SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

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YAKOV TELYAS as Administrator of the Estate of HAVA TELYAS (deceased) and YAKOV TELYAS individually,

Plaintiffs,

-against-

Index No. 157917/2013

LEND LEASE (US) CONSTRUCTION HOLDINGS INC., BREEZE NATIONAL INC., MADAVE PROPERTIES SPE LLC, CARDELLA TRUCKING CO. INC. and IMRE K. BENDE,

DECISION ORDER

Defendants.

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Defendants Lend Lease (US) Construction Holdings Inc. (Lend Lease), Breeze National Inc. (Breeze), and Madave Properties SPE LLC (Madave) (collectively, the Moving Defendants) move for an order, pursuant to CPLR 3212, for (i) summary judgment dismissing the complaint and all cross claims, or, alternatively, (ii) summary judgment on their cross claims for contractual and common-law indemnification, and their cross claim for failure to procure liability insurance as against defendant Cardella Trucking Co. Inc. (Cardella).

This is a wrongful death action arising out of a motor vehicle accident in which plaintiff-decedent Hava Telyas, a pedestrian, was struck and killed by a carting truck driven by Imre K. Bende (Bende) in furtherance of his employment by Cardella. The accident occurred next to a construction site owned by Madave, where Lend Lease was the construction manager, and Breeze was the demolition subcontractor. The Moving Defendants move for summary judgment dismissing the

complaint, asserting that they owed no legal duty of care to plaintiff-decedent, because they did not fail to exercise reasonable care, did not launch a force or instrument of harm, and had no duty to provide flagmen for a carting truck performing the routine activity of pulling away from the curb. They also contend that under the contract between Breeze and Cardella, Cardella was obligated to defend and indemnify the Moving Defendants, because the Moving Defendants were free from any negligence with regard to the accident.

BACKGROUND

On September 20, 2012, plaintiff-decedent was struck and killed by a carting truck at approximately 2:05 pm at West 58th Street, New York, New York, about 262 feet east of Broadway (exhibit H to notice of motion, plaintiffs' bill of particulars, ¶¶ 1-3). At the time of the accident, she was a pedestrian traveling northbound mid-block across 58th Street (*id.*, ¶ 2). She was struck by a Cardella truck, New Jersey license plate number AM626T, driven by defendant Bende in furtherance of his employment with Cardella (exhibit P to notice of motion, police accident report). Plaintiff-decedent did not cross in a pedestrian crosswalk, but crossed in the middle of the block.

On that same date, the building located at 221 West 58th Street was being demolished (affidavit of Eli E. Zamek, dated Dec 11, 2015 [Zamek aff], ¶ 4). Defendant Madave was the owner of the building, and had hired defendant Lend Lease as the construction manager for the project (*id.*, ¶ 2). Madave, as the property owner, did not supervise or control the demolition work (*id.*, ¶¶ 5-9). Lend Lease, as the construction manager, had a site safety manager for the job site, Benito Palmieri (affidavit of Benito Palmieri, dated Dec 9, 2015 [Palmieri aff], ¶ 1).

Lend Lease entered into a contract with defendant Breeze, the demolition contractor, pursuant to which Breeze was obligated to provide flagmen to assist with the loading and unloading of carting

trucks, which were to be provided through Breeze's subcontract with defendant Cardella (*id.*, ¶ 3). On the day of the accident, Breeze provided two flagmen at sidewalk level, who were supervised and directed by Breeze foreman, Danny Collins (*id.*, ¶ 4). According to Breeze, when Cardella trucks pulled up to the job site, these flagmen would stop traffic and assist the driver to back into the loading area, a closed lane on the street (*id.*, ¶ 5). Palmieri stated, in his affidavit in support, that the protocol for the job site was that if a Cardella truck had to wait for the loading area to become unoccupied, Breeze flagmen would walk to the truck and stop vehicular traffic before the truck left the curb (*id.*).

At the time of the accident, Bende moved his truck to leave his parked position at the curbside, without the assistance of Breeze's flagmen, and made his way for the 10-15 feet to the job site in order to load, when he struck plaintiff-decedent as she was crossing the street (affirmation of Stacy Thompson, dated Feb 10, 2016 [Thompson aff], ¶ 7). When struck, she was on the driver's side, pinned under the center of the front axle (*id.*, ¶ 8).

At his deposition, Bende stated that when he arrived at the job site that afternoon, he parked the truck, got out and he spoke to someone from Breeze (exhibit S to notice of motion, deposition of Imre Bende [Bende tr] at 19, 21-22). He asserted that, on other occasions when he arrived at the site and had to wait and then move to pick up his load, he would not get assistance from the Breeze flagmen. He testified "[f]irst you pull out, you look out, make sure nobody came, you pull to the side. Then the flagmen wave in when the truck is moving out and when he's move, he's coming to put you in the right spot and back you in" and that was how it worked (*id.* at 20-21). He knew what the procedure was at the job site, because when he would arrive, he would stop his truck and go talk to the Breeze supervisor on the site (*id.* at 42-43). He stated that, at the time of the accident, the

flagmen were not assisting him when he moved his truck from its parked position until he stopped the truck upon learning about this accident (*id.* at 28). He attested that, after the accident, the procedures changed, the Breeze employees "[t]hey coming to you, They guide you out, put you back in . . . . They walk you into the site and walk you back out" (*id.* at 92), but that on the day of the accident, and other previous times, they did not use the walk-in walk-out procedure (*id.*).

Several other Cardella truck drivers attested that there were changing job site rules about where and when to wait, or whether to just drop the box from their truck (exhibit Y to notice of motion, deposition of Safet Sejmenovic at 11). Safet Sejmenovic testified:

> "Usually what they do, if they [the flagmen] see you and you see them, they're going to just tell you to come on, we're ready for you. They are not going to come directly. Only if you're sleeping or something, they are going to come and wake you up, hey, what's going on"

(*id.* at 12). John Corrente, another Cardella trucker, testified that no one told him the procedures, but that:

> "you pull up to the side, if there was a truck there. When the truck got loaded, he put his box on, the guys would come up, wave you up. Wave you up, that truck would pull out, you's pull right up like that. They would stop the traffic and you back in right there"

(exhibit Z to notice of motion, deposition of John Corrente at 10). In response to the question: "Did the flagmen ever come out to where you were parked and walk you into the job?," Corrente answered: "Never" (*id.* at 11), and that this was common to the Breeze job sites, because they were in a rush to get you in and out (*id.* at 12).

Breeze's labor foreman, Daniel Collins, testified that the general procedure for moving trucks

into and out of the work site was that the flagmen would go up with their flags to the driver, one in front and one in back, and they would walk the truck down the street into the spot where it was going to be backed in (exhibit U to notice of motion, deposition of Daniel Collins [Collins tr] at 16-17). It was done this way, according to Collins, "to make sure that no pedestrians walk in front or behind the truck at the time of parking, and that includes while the box is being dropped into the location" (*id.* at 17). He affirmed that the trucks "would stay parked until my flagmen went down and walked them into the spot" (*id.* at 21-22).

Christopher Carlson, one of the flagmen on the day of the accident, testified that his job was to watch for pedestrians mainly, and vehicles too, particularly people "just not paying attention trying to walk right into the jobsite" (exhibit V to notice of motion, deposition of Christopher Carlson [Carlson tr] at 14). He stated that his responsibility was to "[s]top them, make them cross the street and go around the job site. Go back down the street and cross it" (*id.*), and that his job was to stop pedestrians from crossing the street while the truck was moving (*id.* at 35). He affirmed that the flagmen had safety meetings with Breeze foreman Collins, and the "Lend Lease guys," but that Cardella was not present at the meetings (*id.* at 18-19, 25). He attested that the trucks "usually park like down the street on their own and then once we finish loading the one truck, then we go down, get the other truck driver, walk him up and bring him into the chute" (*id.* at 20). He stated that trucks had never moved without him prior to the day of the accident (*id.*). He admits that he never personally told the driver of the Cardella truck that he was not allowed to move unless he advised him (*id.* at 38).

Donald Noble, another flagman working with Carlson on the date of the accident, attested at his deposition that "[a] flag man is a person that stands outside and protects people, you know,

protects the people" (exhibit W to notice of motion, deposition of Donald Noble [Noble tr] at 14). While he attested to the walk-in walk-out procedure, he stated that trucks used to move before the flagmen got there, but that "they [Lend Lease] had put a stop to that" (*id.* at 20). When asked how long the trucks were doing that, he responded that it "probably wasn't long, but, you know, stopped them, you know, wait until one truck is out because the traffic is crazy over there. So we have to make sure one truck is all the way out before we bring in another truck" (*id.*). Then, he stated that it was related to him before the accident that they needed to do the walk-in walk-out procedure, and that they related it to the truck drivers (*id.* at 21). He attested that it was Chris Carlson's job, as the flagman in back, to stop pedestrians while the trucks were pulling out (*id.* at 43). Mr. Noble further stated that he did not tell Mr. Bende that he was not permitted to move from the parking spot without the flagmen, and he did not know if any other flagmen told Bende that (*id.* at 46-47).

In moving for summary judgment, the Moving Defendants contend that the accident here occurred because Mr. Bende and plaintiff-decedent failed to use ordinary and reasonable care in observing the conditions on the street at the time of the accident, and that, as a matter of law, the Moving Defendants owed no legal duty of care to plaintiff-decedent. They further seek summary judgment on their common-law and contractual indemnification claims, asserting that, because they are free from negligence, they are entitled to indemnification as a matter of law, and Cardella is obligated to pay their defense costs. Finally, they assert that Cardellla failed to procure liability insurance as required under its contract.

In opposition, plaintiffs urge that Lend Lease and Breeze owed direct duties of care based on Cardella's and Mr. Bende's dangerous conduct, and that they had sufficient authority to control that conduct. Plaintiffs urge that all Moving Defendants owed a duty, because they had a special

relationship to plaintiff-decedent, which created a duty to act reasonably to maintain safe demolition procedures, and protect pedestrians in the public roadway such as plaintiff-decedent from the hazards therein. They further argue that the Moving Defendants are vicariously liable for the tortious conduct of Cardella.

Defendant Cardella opposes, contending that the Moving Defendnts were negligent, because they failed to prevent the plaintiff from jaywalking in front of an active construction site. It asserts that the Moving Defendants have not demonstrated that they are free from negligence as a matter of law, barring recovery on their cross claims for indemnification. With respect to the failure to procure liability insurance, Cardella urges that, even if there were a breach, because the Moving Defendants obtained their own insurance, they are limited to the costs of that insurance.

DISCUSSION

The branch of the Moving Defendants' motion for summary judgment dismissing the complaint is denied, and summary judgment on its cross claims also is denied.

With regard to the plaintiffs' claims for negligence, defendants failed to satisfy their *prima facie* burden of eliminating all material issues of fact (*see, Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]*). In order for the plaintiffs to establish a common-law negligence claim, they must demonstrate that the defendants owe a duty to the plaintiffs, a breach of that duty, proximate causation, and damages (*Oddo v Queens Vil. Comm. for Mental Health for Jamaica Community Adolescent Program, Inc., 135 AD3d 211, 215 [1st Dept 2015]*). Whether defendants owe a duty of care to reasonably avoid causing injury to another is a question of law for the court (*see Purdy v Public Adm'r of County of Westchester, 72 NY2d 1, 8 [1988]*).

While, generally, "the common law does not impose a duty to control the conduct of third

persons to prevent them from causing injury to others," where the "defendant has the authority to control the actions of such third persons," liability may arise (*Oddo v Queens Vil. Comm. for Mental Health for Jamaica Community Adolescent Program, Inc., 135 AD3d at 215* [quotation marks and citation omitted]). As a general rule, where a defendant engages an independent contractor to do work, it will not be liable for that party's negligence in performance, because it has no right to supervise or control the work (*Backiel v Citibank, 299 AD2d 504, 505 [2d Dept 2002]; Wright v Esplanade Gardens, 150 AD2d 197, 198 [1st Dept 1989]*; *Pannone v Burke, 149 AD2d 673 [2d Dept 1989]*). However, there are a number of exceptions to this rule, including where the defendant had actual or constructive notice of the existence or creation of a dangerous condition by the independent contractor; where it assumes control over the details of the work, or some part of it; or where there was danger to others inherent in the work, and the defendant, as the hirer, should have reasonably anticipated, from the nature of the work, that it would be dangerous to others (*see Wright v Esplanade Gardens, 150 AD2d at 198; Kojic v City of New York, 76 AD2d 828, 830 [2d Dept 1980]*). "If an owner hires an independent contractor to excavate an area next to a thoroughfare," the "work obviously presents inherent dangers to those who must use the thoroughfare" (*Rosenberg v Equitable Life Assur. Socy. of U.S., 79 NY2d 663, 669 [1992]*; *see e.g. Wright v Tudor City Twelfth Unit, 276 NY 303, 307-308 [1938]* [defendant employer liable where danger to pedestrians inherent in work involving cleaning mats with soap and water on sidewalk]). Whether work is inherently dangerous usually is a question of fact for the jury (*Rosenberg v Equitable Life Assur. Socy. of U.S., 79 NY2d at 670 [risk must be apparent or contemplated by the employer]*; *Christie v Ranieri & Sons, 194 AD2d 453, 454 [1st Dept 1993]* [fact issue whether demolition of garage was inherently dangerous activity, or activity dangerous if special precautions not taken]). "Demolition of a

building in a crowded section of a city should be considered as inherently dangerous" (*Christie v Ranieri & Sons, 194 AD2d at 454* [quotation marks and citations omitted]).

There also is the nondelegable duty exception, which applies where the defendant is under a duty to keep the premises safe (*Backiel v Citibank, 299 AD2d at 505*). "An owner may be held vicariously liable for the negligence of its independent contractor because the owner in possession has retained control over the premises" (*id.* at 506). This nondelegable duty also is imposed where the owner is on actual or constructive notice of a hazard, particularly where the hazard threatens persons using the public highways as a result of the work performed on or to the benefit of the owner's property (*Wright v Tudor City Twelfth Unit, 276 NY at 307; Kojic v City of New York, 76 AD2d at 830*). "When one undertakes work in a public highway which, unless carefully done, will create conditions which are dangerous to members of the public using the highway, in the usual and ordinary manner, he is under a duty to use requisite care. That duty cannot be delegated" *(Wright v Tudor City Twelfth Unit, 276 NY at 307* [quotation marks and citation omitted).

Breeze, as the demolition subcontractor, and Lend Lease, as the construction manager, failed to establish, *prima facie*, that they did not have control over the work site and, more particularly, over the flagmen, or that they did not create or have actual or constructive notice of the alleged dangerous condition (*see Rocha v GRT Constr. of New York, 145 AD3d 926 [2d Dept 2016]).* With regard to Lend Lease, it failed to submit proof as to its responsibility with regard to safety at the job site, and particularly with regard to the flagmen, whether it directed how many flagmen were to be provided, how they performed their duties, or where they were to be posted (*cf. Marzec v City of New York, 136 AD3d 410 [1st Dept 2016]* [where contractor submitted testimony that it only had general supervisory power over flagmen provided by nonparty security company, there was no basis for

liability]). In his affidavit, Mr. Palmieri, Lend Lease's project site safety manager, never describes Lend Lease's responsibilities with regard to site safety or the flagmen, only Breeze's (*see* Palmieri aff, ¶¶ 3-5, 7). That failure of proof is sufficient to deny their motion without considering plaintiffs' proof. Even if Lend Lease's proof were enough to make a *prima facie* case, plaintiffs point to evidence that, as the construction manager, Lend Lease provided on-site supervision of the demolition pursuant to its contract with Madave (exhibit K to notice of motion, ¶ 2, and schedule A, Scope of Services, ¶ 12). It established safety policies requiring the use of flagmen that it discussed with its subcontractors (exhibit BB, deposition of Eliz Zamek at 17). It had a supervisor and a site safety person who were on site daily, and the site safety person shared safety responsibilities with Breeze and could intervene to stop unsafe conduct (exhibit CC, deposition of Benito Palmieri, at 8, 11, 25-26, 51). It conducted safety meetings regarding job site safety procedures (exhibit V, Carlson tr at 25). There also is some proof that it put a stop to the trucks moving before the flagmen got to them, thus raising an issue of fact as to its control and responsibility with regard to the flagmen's procedures (exhibit W, Noble tr at 20). This further raises an issue with respect to whether they had actual or constructive notice of the danger of these carting trucks moving into the job site and on the public street where pedestrians were present. Therefore, it failed to make a *prima facie* case that it had no control over the means and method of the work, and no notice of the danger, and triable issues of fact are raised as to whether it acted with reasonable care.

Breeze, as the company which directed the demolition and provided the flagmen who directed the trucks to wait, where to wait, and when to pull in, had control over this portion of the work site, and over the means and methods of operation of Cardella's trucks into and out of it. Thus,

it had a legal duty to pedestrians to act reasonably in controlling the movement of those trucks, and to make sure that pedestrians were not crossing the street near the area where the trucks were moving, which was in the immediate vicinity of the work site. Breeze's flagmen specifically testified that their responsibility was to protect the pedestrians from the dangers due to the trucks moving into and out of the area (exhibit V, Carlson tr at 35), and to direct the trucks, particularly since the "traffic was crazy over there" (exhibit W, Noble tr at 20). Breeze's foreman, Mr. Collins, attested that he was responsible to make sure that the walk-in walk-out procedure was followed by the trucks (exhibit U, Collins tr at 17). Mr. Carlson, one of the flagmen working at the time of the accident, testified that if a truck would not follow the procedure, Mr. Collins would tell him not to come back to the job site (exhibit V, Carlson tr at 33). This also demonstrates that Breeze had control over the methods and actual and constructive notice of the alleged dangerous condition of these trucks moving on this street within 10 feet of the job site.

In response to this motion, plaintiffs have presented sufficient proof to raise a triable issue as to whether Breeze failed to act reasonably to protect pedestrians such as plaintiff-decedent from trucks negotiating in that immediate area. Plaintiffs rely on testimony from various Cardella drivers to the effect that, while the flagmen would direct them when to proceed, they would just wave them to come down to the site and then move them, walking them in and out only directly in front of the site (*see* exhibits Y, Sejmenovic tr at 11-12; Z, Corrente tr at 10; S, Bende tr at 20-21). This creates an issue of fact as to whether Breeze exercised control and direction over Cardella's drivers, whether those drivers were following Breeze's direction when pulling off the curb, and whether this was reasonable under the circumstances (*see Montefiore v Ansonia Assoc., Inc., 11 Misc 3d 145[A], 2006 NY Slip Op 50843[U] [App Term, 1st Dept 2006]* [contractor's obligations to building owners, which

included supervision and control over the work and subcontractor's means and methods, and testimony contractor visited site and assessed work, creates triable issues]). There is a triable issue of fact as to whether reasonable precautions were taken so close to the entrance to the job site (*see Christie v Ranieri & Sons, 194 AD2d at 454-455*).

Summary judgment also is denied Madave, as the premises owner. It had a nondelegable duty to keep the premises safe (*Backiel v Citibank, 299 AD2d at 505*). It had, at the least, constructive notice of the dangerous condition presented to pedestrians in such close proximity to the job site from these carting trucks moving in and around this busy public street. This accident did not occur around the corner from Madave's premises, rather, it occurred approximately 10 feet from the truck entrance (*cf. Pannone v Burke, 149 AD2d at 674* [contractors had no duty to plaintiff seated in car several blocks from construction site who was killed by truck stolen from job site]). It is clearly within the zone of Madave's nondelegable duty to use reasonable care. Madave did not demonstrate that any of the other defendants had entirely displaced its own duty to maintain the premises safely (*see George v Marshalls of MA, Inc., 61 AD3d 925, 928 [2d Dept 2009]*). Moreover, the demolition of this building, in the congested area of midtown Manhattan, in close proximity to a supermarket where pedestrians frequent, and where trucks are moving in and around the site entrance, is a dangerous activity if special precautions were not taken, for which Madave, as the employer of independent contractors, may have vicarious liability (*see Christie v Ranieri & Sons, 194 AD2d at 454* [demolition of garage door in populated area of city near public roadway inherently dangerous]). As with the other Moving Defendants, Madave failed to satisfy its *prima facie* burden of eliminating all material issues of fact, and summary judgment dismissing the complaint as against it is denied.

Further, while Moving Defendants contend that they had no legal duty to protect plaintiff-decedent from jaywalking across the street, "the fact that a pedestrian is struck by a vehicle while attempting to cross in the middle of the block will not, of itself, constitute contributory negligence so as to bar his action for personal injuries" (*Lo Giudice v Riedel, 32 AD2d 950, 950 [2d Dept 1969]* [citations omitted]).

The Moving Defendants' citation to *Espinal v Melville Snow Contrs. (98 NY2d 136 [2002])* is inapposite. Contrary to these defendants' argument, plaintiffs are not relying on that case and are not arguing that defendants launched a force of harm at plaintiff-decedent.

The branch of the Moving Defendant's motion for summary judgment on their cross claims for contractual and common-law indemnification also is denied. Summary judgment on a contractual indemnification claim is premature where the liability of the parties has not been resolved (*see McAllister v Construction Consultants L.I., Inc., 83 AD3d 1013, 1014 [2d Dept 2011]; see also Erickson v Cross Ready Mix, Inc., 75 AD3d 519, 524 [2d Dept 2010]*; *George v Marshalls of MA, Inc., 61 AD3d at 930; Farduchi v United Artists Theatre Circuit, Inc., 23 AD3d 613, 613 [2d Dept 2005]; see also King v City Bay Plaza, LLC, 118 AD3d 476, 477 [1st Dept 2014]* [summary judgment on contractual indemnification cross claim denied where fact issues as to which defendant was responsible for area of accident]). "[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp., 58 AD3d 660, 662 [2d Dept 2009]*); *see* General Obligations Law § 5-322.1; *McAllister v Construction Consultants L.I., Inc., 83 AD3d at 1014; Reynolds v County of Westchester, 270 AD2d 473, 474 [2d Dept 2000]*). It also is denied where the contractor or owner supervised or controlled the work site (*see Amato v*

Rock-McGraw, Inc., 297 AD2d 217, 219 [1st Dept 2002]).

As determined above, it cannot be said as a matter of law that Breeze, Lend Lease, and Madave were wholly free from negligence under the circumstances. Thus, since there are issues of fact as to whose negligence, if any, caused plaintiff-decedent's accident, it would be premature to award any of the Moving Defendants summary judgment on that cross claim (*see McAllister v Constr. Consultants L.I., Inc., 83 AD3d at 1014; George v Marshalls of MA, Inc., 61 AD3d at 930; Kelly v City of New York, 32 AD3d 901, 902 [2d Dept 2006]*).

Similarly, summary judgment is denied as to the Moving Defendants' cross claims for common-law indemnification. To establish a claim for common-law indemnification, the party must demonstrate "not only that it was not negligent, but also that the proposed indemnitor's actual negligence contributed to the accident, or, in the absence of any negligence, that the indemnitor had the authority to direct, supervise, and control the work giving rise to the injury" (*Mohan v Atlantic Ct., LLC, 134 AD3d 1075, 1079 [2d Dept 2015]*). "The principle of common-law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party" *(Curreri v Heritage Prop. Inv. Trust, Inc., 48 AD3d 505, 507 [2d Dept 2008]*). As with contractual indemnification, where triable issues of fact exist as to the alleged negligence of the various parties, conditional summary judgment for common-law indemnification also would be premature (*Farduchi v United Artists Theater Circuit, Inc., 23 AD3d at 613; see King v City Bay Plaza, LLC, 118 AD3d at 477; Chevalier v 368 E. 148th St. Assoc., LLC, 80 AD3d 411, 414 [1st Dept 2011]*).

Here, in order for these Moving Defendants to be entitled to summary judgment relief on these cross claims, they are required to demonstrate that they were not negligent, and the proposed

indemnitors, each other defendant, was responsible for the negligence that contributed to the accident (*see George v Marshalls of MA, Inc., 61 AD3d at 929-930; Benedetto v Carrera Realty Corp., 32 AD3d 874, 875-876 [2d Dept 2006]*). Again, the Moving Defendants failed to satisfy their *prima facie* burden establishing that they were not negligent, and that plaintiff-decedent's accident was solely attributable to the other defendants, and triable issues have been raised with respect thereto. Accordingly, summary judgment on this cross claim is premature.

Finally, the Moving Defendants seek a "conditional finding" on their cross claim against Cardella for breach of its obligation to procure liability insurance naming them as additional insureds under its insurance policy (affirmation in reply of Douglas R. Rosenzweig, dated Mar 18, 2016, ¶ 36). To establish a claim for failure to procure liability insurance, they must demonstrate that the contract required that insurance be procured, and that the provision was not complied with (*see DiBuono v Abbey, LLC, 83 AD3d 650, 652 [2d Dept 2011]*). Here, the Moving Defendants submitted a copy of Breeze's agreement with Cardella, which stated, among other things, that Cardella was to obtain a commercial general liability policy naming as additional insureds Breeze, Madave, and "any other entity required under [Breeze's] contract with Owner [Madave]/Construction Manager [Lend Lease] for the Job" (exhibit M to notice of motion, Blanket Purchase Order § 12 (b) at 3). They, however, failed to submit any tender letter from Cardella's insurer indicating that these Moving Defendants were not named as additional insureds on any policies issued to Cardella. Thus, they failed to meet their *prima facie* burden to seek relief on this claim, and therefore, it is denied (*see DiBuono v Abbey, LLC, 83 AD3d at 652*).

Even if they met their *prima facie* burden, because the Moving Defendants procured their own liability insurance, the damages for Cardella's breach of its obligation to name the Moving

Defendants as additional insureds are limited to their out-of-pocket costs in obtaining and maintaining their own separate insurance, including the costs of premiums and any additional costs they incurred (i.e., deductibles, co-payments, increased future premiums) (*see Inchaustegui v 666 5th Ave. Ltd. Partnership, 96 NY2d 111, 114 [2001]; Netjets, Inc. v Signature Flight Support, Inc., 43 AD3d 1016, 1018 [2d Dept 2007]; Amato v Rock-McGraw, Inc., 297 AD2d at 219*). The Moving Defendants have failed to present any evidence as to these costs.

Accordingly, it is

ORDERED that the branch of Moving Defendants' motion for summary judgment dismissing the complaint and the cross claims is denied; and it is further

ORDERED that the branch of Moving Defendants motion for summary judgment on their cross claims for common-law and contractual indemnification and for failure to procure liability insurance also is denied.

Dated: February 2nd, 2017

HON. LETICIA M. RAMIREZ, J.S.C.

HON. LETICIA RAMIREZ