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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. *Justice* PART 8

Index Number : 100115/2012
QUINONES, PEDRO
vs.
OLMSTEAD PROPERTIES
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 100115/12
MOTION DATE 9/10/13
MOTION SEQ. NO. 001

The following papers, numbered 1 to 24, were read on this motion to/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). 1-9

Answering Affidavits — Exhibits ____ No(s). 10-22

Replying Affidavits ____ No(s). 23, 24

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

Dated: 11/22/13

JOAN M. KENNEY, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

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PEDRO QUINONES,

Plaintiff,

-against-

OLMSTEAD PROPERTIES, INC., 363 LAFAYETTE LLC and FUEL OUTDOOR LLC,

Defendants.

----------x

DECISION & ORDER
Index No.: 100115/2012

Kenney, J.:

Motion sequence numbers 001 and 002 are hereby consolidated for disposition.

This is an action to recover damages for injuries sustained by a sign-A journeyman when he fell while painting a billboard located at 363 Lafayette Street, New York, New York (the premises) on November 30, 2011.

In motion sequence number 001, defendants Olmstead Properties, Inc. (Olmstead) and 363 Lafayette, LLC (Lafayette) (together, defendants) move, pursuant to CPLR 3212, for (1) summary judgment dismissing plaintiff Pedro Quinones's common-law negligence and Labor Law § 200 claims as against them; and (2) summary judgment in their favor as to their cross claim for contractual indemnification as against co-defendant Fuel Outdoor, LLC (Fuel).

In motion sequence number 002, plaintiff moves, pursuant to CPLR 3212, for partial summary judgment in his favor on the issue of liability under Labor Law § 240 (1) as against defendants and Fuel.

BACKGROUND

On the date of the accident, plaintiff, an employee of North Shore Neon (Neon), was assigned by his supervisor to go to the premises, a vacant lot, and paint over graffiti which had been placed on the bottom face (the apron) of a 52.5-foot-high billboard/sign structure (the billboard)

located there. In order to reach the apron of the billboard, which was located approximately 12 to 13 feet above the ground, plaintiff had to stand on top of three concrete blocks that were stacked on top of one another (the concrete blocks), reaching nine to 10 feet in height. The concrete blocks acted as counterweights to keep the billboard stable and not at risk of falling over.

As plaintiff attempted to remove a ratchet strap that held the advertising copy on the billboard in place, so that he could paint underneath it, he lost his balance and fell from the concrete blocks to the ground. Plaintiff was injured when, during his fall, his right foot struck a steel tube that was part of the scaffold piping which comprised the structure of the billboard.

On the date of the accident, the premises was owned by defendant Lafayette. Defendant Olmstead was the managing agent for the premises. Defendant Fuel, an entity in the business of selling outdoor advertising to third-party clients, leased the property from Lafayette for a two-year period, commencing upon the execution of a lease, dated January 31, 2005 (the lease), for the purpose of erecting the billboard. Thereafter, Fuel arranged for the billboard to be erected and maintained by Neon.

In this action, asserting claims under common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6), plaintiff claims that the billboard that he was working on at the time of the accident was hazardous in that there were no guardrails in place to protect him from falling, no catwalks to work from and no safety cables for him to tie off to.

Plaintiff's Deposition Testimony

Plaintiff testified that, on the date of the accident, he was employed by Neon as a sign-A journeyman. On the morning of the accident, plaintiff's Neon supervisor instructed him to go to the premises and paint over graffiti which had been placed on the billboard. Neon did not send anyone

along with plaintiff to assist him.

Plaintiff traveled to the premises in a "cherry picker" truck (the truck) (plaintiff's notice of motion, exhibit M, plaintiff's tr at 67-68). Plaintiff described the premises as a vacant lot surrounded by a fence with a locked gate. The billboard, which was the only structure at the premises, was comprised of pipe scaffolding and cement blocks. Plaintiff noticed several safety hazards associated with the billboard. For example, it did not have any guardrails, a catwalk or anywhere for him to tie a harness off to.

Plaintiff testified that the only way that he could access his work area was to stand on top of the cement blocks, which were located in front of the billboard. He explained that, although the truck was equipped with an eight-foot step ladder and a 24-foot extension ladder, due to particular circumstances at hand, it was not possible for him to utilize them to perform his work. It was not possible for plaintiff to utilize the step ladder, because the placement of the concrete blocks, which were located one and one-half to two feet in front of the billboard structure, made it impossible for him to set up the ladder close enough to reach the billboard to paint it. In addition, plaintiff could not utilize the extension ladder, because there was no one available to support, or foot, the ladder for safety.

Plaintiff also explained that he could not work from the basket of the truck, because the concrete blocks, as well as various lighting fixtures, prevented the truck and its basket from being able to be situated at the necessary angle required to perform his work. In fact, because the truck did not fit through the gate in the first place, plaintiff had to use the truck's basket to lift himself and his painting materials over the fence. As plaintiff stepped out of the truck's basket and onto the concrete blocks to begin his work, he noticed that there was "nothing to attach [his harness] to," so he

removed it (*id.* at 82).

As plaintiff was busy painting over the graffiti, while standing on the cement blocks, he realized that he needed to loosen some ratchet straps, which held the advertising copy in place on the billboard, so that he could paint underneath them. As plaintiff was attempting to loosen one of these straps, he lost his balance and fell nine to 10 feet from the concrete blocks to the ground below.

Deposition Testimony of Cesar Vasquez, Olmstead's Property Manager for the Premises

Cesar Vasquez testified that, as property manager for the premises, he visited the premises approximately three to four times per week. Vasquez explained that defendant Lafayette was the owner of the premises, and that defendant Olmstead was the managing agent. Vasquez described the premises as a vacant lot surrounded by a fence. Lafayette leased the premises to defendant Fuel for the purpose of Fuel erecting a billboard containing advertisements, which were changed periodically.

Vasquez testified that, before the billboard was erected, Fuel submitted drawings to Olmstead for approval. Vasquez reviewed the drawings and made comments, but only from the standpoint of making sure that the billboard was stable and not at risk of falling over. Vasquez testified that he never considered whether the billboard's structure was safe from the point of view of worker safety. In response to Vasquez's comments, concrete blocks were installed at the bottom of the billboard, functioning as counterweights, in order to stabilize it. Once the billboard was erected, Vasquez made no further comments to Fuel regarding the billboard's safety, although he would inspect the billboard occasionally to make sure that it remained stable. Vasquez was not familiar with OSHA requirements, and he never received any training regarding the proper use of safety devices while working at heights. However, he maintained that plaintiff could have tied off to the piping which

comprised the billboard's frame.

Deposition Testimony of James Taggart, Fuel's Vice President of Operations

James Taggart testified that, as vice president of operations for Fuel, he oversees the day-to-day operations and scheduling of Fuel's sign installations. Taggart testified that third-parties pay Fuel for the right to advertise on its billboards, with the various property owners receiving a percentage of the revenues Fuel receives for the rental of the sign space. Taggart explained that, because it was possible that the premises might be developed at some point in the future, though a permanent structure, the billboard was designed so as to be erected without having to dig a hole or place a pole in the ground.

Taggart further testified that Fuel subcontracts out all of its work, including the design, construction and maintenance of the billboard. To that effect, Fuel hired engineers to design the plans and specifications for the billboard, and Fuel hired Neon to construct the billboard. Although Fuel was responsible for the repair and maintenance of the billboard, as no one at Fuel had a sign hanger's license, it subcontracted out that work to Neon, as well. Taggart called upon Neon to paint out the graffiti on the billboard. However, Fuel did not control the means and methods of Neon's work. Taggart never evaluated whether the billboard structure was safe for workers.

Affidavit of David Brown, Vice President of Neon

In his affidavit, David Brown, Neon's vice president, stated that all Neon's workers, including plaintiff, were provided with safety devices to perform their jobs, and that they were regularly instructed and reminded to tie off when working at heights. Brown maintained that plaintiff's accident was caused by his failure to use the equipment provided to him.

The Lease Agreements Between Lafayette and Fuel

Pursuant to the lease, Lafayette, c/o Olmstead, leased the premises to Fuel for a two-year period for the purpose of erecting and maintaining the billboard. Section 7.5 of the lease provides that Fuel indemnify Lafayette, as owner, and Olmstead, as Lafayette's managing agent, from all claims "arising out of or in connection" with the maintenance of the billboard (plaintiff's notice of motion, exhibit P, January 31, 2005 lease).

Specifically, the lease states, in pertinent part, as follows:

> "Lessee [Fuel] covenants and agrees to indemnify and save harmless Lessor [Lafayette, c/o Olmstead], its managing agent and its principals . . . from and against any and all claims, losses, damages or expenses (including reasonable attorneys' fees and disbursements) or other liability arising out of or in connection with (i) the construction, possession, use, occupancy, management, repair, maintenance or control of the Sign Space and Sign Structures or any part thereof . . ., or (ii) any act, negligence or omission of Lessee or Lessee's agents, employees, contractors, concessionaires, licensees, invitees, subtenants or assignees . . . or (iv) any injury to person or property or loss of life sustained in or about the Sign Space and Sign Structures or any part thereof"

(*id.*).

An extension agreement and modification of the lease, dated January 31, 2007 (the January 31, 2007 extension agreement), extended the term of the lease for an additional 10 months to November 31, 2007 "upon the same terms, covenants, conditions, provisions, and agreements contained in the Lease except as provided in [the] Lease" (plaintiff's notice of motion, exhibit Q, January 31, 2007 extension agreement). Approximately four years after the expiration of the January 31, 2007 extension agreement, November 31, 2007, an extension agreement, dated October 1, 2012 (the October 1, 2012 extension agreement) between the parties further extended the lease to a term of three additional years, commencing October 1, 2012 and extending to September 30, 2015.

The October 1, 2012 extension agreement acknowledged that "Tenant has been leasing the

Sign Space on a month to month basis since December 1, 2007, in accordance with the terms and conditions set forth in the Lease and Landlord and Tenant now desire to modify the Lease upon the terms and conditions hereinafter provided" (plaintiff's notice of motion, exhibit R, October 1, 2012 extension agreement). Notably, the October 1, 2012 extension agreement contains an indemnification provision which provides, in pertinent part, as follows:

> "To the fullest extent permitted by law, the Tenant [Fuel] shall defend, indemnify and hold harmless Landlord [Lafayette] and the agents and employees of Landlord, against all claims, damages, losses and expenses, including but not limited to reasonable attorney's fees, arising out of or resulting from performance or nonperformance of the work, and/or arising out of Tenant's repair, construction, maintenance and installation of equipment covered under the Lease, provided that such a claims, damage, loss or expense is attributable to bodily injury . . . . It is expressly agreed that this provision is deemed to be retroactive to cover and include all work and maintenance performed by tenant &/or its subtenants or contractors, as of the date said tenancy commenced"

(*id.*).

DISCUSSION

"'The 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 eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Plaintiff's Labor Law § 240 (1) Claim Against Defendants and Fuel (motion sequence number 002).

Plaintiff moves for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against defendants and Fuel. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

> "All contractors and owners and their agents . . . 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."

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

"Not 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). 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" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Makarius v Port Auth. of N.Y. & N.J.*, 76 AD3d 805, 807 [1st Dept 2010] ["a distinction must be made between those accidents caused by the failure to provide a safety device required by Labor Law § 240 (1) and those caused by general hazards specific to a workplace"]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d

263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

Initially, Labor Law § 240 (1) applies to the facts of this case, because plaintiff was subjected to an elevation-related risk when, while performing his painting work, he utilized the cement blocks he was standing on as a scaffold of sorts. As a review of the evidence in this case reveals that plaintiff was not provided with sufficient safety devices so as to prevent him from falling while subjected to this elevation-related risk, defendants and Fuel are liable for his injuries under Labor Law § 240 (1) (*see Pichardo v Aurora Contrs., Inc.*, 29 AD3d 879, 880 [2d Dept 2006] [where plaintiff was injured when his unsecured ladder began to slide off the wall, plaintiff demonstrated that defendants violated the statute by failing to provide him with adequate safety devices to afford him proper protection while working]; *Becerra v City of New York*, 261 AD2d 188, 190 [1st Dept 1999] [Court held that the collapse of unsecured plywood platform which supported a construction worker four stories above ground level constituted a prima facie violation of scaffolding statute]; *Aragon v 233 W. 21st St.*, 201 AD2d 353, 354 [1st Dept 1994] [collapse of a scaffold is prima facie evidence of a violation of Labor Law § 240 (1) which shifts the burden to defendants to raise a factual issue on liability]).

As plaintiff argues, the billboard itself was unsafe from the standpoint of worker safety, because it lacked guardrails, a catwalk and/or safety cables to tie off to. In addition, due to the particular circumstances at hand, the safety devices provided to plaintiff could not be utilized, and

so his only option was to perform his painting work while standing on the concrete blocks, which did not provide adequate protection, such as a guard rail, to prevent him from falling. Moreover, as plaintiff testified, there was no place for him to tie off his safety harness to. Plaintiff put forth the affidavit of an expert, Daniel Paine, CSE, in support of his assertions.

In their opposition to plaintiff's motion for partial summary judgment in his favor on this issue, defendants and Fuel assert that they are not liable for plaintiff's injuries under Labor Law § 240 (1), because a question of fact exists as to whether plaintiff was the sole proximate cause of his injuries. They argue that plaintiff was provided with the truck, two ladders and a safety harness that he could have attached somewhere on the billboard's structure.

"[T]he duty to see that safety devices are furnished and employed rests on the employer in the first instance" (*Aragon v 233 W. 21st St.*, 201 AD2d at 354). However, "[w]hen the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-New York, Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]).

Under the "sole proximate cause" theory, a defendant can escape liability by demonstrating that "plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]). A plaintiff "is expected, as a normal and logical response, to obtain a safety device himself" only when the plaintiff "knows exactly" its location, and when "there is a practice of obtaining the safety device himself because it is easily done" (*Auriemma v Biltmore Theatre, LLC*,

82 AD3d 1, 10-11 [1st Dept 2001] [internal quotation marks omitted]; *see Cherry v Time Warner, Inc.*, 66 AD3d 233, 238 [1st Dept 2009]).

Furthermore, "[t]he mere presence of [safety devices] somewhere at the worksite" is insufficient to defeat liability (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524 [1985]; *Auriemma v Biltmore Theatre, LLC*, 82 AD3d at 11; *DePalma v Metropolitan Transp. Auth.*, 304 AD2d 461, 461 [1st Dept 2003] [Court rejected a recalcitrant worker defense where there was no evidence that plaintiff's decedent had refused to use a safety harness, and the fact that safety harnesses may have been available at the work site was insufficient to allow defendants to escape Labor Law § 240 (1) liability]; *Crespo v Triad, Inc.*, 294 AD2d 145, 147 [1st Dept 2002]; *Sanango v 200 E. 16th St. Hous. Corp.*, 290 AD2d 228, 228-229 [1st Dept 2002]).

Here, defendants have failed to sufficiently refute plaintiff's assertion that, due to the particular circumstances of the job, plaintiff was not able to utilize the safety devices that were allegedly provided to him. In addition, while plaintiff may have received a general instruction to use safety devices and to tie off while working at heights, there is no evidence in this case to demonstrate that plaintiff was provided with the kinds of safety devices which could be utilized under the particular circumstances facing plaintiff, and then specifically instructed to use them. Moreover, it was simply not enough for defendants to generally assert that plaintiff could have tied off to the piping comprising the billboard's structure, without providing some specific proof that said piping was strong enough to support plaintiff, as well as also located in a place that would allow plaintiff to reach the apron of the billboard where he was to paint while tied off to it.

Thus, it has not been demonstrated that this is a case of a recalcitrant worker, wherein a plaintiff was specifically instructed to use a safety device and refused to do so (*see Olszewski v Park*

Terrace Gardens, 306 AD2d 128, 128-129 [1st Dept 2003]; *Morrison v City of New York*, 306 AD2d 86, 87 [1st Dept 2003]; *Crespo v Triad, Inc.*, 294 AD2d at 147; *Sanango v 200 E. 16th St. Hous. Corp.*, 290 AD2d at 228-229).

In fact, in such a case as here, where plaintiff was not given adequate devices to prevent him from falling, comparative fault is not a defense to a Labor Law § 240 (1) cause of action because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Velasco v Green-Wood Cemetery*, 8 AD3d 88, 89 [1st Dept 2004] ["Given an unsecured ladder and no other safety devices, plaintiff cannot be held solely to blame for his injuries"]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002] ["It 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"]).

Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence [internal quotation marks and citations omitted]" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d at 291; *see Ranieri v Holt Constr. Corp.*, 33 AD3d 425, 425 [1st Dept 2006] [Court found that failure to supply plaintiff with a properly secured ladder or any safety devices was a proximate cause of his fall, and there was no reasonable view of the evidence to support defendants' contention that plaintiff was the sole proximate cause of his injuries]; *Lopez v Melidis*, 31 AD3d 351, 351 [1st Dept 2006]; *Torres v Monroe Coll.*, 12 AD3d at 262 [Court noted that even if another cause of the accident was plaintiff's own improper use of an unopened A-frame ladder leaned against the wall from atop the scaffold, defendant's failure to ensure that the scaffold plaintiff needed to use to

perform his assigned task provided proper protection, and was properly secured and braced, constituted a proximate cause of the accident]).

Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed [internal citations omitted]" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]). "As has been often stated, the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, 'those best suited to bear that responsibility' instead of on the workers, who are not in a position to protect themselves" (*John v Baharestani*, 281 AD2d at 117, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 500).

Thus, plaintiff is entitled to partial summary judgment on the issue of liability under Labor Law § 240 (1) as against defendants and Fuel.

Plaintiff's Common-Law Negligence and Labor Law § 200 Claims Against Defendants (motion sequence number 001)

Defendants move for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims against them. Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work' [citation omitted]" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so

> placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]).

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work, because the injury arose from the condition of the work place created by or known to contractor, rather than the method of the work]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Berger v ISK Manhattan, Inc.*, 10 AD3d 510, 512 [1st Dept 2004]).

It is well-settled that, in order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where plaintiff's injury was caused by lifting a beam and there was no evidence that defendant exercised

supervisory control or had any input into how the beam was to be moved]).

Moreover, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]).

In the case at bar, plaintiff's accident resulted from an allegedly unsafe condition, in that the stack of cement blocks that plaintiff was essentially utilizing as a scaffold lacked proper protection, such as a guardrail, which would have prevented him from falling. Applying the dangerous condition theory analysis, while defendants did not create the alleged unsafe condition at issue (Fuel and Neon designed, constructed and maintained the billboard), in light of the testimony that Vasquez visited the site three to four times a week as managing agent for Lafayette, as well as performed inspections at the premises, at least a question of fact exists as to whether defendants had actual or constructive notice that the billboard was unsafe for workers, because it lacked guardrails, a catwalk and appropriate places for plaintiff to tie his safety harness off to (*see Geonie v OD & P NY Ltd.*, 50 AD3d 444, 445 [1st Dept 2008]).

Thus, defendants are not entitled to dismissal of plaintiff's common-law negligence and Labor Law § 200 claims against them. In addition, defendant Fuel's request that this court search the record and dismiss plaintiff's Labor Law § 200 claim as against it is denied, as Fuel's request is made without a proper cross motion, as well as being untimely.

Defendants' Cross Claim for Contractual Indemnification Against Fuel (motion sequence number 001)

Defendants move for summary judgment in their favor on their cross claim for contractual indemnification as against defendant Fuel. "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'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see Torres v Morse Diesel Intl.*, 14 AD3d 401, 403 [1st Dept 2005]).

With respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and that "'[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant' [citation omitted]" (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003]; *Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]).

Fuel argues that the portion of defendants' motion seeking contractual indemnification against it should be denied, because, on the date of plaintiff's accident, November 30, 2011, there was no lease agreement in place. The January 31, 2007 extension agreement expired on November 31, 2007, and the October 1, 2012 extension agreement extended the lease to a term of three additional years, commencing October 1, 2012 and extending to September 30, 2015.

However, "[w]hen a [commercial] tenant remains in possession after the expiration of a lease 'pursuant to common law, there is implied a continuance of the tenancy on the same terms and subject to the same covenants as those contained in the original instrument'" (*Lynch v Savarese*, 217 AD2d 648, 649 [2d Dept 1995], quoting *City of New York v Pennsylvania R.R. Co.*, 37 NY2d 298,

300 [1975]; *Ford v Weishaus*, 86 AD3d 421, 424 [1st Dept 2011]; *Rubin v Port Auth. of N.Y. & N.J.*, 49 AD3d 422, 422 [1st Dept 2008]).

Therefore, although the January 31, 2007 extension agreement, which had extended the term of the original lease "upon the same terms, covenants, conditions, provisions, and agreements contained in the Lease except as provided in [the] Lease," for an additional 10 months to November 31, 2007, had expired, a continuance of the tenancy on the same terms as the original instrument was implied (plaintiff's notice of motion, exhibit Q, January 31, 2007 extension agreement). Moreover, the indemnification provision contained in the October 1, 2012 extension agreement, which covers all work and maintenance performed by Fuel and its subcontractors, states that the provision is to be deemed retroactive as of the tenancy's commencement.

However, as discussed previously, as a question of fact exists as to whether or not defendants were negligent in not providing a safe work environment for plaintiff, a finding that defendants are entitled to contractual indemnification from Fuel is premature at this time (*Keena v Gucci Shops*, 300 AD2d at 82). For the foregoing reasons, it is hereby

ORDERED that defendants Olmstead Properties, Inc. and 363 Lafayette, LLC's (together, defendants) motion (motion sequence number 001), pursuant to CPLR 3212, for (1) summary judgment dismissing plaintiff Pedro Quinones's common-law negligence and Labor Law § 200 claims against them; and (2) summary judgment in their favor as to their cross claim for contractual indemnification as against defendant Fuel Outdoor, LLC (Fuel) is denied; and it is further

ORDERED that plaintiff's motion (motion sequence number 002), pursuant to CPLR 3212, for partial summary judgment in his favor on the issue of liability under Labor Law § 240 (1) against defendants and Fuel is granted, with the issue of the amount of damages to be determined at trial;

and it is further

ORDERED that the remainder of the action shall continue.

DATED: 11/25/13

ENTER:

JOAN M. KENNEY
J.S.C.