

<b>Saft v 111 Chelsea, LLC</b>
2009 NY Slip Op 32062(U)
September 8, 2009
Supreme Court, New York County
Docket Number: 112848/04
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN  
Justice

PART 7

Index Number : 112848/2004  
**SAFT, MITCHELL E.**  
 VS.  
**111 CHELSEA**  
 SEQUENCE NUMBER : 003  
 SUMMARY JUDGMENT

**FILED**  
 SEP 17 2009  
 COUNTY CLERK'S OFFICE  
 NEW YORK

INDEX NO. 112848/04  
 MOTION DATE 11/26/08  
 MOTION SEQ. NO. 003  
 MOTION CAL. NO. 94

The following papers, numbered 1 to 18 were read on this motion for Summary judgment

	PAPERS NUMBERED
Notice of Motion— Affirmation — Exhibits A-L	<u>1-2</u>
Answering Affirmation — Exhibit A	<u>3</u>
Replying Affirmation	<u>4</u>
Notice of Cross Motion— Affirmation — Exhibits A-I	<u>5-6</u>
Answering Affirmations	<u>7-9</u>
Replying Affirmations	<u>10-11</u>
Notice of Cross Motion— Affirmation — Exhibit 1	<u>12-13</u>
Answering Affirmations	<u>14-16</u>
Replying Affirmation	<u>17-18</u>

Cross-Motions (2):  Yes  No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the new order decision and order filed herewith.

Dated: 9/8/09  
 New York, New York

[Signature]  
 J.S.C.  
**HON. MICHAEL D. STALLMAN**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
 Check if appropriate:  DO NOT POST  REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 7**

-----X  
MITCHELL E. SAFT and LORRAINE SAFT,

Plaintiffs,

**Index No. 112848/04**

-against-

111 CHELSEA, LLC, DOUBLECLICK, LLC and JLS  
CONTRACTING, INC.,

Defendants.

**Decision and Order**

-----X

DOUBLECLICK, INC.,

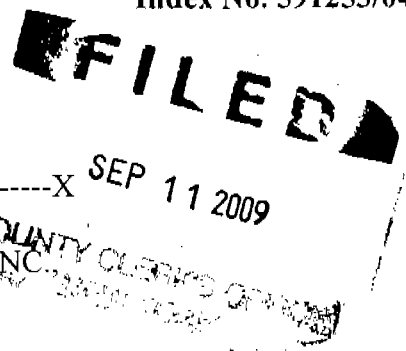
Third-Party Plaintiff,

**Third-Party  
Index No. 591253/04**

-against-

ADCO ELECTRICAL CORPORATION,

Third-Party Defendant.



-----X

JLS INDUSTRIES, INC. i/s/h/a JLS CONTRACTING, INC.

Second Third-Party Plaintiff,

**Second Third-Party  
Index No. 590085/05**

-against-

ADCO ELECTRICAL CORPORATION,

Second Third-Party Defendant.

-----X

**HON. MICHAEL D. STALLMAN, J.:**

This action arises from a construction site accident that occurred on November 21, 2003 on the 10th floor of premises located at 111 Eighth Avenue in Manhattan. Plaintiff Mitchell Saft, an electrician was shocked with 277 volts of electricity while he was attempting to fix nonfunctional

ceiling lighting fixtures in a back hallway, fell from the ladder he was using, and was injured. At the time, Saft was an employee of third-party/second third-party defendant ADCO Electrical Corporation (ADCO).

Pursuant to CPLR 3212, defendant/third-party plaintiff Doubleclick, Inc., s/h/a Doubleclick, LLC (DoubleClick) moves for summary judgment dismissing the complaint, or, in the alternative, for summary judgment on its cross claim for common-law indemnification or contribution against co-defendant JLS Industries, Inc., i/s/h/a JLS Contracting, Inc. (JLS), and on its third-party claims against ADCO.

Plaintiffs cross-move for partial summary judgment in their favor on the issue of defendants' liability under Labor Law § 240 (1).

JLS cross-moves for summary judgment dismissing the complaint, or, in the alternative, for summary judgment in its favor on its cross claim against DoubleClick and on its second third-party claims against ADCO.

### **BACKGROUND**

At the time of Saft's accident, DoubleClick was a commercial lessee of part of the 10th floor of the premises. DoubleClick moved into its demised premises on the same day that Saft was injured, November 21, 2003. Defendant 111 Chelsea, LLC, which has not appeared in this action, is alleged to have been the owner of the building. Although no specific written contract between DoubleClick and JLS has been found, there is an Offer of Project & Construction Management Services, dated July 3, 2003, which JLS submitted to DoubleClick and which seems to have been the basis of their agreement concerning the construction project (*see* DiMartini Affirm., Ex F).

On the day of Saft's accident, Saft's foreman, James Stapleton, directed Saft to find out why

ceiling light fixtures and an exit sign in a back hallway were not working (DiMartini Affirm., Ex K [Saft EBT], at 18; DiMartini Affirm., Ex K [Stapleton EBT], at 21). Saft used a six-foot wooden A-frame ladder to reach the fixtures, standing on the third step from the bottom, approximately two and a half to four feet above the floor, and discovered an unspliced wire within the splice box (Saft EBT, at 18, 21, 22, 101, 111). He looked at the tags on the circuits, and discovered, after testing them, that circuits 37, 39 and 41 were live (*id.* at 24). Saft went to the distribution panel which controlled the wires, and turned off the circuit breakers (*ibid.*).

According to Stapleton, the proper procedure for locking down a breaker is:

[y]ou have a tag with your ID on it and you date it, phone number it, and you say who is working on it. You put that on a plastic tag.

In addition to that, they have a lock that goes through a little eyelet. You put your lock through it, and there's only one key for that lock. You take that key and you put it in your pocket so nobody can turn it on.

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The toggle on the breaker is horizontal. It is a little, red plastic with a hinge. You put that over the toggle. There's a thumbwheel with a metal spike that screws into the toggle. You close the hatch and it has an eyelet now. You put the tag and you[r] lock through it. You put the tag over the lock and you lock through the hole.

Now, the breaker cannot be turned on because the plastic is up against the metal of the faceplate of the panel so you can't physically push it. What you have to do is, open it, undo the thumbwheel, take it off, and then hit the breaker

(Stapleton EBT, at 40-41, 76-77).. ADCO provided the kits with the lock for locking down breaker panels (*id.* at 41). This procedure was covered during the weekly safety meetings at the site (*id.* at 42, 44).

In addition to the lock-down procedure described, Stapleton testified that an alternate

procedure was also discussed, that of taking the wires off the breaker: “We take the wires off so there’s absolutely no chance of anybody getting hurt” (*id.* at 45).

Saft claims he did not have a lock, so “I shut off the circuit breaker that I was working on. I put the mechanism on, I screwed it down, tightened it down. I put a piece of 12 wire through, with my tag on it, knowing that I needed a lock,” and went to look for the shop steward, to ask if he had a lock (Saft EBT, at 24, 28; *see also id.* at 143 [wire was “(J)ust a piece of scrap”]). The steward did not have a lock, either, and Saft did not know where the locks on site were stored (*id.* at 154, 151-152). Saft went back to the breaker panel to make sure that his tag was still on, and that the breakers were still off (*id.* at 25, 158-159). The time between this check of the breakers and his ascent of the ladder was approximately 30 seconds to one minute (*id.* at 32; *see also id.* at 171 [Q. “If that wire was to turn live, something had to have happened at that electrical closet for that two minutes or so (that Saft was skinning the wires)?” A. “Two, three minutes”]). He locked the legs of the ladder in place before climbing up (*id.* at 34, 161).

According to Stapleton, there are different devices for testing to see if a wire is live. VoCon and Wiggins testers use probes that have to be physically applied to a conductor (Stapleton Depo., at 37). When asked if there “is another type of voltage tester where you use a wand of some type without touching anything?”, Stapleton replied:

There is called a proximity tester that you would sort of wave in front of the current. If it is live, it will chant a noise but that tester is just a precautionary, if you are in the area type of tester. It is not one that you test a live circuit with

(Stapleton EBT, at 37). Specifically, Stapleton testified that the “whole protocol” for testing to see if a circuit is live is to use VoCon or Wiggins testers, but not a “proximity tester” (“you would use

the tester with the conductor, with the test leads”) (*id.* at 38).

After he ascended the ladder, Saft tested the wire by wanding it (Saft EBT., 33, 159, 164; *but see* at 144-146 [he tested with both the wand and the Wiggins tester]; at 166-167, 169 [he used the Wiggins tester for the hot leg of the circuit]), and determined that the wire was dead, but then was shocked with 277 volts of electricity when he proceeded to splice the wires (*id.* at 33). “The ladder started to shake. I reached down to try to steady the ladder, steady myself, I reached up, the ladder collapsed out from underneath me” and he fell (*id.* at 25, 175 [“My body jolted and the ladder started to shake. I reached down to steady the ladder, reached up to hold myself up there. And then the damn thing collapsed”]; *id.* at 178 [ladder began to shake as a result of Saft being shocked]). The ladder “just collapsed on me, just folded. After I hit the ground the thing came down and hit me. [It no longer looked like an A], it was folded ... it was closed” (*id.* at 35, 181-182 [the ladder was “completely closed”]).

## DISCUSSION

The standards for summary judgment are well settled.

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action”

(*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986)(internal citations omitted).

### **Plaintiffs’ Cross Motion for Partial Summary Judgment on the Issue of Defendants’ Liability Under Labor Law § 240 (1)**

Section 240 (1) of the Labor Law “imposes a nondelegable duty and absolute liability upon

owners or contractors for failing to provide safety devices necessary for the protection of workers subject to the risks inherent in elevated work sites who sustain injuries proximately caused by that failure” (*Ramos v Port Auth. of N.Y. & N.J.*, 306 AD2d 147, 147-148 [1st Dept 2003]).

It is uncontested that DoubleClick, as lessee of the premises who hired JLS, is an “owner” within the intendment of section 240 (1) (*see e.g. Frierson v Concourse Plaza Assocs.*, 189 AD2d 609, 611 [1<sup>st</sup> Dept 1993]; *Ampolini v Long Is. Lighting Co.*, 186 AD2d 772 [2<sup>nd</sup> Dept 1992]). In its answer, JLS admitted that it “provided construction management services for [DoubleClick] in connection with the work being performed on the premises on November 21, 2003” (DiMartini Affirm., Ex C [Verified Answer] ¶ 2). Thus, a threshold issue arises as to whether the statute applies to JLS, either as a general contractor, or as a statutory agent of DoubleClick.

JLS submitted to DoubleClick an Offer of Project & Construction Management Services [the Offer] (DiMartini Affirm., Ex F). Aside from cover pages, the Offer itself spans six pages, and does not actually set forth JLS’s role and responsibilities in DoubleClick’s project. JLS’s director, John LoVerde testified at his EBT that JLS was hired to “(b)e the construction manager” (DiMartini Affirm., Ex E [LoVerde EBT], at 9), which DoubleClick’s operations manager, Matthew Romano, also corroborated (*id.*, Ex H [Romano EBT], at 11, 14 [JLS was hired to do “general construction management. They coordinated all of the work to be done by the various trades”]). According to LoVerde, JLS’s responsibilities were “to make sure that the job was built in accordance with the plans and specifications, in budget, and on time” (LoVerde EBT, at 9-10). JLS coordinated the trades on site, in order to make sure “that the job was built in accordance with the plans and specs that were provided to us by the architect and Doubleclick” (*id.* at 12). And yet, Michael Hickey, JLS’s construction project manager/supervisor, testified at his EBT that “[JLS was] the general

contractor that was hired to build out the new office space for Doubleclick” (DiMartini Affirm., Ex G [Hickey EBT], at 9).

Plaintiffs’ assumption that JLS acted as a general contractor is devoid of any factual support (*see* Plaintiffs Mem., at 12). Plaintiffs have not met their prima facie burden of demonstrating that Labor Law § 240 (1) applies to JLS. Therefore, plaintiffs’ cross motion for summary judgment in their favor on their Labor Law § 240 (1) claim is denied as to JLS.

As to DoubleClick,

In order for a plaintiff to demonstrate entitlement to summary judgment on an alleged violation of Labor Law § 240(1), he must establish that there was a violation of the statute, which was the proximate cause of the worker's injuries. However, if adequate safety devices are provided and the worker either chooses not to use them or misuses them, then liability under section 240(1) does not attach. Hence, in determining whether there is a violation of Labor Law § 240(1), or whether a worker is the sole proximate cause of his injuries, the issue to be addressed first is whether adequate safety devices were provided, "furnished" or "placed" for the worker's use on the work site.

(*Cherry v Time Warner*, \_\_\_ AD3d \_\_\_, (1<sup>st</sup> Dept, Aug. 16, 2009)(citations omitted).

Here, the evidence is clear that Saft fell from the ladder after being shocked with 277 volts of electric current. Once Saft was “hit with 277,” the “ladder collapsed, started shaking violently ... just folded ... [it no longer looked like a capital A] ... it was closed” (Saft EBT, at 34-35). It is uncontested that the ladder was unsecured in any way. The fact that the ladder was unsecured constitutes a prima facie violation of Labor Law § 240 (1) (*see e.g. Vega v Rotner Mgt. Corp.*, 40 AD3d 473, 473-474 [1st Dept 2007]; *Palacios v Lake Carmel Fire Dept., Inc.*, 15 AD3d 461, 462 [2d Dept 2005]; *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004]; *Davis v Selina Dev. Corp. of N.Y.*, 302 AD2d 304, 305 [1st Dept 2003]). The fact that the unsecured ladder did not prevent Saft from falling to the floor after being shocked also constitutes a violation of Labor

Law § 240 (1) (*Vukovich v 1345 Fee, LLC*, 61 AD3d 533, 534 [1st Dept 2009]; *Quackenbush v Gar-Ben Assoc.*, 2 AD3d 824, 825 [2d Dept 2003] [ladder was inadequate to prevent plaintiff from falling after sustaining electric shock]).

Thus, Saft has established a violation of Labor Law § 240 (1). With respect to the issue of causation, it cannot be said that an electrician getting shocked and falling from an unsecured ladder is an unforeseeable occurrence. The Court finds that the violation of section 240 (1) was a foreseeable and proximate cause of Saft's injuries (*see e.g. Dasilva v A.J. Contr. Co.*, 262 AD2d at 214 ["the absence of adequate safety devices was a substantial and, given the nature of the work being performed, foreseeable cause of plaintiff's fall and injury"]; *Wasilewski v Museum of Modern Art*, 260 AD2d 271, 271-272 [1st Dept 1999] [fact that A-frame ladder "shook and moved, precipitating his fall ... is sufficient to establish that defendant's ... breach was a contributing factor"]; *Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152, 153 [1st Dept 1998] [plaintiff proved violation, and evidence did not suggest possibility that fall was caused by something other than unsafe condition of ladder; thus, ladder was not "constructed, placed and operated as to give proper protection to" worker (Labor Law § 240 [1])]).

The cases that DoubleClick cite do not stand for the proposition that there is no violation of Labor Law § 240 (1) when a worker falls off a non-defective ladder. *Boccia v City of New York* (46 AD3d 421 [1<sup>st</sup> 2007]) and *Buckley v J.A. Jones/GMO* (38 AD3d 461 [1<sup>st</sup> Dept 2007]) ruled that a question of fact arises when there is an issue as to whether a worker's falls from a ladder because the worker "lost footing" while on the ladder. In *Boccia*, there was conflicting evidence as to whether the plaintiff slipped because the ladder shifted or slipped due to water, mud and other debris on the ground, or because wet concrete or wet cement were on plaintiffs' boots. *Boccia*, 46 AD3d

at 421. In *Buckley*, the plaintiff claimed that the ladder “kicked out from underneath him,” but in an incident report, the plaintiff’s foreman stated that the plaintiff “just slipped as a result of losing his footing.” *Buckley*, 38 AD3d at 462.

In *Antonucci v Three Dogs LLC* (41 AD3d 205 [1<sup>st</sup> Dept 2007]), the appellate court ruled there were issues of fact as to whether plaintiff was provided a defective ladder, or whether plaintiff was the sole proximate cause of his fall, without discussing any facts of that case. *Antonucci* cannot be read to stand for the proposition that plaintiff must prove a defect in the ladder to prevail. A plaintiff need not demonstrate that the ladder was faulty in any way to establish a violation of Labor Law § 240 (1) (see *Montalvo v J. Petrocelli Constr.*, 8 AD3d at 174). Rather, “[i]t is sufficient for purposes of liability under section 240 (1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent” (*Orellano v 29 E. 37<sup>th</sup> St. Realty Corp.*, 292 AD2d 289, 291 [1<sup>st</sup> Dept 2002]).

Defendants’ contention that Saft’s failure to properly lock down the circuit breakers was the sole proximate cause of his injuries is unpersuasive. It is well-settled that once a plaintiff has established that a violation of the statute is a proximate cause of his injury, the worker’s “contributory negligence ... is not a defense to a section 240 (1) claim” (*Ernish v City of New York*, 2 AD3d 256, 257 [1<sup>st</sup> Dept 2003]; see also *Tavarez v Weissman*, 297 AD2d 245, 247 [1<sup>st</sup> Dept 2002] [same]), and that “if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it” (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]).

In sum, plaintiffs’ cross motion for summary judgment on the issue of liability under section 240 (1) of the Labor Law is granted as to DoubleClick only, and is otherwise denied.

**DoubleClick's Motion for Summary Judgment Dismissing the Complaint, or, in the Alternative, for Summary Judgment on its Cross Claim Against JLS and on its Third-Party Claims Against ADCO;**

As discussed above, the Court granted plaintiffs' summary judgment in their favor on the Labor Law § 240 (1) claim against DoubleClick. Thus, the branch of DoubleClick's motion which seeks summary judgment dismissing plaintiffs' section 240 (1) claim is denied. The part of JLS's cross motion which seeks summary judgment dismissing plaintiffs' section 240 (1) claim is granted.

In addition, plaintiffs have withdrawn their Labor Law § 200 claim as against DoubleClick (Levien Affirm. ¶ 2). Thus, DoubleClick's summary judgment motion now pertains to plaintiffs' claims of negligence, and violation of Labor Law § 241 (6).

Common-law negligence

With respect to the claim for negligence, the elements necessary to the cause of action are: "(1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof" (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]; see also *Ingrassia v Lividikos*, 54 AD3d 721, 724 [2d Dept 2008]; *Quick v G.G.'s Pizza & Pasta, Inc.*, 53 AD3d 535, 536 [2d Dept 2008]). "It is well established that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff. ... The question of duty ... is best expressed as 'whether the plaintiff's interests are entitled to legal protection against the defendant's conduct' [citations omitted]" (*Pulka v Edelman*, 40 NY2d 781, 782 [1976]).

There has been no showing that DoubleClick owed any duty of care to Saft, and "[w]ithout a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm" (*Lauer v City of New York*, 95 NY2d 95, 100 [2000]). There

has also been no showing that any act or omission by DoubleClick played any part in causing Saft's injuries. Thus, no claim in common-law negligence lies as against DoubleClick.

Moreover, the fact that DoubleClick has been held vicariously liable under section 240 (1) is no basis for a finding of negligence, because such liability

is not predicated on fault: it is imputed to the owner or contractor by statute and attaches irrespective of whether due care was exercised and without reference to principles of negligence [citations omitted]. A violation of the statute is not the equivalent of negligence and does not give rise to an inference of negligence

(*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]).

Therefore, the part of DoubleClick's motion which seeks summary judgment dismissing the Labor Law § 200 and common-law negligence claims is granted.

Labor Law § 241 (6)

Labor Law § 241 (6)

"requires owners and contractors 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 . . . . In order to support a claim under section 241(6), however, the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles."

(*Misicki v Caradonna*, 12 NY3d 511 [2009][citations and quotation marks omitted]).

Paragraph "Thirteenth" of the complaint and paragraph 4 of plaintiffs' verified bill of particulars allege a plethora of violations of the Industrial Code, including 12 NYCRR 23-1.5, 12 NYCRR 23-1.13 and 12 NYCRR 23-1.21 (DiMartini Affirm., Ex A; Rosenheck Partial Opp. Affirm., Ex A).

As DoubleClick indicates, courts have previously ruled that 12 NYCRR 23-1.5 (a), (c) (1) (2) and (c) (3) are general safety standards, the violation of which can be the basis for liability under

Labor Law § 241 (6) (*Maldonado v Townsend Ave. Enter.*, 294 AD2d 207, 208 [1st Dept 2002]; *Williams v White Haven Memorial Park, Inc.*, 227 AD2d 923, 924 [3d Dept 1996]; *Vernieri v. Empire Realty Co.*, 219 AD2d 593, 598 [2d Dept 1995]; see also *Hassett v Celtic Holdings, LLC*, 7 AD3d 364, 365 [1<sup>st</sup> Dept 2004], *abrogated on other grounds*). In this Court's view, 12 NYCRR 23-1.5 (b), which requires that employers employ competent employees, is also a general standard, because it reiterates a common-law standard that employers must exercise reasonable care in hiring employees. See *Misicki*, 12 NY3d at 521. Therefore, so much of plaintiffs' Labor Law § 241 (6) claim that is based on violations of 12 NYCRR 23-1.5 is dismissed.

DoubleClick also demonstrates that 12 NYCRR 23-1.21 (e) (3) is inapplicable. This provision, which requires a step ladder to be footed or secured against sway by mechanical means, applies "[w]hen work is being performed from a step of a stepladder 10 feet or more above the footing." Saft testified that he was standing on the third step of a six foot ladder, about 2½ to 3 feet above the floor (Saft EBT, at 101).

The Court also agrees with DoubleClick that many other Industrial Code provisions alleged in the complaint and bill of particulars are patently inapplicable to Saft's accident: 12 NYCRR 23-1.7, 23-1.8, 23-1.15, 23-1.17, and 23-2.2. 12 NYCRR 23-1.16, entitled "Safety belts, harnesses, tail lines and lifelines," does not apply because Saft was not provided with those devices (*Partridge v Waterloo Cent. School Dist.*, 12 AD.3d 1054, 1056 [4<sup>th</sup> Dept 2004]; see *Hawkins v City of New York* 275 AD2d 634, 635 [1st Dept 2000]). Plaintiffs also allege violations of Article 1926 of OSHA, which may not support liability under Labor Law § 241 (6), because OSHA is limited to the safety practices of employers (*Kocurek v Home Depot*, 286 AD2d 577 [1st Dept 2001]).

Plaintiffs do not address the patent inapplicability of the Industrial Code provisions discussed

above, and characterize DoubleClick's motion as directed only to 12 NYCRR 23-1.3 (b) and 12 NYCRR 23-1.21. Therefore, the Court grants DoubleClick summary judgment dismissing so much of plaintiffs' Labor Law § 241 (6) claim that is based on violations of 12 NYCRR 23-1.7, 23-1.8, 23-1.15, 23-1.16, 23-1.17, 12 NYCRR 23-1.21 (e) (3) and 23-2.2, and alleged violations of OSHA.

As to 12 NYCRR 23-1.13, DoubleClick does not argue that this Industrial Code provision lacks a specific directive. Rather, DoubleClick focuses only on subsections 23-1.13 (b) (4) and (b) (5), which state:<sup>1</sup>

(4) Protection of employees. No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means. ...

(5) Guarding of switches or other circuit interrupting devices. If protection for employees consists of de-energizing circuits, employers shall cause open switches or other circuit interrupting devices to be guarded against inadvertent closing until such employees are no longer exposed.

DoubleClick points out that Saft did not follow his employer's lock-out procedures and failed to disconnect the wires when he could not find a lock, which DoubleClick argues caused Saft's injury.

Plaintiffs maintain that an issue of fact exists as to whether the wiring in the circuit breaker panel was mislabeled, citing the deposition testimony of JLS's construction project manager/supervisor, Hickey. Plaintiffs conclude that "[t]he mislabeling of the panel supercedes the lockout/tag-out procedure because placing a lock on the wrong circuit due to its mislabeling renders

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<sup>1</sup> These subsections have been found specific enough to support a section 241 (6) claim (*see Lorefice v Reckson Operating Partnership*, 269 AD2d 572 [2d Dept 2000]; *Zak v United Parcel Serv.*, 262 AD2d 252 [1st Dept 1999]; *Adams v Owens-Corning Fiberglass Corp.*, 260 AD2d 877 [3d Dept 1999]; *Snowden v New York City Tr. Auth.*, 248 AD2d 235, 236 [1st Dept 1998])

the lockout/tag-out procedure ineffectual” (Plaintiffs’ Mem., Point III). However, as DoubleClick correctly states, Hickey’s statements are attributed to Stapleton, and thus are inadmissible hearsay.

“[U]nder certain circumstances, hearsay and other inadmissible evidence has been found sufficient to defeat a motion for summary judgment” (*Baker v City of Elmira*, 271 AD2d 906, 909 [3d Dept 2000]). “[I]n opposing a motion for summary judgment, hearsay evidence may be utilized as long as it is not the only evidence submitted” (*Guzman v L.M.P. Realty Corp.*, 262 AD2d 99, 100 [1st Dept 1999]; *see also Acevedo v York Intl. Corp.*, 31 AD3d 255, 258 [1st Dept 2006] [“hearsay evidence may be properly considered by the motion court on a summary judgment motion where it is not the sole basis for the court’s denial of summary judgment to the defendant”]).

Here, the only basis for the supposition that wires in the panel may have been mislabeled is the hearsay statements in Hickey’s deposition testimony. Therefore, the statements are insufficient to raise a triable issue on DoubleClick’s motion that Saft’s failure to follow the lock-out procedure could not be a proximate cause of Saft’s injuries.

As is well-settled, “[a]n owner or general contractor may, of course, raise any valid defense to the imposition of vicarious liability under section 241 (6), including contributory and comparative negligence” (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d at 350).

However, raising the defense of Saft’s negligence is not the same as demonstrating entitlement to summary judgment. DoubleClick relies on its assertion that Saft was the sole proximate cause of his injuries, and that, even if Saft did not know where the locks were, that was not DoubleClick’s fault, and that, in any event, the alternative procedure of removing the wires from the circuit breakers was available to him. However, DoubleClick has failed to establish that there are no material issues of fact concerning its possible violations of 12 NYCRR 23-1.13 (b) (4) and

(5). Therefore, the part of DoubleClick's motion which seeks summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim based on 12 NYCRR 23-1.13 (b) (4) & (5) is denied.

Common-law indemnification against JLS

DoubleClick seeks conditional summary judgment on its cross claim against JLS for common-law indemnification. DoubleClick argues that, because its liability under Labor Law § 241 (6) is solely vicarious, it is entitled to common-law indemnification from the general contractor, JLS, citing *Farina v Plaza Construction Company Inc.* (238 AD2d 158 [1<sup>st</sup> Dept 1997]).

“It is well settled that ‘an owner or general contractor who is held strictly liable under Labor Law § 240 (1) is entitled to full indemnification from the party actually responsible for the incident’”

(*Frank v Meadowlakes Dev. Corp.*, 6 NY3d 687, 691 [2006]; *Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 661-662 (2d Dept 2009); *Carr v Jacob Perl Assoc.*, 201 AD2d 296, 297 (1<sup>st</sup> Dept 1994); *see also Young v Casabonne Bros.*, 145 AD2d 244 (3d Dept 1989).

The Appellate Division, First Department ruled that indemnification lies against the party that “had direct control over the work giving rise to the injury.” *Mejia v Levenbaum*, 57 AD3d 216 (1<sup>st</sup> Dept 2008); *Tighe v Hennegan Constr. Co., Inc.*, 48 AD3d 201 (1<sup>st</sup> Dept 2008); *see also Bronzino v NYNEX*, 262 AD2d 236 (1<sup>st</sup> Dept 1999) (awarding common-law indemnification against the party with direct supervisory authority over plaintiff's work); *see also Reilly v DiGiacomo & Son*, 261 AD2d 318 (1<sup>st</sup> Dept 1999) (summary judgment for contractual indemnification against general contractor denied for lack of evidence that was either negligent or exclusively supervised and controlled plaintiff's work site). Other cases define the party “actually responsible” for plaintiff's injuries as the party that “‘actually supervised, directed or controlled the work giving rise to the injury.’” *Delaney v Spiegel Assoc.*, 225 AD2d 1102, 1103 (4th Dept 1996) (citation omitted); *Keck*

*v Board of Trustees of Corning Community Coll.*, 229 AD2d 1016, 1017 (4<sup>th</sup> Dept 1996); *Nappo v Menorah Campus*, 216 AD2d 876, 877 (4<sup>th</sup> Dept 1996).

Thus, the inquiry is not whether JLS is a general contractor, or construction manager, but rather whether JLS had actually supervised or had direct control over Saft's work. Here, DoubleClick has not met its prima facie burden for summary judgment for common-law indemnification against JLS. Although DoubleClick submits deposition testimony of JLS's duties with respect to project, including "directly supervising the construction laborers," (*see* Mem. at 14-15), DoubleClick has not offered evidence of JLS's actual supervision or direct control of Saft, in particular. Saft testified that ADCO, his employer, alone directed and supervised Saft's work (Saft EBT, at 15-18, 98). DoubleClick's own operations manager testified that, to his knowledge, JLS was not responsible for the means and methods of ADCO's work (Romano EBT, at 42).

Therefore, this branch of DoubleClick's motion for summary judgment is denied. Pursuant to CPLR 3212 (b), the Court grants JLS reverse summary judgment dismissing DoubleClick's cross claim against JLS for common-law indemnification.

#### Contractual indemnification against ADCO

In support of this branch of its motion for summary judgment, DoubleClick submits a copy of a contract between DoubleClick and ADCO dated as of September 17, 2003 (DiMartini Affirm., Ex. J, at NatCas 00028 [DoubleClick/ADCO contract]). The copy of the DoubleClick/ADCO contract is executed by ADCO, but not by DoubleClick. As DoubleClick indicates, "an unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound" (*Flores v Lower East Side Serv. Ctr.*, 4 NY3d 363, 369 [2005]). There is no dispute here that the parties intended to be bound by the terms of the DoubleClick/ADCO contract

(see Moskowitz EBT. at 67, 70).

Section 11.2 of the DoubleClick/ADCO contract provides, in relevant part:

Contractor [ADCO] shall indemnify, defend and hold harmless Owner [DoubleClick] ... from and against any loss, cost, expense, claim, injury or damage (including, without limitation, reasonable attorneys' fees and expenses), whether or not incurred due to third party suits or proceedings, arising or resulting from or caused by (i) any negligent act or omission or willful misconduct of Contractor ... or any of its ... employees ...

(*id.* at NatCas 00040).

Here, DoubleClick has not established ADCO's negligence. The Court would have been thus inclined to deny this branch of DoubleClick's motion for summary judgment, because DoubleClick did not establish its prima facie case on this cause of action. However, the Appellate Division, First Department has indicated that conditional summary judgment is appropriate (*Gary v Flair Beverage Corp.*, 60 AD3d 413 [1st Dept 2009]). The appellate court stated "[s]ince the indemnification provision plainly contemplates a showing of negligence by third-party defendant, and there are issues of fact as to that negligence, [defendant/third-party plaintiff] is entitled to conditional summary judgment on its contractual indemnification claim" (*Gary*, 60 AD3d at 415). Accordingly, summary judgment in DoubleClick's favor is granted on its contractual indemnification claim, conditioned on a finding of Saft's or ADCO's negligence at trial.

**JLS's Cross Motion for Summary Judgment Dismissing the Complaint, or, in the Alternative, for Summary Judgment on its cross claim against DoubleClick and its Second Third-Party Claims Against ADCO**

Summary Judgment dismissing the Complaint

As discussed above, the Court granted plaintiffs summary judgment as to liability against DoubleClick with respect to a violation of Labor Law § 240 (1). JLS raised the same arguments as

DoubleClick in opposition to plaintiffs' cross motion, which this Court found unavailing. Therefore, this branch of JLS's cross motion is denied.

As to plaintiffs' claims under Labor Law § 241 (6), JLS again raised the same arguments as DoubleClick. For the reasons previously discussed above, this branch of JLS's cross motion for summary judgment is granted with respect to the Labor Law § 241 (6) claims based on 12 NYCRR 23-1.5, 23-1.7, 23-1.8, 23-1.15, 23-1.16, 23-1.17, 12 NYCRR 23-1.21 (e) (3) and 23-2.2, and alleged violations of OSHA.

JLS argues that plaintiffs' claims under Labor Law § 200 and common-law negligence should be dismissed as against it because neither supervised nor controlled Saft's work. Plaintiffs argue that an issue of fact exists as to whether JLS violated Labor Law § 200, because JLS knew that ADCO employees were working with electricity while working at heights utilizing ladders, and did not provide Saft with a scaffold, manlift, a lanyard, or a place to tie off.

Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction workers with a safe work site" (*Perrino v Entergy Nuclear Indian Point 3, LLC*, 48 AD3d 229, 230 [1st Dept 2008]; see also *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 272 [1st Dept 2007] [same]). When, as here, injuries arise out of the means and methods of a Saft's work, liability under section 200 "may not be assigned absent proof that the defendant exercised some supervisory control over the work in the course of which the plaintiff was injured" (*DeSimone v Structure Tone*, 306 AD2d 90, 90 [1st Dept 2003]).

As mentioned previously, Saft testified that ADCO, his employer, alone directed and supervised Saft's work (Saft EBT, at 15-18, 98). Plaintiffs fail to raise a triable issue of fact as to whether JLS supervised or controlled Saft's work. There is no liability under the statute solely

because JLS may have notice of the allegedly unsafe manner in which the work was performed (*Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 878 [1993]).

Therefore, JLS is granted summary judgment dismissing so much of the first cause of action as against it that alleges a violation Labor Law § 200 is dismissed, along with the claim alleging common-law negligence (*see e.g. Tornello v Beaver Brook Assocs., LLC*, 8 AD3d 7 [1<sup>st</sup> Dept 2004]).

Common-law indemnification against ADCO

JLS seeks summary judgment on its first cause of action of the second third-party complaint against ADCO, for common-law indemnification and contribution. However, ADCO was Saft's employer.

“Workers’ Compensation Law § 11 prohibits third-party indemnification or contribution claims against employers, except where the employee sustained a “grave injury,” or the claim is “based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered”

(*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 429-430 [2005]; *see also Ascencio v Briarcrest at Macy Manor, LLC*, 60 AD3d 606, 607-608 [2d Dept 2009]; *Mantovani v Whiting-Turner Contr. Co.*, 55 AD3d 799, 800 [2d Dept 2008]).

It is uncontested that Saft did not sustain a “grave injury.” Therefore, the branch of JLS's cross motion for summary judgment in its favor for contribution and common-law indemnification against ADCO must fail. Pursuant to CPLR 3212 (b), the Court grants ADCO reverse summary judgment dismissing the first cause of action of the second third party-complaint.

**CONCLUSION**

Accordingly, it is

ORDERED that defendant DoubleClick Inc.'s motion for summary judgment is partially granted as follows:

- 1) so much of the first cause of action as alleges a violation of Labor Law § 200 and common-law negligence is dismissed as against this defendant;
- 2) so much of the first cause of action as alleges a violation of Labor Law § 241 (6) that is based on violations of 12 NYCRR 23-1.5, 23-1.7, 23-1.8, 23-1.15, 23-1.16, 23-1.17, 23-1.21 (e) (3) and 23-2.2, and alleged violations of OSHA, is dismissed;
- 3) on the fourth cause of action of the first third-party complaint, DoubleClick, Inc. is granted conditional summary judgment against third-party defendant ADCO Electrical Corporation, conditioned on a finding of Saft's or ADCO's negligence at trial;

and DoubleClick Inc.'s motion is otherwise denied; and it is further

ORDERED that the Court grants defendant JLS Contracting, Inc. reverse summary judgment dismissing defendant DoubleClick Inc.'s cross claim as against defendant JLS Contracting, Inc.; and it is further

ORDERED that plaintiffs' cross motion for partial summary judgment so much of the first cause of action as alleges a violation of Labor Law § 240 is granted as to liability as against defendant DoubleClick, Inc., and is otherwise denied; and it is further

ORDERED that defendant JLS Contracting, Inc.'s cross motion for summary judgment is partially granted as follows:

- 1) so much of the first cause of action as alleges a violation of Labor Law § 200 and common-law negligence is dismissed as against this defendant;
- 2) so much of the first cause of action as alleges a violation of Labor Law § 241 (6) that is based on violations of 12 NYCRR 23-1.5, 23-1.7, 23-1.8, 23-1.15, 23-1.16, 23-1.17, 23-1.21 (e) (3) and 23-2.2, and alleged violations of OSHA, is dismissed;

and defendant JLS Contracting, Inc.'s cross motion for summary judgment is otherwise denied; and it is further

ORDERED that the Court grants third-party ADCO Electrical Corporation reverse summary judgment dismissing the first cause of action of the second third-party complaint; and it is further

ORDERED that the remainder of the action shall continue.

Dated: September 7, 2009  
New York, New York

ENTER:

  
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J.S.C.

NON RECIPROCO DI AL 10/4

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