At an IAS Term, Part 90 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of November, 2016.

PRESENT:

HON. EDGAR G. WALKER,
Justice.

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ADAM KOZUCHOWICZ,

Plaintiff,

- against -

Index No. 502187/13

CENTIMARK CORPORATION, 22 ARKAY LLC, AND L.N.K. INTERNATIONAL, INC.,

Defendants.

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22 ARKAY LLC AND L.N.K. INTERNATIONAL, INC.,

Third-Party Plaintiffs,

- against -

CITY GREEN STREET, INC.,

Third-Party Defendant.

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CENTIMARK CORPORATION,

Second Third-Party Plaintiff,

- against -

CITY GREEN STREET, INC.,

Second Third-Party Defendants.

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The following papers numbered 1 to 20 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 3-5, 6, 7, 8-9
Opposing Affidavits (Affirmations)	10, 11, 12, 13
Reply Affidavits (Affirmations)	14, 15, 16, 17, 18
Affidavit (Affirmation)	
Other Papers 2/25/16 letter and Workers Comp. Settlement	19
Other Papers 3/1/16 letter from City Green	20

Upon the foregoing papers, plaintiff Adam Kozuchowicz moves for an order, pursuant to CPLR 3212, granting him partial summary judgment with respect to liability on his Labor Law § 240 (1) claim as against defendants Centimark Corporation (Centimark), 22 Arkay LLC (22 Arkay) and L.N.K. International Inc. (LNK) (Motion Sequence Number 2). Third-party defendant and second third-party defendant City Green Street, Inc., (City Green) moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing 22 Arkay and LNK's third-party action and dismissing Centimark's second third-party action (Motion Sequence Number 3). Centimark moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing plaintiff's complaint as against it (Motion Sequence Number 4). 22 Arkay and LNK cross-move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing plaintiff's complaint and granting them summary judgment in their favor with respect to their cross claims for common-law indemnification from Centimark (Motion Sequence Number 5).

Plaintiff's motion (Motion Sequence Number 2) is granted to the extent that he is granted partial summary judgment with respect to liability as against 22 Arkay and LNK. Plaintiff's motion is otherwise denied. City Green's motion (Motion Sequence Number 3) is granted. The third-party and second third-party complaints are dismissed, and the action is severed accordingly. Centimark's motion (Motion Sequence Number 4) and 22 Arkay and LNK's motion (motion sequence 5) are denied.

Plaintiff allegedly suffered injuries on August 16, 2012 while performing work for City Green, an asbestos mediation company, when a portion of the roof on which he was working collapsed causing plaintiff to fall 12 to 16 feet to floor below the roof. The building at issue was owned by 22 Arkay and leased by LNK, a pharmaceutical company which used to building for offices, for manufacturing and as a warehouse. By way of a purchase order dated May 2, 2012, LNK hired Centimark, a roofing contractor, to perform roofing work, and after asbestos was discovered on the roof, LNK also hired City Green to remove the asbestos laden material from the roof.[1]

Centimark's work involved covering the entire roof with a new roofing surface, removing certain equipment from the roof such as fans and vents that were no longer in use, and repairing the roof decking in certain areas of the roof. The work at issue primarily involved work on what the parties referred to as the upper and lower roofs. Before

[1] 22 Arkay, LNK and Centimark assert that there are issues of fact as to whether City Green was plaintiff's employer. As discussed below, however, this court finds that City Green has demonstrated as a matter of law that it was plaintiff's employer.

commencing any work on the roof Centimark identified a 72 square foot area on the lower roof as having a compromised roof deck and marked off this 72 square foot area with flags on strings. Dan Seaver, a Centimark on-site supervisor, spray painted the words "Bad Deck" directly onto the roof in the area between two metal beams.

After Centimark discovered that some of the roofing materials and equipment on the roof were contaminated with asbestos Centimark contacted City Green to submit a proposal for the removal of the asbestos. City Green first submitted a proposal for the asbestos work to Centimark, but it was ultimately agreed that LNK would contract for City Green's work directly. In a change order thereafter issued to LNK, Centimark deducted charges for portions of its original purchase order with LNK that were to be performed by City Green. Prior to City Green commencing any work on the roof, LNK's facility manager walked the roof with Centimark's supervisors and marked with spray paint the roof areas and roof equipment that would be subject to City Green's work. City Green began performing its asbestos removal work on or around July 30, 2012. Near the end of each of Centimark's workdays, which ran from 6:00 A.M. until 6:00 P.M., and before City Green started its nightwork, which ran from 4:00 P.M. until midnight, Centimarks' Dan Seaver would inform Marek Kruk, City Green's owner, of the fans and other asbestos laden material City Green should remove during each night.

By August 16, 2012, City Green had completed work on the upper roof of the building and was working on the lower roof.[2] On that date Centimark informed City Green that its work that night would involve the removal of two steel beams that had flashing containing asbestos around their bases. These beams were located within the 72 square foot area in the center of the lower roof that Centimark had identified as having a compromised roof deck and had roped off.

Plaintiff, who was visiting from Poland and did not speak any English, got his job with City Green as a helper through his father, a supervisor for City Green, and started working for City Green on or around August 5, 2016. On August 16, 2012 plaintiff was directed by his father to cut the beams off at their bases and remove them to a disposal area on the roof. Before plaintiff began working in the area of the beams other City Green workers had already removed the flashing containing the asbestos from around the beams and had also cut and removed the roofing material down to the gypsum decking in the area surrounding the beams. By removing such roofing material it is undisputed that the workers also removed the warning "Bad Deck" that had been spray painted on the roof surface. Once these tasks were completed plaintiff, who had been assembling lamps for use during the night work, began cutting beams off of the roof at their bases with a Sawzall. The accident occurred when plaintiff , who had previously cut and removed one of the beams, had just finished cutting the second beam, picked-up the second beam and took half a step. Although

[2] Although the building also had two smaller separate roof areas on which Centimark performed work, it does not appear that City Green worked in those areas of the building.

plaintiff has no specific memory of what happened next, it is undisputed that a portion of the gypsum decking collapsed and that plaintiff fell through the roof to the floor below.

The court first addresses plaintiff's contention that Centimark's motion and 22 Arkay and LNK's cross motion must be denied as untimely under the terms of a so-ordered stipulation that extended the parties' time to move for summary judgment until November 30, 2015 because Centimark did not make its motion until December 9, 2015 and 22 Arkay and LNK did not make their motion until January 6, 2015.

22 Arkay and LNK do not contend that their motion was timely or provide any excuse for their delay in moving.

With respect to Centimark, while it does not deny that the motion was not made until December 9, 2015, it asserts that the motion was timely under the terms of a November 10, 2015 stipulation signed by the parties in which they agreed that the parties' time to move for summary judgment should be extended to December 18, 2015. This November 10, 2015 stipulation, however, was not so-ordered or accepted by the court. Given that the court did not issue an order extending the parties' time to move (*see Coty v County of Clinton*, 42 AD3d 612, 614 [3d Dept 2004]) and did not accept the November 10, 2015 stipulation in advance of the motion (*see Bennett v St. John's Home*, 128 AD3d 1428, 1429 [4th Dept 2015], *affirmed* 26 NY3d 1033 [2015]; *Reyes v Sanchez-Pena*, 117 AD3d 621, 622 [1st Dept 2014]), the November 10, 2015 stipulation fails to extend Centimark's time to move for summary judgment (*see Coty*, 42 AD3d at 614; *cf. Benett*, 128 AD3d at 1429; *Reyes*, 117

AD3d at 622). While Centimark also argues that its reliance on the stipulation constitutes good cause for making an untimely motion, its reliance on the stipulation does not constitute good cause given that the above noted case law requires a court order or at least court acceptance of a stipulation prior to the making of a motion which would otherwise be untimely.

The untimeliness of these motions, however, does not entirely preclude consideration of portions of the motions. An untimely motion for summary judgment may be entertained if it is made on grounds nearly identical to the grounds of a timely motion already properly before the court (*see Sheng Hai Tong v K and K 7619, Inc.*, ___ AD3d ___, 2016 NY Slip Op 07637 * 2-3 [2d Dept 2016]; *Derrick v North Star Orthopedics, PLLC*, 121 AD3d 741, 743 [2d Dept 2014]; *Wernicki v Knippert*, 119 AD3d 775, 776 [2d Dept 2014]; *Paredes v 1668 Realty Assoc., LLC*, 110 AD3d 700, 702 [2d Dept 2013]). As such, since plaintiff has already timely moved for partial summary judgment with respect to liability on his Labor Law § 240 (1) cause of action and since the issue of sole proximate cause and the issue of which entities may be held liable under that statute are elements of plaintiff's prima facie case, this court may properly consider the portions of Centimark's motion and 22 Arkay and LNK's cross-motion seeking dismissal of the Labor Law § 240 cause of action on those grounds (*see Sheng Hai Tong*, ___ AD3d at ___, 2016 NY Slip Op 07637 * 2-3; *Wernicki*, 119 AD3d at 777; *Paredes*, 110 AD3d at 702). On the other hand, issues relating to plaintiff's common-law negligence and Labor Law §§ 200 and 241 (6) claims and LNK and

22 Arkay's indemnification claims against Centimark are not raised in either plaintiff's motion or City Green's motion (*see Sheng Hai Tong*, ___ AD3d at ___, 2016 NY Slip Op 07637 * 2-3; *Paredes*, 110 AD3d at 702). As such, the court denies as untimely the portions of Centimark's motion and LNK and 22 Arkay's cross motion addressing plaintiff's common-law negligence and Labor Law §§ 200 and 241 (6) claims and LNK and 22 Arkay's indemnification claims against Centimark.

Labor Law § 240(1) imposes absolute liability on owners and contractors or their agents when their failure to protect workers employed on a construction site from the risks associated with working at an elevation proximately causes injury to a worker (*see Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). Here, defendants do not dispute that plaintiff was performing construction work of the kind covered by the statute (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 880-883 [2003]; *Panek v County of Albany*, 99 NY2d 452, 457-458 [2003]) or that the collapse of the roof that caused plaintiff to fall to the floor below constituted an elevation risk requiring the provision of a section 240 safety device to prevent such a fall (*see Dyrnyshi v Clifton Place Dev. Group*, 7 AD3d 565, 565 [2d Dept 2004]; *see also Zong Mou Zou v Hai Ming Constr. Corp.*, 74 AD3d 800, 801 [2d Dept 2010]; *Ewing v Brunner Intl., Inc.*, 60 AD3d 1323, 1323 [4th Dept 2009]; *Cavanagh v Mega Contr., Inc.*, 34 AD3d 411, 412 [2d Dept 2006]; *Taylor v V.A.W. of Am.*, 276 AD2d 621, 622 [2d Dept 2000];

cf. Mendoza v Highpoint Assocs., IX, LLC, 83 AD3d 1, 10-11 [1st Dept 2011]; *Shipkoski v Watch Case Factory Assocs.*, 292 AD2d 587, 588-589 [2d Dept 2002]).

Defendants, however, argue that plaintiff's failure to wear a harness and tie it off to a safety line attached to one of the fall prevention carts located on the roof while he was working in the roped off area of the roof was the sole proximate cause of his injuries. A plaintiff's negligence is the sole proximate cause of his or her injuries "when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he [or she] was expected to use them but for no good reason chose not to do so, causing an accident" (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; *see Przyborowski v A&M Cook, LLC*, 120 AD3d 651, 653-654 [2d Dept 2014]). In addressing sole proximate cause claims based on a failure to use a harness in analogous factual situations, the cases hold that the failure to wear a harness cannot be the sole proximate cause of an accident where the worker was not instructed to wear the harness under the circumstances and there is no evidence showing that the worker knew or should have known to use the harness under the circumstances (*see Gallagher*, 14 NY3d at 88 [no evidence that standing order to wear a harness and tie off had been conveyed to plaintiff]; *Eustaquio v 860 Cortlandt Holdings, Inc.*, 95 AD 548, 549 [1st Dept 2012]; *Durmiacki v International Bus. Machs. Corp.*, 85 AD3d 960, 961 [2d Dept 2011]; *Murray v Arts Ctr. & Theater of Schenectady, Inc.*, 77 AD3d 1155, 1156 [3d Dept 2010]; *Ewing*, 60 AD3d at 1323-1324; *see also Vasquez-Roldan v Two Little Red Hens, Ltd.*, 129 AD3d 828,

830 [2d Dept 2015]; *cf. Moracho v Open Door Family Med. Ctr., Inc.*, 74 AD3d 657, 657-658 [1st Dept 2010] [issue of fact as to whether plaintiff was aware of expectation that he should "tie off" a safety vest]; *Yedynak v Citnalta Constr. Corp.*, 22 AD3d 840, 841 [2d Dept 2005]).

At his own deposition plaintiff testified that he knew that harnesses were available at the worksite and that they could be tied off on the fall arrest carts that Centermark had placed on the roof.[3] While plaintiff testified that he had been instructed to wear such a harness when he was working within six feet of the edge of the roof, the area within which he was working was in the center of the lower roof and was not anywhere near six feet from the roof's edge. Further, although he testified that he had observed workers from City Green and from Centimark tying off onto the fall arrest carts while they were working on the upper roof, he did not observe them tying off to the cart while working on the lower roof. Plaintiff asserted that he was never told to wear a safety harness while working in the roped off area of the lower roof and that he was never told what the ropes meant and that he did not know that the ropes around that area in which he was working meant that that area of the roof was compromised.

Relevant in this regard is plaintiff's testimony that he did not notice the spray painted marking stating "bad deck." The spray painted warning, which photographs show to be on

[3] While Michael Horwith, a branch manager for Centimark, asserted that the fall arrest carts could only be used by Centimark employees, it is undisputed that Dan Seaver, Centimark's onsite supervisor, allowed City Green's employees to tie off onto to the carts when they were working on the compromised areas of the upper deck.

the outer covering of the roof, was removed along with the outer covering of the roof by plaintiff's coworkers before plaintiff started his task of removing the beams. Plaintiff stated that before he started working in the area he was busy assembling lamps, that he did not observe his co-workers remove the roof covering down to the decking in the area of the beams, and that he only started removing the beams after this covering had been removed. Moreover, even if plaintiff may have seen the spray painted warning at some point before the roof covering was removed, nothing in the record suggests that he would have understood it given that he only speaks Polish.

While Dan Seaver, a Centimark supervisor, asserted in his deposition testimony that he told Marek Kruk, City Green's owner, that the roped off area on the lower roof had a compromised deck, and Kruk testified that he was aware of that fact, nothing in the record suggests that plaintiff or City Green's other workers were ever informed that the roped off area had a compromised deck or that they should wear harnesses and tie off in that area. In this regard, Kruk testified that he was not even aware that his employees were working in the roped off area on the date of the accident. Iwona Ellent, an asbestos supervisor for City Green, testified that she did not know why the area in middle of lower roof was roped off and that she had only informed City Green's workers to wear harnesses when working within six feet of the roof's edge. Plaintiff's father, Jozef Kozuchowicz, the City Green supervisor who told plaintiff to remove the beams, testified that he did not see the spray painted warning on the roof deck and did not know the flags around that area of the roof deck meant that the

deck was compromised. Jozef Kozuchowicz added that it was Centimark's Dan Seaver who told him to remove the roofing material in the area of the beams and remove the beams, and that he did not see the warning about the deck spray painted on the roof. Kozuchowicz added that both he and Seaver walked into the roped off area when Seaver was showing him the beams to be removed and that Seaver was not wearing a harness at that time.

In sum, assuming that the record is sufficient to demonstrate as a matter of law that City Green's workers had harnesses readily availible and anchor points on which to tie off, plaintiff has shown prima facie that he did not know that he was expected to wear a harness in the roped off area at issue while performing the work just prior to the accident. Defendants, in support of their own motions and in opposing plaintiff's motion, have failed to demonstrate an issue of fact in this regard and thus failed to demonstrate that plaintiff's conduct was the sole proximate cause of his injuries (*Gallagher*, 14 NY3d at 88; *Eustaquio*, 95 AD at 549; *Durmiacki*, 85 AD3d at 961; *Murray*, 77 AD3d at 1156; *Ewing*, 60 AD3d at 1323-1324). Plaintiff has thus demonstrated as a matter of law that he was not provided with a proper safety device to protect him from the risks of working in the area of the roof that was known to be structurally unsound (*see Taylor*, 276 AD2d at 622; *see also Restrepo v Yonkers Racing Corp., Inc.*, 105 AD3d 540, 540 [1st Dept 2013]; *Zong Mou Zou*, 74 AD3d at 801; *Ewing*, 60 AD3d at 1323; *Cavanagh*, 34 AD3d at 412). Accordingly, plaintiff is

entitled to partial summary judgment with respect to liability as against 22 Arkay and LNK given that they do not dispute that they are owners for purposes of Labor Law § 240 (1).[4]

Factual issues as to whether Centimark may be held liable as a statutory agent of LNK requires denial of the motions by plaintiff and Centimark relating to plaintiff's Labor Law § 240 (1) cause of action as against Centimark. "As a general rule, a separate prime contractor is not liable under Labor Law §§ 240 or 241 for injuries caused to the employees of other contractors with whom they are not in privity of contract, so long as the contractor has not been delegated the authority to oversee and control the activities of the injured worker" (*Barrios v City of New York*, 75 AD3d 517, 518 [2d Dept 2010]; *see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]; *Aversano v JWH Contr., LLC*, 37 AD3d 745, 746 [2007]). However, as noted by the Court of Appeals, "when the work giving rise to these duties [imposed by section 240 and 241] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor" (*see Rusin*, 54 NY2d at 317-318). In deciding the issue of statutory agency, courts will look beyond the terms of the

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[4] John Caraciolo, LNK's facility manager, who appeared at the deposition for 22 Arkay and LNK, identified 22 Arkay as the owner of the building at issue. Raymond McCusker, an executive vice-president of LNK, testified that LNK leased the building from 22 Arkay and that LNK was the entity that contracted with Centimark and City Green to perform the work at issue. 22 Arkay is liable under Labor Law § 240 (1) as an owner (*see Gordan v Eastern Ry. Supply*, 82 NY2d 555, 559-560 [1993]; *cf. Guryev v Tomchinsky*, 20 NY3d 194, 199-201 [2012]), and LNK may be held liable as an owner since it was a lessee who contracted for the work at issue (*see Seferovic v Atlantic Real Estate Holdings, LLC*, 127 AD3d 1058, 1059-1060 [2d Dept 2015]; *Alfonso v Pacific Classon Realty, LLC*, 101 AD3d 768, 770 [2d Dept 2012]).

governing contracts and examine the roles the parties actually assumed in performing their construction work (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005] [court considered deposition testimony of construction manager's representative who acknowledged its authority to control activities at the work site and stop unsafe work practices]; *Barrios*, 75 AD3d at 518-519 [court considered deposition testimony regarding employment of safety officers who had authority to bring safety issues to the individual contractors' foremen]).

Here, Centimark and City Green are undoubtedly separate prime contractors. While Centimark was the entity that initially contacted City Green about performing the asbestos abatement work and City Green first submitted its proposal for the performance of the asbestos removal work to Centimark, LNK ultimately agreed to enter into a contract directly with City Green in order to save on the costs Centimark would have charged LNK to employ City Green as a subcontractor. At their depositions, Centimark's witnesses denied that Centimark, at the time that LNK entered into the direct contract with City Green, agreed to assume any responsibility with respect to supervision of City Green's work or worker safety on the roof. On the other hand, Raymond McCusker, an executive vice-president with LNK, testified that Brian Bannigan, a Centimark representative, assured him that Centimark would supervise City Green with respect to its performance of the work and jobsite safety.[5] While Bannigan denied making any such representation at his own deposition, Bannigan did

[5] The court notes that Centimark performed its work for LNK based solely on a purchase order and a later change order it issued to LNK that list Centimark's fee for the project and the costs of components of the work, but which contain no additional terms addressing Centimark's role in the project or its responsibilities with respect to other contractors.

concede that he sent an email to various recipients involved in the project that Centimark helped "manage" LNK's contract with City Green.

The deposition testimony addressing Centimark's actual interaction with City Green presents similar conflicts with respect to the scope of Centimark's authority. The testimony of Dan Seaver, Centimark's onsite supervisor, in which he concedes that he informed City Green supervisors of City Green's nightly tasks may be seen as simple scheduling and coordination of the work, activities which have been found insufficient to render a prime contractor a statutory agent (*see Hargrave v LeChase Constr. Servs., LLC*, 115 AD3d 1270, 1271 [4th Dept 2014]; *Rodriguez v JMB Architecure, LLC*, 82 AD3d 949, 951 [2d Dept 2011]; *Dileso v Hill Intern., Inc.*, 2015 WL 1475826 * 6 [EDNY 2015]). On the other hand, Seaver's testimony that he informed City Green workers that they should wear a harness and tie off onto the fall arrest carts when he observed them working in the compromised areas of the upper deck may support a finding that Centimark in fact assumed authority over the safety of City Green's workers (*see Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 434 [2015]; *Van Blerkom v American Painting LLC*, 120 AD3d 660, 662 [2d Dept 2014]; *Barrios*, 75 AD3d at 518-519; *Moracho*, 74 AD3d at 658). In considering Seaver's testimony, a jury would not be required to accept Seaver's explanation that he only told the City Green workers that they should wear harnesses out of concern for their safety and not because Centimark had authority over site safety (*see Scalogna v Osipov*, 117 AD3d 934, 935 [2d Dept 2014]).

This competing evidence as to the scope of Centimark's duties with respect to City Green presents a factual issue as to whether Centimark had the authority to supervise and control the activity bringing about the injury and thus, as to whether Centimark may be deemed a statutory agent under Labor Law § 240 (1) (*see Barreto*, 25 NY3d at 434; *Walls*, 4 NY3d at 864; *Barrios*, 75 AD3d at 518; *Moracho*, 74 AD3d at 658). In view of these factual issues relating statutory agency, neither plaintiff nor Centimark is entitled to summary judgment with respect to plaintiff's Labor Law § 240 (1) cause of action as against Centimark.

Finally, turning to City Green's motion for summary judgment, City Green has demonstrated as a matter of law that it is entitled to dismissal of the third-party actions based on Workers' Compensation Law § 11. City Green has demonstrated, prima facie, that it was plaintiff's employer through Marek Kruk's deposition testimony and affidavit in which he states that plaintiff was employed by City Green as well as copies of plaintiff's pay check and 1099 form showing that plaintiff was paid for his work by City Green (*see Vitello v Amboy Bus Co.*, 83 AD3d 932, 933 [2d Dept 2011]; *Sorrento v Ronbet Co.*, 244 AD2d 262, 262 [1st Dept 1997]). Although the Workers' Compensation Board (Board) on its notice of approval of the section 32 settlement agreement and in other Board paperwork lists plaintiff's employer as M-Deco, Inc., (M-Deco), this listing has no collateral estoppel or other preclusive effect as there is no suggestion in the notice of approval of the Board or the record before this court that the issue of plaintiff's employer was in dispute or that it was

adjudicated by the Board (*see Vitello*, 83 AD3d at 933; *Weitz v Anzek Constr. Corp.*, 65 AD3d 678, 679 [2d Dept 2009]; *Caiola v Allcity Ins. Co.*, 257 AD2d 586, 587 [2d Dept 1999]).

Additionally, the listing of M-Deco as plaintiff's employer by the Board also carries no evidentiary weight under the facts here. Of note, while the parties before the Board represented in the settlement agreement that M-Deco was the employer, it was the insurance carrier that signed the settlement agreement on behalf of the employer, not City Green or M-Deco. Kruk, in his affidavit in support of the motion, identifies M-Deco as a New Jersey corporation of which he was a part owner that was no longer active at the time of the accident and that M-Deco was identified as an insured on the same Workers' Compensation Policy covering City Green. Kruk added that after the accident he prepared a Board "C-2" form in which he identified City Green as plaintiff's employer and that he forwarded this C-2 form to his insurance broker to forward to the Board. According to Kruk, the C-2 form received by the Board that identifies M-Deco his employer was apparently prepared and submitted to the Board by his broker. Kruk specifically denied that he prepared this C-2 form received by the Board and the court notes that the portion of this form received by the Board that was supposed to be signed by the employer or preparer of the form was left blank. As such, there is no evidence in the record suggesting that the Board's listing of M-Deco as plaintiff's employer was the result of a concession by City Green or M-Deco that plaintiff was employed by M-Deco (*cf. Callaghan v Point at Saranac Lake, Inc.*, 83 AD3d 1177, 1178-

1179 [3d Dept 2011]). Thus, 22 Arkay, LNK and Centimark have failed to identify any factual issues supporting a finding that M-Deco was plaintiff's employer (*see Vitello*, 83 AD3d at 933-934; *cf. Callaghan*, 83 AD3d at 1178-1179).

City Green has also demonstrated, prima facie, that it secured the payment of compensation as required by Workers' Compensation Law §§ 10 (1) and 11 through Kruk's affidavit in which he stated that City Green had a workers' compensation insurance policy in effect at the time of the accident and by submitting a copy of a workers' compensation insurance policy naming it as an insured that was in effect at the time of the accident (*see Reinoso v Ornstein Layton Mgt., Inc.*, 34 AD3d 437, 438 [2d Dept 2006]; Workers Compensation Law § 50 [2]; *see also De Los Santos v Butkovich*, 126 AD3d 845, 846 [2d Dept 2015]; *Villatoro v Grand Blvd. Realty, Inc.*, 18 AD3d 647, 647 [2d Dept 2005]). Contrary to 22 Arkay and LNK's assertion, City Green was not required to show that the policy covering City was the policy that paid plaintiff his workers' compensation benefits as part of its initial summary judgment burden (*see De Los Santos*, 126 AD3d at 846; *Reinoso*, 34 AD3d at 438; *Villatoro*, 18 AD3d at 647). It would appear, in any event, that it has made such a showing given that the policy that the Board identifies as paying benefits on the behalf of M-Deco as the employer was issued by the same insurer and bears the same policy number as the policy covering City Green. In opposing the motion, 22 Arkay and LNK have failed submit any evidentiary proof suggesting that City Green did not have Workers Compensation

insurance or that the benefits plaintiff has received were paid by an insurance policy other than that obtained by City Green.

City Green has further demonstrated, prima facie, that plaintiff did not suffer a grave injury through the submission of his bill of particulars and deposition testimony, which show that none of his injuries constituted a grave injury as defined in Workers' Compensation Law § 11 (*see Lombardo v Tag Ct. Sq., LLC*, 126 AD3d 949, 951 [2d Dept 2015]; *Maxwell v Rockland County Community Coll.*, 78 AD3d 793, 794 [2d Dept 2010]; *Fleischman v Peacock Water Co., Inc.*, 51 AD3d 1203, 1205 [3d Dept 2008]; *Marshall v Arias*, 12 AD3d 423, 424 [2d Dept 2004]). As 22 Arkay and LNK and Centimark have failed to even address the issue of grave injury, they have failed to demonstrate the existence of a factual issue in that respect.

Finally, with respect to 22 Arkay and LNK's cause of action against City Green premised on a breach of a contractual insurance procurement requirement, City Green has demonstrated, prima facie, the absence of any contractual requirement that it obtain insurance benefitting 22 Arkay or LNK and 22 Arkay and LNK make no argument regarding the existence of any such agreement.

In sum, City Green has demonstrated, prima facie, that the third-party actions are

barred by Workers Compensation Law § 11, and the third-party plaintiffs have failed to demonstrate the existence of a factual issue warranting denial of City Green's motion.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. EDGAR G. WALKER