[*1] SCANNED ON 9/15/2009

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

PRESENT: EMILY JANE GOODMAN PART 17
Justice

Index Number : 114418/2007
SAVILLO, DANIEL J.
vs
GREENPOINT LANDING
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

Is motion to/for _____

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

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

As decided on the record

FILED
SEP 15 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 9/8/09

J.S.C.
EMILY JANE GOODMAN

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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DANIEL J. SAVILLO,

Plaintiff,

-against-

Index No. 114418/07

GREENPOINT LANDING ASSOCIATES, L.L.C., and GREENPOINT STORAGE TERMINAL, L.L.C.,

Defendants.

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GREENPOINT LANDING ASSOCIATES, L.L.C., and GREENPOINT STORAGE TERMINAL, L.L.C.,

Third-Party Plaintiffs,

Third-Party Index No. 590014/08

-against-

ALL SAFE HEIGHTS CONTRACTING, CORP.,

Third-Party Defendant.

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Emily Jane Goodman, J.S.C.:

In this action, which arises from an accident which rendered plaintiff a paraplegic, third-party defendant All-Safe Height Contracting Corp., s/h/a All Safe Heights Contracting, Corp. (All-Safe), moves, pursuant to CPLR 3212, for an order (1) granting summary judgment dismissing the complaint in favor of defendant/third-party plaintiff Greenpoint Landing Associates, L.L.C. (Greenpoint), and, in turn, dismissing Greenpoint's claims against All-Safe; and (2) granting partial summary judgment on behalf of All-Safe, dismissing Greenpoint's claims for contractual indemnification and breach of contract by failure to

procure insurance.[1]

Greenpoint "adopt[s] the arguments made in support of All Safe's motion and urge[s] them on the court on behalf of Greenpoint Landing as well" (Mulcahy 12/30/08 Affirm. in Partial Opp. to [All-Safe]'s Motion for Summary Judgment, ¶ 12), but has not made a separate motion or cross motion.

BACKGROUND

On February 12, 2007, plaintiff, then an employee of All-Safe, was injured when he fell 12 to 15 feet from the top of an equipment storage rack or structure that he was helping to erect on premises located at 171 West Street in Brooklyn. At the time of the accident, All-Safe, a construction equipment rental company, had leased the area and was using it as a storage yard and office. Plaintiff's complaint alleges causes of action sounding in common-law negligence, and violations of Labor Law §§ 200, 240 (1), 241, 241 (a),[2] and 241 (6).

On December 1, 2001, non-party Lumber Exchange

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[1]By so-ordered Stipulation filed December 5, 2005, plaintiff's action against the managing agent of the property, Greenpoint Storage Terminal, L.L.C. (Greenpoint Storage) (Index No. 106022/08), was consolidated with this action. However, in this motion, All-Safe does not seek any relief with respect to Greenpoint Storage.

[2]There is no such statute as Labor Law § 241 (a), and it appears that only subsection (6) of Labor Law § 241 is intended to be alleged and pursued. Therefore, the court will not consider the claims of violation of Labor Law §§ 241 and 241 (a) in this decision.

Terminal, Inc. (LE), the owner of the property, entered into a lease with All-Safe for a portion of the lot at 171 West Street for a term ending on November 20, 2002. Article XIX of the lease, section 1902, provides that "Landlord may assign this lease to any subsidiary, affiliate or successor entity." The lease was subsequently extended several times, on May 1, 2002, April 23, 2004, and April 15, 2005, with the final termination date of May 15, 2007.

Pursuant to a Purchase Agreement, Greenpoint purchased LE's interest in the property, and by an Assignment and Assumption Agreement, dated October 31, 2005, LE assigned its right, title and interest to the property to Greenpoint, including "all Security Deposits, all Leases, and all correspondence with the tenants under Leases" (Assignment and Assumption Agreement, ¶ 1 [ii]).

It is undisputed that, on the date of plaintiff's accident, Greenpoint was the owner in fee of the property. Moreover, in its answer, Greenpoint admitted that it had leased a portion of the property to All-Safe (Greenpoint's Answer, ¶ 4). However, All-Safe argues that no new lease was negotiated between All-Safe and Greenpoint prior to the date of plaintiff's accident.

DISCUSSION

Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *see also Smalls v AJI Industries*, 10 NY3d 733, 735 [2008] [proponent must tender "'sufficient evidence to demonstrate the absence of any material issues of fact'"], quoting *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). "'Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers'" (*Santiago v Filstein*, 35 AD3d 184, 186 [1st Dept 2006], quoting *Winegrad*, 64 NY2d at 853; *see also Johnson v CAC Business Ventures*, 52 AD3d 327, 328 [1st Dept 2008], quoting *Alvarez*, 68 NY2d at 324). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson*, 39 AD3d at 306, citing *Alvarez*, 68 NY2d at 324). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso*, 50 AD3d 535, 544 [1st Dept 2008]). "The court's role, in passing on a motion for summary judgment, is

solely to determine if any triable issues exist, not to determine the merits of any such issues" (*Sheehan v Gong*, 2 AD3d 166, 168 [1st Dept 2003], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Validity of the Assignment of the Lease

All-Safe maintains that the lease was not validly assigned by LE to Greenpoint because Greenpoint is not a "subsidiary, affiliate or successor entity" to LE (see Lease, Article XIX, § 1902). In so strictly construing Article XIX of the lease, All-Safe argues that no party other than a subsidiary, affiliate or successor entity of LE could be a valid assignee of the lease. In particular, All-Safe argues that Greenpoint cannot be a "successor in interest" to LE because the term "does not include a transfer [of real property] from one party to another" (*City of New York v Turnpike Development Corp.*, 36 Misc 2d 704, 706 [Sup Ct, Kings County 1962]; *but see 52 Riverside Realty Co. v Ebenhart*, 119 AD2d 452, 453-454 [1st Dept 1986] [seller with no corporate ties to buyer referred to as "predecessor-in-interest"]; *Tehan v Thos. C. Peters Printing Co.*, 71 AD2d 101, 104 [4th Dept 1979] [buyer with no corporate ties to seller referred to as "successor-in-interest"]).

Plaintiff contends that the lease provision should not be construed in such limited terms; the fact that the lease did not prohibit its assignment to parties other than those set forth

in Article XIX means that the assignment was valid and enforceable. In any event, Plaintiff argues Greenpoint is a "successor entity" because, by purchasing the land, it became the owner in fee, and thus became a successor in title.

None of the parties in this matter has cited case law which considers the particular issue involved here, that is, whether an owner/lessor can allegedly breach a lease by an allegedly invalid assignment of the lease to a successor owner, such that the nexus of the lessor/lessee relationship with the tenant is severed.

In *Rowe v Great Atlantic & Pacific Tea Co.* (46 NY2d 62 [1978]), a case which considered whether an implied covenant limiting a lessee's power to assign the lease was present in the lease, the Court of Appeals declared:

> It has long been the law that covenants seeking to limit the right to assign a lease are "restraints which courts do not favor. They are construed with the utmost jealousy, and very easy modes have always been countenanced for defeating them" [citations omitted]. This is so because they are restraints on the free alienation of land, and as such they tend to prevent full utilization of the land, which is contrary to the best interests of society

(*id.* at 69; *see also Whiteface Resort Holdings, LLC v McCutchen*, 52 AD3d 1106, 1108 [3d Dept 2008], quoting *Rowe*).

There is no evidence before the court concerning whether LE had any subsidiary, affiliate, or other "successor

entity," as All-Safe would define the term. However, it seems clear that, without the assignment, LE would not have been able to divest itself of the property (*see* Assignment and Assumption Agreement, second WHEREAS paragraph: "the execution and delivery of the Assignment is a condition precedent to the purchase by the Assignee of the Premises"). Thus, the interpretation of the lease that All-Safe espouses would, at the very least, severely limit LE's ability to freely dispose of its property, a "restraint[] which courts do not favor" (*Rowe*, 46 NY2d at 69).

Moreover, in *Commonwealth Mortgage Co. v De Waltoff* (135 App Div 33 [1st Dept 1909]), the Appellate Division, First Department, in discussing the ramifications of a foreclosure sale in which the lessee took no part, stated that

> the purchaser, succeding [*sic*] to all the title and rights of the original landlord, becomes the landlord by operation of law, with all the rights and remedies of the original landlord. The conventional relation of landlord and tenant is thus created ...

(*id.* at 35).

The court finds All-Safe's arguments to be unpersuasive, and perceives no reason to limit the language of Article XIX as strictly as All-Safe urges. Rather, in light of the above, the court finds that All-Safe's interpretation of the provision is too narrow and untenable. Therefore, there is no basis to find that the assignment of the lease from LE to Greenpoint was invalid for the reason proffered.

Even if the assignment of the lease had been invalid, the alleged breach of the lease would still not have broken the nexus of the lessor/lessee relationship between Greenpoint and All-Safe (*see Sanatass v Consolidated Investing Co.*, 10 NY3d 333, 341-342 [2008] ["the tenant's breach of this lease clause ... did not sever the nexus (between the landlord and tenant)"]). Plaintiff's accident occurred approximately 15 months after Greenpoint became the owner in fee of the premises. All-Safe remained in possession of the demised premises during that time, and there is no evidence before the court that All-Safe, at any time during that period, failed to perform its obligations under the lease, including the payment of rent, or acted in any way that would be inconsistent with its tenancy under the lease. Nor is there any evidence that Greenpoint failed to accept any rent which All-Safe may have tendered.[3] Instead, the evidence indicates that Greenpoint and All-Safe conducted themselves as landlord and tenant until All-Safe vacated the premises.

Unlike the plaintiff in *Abbatiello v Lancaster Studio Associates* (3 NY3d 46, 52 [2004]), where "but for Public Service

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[3]In the determination of this motion, the court has not considered plaintiff's counsel Golomb's January 9, 2009 Reply Affirmation (which All-Safe contends is actually a sur-reply) with its attached exhibits. While the court could have given All-Safe an opportunity to respond to Golomb's affirmation, no such response is necessary, and the court would rather not prolong the disposition of this motion. The case is clear even without considering Golomb's affirmation and its exhibits.

Law § 228, plaintiff [the injured cable technician] would be a trespasser upon [the owner's] property and [the owner] would neither owe a duty to plaintiff nor incur liability [under Labor Law § 240 (1)]," here, All-Safe, with or without the lease, retained possession of the demised premises, continued to use the property as it had under the lease, and did not disavow its status as a tenant under the lease. Unlike the plaintiff in *Abbatiello*, All-Safe cannot reasonably be considered a "trespasser" which would have had no nexus with Greenpoint, the owner in fee.

In any event, there existed between Greenpoint and All-Safe the month-to-month tenancy created by Real Property Law § 232-c, which provides, in pertinent part:

> Where a tenant whose term is longer than one month holds over after the expiration of such term, ... if the landlord shall accept rent for any period subsequent to the expiration of such term, then, unless an agreement either express or implied is made providing otherwise, the tenancy created by the acceptance of such rent shall be a tenancy from month to month commencing on the first day after the expiration of such term

(*see also Stainless Broadcasting Co. v Clear Channel Broadcasting Licenses, L.P.*, 58 AD3d 1010, 1013-1014 [3d Dept 2009]).

That All-Safe was a tenant under a commercial lease is no bar to the application of Real Property Law § 232-c (*see e.g. Estate of Birnbaum v Yankee Whaler, Inc.*, 75 AD2d 708 [4th Dept], *affd* 51 NY2d 935 [1980]; *Vita v Dol-Fan, III, Inc.*, 18 Misc 3d 30

[App Term, 2d Dept 2007]; *New Eagle Inc. v H.R. Neumann Associates*, 4 Misc 3d 1005[A], 2004 NY Slip Op 50724[U] [Sup Ct, Kings County 2004]).

Thus, the alleged breach the lease by LE by an allegedly invalid assignment of the lease to Greenpoint, the successor owner, did not sever the nexus of the lessor/lessee relationship with All-Safe, and whether pursuant to the lease itself, or pursuant to the month-to-month tenancy created by Real Property Law § 232-c, the nexus of the lessor/lessee relationship existed between Greenpoint and All-Safe at the time of plaintiff's accident.

Greenpoint as "Owner" Under the Labor Law

Labor Law § 240 (1) "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 Authority of New York & New Jersey*, 306 AD2d 147, 147-148 [1st Dept 2003]).

> The Court of Appeals has long and repeatedly observed that the purpose of the statute is to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owners and general contractors, instead of on the individual workers who are not in a position to protect themselves

(*Gallagher v New York Post*, 55 AD3d 488, 489 [1st Dept 2008]).

All-Safe contends that the complaint must be dismissed against Greenpoint because it is not a proper Labor Law defendant, in that it was an out-of-possession owner, but not an "owner" as that term is used within the context of Labor Law construction accident claims.

Under section 240 (1) of the Labor Law, the term "owner" includes owners in fee (*Gordon v Eastern Railway Supply*, 82 NY2d 555, 560 [1993]), as well as "a 'person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit' [citation omitted]" (*Zaher v Shopwell, Inc.*, 18 AD3d 339, 339 [1st Dept 2005]; *see also Frierson v Concourse Plaza Associates*, 189 AD2d 609, 611 [1st Dept 1993] ["The 'owners' who are contemplated by the Legislature under Labor Law § 240 (1) are those parties with a property interest who hire the general contractor"]).

All-Safe contends that Greenpoint was an out-of-possession landlord which (1) did not contract for or request the assembly of the equipment storage rack from which plaintiff fell; (2) did not supervise its assembly; (3) did not benefit from its assembly or its presence on the premises; and (4) was not aware that the equipment storage rack was being assembled. In support of its assertion that Greenpoint did not benefit from the assembly of the storage rack, All-Safe maintains that the storage rack was a temporary structure which All-Safe disassembled and

took with it when it vacated the premises.

All-Safe's reliance on the Court of Appeals' decision in *Abbatiello v Lancaster Studio Associates* (3 NY3d 46, *supra*) for its argument that Greenpoint cannot be held liable as an "owner" under the Labor Law is misplaced, for the reasons previously stated. In *Abbatiello*, the Court of Appeals discussed and distinguished its prior holdings in *Celestine v City of New York* (86 AD2d 592 [2d Dept 1982], *affd* 59 NY2d 938 [1983]) "and its progeny," *Gordon v Eastern Railway Supply* (82 NY2d 555, *supra*) and *Coleman v City of New York* (91 NY2d 821 [1997]).

> Common to *Celestine*, *Gordon* and *Coleman* -- and to all cases imposing Labor Law § 240 (1) liability on an out-of-possession owner -- is some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest. Here, however, no such nexus exists. The injured plaintiff was on the owner's premises not by reason of any action of the owner but by reason of provisions of the Public Service Law

(*Abbatiello*, 3 NY3d at 51; *see also Campoverde v Liberty, LLC*, 37 AD3d 275, 275 [1st Dept 2007] [no nexus, no liability, citing *Abbatiello*]; *Passante v Peck & Sander Properties, LLC*, 33 AD3d 980, 980 [2d Dept 2006] ["There must be a connection between the defendant and the worker, 'whether by a lease agreement or grant of an easement, or other property interest,'" quoting *Abbatiello*, 3 NY3d at 51]; *Personius v Mann*, 20 AD3d 616 [3d Dept], *affd as mod* 5 NY3d 857 [2005] [no liability because "no proof that

defendants contracted for the work, called plaintiff to the scene or had any notice that he was on their property until after the accident," citing *Abbatiello*]).

For the reasons set forth above, All-Safe argues that Greenpoint, like the defendants in *Abbatiello*, had no nexus to plaintiff, and thus, cannot be held liable to plaintiff as an "owner" under the Labor Law.

Last year, the Court of Appeals decided the case of *Sanatass v Consolidated Investing Co.* (10 NY3d 333, *supra*). In its decision, the Court revisited the purpose of Labor Law § 240 (1) and the Court's holdings in *Celestine*, *Gordon* and *Coleman*, i.e., "the statute imposes a nondelegable duty on owners to furnish adequate protection to workers 'regardless of the absence of control, supervision or direction of the work' (*Celestine*, 86 AD2d at 593)"; "liability 'rests upon the fact of ownership and whether [defendant] had contracted for the work or benefitted from it [is] legally irrelevant' (*Gordon*, 82 NY2d at 560)"; "*Celestine* and *Gordon* articulated a 'bright line rule' that section 240 (1) applied to all owners regardless of whether the property was leased out and controlled by another entity or whether the owner had the means to protect the worker (*Coleman*, 91 NY2d at 822)" (*Sanatass*, 10 NY3d at 338-340). The Court distinguished *Abbatiello*, stating that

> in *Abbatiello* we carefully distinguished

> *Celestine* and its progeny, noting that in those cases a nexus existed between the out-of-possession owner and the plaintiff, be it by lease, easement or some other property interest. In *Abbatiello*, however, the injured cable technician was on the property solely "by reason of provisions of the Public Service Law" (3 NY3d at 51). ... We concluded that, absent an adequate nexus between the worker and the owner, the cable technician was not entitled to the extraordinary protections of the Labor Law since he was not an "employee" for purposes of section 240 (1); as such, [defendant] could not be liable for his injuries"

(*id.* at 341). In *Sanatass*, the Court reflected:

> [Defendant] asks us to import a notice requirement into the Labor Law or, conversely, create a lack-of-notice exception to owner liability. But our precedents make clear that so long as a violation of the statute proximately results in injury, the owner's lack of notice or control over the work is not conclusive -- this is precisely what is meant by absolute or strict liability in this context. We have made perfectly plain that even the lack of "any ability" on the owner's part to ensure compliance with the statute is legally irrelevant (*see Coleman*, 91 NY2d at 823)

(*id.* at 340; *see also Morales v D & A Food Service*, 10 NY3d 911, 912-913 [2008], *revg* 41 AD3d 352 [1st Dept 2007], where the First Department incorrectly held that "[b]ecause the work was performed without landlord's knowledge, and in violation of the lease requirement that tenant obtain prior consent, the landlord cannot be held liable under Labor Law § 240 [1]"; *Collins v West 13th Street Owners Corp.*, 63 AD3d 621, 2009 WL 1851405, *1, 2009 NY App Div LEXIS 5229, **3 [1st Dept 2009] ["the owner's lack of

notice or control over the work is not conclusive - this is precisely what is meant by absolute or strict liability in this context"], quoting *Sanatass*, 10 NY3d at 340; *Ali v Richmond Industrial Corp.*, 59 AD3d 469, 470 [2d Dept 2009] [defendant's "status as an out-of-possession landlord/owner does not shield it from liability under Labor Law § 240 (1) or § 241 (6) since the record shows that there was a clear nexus between it and the injured plaintiff," citing *Sanatass*]; *DeSabato v 674 Carroll Street Corp.*, 55 AD3d 656, 658-659 [2d Dept 2008] [owner liable "regardless of whether it contracted for or benefitted from the work in (the) apartment," citing *Sanatass*]; *Duffield v Will's Equipment Repair*, 55 AD3d 1365, 1366 [4th Dept 2008] [liability imposed on owner "based on her status as the fee owner of the property," citing *Sanatass*]; *Mennis v Commet 380, Inc.*, 54 AD3d 641, 642 [1st Dept 2008] [defendant "was liable under section 240 (1) notwithstanding its out-of-possession status and asserted lack of active negligence in connection with plaintiff's injury," citing *Sanatass*]).

Having found that a nexus existed between Greenpoint and All-Safe, and that Greenpoint is an "owner" under the Labor Law, the court can now consider the part of All-Safe's motion which seeks summary judgment dismissing the complaint against Greenpoint.

Labor Law § 240 (1)

In his affidavit dated November 21, 2008, plaintiff attests that, on the day of his accident, he was on top of an equipment storage rack, approximately 20 feet high, made up of I-beams, wooden planks, corrugated metal and plywood sheets which required the use of a Hi-Lo (forklift) to put it all together. Plaintiff had climbed a ladder to the top of the structure, when the Hi-Lo caused the entire structure to shake and sway. Plaintiff lost his balance and fell over the side of the equipment storage rack, landing approximately 12 to 15 feet below on a stack of materials resting on the forks of another Hi-Lo. According to plaintiff, there "was no fall protection in place of any type" (Plaintiff's 11/21/08 Aff., ¶ 12).

As set forth above, Labor Law § 240 (1) imposes absolute liability on owners who fail to provide adequate safety devices to workers laboring at elevated work sites, when that failure is a proximate cause of the workers' injuries. Here, it is uncontested that Greenpoint provided no safety devices at all for those who were working atop the 20-foot high equipment storage rack, and that the lack of such devices was a proximate cause of plaintiff's injuries. In such a situation, Greenpoint is absolutely liable to plaintiff pursuant to Labor Law § 240 (1) (*see e.g. Blake v Neighborhood Housing Services of New York City*, 1 NY3d 280, 289 [2003] [failure to provide any safety devices is violation of section 240 (1), citing *Zimmer v Chemung County*

Performing Arts, 65 NY2d 513, 522 [1985]; *Striegel v Hillcrest Heights Development Corp.*, 100 NY2d 974, 978 [2003] [plaintiff who was subject to elevation-related risk, not provided with any safety devices, and failure was a proximate cause of injuries "was within the protective ambit of Labor Law § 240 (1)"]; *Cordeiro v Shalco Investments*, 297 AD2d 486, 492 [1st Dept 2002] ["failure to provide any safety measures constitutes a per se violation of the statute," citing *Zimmer*]).

Therefore, the part of All-Safe's motion which seeks summary judgment dismissing the section 240 (1) claim against Greenpoint is denied.

Labor Law § 200 and Common-Law Negligence

"Labor Law § 200 is a codification of the common-law duty imposed upon an owner ... 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]). Here, plaintiff's fall was occasioned by a complete lack of any safety devices or equipment or fall protection, which was part of All-Safe's method of erecting the equipment storage rack. Where "an alleged defect or dangerous condition arises from the contractor's methods, liability for section 200 or common-law negligence requires a showing that the owner ... exercised supervisory control over the work" (*McGarry v CVP 1*

LLC, 55 AD3d 441, 442 [1st Dept 2008]; *see also Gasques v State of New York*, 59 AD3d 666, 667-668 [2d Dept 2009]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner] controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed [citations omitted]" (*Hughes v Tishman Construction Corp.*, 40 AD3d 305, 306 [1st Dept 2007]; *Fischetto v LB 745 LLC, York*, 43 AD3d 810, 810 [1st Dept 2007] [section 200 claim dismissed because dangerous condition "arose from plaintiff's employer's methods over which defendant property owner exercised no supervisory control"]).

There is no evidence at all that Greenpoint supervised the erection of the equipment storage rack or that it controlled the manner in which the plaintiff performed his work. Rather, the evidence indicates that Greenpoint was an out-of-possession landlord that was not involved in any way in the erection of All-Safe's structure.

Therefore, the part of All-Safe's motion which seeks summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims against Greenpoint is granted.[4]

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[4]All-Safe makes no specific argument regarding dismissal of Plaintiff's Labor Law § 241 (6) claim, nor does Plaintiff address that provision. All-Safe's only mention of § 241 (6) is a reference to the fact that Plaintiff asserted causes of action under Labor Law Sections 200, 240, and 241(6), which all impose duties upon owners of property regarding covered persons. Accordingly, the court will not address the Labor Law § 241 (6)

Summary Judgment Dismissing Greenpoint's Third-Party Complaint; Partial Summary Judgment Dismissing Greenpoint's Third-Party Claims for Contractual Indemnification and Breach of Contract by Failure to Procure Insurance

Greenpoint's third-party complaint alleges claims against All-Safe sounding in contribution, common-law and contractual indemnification, and breach of contract to procure insurance.

All-Safe seeks dismissal of the third-party action as a result of the dismissal of plaintiff's action against Greenpoint. However, since plaintiff's Labor Law § 240 (1) claim remains, plaintiff's action has not been disposed of in its entirety, and thus, the third-party complaint remains. In its papers, however, All-Safe only seeks summary judgment dismissing Greenpoint's contractual claims, without moving with respect to the contribution and common-law indemnification claims.

Greenpoint concedes that there is no contractual indemnification provision in the lease, and so, summary judgment dismissing Greenpoint's contractual indemnification claim is granted.

Article XV of the lease ("Insurance") provides, in relevant part:

> Section 1501. During the term hereof Tenant shall, at its own cost and expense, provide and keep in force for the benefit of

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cause of action as All-Safe has not specifically moved to dismiss it.

> Landlord, (a) broad form comprehensive general public liability (including contractual liability) insurance against claims for bodily injury ... occurring in or about the Land or the Demised Premises ... .
>
> Section 1502. The insurance to be provided and kept in force by Tenant under this Article shall cover the Demised Premises and name Landlord as the insured.

All-Safe has not met its burden to dismiss Greenpoint's failure to procure insurance claim. All-Safe maintains, in an attorney's affirmation, that it was instructed by Greenpoint to pay rent to Greenpoint, rather than Lumber Exchange, but that it was not advised of the legal relationship between it and Greenpoint. Greenpoint cites Real Property Law §223 (referring to it as Real Property Law §233). The court need not address Real Property Law §223, because All-Safe has not submitted an affidavit supporting its argument, and an attorney's affirmation is insufficient to establish facts clearly outside the attorney's personal knowledge. Further, All-Safe argues that Greenpoint has no damages (out-of-pocket costs) merely because Greenpoint had its own insurance, purportedly covering the entire potential liability here, which is paying Greenpoint's defense costs. Although Greenpoint does not appear to address All-Safe's argument as to damages, the cause of action is not dismissed because All-State itself notes that out-of-pocket costs include the premium for substitute coverage, the copayment, the deductible and any future increased costs as a result of the

liability claim. There is no basis to believe that some of these out-of-pocket costs will not be incurred here.

Therefore, the part of All-Safe's motion which seeks summary judgment dismissing Greenpoint's breach of contract claim against it is denied.

CONCLUSION

Accordingly, it is

ORDERED that the part of All-Safe Height Contracting Corp.'s motion which seeks summary judgment dismissing plaintiff's Labor Law § 240 (1) claim against Greenpoint Landing Associates, L.L.C. is denied; and it is further

ORDERED that the part of All-Safe Height Contracting Corp.'s motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against Greenpoint Landing Associates, L.L.C. is granted; and it is further

ORDERED that the part of All-Safe Height Contracting Corp.'s motion which seeks summary judgment dismissing Greenpoint Landing Associates, L.L.C.'s third-party contractual indemnification claim is granted; and it is further

ORDERED that the part of All-Safe Height Contracting Corp.'s motion which seeks summary judgment dismissing Greenpoint Landing Associates, L.L.C.'s third-party claim for breach of contract to procure insurance is denied.

This Constitutes the Decision and Order of the Court.

Dated: September 8, 2009

ENTER:

J.S.C.

EMILY JANE GOODMAN