SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

----------X	**DCM PART 5**
JOSEPH S. LAROSA, JR. and DEBRA ANN LAROSA,	**Present:**
Plaintiff(s),	**HON. JUDITH N. McMAHON**
-against-	**DECISION AND ORDER**
INTERNAP NETWORK SERVICES CORP., SPRINT COMMUNICATIONS COMPANY, LP, TACONIC INVESTMENT PARTNERS LLC, TACONIC MANAGEMENT COMPANY LLC, 111 CHELSEA LLC, 111 CHELSEA COMMERCE LP, J. CALNAN & ASSOCIATES, INC., and PAETEC COMMUNICATIONS, INC.,	**Index No. 104062/2007** **Motion Nos. 002, 003, 004, 005, 006, 007**
Defendant(s).	
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The following papers numbered 1 to 18 were used on this motion this 19th day of January, 2010:

[002] Notice of Motion (Paetec Communications)(Affirmation in Support) ---------- 1

[003] Notice of Motion (Internap Network)(Affirmation in Support) ---------- 2

[004] Notice of Motion (Sprint Communications)(Affirmation in Support) --------- 3

[005] Notice of Motion (Taconic Investment)(Affirmation in Support) ---------- 4

[006] Notice of Motion (J. Calnan & Associates)(Affirmation in Support) ---------- 5

[007] Notice of Motion (Plaintiffs)(Affirmation in Support) ---------- 6

Affirmation in Partial Opposition (Sprint) ---------- 7

Affirmation in Partial Opposition (Taconic) ---------- 8

Affirmation in Opposition (Taconic) ---------- 9

Affirmation in Opposition (Internap) ---------- 10

Affirmation in Opposition (Plaintiff) ---------- 11

Affirmation in Opposition (Internap) ---------- 12

Reply Affirmation (Sprint) ---------- 13

Reply Affirmation (Paetec) ---------- 14

Reply Affirmation (Internap) ---------- 15

Reply Affirmation (Plaintiffs) ---------- 16

Reply Affirmation (J. Calnan & Associates) ---------- 17

On June 9, 2006, the plaintiff, Joseph S. Larosa, Jr., suffered injuries while attempting to lift a box on the loading dock of a building located at 111 Eighth Avenue, New York, New York [hereinafter "the premises"]. The building is owned and managed by defendants Taconic Investment Partners LLC, Taconic Management Company LLC, [hereinafter "Taconic"] and 111 Chelsea LLC and 111 Chelsea Commerce LP, [hereinafter "111 Chelsea"]. It is undisputed that at the time of accident there were two construction projects underway at the premises. The first project was for defendant Paetec Communications [hereinafter "Paetec"] located on the eighth floor, and the second project was for defendant Internap Network Services Corp., [hereinafter "Internap"] located on the tenth floor. Defendant Paetec, for its project, contracted with defendant J. Calnan & Associates, Inc., [hereinafter "J.Calnan"], a construction management firm to act as a liaison between itself and the subcontractors. Defendant Sprint Communications Company, LP, is the tenant on the tenth floor and sub-leased to defendant Internap. At the time of the accident, the plaintiff was employed as an electrical journeyman by non-party Platinum Electrical Contracting Inc., [hereinafter "Platinum"], which had been contracted by both defendants Paetec and Internap to perform electrical services in connection with their separate ongoing projects.

On the date in question, plaintiff was on the premises in connection with electrical work being performed on the Internap project. The accident allegedly occurred, however, when the plaintiff's supervisor asked him to retrieve a piece of equipment from a delivery truck for the Paetec project. The equipment weighed approximately 150-200 pounds and was in an unmarked cardboard box. The plaintiff was injured when he attempted to lift the box. Plaintiff suffered a

ruptured bicep tendon which required him to undergo several surgeries. There is no dispute that defendants Internap and Paetec are separate tenants in the same building and have no relationship to each other, other than the fact that both had hired plaintiff's employer, Platinum, to perform electrical work on their respective floors.

On or about October 10, 2007, the plaintiffs commenced this action against the defendants alleging, *inter alia*, common law negligence and violations of Labor Law §§ 240(1), 200 and 241(6). The defendants have each individually submitted motions for summary judgment seeking to dismiss the complaint as against each of them separately. Several defendants also seek summary judgment on cross claims sounding in contractual indemnity.

It is well settled that summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of triable issues of fact (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Herrin v Airborne Freight Corp., 301 AD2d 500, 500-501 [2d Dept 2003]). The party moving for summary judgment bears the initial burden of establishing its right to judgment as a matter of law (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]), and in this regard " the evidence is to be viewed in a light most favorable to the party opposing the motion, giving [it] the benefit of every favorable inference" (Cortale v Educational Testing Serv., 251 AD2d 528, 531 [2d Dept 1998]). Nevertheless, upon a prima facie showing by the moving party, it is incumbent upon the party opposing the motion 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 at 324; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

I. Plaintiff's Labor Law § 240(1) Claims

New York "Labor Law § 240(1)[1] imposes absolute liability upon owners and contractors who fail, in accordance with the statute, to provide or erect safety devices necessary to give proper protection to workers exposed to elevation-related hazards" (Bonilla v State of New York, 40 AD3d 673 [2d Dept., 2007]). "In order for Labor Law § 240(1) to apply, the 'plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute'" and further, "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)" (Mentesana v. Bernard Janowitz Constr. Corp., 44 AD3d 721, 723 [2d Dept., 2007]). "Rather, liability is contingent upon the existence of a hazard contemplated in Section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (id.).

Here, the defendants have collectively established their respective entitlement to summary judgment against plaintiff on his New York Labor Law § 240(1) claims (Alvarez v Prospect Hosp., 68 NY2d at 324; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Mentesana v. Bernard Janowitz Constr. Corp., 44 AD3d 721, 723 [2d Dept., 2007]). It is undisputed that at the time of the accident the plaintiff was on the ground lifting a box. This has long been established not to be an elevation related hazard and therefore the protections afforded to workers

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[1] "1. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." New York Labor Law § 240 (1).

by New York State Labor Law § 240(1) are inapplicable to the instant action (Garcia v. Edgewater, 61 AD3d 924, 925 [2d Dept 2009][holding that a panel of drywall, not elevated above the plaintiff made §240(1) inapplicable]; Farrington v. Bovis Lend Leasing LMB, Inc., 51 AD3d 624, 625-626 [2d Dept., 2008][finding that "Labor Law § 240(1) generally does not apply when construction workers are injured by material which falls as it is being loaded onto or unloaded from a truck"], Fills v. Merit Oil Corp., 258 AD2d 556, 557 [2d Dept., 1999][dismissing plaintiffs §240(1) claim reasoning that lifting a 100 pound water pump from the ground was not an elevation related risk]; Rodriguez v. Margaret Tietz Ctr. For Nursing Care, 84 NY2d 841, 843-44 [1994] [ruling special protections of §240(1) not implicated where plaintiff was injured when he dropped a 120 pound beam seven inches]).

In opposition the plaintiff has failed to raise triable issues of fact (Alvarez v Prospect Hosp., 68 NY2d at 324; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). The plaintiff has failed to present any evidence to support recovery under the guise of New York Labor Law § 240(1). Further, the cases cited by plaintiff in support of their proposition are either not authoritative or are easily distinguishable as they involve the elevation-related risks targeted by the statute (Zimmer v. Chemung County Performing Arts, Inc., 65 NY2d 513[1985][granting absolute liability against the defendants in these consolidated cases where each plaintiff *fell off a column and a roof*, respectively]; Smith v. Hooker Chemical & Plastics Corp., 70 NY2d 994, 995-96 [1988][holding defendant liable under §240(1) where defendant *fell from a roof* while removing old asbestos sheeting]; Fernandes v. Skanska USA Building Inc., 15 Misc.3d 601, [New York Cty., 2007][granting plaintiff summary judgment on his §240(1) claims where plaintiff was *hoisting* metal rod *with a mechanical apparatus*]; Gregory v. General Electric

Company [2], 131 AD2d 967 [3d Dept., 1987][holding that the failure to provide any safety devices for plaintiff who was manually transporting hydraulic jacks was a violation of §240(1)]). It is clear that the work being performed by the plaintiff at the time of the accident, namely, lifting a box off of a truck does not fall within the purview of Labor Law §240(1) and as a result, the plaintiff's New York State Labor Law § 240(1) claims are hereby dismissed in their entirety as against all the defendants.

II. Plaintiff's Labor Law § 241(6) Claims

All defendants also move for summary judgment under New York Labor Law § 241(6) whereby "[a] contractor may be liable to an injured worker . . . even absent evidence of control or supervision of the injury-producing event, where a failure to comply with specific safety rules and regulations set forth in the Industrial Code of the State of New York was a substantial factor in bringing about the injury-causing event" (Locicero v. Princeton Restoration, Inc., 25 AD3d 664, 666 [2d Dept., 2006]). General allegations that a plaintiff or contractor provided "unsafe" or "improper" equipment will not suffice (Galarrage v. City of New York, 54 AD3d 308, 309-310 [2d Dept., 2008][stating that "[t]o establish a cause of action for a violation of Labor Law § 241(6), a plaintiff must plead and prove a violation of a specific provision of the Code"); Sapione v. Bd of Edu., 259 AD2d 479, 479 [2d Dept., 1999][holding summary judgment for the plaintiff

[2]While Gregory is not controlling, this court also notes that the First and Fourth Departments have declined to follow Gregory. Additionally, the Third Department appears to have backtracked from its expansive interpretation of §240(1) in Gregory, releasing several inconsistent decisions (Simon v. Schenectady N. Cong. of Jehovah's Witnesses, Cong. No.76802 of Watchtower Bible Tract Socy., 132 AD2d 313 [3d Dept., 1987] [stating that "[t]he pertinent subdivision, Labor Law §240(1), has been held to impose the duty to provide safety equipment to protect workers from hazards related to elevating themselves or their materials at the worksite."]; Bailey v. Lafayette Paper L.P., 289 AD 2d 645, 646-47 [3d Dept., 2001] [holding that the scaffold law did not apply where worker was injured while moving a drill down a fire escape because he was injured by usual and ordinary danger of a construction site]).

was inapplicable where they failed to show defendant violated a specific violation of the Industrial Code]; Ross v. Curtis-Palmer Hydro-Electric Company, 81 NY2d 494 [1993]).

Here, the plaintiff alleges violations of New York State Industrial Code §§ 23-1.2(e), 23-1.3, 23-6, and 23-1.5(a). Plaintiffs claim under Labor Law §241(6) is not supported by his allegation that defendant violated 12 NYCRR 23-1.2(e),which states the following:

> The board finds that the trades and occupations of persons employed in construction, demolition and excavation operations involve such elements of danger to lives, health and safety of such persons and of persons lawfully frequenting the areas of such activities as to require special regulations for their protection in that such persons are exposed to the following:
>
> (e) The hazards incidental to the handling and movement of heavy materials.

As readily indicated, 12 NYCRR 23-1.2(e) is a general safety standard and not sufficient to impose a duty on the defendant under the guise of New York Labor Law § 241(6) (Biszick v. Ninnie Const. Corp., 209 AD2d 661 [2d Dept., 1994][finding allegations of Industrial Code § 12 NYCRR 23-1.2(e) insufficient to establish a cause of action under New York State Labor Law § 241(6)]; Rosen v. McGuire & Bennett Inc., 189 AD2d 966, 967 [3d Dept., 1993][holding that 12 NYCRR 23-1.2(e) is not an "implementing regulation upon which to predicate an action."]).

Plaintiff's reliance on 12 NYCRR 23-1.3 is likewise insufficient to support his claim under Labor Law §241(6). Section 12 NYCRR 23-1.3 again sets forth general safety standards and does not create a duty; it states the following:

> This Part (rule) applies to persons employed in construction, demolition and excavation operations, to their employers and to the owners, contractors and their agents obligated by the Labor Law to provide such persons with safe working conditions and safe places to work. This Part (rule) also applies to persons lawfully frequenting

> the areas of construction, demolition and excavation operations. This Part (rule) applies exclusively throughout the State of New York notwithstanding any other law or regulations, local or general.

As a general provision, 12 NYCRR 23-1.3 cannot provide a basis for liability (Maday v. Gabe's Contracting, LLC, 20 AD3d 513 [2d Dept., 2005] [holding that a general safety standard lacks specificity to support a cause of action under Labor Law §241(6)][3]; Weinberg v. Alpine Improvements, LLC, 48 AD3d 915, 917-918 [3d Dept., 2008][finding 12 NYCRR § 23-1.3 is a general safety standard unavailing in support of a Labor Law § 241(6) claim]; Williams v. White Haven Memorial Park, Inc., 227 AD2d 923 [4th Dept.,1996]; Huether v. New York Times Bldg. LLC, 24 Misc.3d. 634, 640 [Kings Cty., 2009][stating "[i]t is clear that the remaining Industrial Code provisions cited in plaintiffs' bills of particulars - namely 12 NYCRR 23-1.2, 1.3, and 1.5- are too general to support a Labor Law § 241 (6) claim]).

Plaintiff also failed to set forth a valid claim under Labor Law §241(6) by alleging a violation of 12 NYCRR § 23-6. This provision, and its subdivisions, are also not specific enough to support a claim under § 241(6) (Locicero v. Princeton Restoration Inc., 25 AD3d 664, 666 [2d Dept., 2006][holding several subdivisions of 12 NYCRR 23-6 inapplicable under Labor Law § 241(6)]; Barrick v. Palmark, 9 AD3d 414, 415 [2d Dept., 2004][finding subdivision 23-6.1 inapplicable to support a § 241(6) claim]). However, even if it were sufficiently specific to support a claim under § 241(6), it would not apply here as it provides detailed rules to be followed only where hoists and cranes *are used*, clearly not the instant case (Toefer v. Long Island R.R., 4 NY3d 399, 410 [2005] [holding that "[t]he regulations . . . subparts 23-6 and 23-8

[3]In an unreported decision, the Second Department cited Maday v Gabe's Contracting in holding that 12 NYCRR 23-1.3 suffers from the same lack of specificity defect as 12 NYCRR 23-1.5. (D'Allesandro v. Lucent Technologies, 14 Misc.3d 1210A [Richmond Cty., 2006]).

of the Industrial Code, do not require the use of hoists or cranes under any particular circumstances; rather, they provide detailed rules to be followed when hoists or cranes are used. Since no hoist or crane was used on the job involved in Toefer, these regulations have no application and plaintiffs' Labor Law § 241 (6) claim must fail"]). In this case, no hoists or cranes were used and as such the alleged violations under New York Industrial code 12 NYCRR 23-6 are insufficient for plaintiff to sustain the causes of action against the defendants under Labor Law § 241(6).

Finally, plaintiff claims defendants have violated 12 NYCRR 23-1.5(a), which is titled "General Responsibility of Employers." This provision, as suggested by the title, relates to general safety standards and does not provide a basis for a claim under Labor Law § 241(6). (Maday v. Gabe's Contracting, LLC, 20 AD3d 513 [2d Dept., 2005]; Mancini v. Pedra Const., 293 AD2d 453, 454 [2d Dept., 2002][ruling that 12 NYCRR 23-1.5 merely states general safety standards and does not give rise to the nondelegable duty imposed by §241(6)]; Greenwood v. Shearson, 238 AD2d 311, 312 [2d. Dept., 1997]; Vernieri v. Empire Realty Co., 219 AD2d 593,598 [2d Dept., 1995]).

In aggregate, while plaintiff has pinpointed several sections of the Industrial Code, none of the regulations alleged are specific enough to give rise to a cause of action under Labor Law § 240(1). As a result, the defendants' motions for summary judgment with respect to the plaintiff's New York Labor Law § 241(6) are hereby granted and the complaint is dismissed with respect to those causes of action against all defendants.

III. Defendant Paetec's Motion [002]

With respect to Paetec's summary judgment motion based upon Labor Law § 200, it is well settled that New York Labor Law § 200 "is but a codification of the common-law duty of a landowner to provide workers with a reasonably safe place to work" (Hunter v. R.J.L. Dev., LLC, 44 AD3d 822 [2d Dept., 2007]; Haider v. Davis, 35 AD3d 363 [2d Dept., 2006]). As a result, when an injury occurs, "[i]f the allegedly dangerous condition arises from the contractor's methods and the owner or general contractor exercises no supervisory control over the operation, liability does not attach under the common law or under Labor Law § 200 (Ferrero v. Best Modular Homes, 33 AD3d 847, 853 [2d Dept., 2006]; Kajo v. E.W. Howell Co., 52 AD3d 659, 661-662 [2d Dept., 2008]; Mas v. Kohen, 283 AD2d 616, 617 [2d Dept., 2001]).

Here, Paetec has presented evidence sufficient to warrant summary judgment by establishing that they did not exercise supervisory control over the work performed by plaintiff (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Herrin v Airborne Freight Corp., 301 AD2d 500, 500-501 [2d Dept 2003]; Ferrero v. Best Modular Homes, 33 AD3d 847, 853 [2d Dept., 2006]; Kajo v. E.W. Howell Co., 52 AD3d 659, 661-662 [2d Dept., 2008]). Specifically, plaintiff was employed by nonparty Platinum to perform certain electrical work, and Paetec did not possess any ability to control the work being performed by plaintiff in that capacity.

However, in opposition, the plaintiff and codefendant's have successfully raised triable issues of fact with respect to the fact that the item being retrieved from the loading dock on the date in question was an item for the Paetec job, which did maintain supervisory control over deliveries and work methods for load/unloading equipment (Cortale v Educational Testing Serv., 251 AD2d 528, 531 [2d Dept 1998]). As such, summary judgment on plaintiff's Labor Law § 200 claims against defendant Paetec Communications is hereby denied.

IV. Defendant Internap's Motion [003]

With respect to Internap's motion for summary judgment under Labor Law § 200, it has established a prima facie entitlement based upon the lack of evidence that Internap possessed any supervisory control over the plaintiff or his work on the day of the accident (Kajo v. E.W. Howell Co., 52 AD3d 659, 661-662 [2d Dept., 2008]; Ferrero v. Best Modular Homes, 33 AD3d 847, 853 [2d Dept., 2006]; Mas v. Kohen, 283 AD2d 616, 617 [2d Dept., 2001]). Defendant Internap contends that plaintiff left the Internap job to complete a task related to the Paetec project, thus no liability can attach.

In opposition, the plaintiff has raised numerous questions of fact as to whether Internap exercised supervision and control over plaintiff's work sufficient to hold that summary judgment in favor of defendant Internap is inappropriate (Alvarez v Prospect Hosp., 68 NY2d at 324; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Kajo v. E.W. Howell Co., 52 AD3d 659, 661-662 [2d Dept., 2008]). Specifically, there are several questions of fact related to the control and supervision exercised by Raymond Cruz, the manager of the Internap space. Plaintiff alleges that Mr. Cruz occasionally accompanied Platinum employees to the dock area to advise if deliveries were for the Internap space and instruct workers where to take the materials. Additionally, questions of fact exist as to what was actually in the box plaintiff was lifting when he was injured. While the several defendants maintain that the box contained a bus duct for the Paetec space, plaintiff asserts it may have been a ATS switch for the Internap space. As a result, it is clear that numerous questions of fact exist with respect to Internap's level of supervision at the time of the accident requiring denial of summary judgment under Labor Law § 200 (Kajo v.

E.W. Howell Co., 52 AD3d 659, 661-662 [2d Dept., 2008]; Lociero v. Princeton Restoration, Inc., 25 AD3d 664, 666 [2d Dept., 2006]; Mas v. Kohen, 283 AD2d 616, 617 [2d Dept., 2001]).

V. Defendant Sprint's Motion [004]

Defendant Sprint's motion for summary judgment on plaintiff's Labor Law § 200 claim must be granted. Sprint has established its entitlement to summary judgment by presenting admissible evidence that it exercised absolutely no "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (Perri v. Gilbert Johnson Enterprises, Ltd., 14 AD3d 681, 683 [2d Dept., 2005]). There is no dispute that defendant Sprint leased a portion of its space to Internap but the record is devoid of any evidence that Sprint was present or involved in any way with the work being performed by the plaintiff. It is undisputed that no Sprint personnel were in the area, no one was conducting work on behalf of Sprint and the plaintiff's work had no relation to defendant Sprint (Juchniewicz v. Merex Food Corp., 46 AD3d 623, 625 [2d Dept., 2007]).

In opposition, the plaintiff has failed to raise any triable issues of fact that Sprint was present, or in anyway involved in the work being performed on the day of the accident. No evidence presented shows that defendant Sprint had any authority to control or supervise the plaintiff and as such, all of plaintiff's claims against defendant Sprint are hereby dismissed (Kajo v. E.W. Howell Co., 52 AD3d 659, 661-662 [2d Dept., 2008]; Lociero v. Princeton Restoration, Inc., 25 AD3d 664, 666 [2d Dept., 2006]).

Defendant Sprint also moves for summary judgment on it's cross claims against co-defendants 111 Chelsea and Internap based on contractual indemnification. Sprint contends that its lease agreement with owner/managing agent 111 Chelsea/Taconic and its sub-lease with co-

defendant Internap entitles them to indemnification of their defense, costs, expenses and attorney's fees incurred in this case.

It is well settled that "[a] party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (Kennelty v. Darlind Constr., Inc., 260 A.D.2d 443, 446 [2d Dept., 1999]; Lazzaro v. MJM Industries, 288 AD2d 440, 441 [2d Dept., 2001]). However, "[s]ummary judgment on a claim for common-law indemnification is appropriate only where there are no issues of material fact concerning the precise degree of fault attributable to each party involved" (Coque v. Wildflower Estates Developers, Inc.,31 AD3d 484 489 [2d Dept., 2006]; Kwang Ho Kim v. D & W Shin Realty Corp., 47 AD3d 616, 620 [2d Dept., 2008]; Wagner v. Barney Skanska Constru. Co., 289 AD2d 324, 325 [2d Dept., 2001]; La Lima v. Epstein, 143 AD2d 886, 888 [2d Dept., 1988][resolving to not decide any claims or third party actions for contribution/indemnification where questions of fact as to the parties respective fault was a question of fact for the jury to decide]).

At this point, liability on the part of either defendants 111 Chelsea/Taconic or defendant Internap has yet to be determined and it is well settled that the precise degree of fault attributable to either party is a question of fact for the jury to decide (id.). As a result, any motions to determine indemnification claims are premature where issues of fact exist regarding each party's liability and summary judgment is hereby denied on defendant Sprints contractual indemnification claims (Coque v. Wildflower Estates Developers, Inc.,31 AD3d 484 489 [2d Dept., 2006]; Kwang Ho Kim v. D & W Shin Realty Corp., 47 AD3d 616, 620 [2d Dept., 2008]; Wagner v. Barney Skanska Constru. Co., 289 AD2d 324, 325 [2d Dept., 2001]).

VII. Defendants' Taconic/111 Chelsea Motion [005]

As previously noted, Labor Law §200 is a codification of the common-law duty of an owner or employer to provide employees with a safe place to work. (Kajo v. E.W. Howell Co., 52 AD3d 659, 661-662 [2d Dept., 2008]; Lociero v. Princeton Restoration, Inc., 25 AD3d 664, 666 [2d Dept., 2006]; Mas v. Kohen, 283 AD2d 616, 617 [2d Dept., 2001]). "An implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition." (Russin v. Louis N. Picciano, 54 NY2d 311 [1981]; Kajo v. E.W. Howell Co., 52 AD3d 659, 661-662 [2d Dept., 2008]; Lociero v. Princeton Restoration, Inc., 25 AD3d 664, 666 [2d Dept., 2006]; Mas v. Kohen, 283 AD2d 616, 617 [2d Dept., 2001]).

Here, defendants Taconic and 111 Chelsea have presented evidence sufficient to warrant summary judgment by establishing that they did not exercise supervisory control over the work performed by the plaintiff (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; Enos v. Werlatone, 68 AD3d 172, [2d Dept., 2009]). Specifically, defendants have presented sufficient evidence to establish that the plaintiff was employed by nonparty Platinum as an electrician, and Taconic/111 Chelsea did not possess any ability to control the work being performed by plaintiff's work.

However, in opposition, the plaintiff has successfully raised a triable issue of fact with respect to the fact that Taconic/ 111 Chelsea did maintain supervisory control over all aspects of ongoing projects, including deliveries related to such projects (id.). Specifically, plaintiff has presented evidence that defendants Taconic/111 Chelsea had policies and procedures in place at the time of the accident that governed loading dock procedures and responsibilities to ensure

loading dock safety. Plaintiffs have established triable issues of fact as to whether the building owner/managing agents, defendants Taconic/111 Chelsea exercised the authority to direct and control the plaintiff's work and as such, summary judgment on plainitff's Labor Law § 200 claims against defendants Taconic/111 Chelsea is hereby denied.

Defendants Taconic/111 Chelsea also move for summary judgment on its cross claims against co-defendants Sprint and Paetec. This court will deny the motion on the same ground as indicated previously, namely, "[s]ummary judgment on a claim for common-law indemnification is appropriate only where there are no issues of material fact concerning the precise degree of fault attributable to each party involved" (Coque v. Wildflower Estates Developers, Inc.,31 AD3d 484 489 [2d Dept., 2006]; Kwang Ho Kim v. D & W Shin Realty Corp., 47 AD3d 616, 620 [2d Dept., 2008]; Wagner v. Barney Skanska Constru. Co., 289 AD2d 324, 325 [2d Dept., 2001]; La Lima v. Epstein, 143 AD2d 886, 888 [2d Dept., 1988][resolving to not decide any claims or third party actions for contribution/indemnification where questions of fact as to the parties respective fault was a question of fact for the jury to decide]). Here, questions of fact clearly exist regarding each party's liability and considering it has yet to be resolved, rendering summary judgment on indemnification is premature.

VII. Defendant J. Calnan's Motion [006]

In moving for summary judgment on plaintiff's Labor Law § 200 claims, defendant J. Calnan has made a prima facie entitlement to such by establishing that it did not possess the requisite ability to supervise/control plaintiff's work (Kajo v. E.W. Howell Co., 52 AD3d 659, 661-662 [2d Dept., 2008]; Lociero v. Princeton Restoration, Inc., 25 AD3d 664, 666 [2d Dept., 2006]). It is undisputed that defendant J. Calnan was hired by co-defendant Paetec to act as a

liaison between sub-contractors and the client. While an employee from J. Calnan would frequently visit the Paetec space when work was occurring, non-party witness Peter Gavagan testified that no one from J. Calnan would direct the Platinum employees in the method and manner in which they would bring the materials up.

However, in opposition, the plaintiff has successfully raised triable issues of fact with respect to whether defendant J. Calnan supervised and/or controlled the method/manner of the plaintiff's work (Alvarez v Prospect Hosp., 68 NY2d at 324; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Kajo v. E.W. Howell Co., 52 AD3d 659, 661-662 [2d Dept., 2008]). Specifically, plaintiff has raised a question of fact with respect to whether the item in the box, which caused plaintiffs injuries, was an ATS switch for the Paetec project. Defendant J. Calnan supervised the construction on the Paetec project and had a safety plan in place pursuant to its contract with Paetec raising questions of fact with respect to the level of control they possessed over plaintiff's pickup of the ATS switch. As a result, as such summary judgment on plaintiff's Labor Law § 200 claims is inappropriate.

Further, the Court denies any dismissal of cross claims, as previously indicated, such dismissal is premature where the precise degree of fault attributable to each party is unresolved (Coque v. Wildflower Estates Developers, Inc.,31 AD3d 484 489 [2d Dept., 2006]; Kwang Ho Kim v. D & W Shin Realty Corp., 47 AD3d 616, 620 [2d Dept., 2008]). Therefore, the motion by J. Calnan for summary judgment is hereby denied.

VIII.. Plaintiff's Motion [007]

The plaintiffs have filed a motion for summary judgment only against defendants 111 Chelsea/Taconic. Plaintiff asserts that, as building owner, Taconic always maintained the

authority to direct Platinum employees in the method and procedures for accepting construction deliveries, transporting deliveries to tenant spaces, and/or storing materials/deliveries. As previously indicated, triable issues of fact exist warranting denial of summary judgment in favor of defendants 111 Chelsea or Taconic with respect to plaintiff's Labor Law § 200 claims (Kajo v. E.W. Howell Co., 52 AD3d 659, 661-662 [2d Dept., 2008]; Lociero v. Princeton Restoration, Inc., 25 AD3d 664, 666 [2d Dept., 2006]; Mas v. Kohen, 283 AD2d 616, 617 [2d Dept., 2001]). There are issues of fact as to the level of supervision and control exercised by the building owner and manager and as such summary judgment is inappropriate (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Accordingly, it is

ORDERED that ALL claims and causes of action by the plaintiff against ANY party alleging claims based upon New York Labor Law § 240(1) are hereby dismissed, and the complaint is dismissed with respect to those claims, and it is further

ORDERED that ALL claims and causes of action by the plaintiff against ANY party alleging claims based upon New York Labor Law § 241(6), alleging violations of Industrial Codes §§ 23-1.2(e), 23-1.3, 23-6, and 23-1.5(a), are hereby dismissed and the complaint is dismissed with respect to those claims, and it is further

ORDERED that remaining relief sought by defendant Paetec Communications, Inc., [Motion 002] is hereby denied in its entirety, and it is further

ORDERED that the remaining relief sought by defendant Internap Network Services Corp., [Motion 003] is hereby denied in its entirety, and it is further

ORDERED that the portion of the motion seeking summary judgment by defendant Sprint Communications Company, LP, [Motion 004] is hereby granted with respect to plaintiff's claims

under New York Labor Law § 200 and those claims are hereby dismissed as against defendant Sprint Communications Company, LP, and it is further

ORDERED that the motion seeking summary judgment by defendant Sprint Communications Company, LP, [Motion 004] is hereby denied with respect to the cross claims of contribution/indemnification against the co-defendants, and it is further

ORDERED that the remaining relief sought by defendant Taconic Investment Partners, LLC, Taconic Management Company LLC, 111 Chelsea LLC, and 111 Chelsea Commerce LP, [Motion 005], is hereby denied in its entirety, and it is further

ORDERED that the remaining relief sought by defendant J. Calnan & Associates, Inc., [Motion 006] is hereby denied in its entirety, and it is further

ORDERED that the relief sought by the plaintiff Joseph S. Larosa, Jr. and Debra Ann Larosa [Motion 007] is hereby denied in its entirety, and it is further

ORDERED that any and all other requests for relief by any party are hereby denied, and it is further,

ORDERED that the remaining causes of action proceed directly to trial, and it is further

ORDERED that the Clerk enter judgment accordingly.

THIS IS THE DECISION AND ORDER OF THE COURT!

Dated: March 9, 2010 E N T E R,

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Hon. Judith N. McMahon

Justice of the Supreme Court