the electrical system at the store.

RIM has also made a *prima facie* showing that it did not have constructive notice of any defective electrical condition in the store. “To constitute constructive notice, the defect must be visible and apparent and it must exist for a sufficient amount of time prior to the accident to permit the defendant’s employees to discover and remedy it” (*Robinson v Pathmark Stores, Inc.*, 2007 NY Slip Op 51020U, 2 [2007]). In this regard, Mr. Heiny testified that RIM did not maintain an office on the premises and did not employ any type of persons that were responsible for maintenance of the building; that the tenants were responsible for the maintenance of store; that RIM did not receive any Con Edison bills, the tenants received their Con Edison bills directly and were responsible for paying their own electrical charges; that RIM did not make regular visits to the store; that the rent was paid by mail; that prior to plaintiff’s accident, RIM did not receive any complaints about the store; and that, as noted above, after purchasing the store, RIM visited the store and noticed that the lights were functioning. Further, Mr. Nahatoo testified that prior to the accident, Game Express never experienced any problem with the breakers, and never had any trouble turning on the lights, except for having to change one of the fluorescent bulbs; that Game Express never called an electrician to come to the store before the accident; and that Game Express did not have any complaints about the lights before the accident.

RIM has made a *prima facie* showing that plaintiff was injured through the same condition he was retained to repair, barring him from any recovery under Labor Law § 200 and/or common-law negligence (*see Barnes v Lucas*, 234 AD2d 405, 406 [1996]; *Skinner*

v G & T Realty Corp., 232 AD2d 627, 627 [1996]). In this regard, the record reveals that plaintiff was directed by his employer to repair the condition at the store which prevented some of the fluorescent lights from working. Once plaintiff determined that a circuit breaker in the panel board was the cause of the malfunction, he tried to re-set the breaker by turning it off and then turning it back on. He then tested the breaker to see if there was any current coming out. After doing so, he was electrocuted, thus demonstrating that he was injured by the circuit breaker he was called upon to repair.

Lastly, RIM's expert has made a *prima facie* showing that there was no defective condition in the electrical wiring of the subject premises. As noted above, Dr. Wharton opines, with a reasonable degree of engineering certainty, that the subject panel board and its component were not defective; that no defect in the electrical supply or wiring caused or contributed to the accident; that the wearing out of a circuit breaker in a lighting panel is an anticipated event, and not a defect of the electrical system; that exposure of potentially dangerous voltage, once the panel box cover is removed, is not a defect and is expected if the panel box's supply breaker is not tripped; that there was no hidden defect in the equipment that led to plaintiff's injuries; and that the incident was caused either by a safety failure in the test device used by plaintiff or an unsafe procedure used by plaintiff in conducting his test.

Plaintiff has failed to raise an issue of fact in opposition to this *prima facie* showing. As RIM contends, plaintiff relies upon Mr. Nahatoo's testimony regarding his use of

breakers as light switches but fails to explain how this demonstrates that RIM created or had notice of the condition which caused his injury. Plaintiff's expert affidavit also fails to demonstrate how RIM is liable for the actions of its tenants with respect to their use of the electrical panel. Lastly, the affidavits of plaintiff's expert - based on the theories that the accident was caused by misuse of the circuit breakers as light switches, that there was a defect in the mechanical ground, and that the panel box was placed too close to the store counter, are speculative and conclusory, and therefore fail to raise a triable issue of fact as to whether RIM's negligence or the negligence of any of the defendants was a proximate cause of the accident (*Tantuccio v Marina Holding Corp.*, 20 AD3d 472, 473 [2005]; see also *Moore v City of Yonkers*, 54 AD3d 397, 398 [2008]; *DiGiose v Bellmore-Merrick Cent. High School Dist.*, 50 AD3d 623, 624, 634 [2008]; *Exime v Williams*, 45 AD3d 633 [2007]).

In this regard, with respect to the alleged misuse of the breakers as light switches, Mr. Sloboda makes vague assertions that "repeated use of a breaker not intended for this purpose *can* create defects in the system," and that such overuse "*can* lead to the failure of the breaker as well as the internal bus," and "may create" loosening and a resultant instability of the panel" (emphasis added). These equivocal statements fail to establish a causal connection between the alleged misuse of the breakers and the injuries plaintiff sustained. Similarly, Mr. Sloboda asserts that plaintiff encountered a failure of a mechanical ground and/or internal bus without any substantiation. While he relies upon the Con Edison records that there was defective meter equipment, he provides no evidence, nor does he assert, that

the defective meter caused the ground failure which led to plaintiff's injuries. Further, Mr. Sloboda opines that the requirement to keep the panel box at least three feet away from the counter may not have been met, which could cause a person in contact with the live panel to become grounded out. However, he does not provide any evidence that the panel box was improperly positioned, and as such, does not opine with any certainty that such was a cause of plaintiff's injuries.

In his second affidavit, Mr. Sloboda opines that six different types of circuit breakers in the panel box "*may contribute to the instability of the workings of the internal bus;*" that "*the overuse of the breaker mechanism can lead to failure of the breaker or internal bus;*" that there is a "*possibility that the internal component parts of the panel board, such as the internal bus, were replaced.*" These statements are equivocal and entirely speculative, and thus fail to support plaintiff's claims that his injuries arose from damage to the panel from misuse of the breakers or a defect in the mechanical ground. He also suggests that electrical work may have been performed without a permit, but provides no support for this conclusion.

In his third affidavit, made after inspection of the panel box, Mr. Sloboda opines that the entire inner bus works of the panel box had been replaced, and that "with a reasonable degree of certainty" there was a catastrophic failure of the bus works in the panel." However, Mr. Sloboda has not stated with a reasonable degree of engineering or scientific certainty that the bus works burned out and has not stated the cause of the

purported burnout. Mr. Slobaba also fails to raise an issue of fact as to whether any of the defendants' alleged negligence was a proximate cause of the accident. As to the lack of a mechanical ground, Mr. Sloboda again fails to substantiate this claim with any evidence, only stating in conclusory fashion that the panel box did not have a proper mechanical ground and that "this dangerous violation existed at the time of the [accident] and contributed to what occurred." In addition, the affidavit does not set forth a causal connection between the lack of grounding and plaintiff's injuries. Similarly, Mr. Sloboda's opinions with respect to the branch wiring and the lack of a proper disconnect system fail to establish a causal connection between any action or omission by defendants and plaintiff's injuries. Further, as Dr. Wharton notes, any deficiency with respect to the provisions for disconnecting the power in the base cannot be causally related to plaintiff's accident because plaintiff testified that he intended to keep the power on to determine the condition of the suspect branch circuit breaker.

Finally, plaintiff has failed to demonstrate, either through the witness' deposition testimony or his expert's affidavits, that his accident was caused by factors other than the condition he was hired to repair. As such, plaintiff cannot recover under either common-law negligence and/or Labor Law § 200 (*Barnes*, 234 AD2d at 406; *Skinner*, 232 AD2d at 627). Accordingly, that branch of RIM's motion for summary judgment dismissing plaintiff's Labor Law § 200 and/or common-law negligence claim is granted.

That branch of the Choi defendants' motion for summary judgment dismissing

plaintiff's Labor Law § 200 and/or common-law negligence claim insofar as asserted against them is also granted. Defendants have made a *prima facie* showing that neither Mr. Choi nor Game Express supervised or controlled plaintiff's work. As noted above, the record reveals that plaintiff arrived with his assistant and performed the work without any supervision from any of the defendants.

Defendants have also made a *prima facie* showing that they did not have actual or constructive notice of any defective electrical condition in the store. Mr. Choi testified that when he was present at the store on a daily basis, there were never any electrical problems that required a repair; that from the time RIM purchased the building up until the time of the accident, neither he nor anyone from Game Express or KP made any complaints to RIM regarding the electrical system of the building; and that prior the accident, there was never a problem with the electrical system at the store.

Similarly, Mr. Nahatoo testified that prior to the accident, Game Express never experienced any problem with the breakers, and never had any trouble turning on the lights, except for having to change one of the fluorescent bulbs; that Game Express never called an electrician to come to the store before the accident; and that Game Express did not have any complaints about the lights before the accident

Defendants have also made a *prima facie* showing that they did not create any defective electrical condition at the store. Mr. Choi testified that he made no changes to the electrical system when he first took the lease; that when the business changed from an ice

cream store to a video store, no electrical work was done in the store nor was any work done on the electrical panel; that while the store was an ice cream store (before Mr. Choi converted it into a computer/video store), no work was done in the basement; that when he changed over to a video store, an electrician was hired to move wall outlets, but did not perform other electrical work; that from 1983, when he first worked in the store, until 1993, no changes were made to the panel; that from 1993 until the store was changed to a video store in 1994 or 1995, no electrical work was done at the store; that no change was made in the lighting to the ceiling when the store was changed from an ice cream store to a video store, other than changing a light bulb; that Mr. Choi never observed any electrical equipment in the basement and only went there to show the Con Ed meter man the way; that except for changing a light bulb, nothing was done with respect to the electricity in the store from the time Mr. Choi first was there in the 1980's until September, 2000; and that he never had to call anyone to fix the circuit breaker and that to his knowledge, no circuit breakers in the panel were changed.

Plaintiff has failed to rebut this *prima facie* showing. Plaintiff has not submitted any evidence that defendants supervised or controlled plaintiff's work, or that defendants had actual or constructive notice of any defective condition in the store's electrical system. In addition, the affidavits of plaintiff's expert fail to raise a question of fact as to whether defendants created a defective condition in the store's electrical system. As noted above, the affidavits are speculative and conclusory, and fail to raise an issue of fact as to whether

defendants' negligence was a proximate cause of the accident. Finally, the court has already determined that plaintiff was injured through the same condition he was hired to repair, which bars any recovery under common-law negligence and/or Labor Law § 200. Accordingly, the branch of defendants' motion to dismiss plaintiff's Labor Law § 200 and/or common-law negligence claims insofar as asserted against them is granted.

Labor Law 241(6)

RIM and the Choi defendants separately move for summary judgment dismissing plaintiff's Labor Law §241(6) cause of action. In so moving, defendants argue that plaintiff cannot establish a Labor Law § 241(6) cause of action because he was engaged in a routine repair rather than ongoing construction work at the time of the accident, which they argue does not constitute a protected activity under the statute. Defendants also assert that 12 NYCRR 23-1.13, the Industrial Code cited by plaintiff in support of this claim, is inapplicable since it only pertains to electrical hazards at "construction, demolition and excavation sites."

In opposition, plaintiff contends that liability under Labor Law § 241(6) is not limited to construction sites, and that the nature of the work he was performing was neither a routine repair nor maintenance.

In its reply, RIM does not specifically address plaintiff's Labor Law § 241(6) cause of action, but asserts that plaintiff has failed to rebut its claims and has failed to make a *prima facie* showing under the Labor Law.

The Choi defendants reiterate in their reply that since plaintiff was engaged in routine maintenance at the time of the accident, he was not engaged in construction, excavation or demolition work to bring his claim under the protections of Labor Law § 241(6).

These branches of defendants' motion to dismiss are granted. "The plaintiff does not have a claim under Labor Law § 241(6) since the plaintiff was not working in a construction area and the accident did not occur in connection with construction, demolition, or excavation work" (*Gleason v Gottlieb*, 35 AD3d 355, 356 [2006], citing *Nagel v D & R Realty Corp.*, 99 NY2d 98, 103 [2002], *Peterkin v City of New York*, 5 AD3d 652, 652 [2004], *lv denied* 3 NY3d 605 [2004]; *see also Holler v City of New York*, 38 AD3d 606, 607-608 [2007]; *lv denied* 9 NY3d 802 [2007]). As noted above, the record reveals that there was no construction, excavation or demolition work being performed at the time of plaintiff's accident. Plaintiff was engaged in routine repair, namely the replacement of a circuit breaker in a lighting panel box. Further, 23 NYCRR 23-1.13, the Industrial Code provision upon which plaintiff relies, is inapplicable to the facts at bar. 23-1.13 (a) merely provides that none of the provisions of the section are subject to the jurisdiction of the Public Service Commission, and the remaining subsections pertain to electrical hazards at "construction, demolition and excavation sites." Accordingly, those branches of defendants' motions for summary judgment dismissing plaintiff's Labor Law § 241(6) cause of action are granted.

Plaintiff's Cross-Motion to Strike based upon Spoliation of Evidence

Plaintiff argues that defendants' answers should be stricken for spoliation of evidence. Specifically, plaintiff asserts that Mr. Choi, who was responsible for store operations at Game Express, hired an electrician after plaintiff's accident to repair the meter, but that the bill, which was sent to Game Express, was not retained by either Game Express or Mr. Choi. Plaintiff also notes that KP has admitted in a response dated March 7, 2007 that it does not have any of the surveillance tapes for the accident date and is not in possession of any bills or repair records for work done subsequent to the accident, despite a search conducted by Mr. Choi.⁵ Plaintiff also points out that Michael Heiny, President and principal shareholder of RIM, testified that he did not have any records for the work performed in the building's basement by an electrical contractor he hired after the accident. Plaintiff contends that despite the fact that the electrical repairs were made by all defendants after the accident, "none of them kept any records which might reveal the nature of the defects which were repaired and the repairs which were actually made." Plaintiff also argues that there has never been any explanation as to what happened to the surveillance tapes for the time of the occurrence.

In opposition, RIM raises two arguments. First, RIM contends that the only evidence relevant to a spoliation claim - the electrical panel that plaintiff claims caused his

⁵ Defendants annexed Mr. Choi's affidavit stating that he was the manager of Game Express and that he had searched for documents related to work done at the premises in 1999 and 2000 but could only locate documents contained in Game Express' response dated March 25, 2005.

injuries - still exists and was available for inspection when plaintiff filed his note of issue. Secondly, RIM maintains that plaintiff has failed to demonstrate how surveillance videotapes and electrician's repair records are material to the prosecution of his claims, or why the disposal of this material in the ordinary course of business by RIM's tenants constitutes spoliation, particularly since the tenants lost their records and RIM disposed of its records before any lawsuit was commenced. RIM also notes that plaintiff ignores the testimony of RIM's principal, Mr. Heiny, who said that he was never told by Con Ed that the building's electrical system may have been tampered with.

As to plaintiff's argument that RIM spoliated evidence because it hired a contractor and electrician after the accident but did not keep the repair bills, RIM argues that plaintiff has not demonstrated that it acted in bad faith or engaged in any non-compliance, and that plaintiff's argument must therefore be rejected. In this regard, RIM contends that while it possessed records regarding the panel box in the basement, it did not have any records regarding the circuit breaker in the store. RIM also asserts that plaintiff has never served it with a notice to preserve, and that assuming that relevant evidence was disposed of, this took place before the lawsuit was commenced and before RIM was on notice that such evidence should be preserved. Finally, RIM contends that plaintiff has waived his right for the imposition of spoliation sanctions by filing his note of issue.

The Choi defendants also oppose that branch of plaintiff's cross-motion to strike their answer. With respect to plaintiff's claim that neither they nor RIM retained records of repair work performed after the accident, the Choi defendants argue that they had no reason

to believe that plaintiff's injury was caused by anything other than an unfortunate accident. They note that plaintiff waited nearly three years to commence this action, and that Mr. Choi testified that he thought plaintiff caused the accident by placing a screwdriver into the panel box. The Choi defendants also assert that after the incident, Mr. Choi was told that there was damage to the electrical equipment (not a meter as alleged by plaintiff), that he hired an electrician from the Yellow Pages, and that years after the incident, he was unable to locate the bill.

The Choi defendants also argue that the failure to preserve the surveillance tapes does not constitute a basis for finding spoliation. In this regard, they contend that while plaintiff alleges that there were surveillance tapes in the store at the time of the accident, Mr. Nahatoo testified that one camera pointed at the register and one camera pointed at the door, and that neither camera focused "in such a way that the panel would be within its view."

The Choi defendants also assert that the imposition of sanctions for spoliation of evidence is only appropriate where there has been grievous, willful conduct, which is not present here. To demonstrate their good faith, they note that they have not violated any court orders and have annexed the affidavit of an investigator they hired who, after extensive efforts, was unable to locate the electrician who made repairs to the panel box after the accident or any records of any electrical repairs.

In his reply, plaintiff asserts that RIM was on notice of his claim on or about December 3, 2001 when his former counsel (Jacoby & Meyers) sent RIM a letter demanding that the panel and all records relating thereto be preserved. Plaintiff also annexes a letter

sent by Jacoby and Meyers to Game Express, dated January 15, 2002, indicating that counsel had been retained by plaintiff for personal injuries he sustained as a result of Game Express' negligence and advising Game Express to forward the letter to its insurance company. Plaintiff asserts that despite these claim letters, defendants have repeatedly contended that they were not on notice of his claim and did not retain any records with respect to the history of the electrical repairs in the building made before or after the accident. Plaintiff notes that counsel for RIM admits that it possessed records regarding the panel box in the basement but none regarding the circuit breaker in Game Express. In this regard, plaintiff states that despite his notice for discovery and inspection dated January 3, 2005, which demanded all relevant documents, equipment and records for the electrical system in the building, counsel for RIM does not indicate when it discarded the above-noted records.

With respect to Game Express, plaintiff notes that despite the deposition testimony of Mr. Choi, who said he did not know the name of the electrician who made repairs after the accident, defendants' investigator states in an affidavit that Mr. Choi provided him with the business card of this electrical contractor in September, 2003. Plaintiff argues that there is no excuse for failing to provide the name of this electrician to him. Plaintiff also notes that Game Express does not deny that surveillance tapes were not preserved, and that Mr. Nahatoo's self-serving testimony that the cameras were not pointed at the panel box merely raises an issue of credibility that cannot be resolved as a matter of law. Given the lost repair records, and the disagreement among the experts with respect to which components in the panel box were present at the time of the accident and which components

were replaced, plaintiff concludes that spoliation of the records relevant to the accident warrants the striking of defendants' answers.

In a sur-reply, the Choi defendants assert that plaintiff has provided no proof that Game Express ever received the January 15, 2002 letter; that in any event, the letter cannot constitute early notice as it was sent over a year after plaintiff's accident; that plaintiff took no further action until the service of the summons and complaint nearly three years after the accident; and that given these circumstances, it is not surprising that Game Express did not possess any repair records. Defendants also note that there is no indication that Mr. Choi's testimony regarding the name of the electrician was false and that, in any event, plaintiff's discovery requests were limited to the bills and other items which do not bear on the identity of the electrician. Further, defendants assert that their investigator makes clear in his affidavit that after an extensive investigation, he was unable to locate the company identified on the electrician's business card.

“The ‘drastic remedy’ of striking an answer pursuant to CPLR 3126 is warranted when there is ‘a clear showing’ that the failure to comply with discovery demands was willful and contumacious” (*Denoyelles v Gallagher*, 40 AD3d 1027, 1027 [2007], citing *Fellin v Sahgal*, 268 AD2d 456, 456 [2000]). In addition, “under the common-law doctrine of spoliation, ‘[w]hen a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading’” (*id.*, quoting *Baglio v St. John's Queens Hosp.*, 303 AD2d 341, 342-343 [2003], *see also Barahona v Trustees of*

Columbia Univ. in City of N.Y., 16 AD3d 445, 445-446 [2005]; *Iannucci v Rose*, 8 AD3d 437, 438 [2004]). On the other hand, “a less severe sanction or no sanction is appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense” (*id.*, citing *Gerber v Rosenfeld*, 18 AD3d 812 [2006]). “The determination of spoliation sanctions is within the broad discretion of the court (*id.*).

Based upon the record presented, plaintiff has not established that defendants’ failure to retain repair records or surveillance tapes was in bad faith, or that the failure to retain these records and tapes rendered plaintiff “prejudicially bereft of appropriate means” to prove his claim (*see Tommy Hilfiger, USA, Inc. v Commonwealth Trucking, Inc.*, 300 AD2d 58, 59 [2002]). RIM and the Choi defendants were only notified of plaintiff’s claim fourteen months, and fifteen months, respectively, after the accident occurred. “In the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices” (*Conderman v Rochester Gas & Elec. Corp.*, 262 AD2d 1068, 1070 [1999]). Here, plaintiff has failed to establish that defendants destroyed evidence, either willfully or negligently, once they were on notice of plaintiff’s claim or once litigation was pending. As to plaintiff’s claim that Mr. Choi was disingenuous when he testified in 2006 that he did not know the name of the electrician who came to repair the panel box in 2000, there is no evidence that such is the case. While Mr. Choi gave the electrician’s business card to an investigator in 2003, there is no evidence that he remembered the name in 2006.

Moreover, plaintiff has not established, through any competent or expert evidence,

that he will be unable to prove his claim without these records. Notably, at least with respect to the surveillance tapes, Mr. Nahatoo testified that the cameras were not focused in any way toward the panel box. In addition, plaintiff can prove his case through the use of expert affidavits, deposition testimony of defendants' witnesses, and other relevant evidence, such as the records of Consolidated Edison.

In view of the foregoing, plaintiff's motion to strike defendants' answers is denied.

Indemnification Claims

As an out-of-possession landlord which did not supervise or control plaintiff's work, RIM argues that it is entitled to contractual and common-law indemnification against the Choi defendants. With respect to contractual indemnification, RIM relies upon the terms of the lease, which obligates the tenant to defend, indemnify and hold it harmless against any and all claims arising from the tenant's use of the premises. RIM argues that regardless of whether the Choi defendants are without negligence, they are obligated to indemnify it under the lease because this incident arose in connection with their use of the subject premises.

RIM also asserts that since any liability asserted against it would be purely vicarious, it is entitled to common-law indemnification.

In opposition, the Choi defendants argue that this branch of RIM's motion may only be granted with respect to Mr. Choi as he is the only entity listed as a tenant on the lease with RIM. Defendants also contend that since liability has not been assessed against RIM, it is premature to consider contractual indemnification against Mr. Choi.

Defendants next claim that RIM is not entitled to common-law indemnity against KP and Fordham because they have no connection with the operation of Game Express. In addition, defendants assert that RIM is not entitled to common-law indemnity against Game Express and Mr. Choi because RIM must show that it is free from negligence and that one or more of the Choi defendants from whom indemnity is sought were negligent. Defendants contend that RIM's papers, as well as their own papers, have established conclusively that there is no ground for a finding of common-law negligence against them.

That branch of RIM's motion for common-law indemnity is denied as the court has concluded that the Choi defendants are not liable under any of plaintiff's claims (*see Mid-Valley Oil Co., Inc. v Hughes Network Sys., Inc.*, 54 AD3d 394, 395 [2008]). That branch of RIM's motion for contractual indemnification, in this case for expenses and attorney's fees, is also denied because the "broad indemnification provision in the lease purportedly shifts the entire responsibility for damages to [Mr. Choi] regardless of [RIM's] own negligence. Accordingly, the indemnification clause is unenforceable under General Obligations Law § 5-321" (*Rego v 55 Leone Lane, LLC*, 56 AD3d 748, 749-750 [2008]).

Finally, in light of the court's ruling dismissing plaintiff's Labor Law and common-law negligence claims, that branch of the Choi defendant's motion to dismiss the complaint as to KP and Fordham is granted.

In sum, the motions of RIM and the Choi defendants to dismiss plaintiff's Labor Law §§ 241(6) and 200 claims, as well as plaintiff's common-law negligence claims, are granted. Plaintiff's cross-motion to strike the answers of the defendants is denied. That branch of

Plaintiff's cross-motion to strike the answers of the defendants is denied. That branch of RIM's motion for indemnification is denied.

This constitutes the decision and order of the court.

ENTER
J. S. C.
HON. BERT A. BUNYAN
JUSTICE N.Y.S. SUPREME COURT