Dasilva v El-Ad 250 W. LLC
2021 NY Slip Op 32760(U)
December 23, 2021
Supreme Court, New York County
Docket Number: Index No. 158079/2013
Judge: Richard G. Latin
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD LATIN** **PART** **46V**

Justice

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JOAQUIM DASILVA, GRACIENE DASILVA,

Plaintiff,

- v -

EL-AD 250 WEST LLC,NEW LINE STRUCTURES INC.,

Defendant.

----------X

INDEX NO. 158079/2013

MOTION DATE N/A, N/A, N/A

MOTION SEQ. NO. 001 003 004

DECISION + ORDER ON MOTION

NEW LINE STRUCTURES INC.

Plaintiff,

-against-

A&V INTERIORS, INC.

Defendant.

----------X

Third-Party
Index No. 595077/2014

EL-AD 250 WEST LLC

Plaintiff,

-against-

A & V INTERIORS, INC

Defendant.

----------X

Second Third-Party
Index No. 595128/2014

NEW LINE STRUCTURES INC.

Plaintiff,

-against-

EUROPA CONSTRUCTION CORP.

Defendant.

----------X

Third Third-Party
Index No. 595195/2015

EL-AD 250 WEST LLC

Fourth Third-Party
Index No. 595223/2015

Plaintiff,

-against-

EUROPA CONSTRUCTION CORP.

Defendant.
----------X

A&V INTERIORS, INC. Fifth Third-Party
Index No. 596018/2019

Plaintiff,

-against-

EUROPA CONSTRUCTION CORP.

Defendant.
----------X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 183, 188, 194, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 286, 288, 289, 290, 294, 295

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 287, 291, 292, 293, 296, 297

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that the motion seqs. #1,3, and 4 are determined as follows:

In this action, plaintiffs Joaquim DaSilva (plaintiff) and Graciene DaSilva allege that on September 8, 2012, plaintiff, while employed by Third Third-Party Defendant/Fourth Third-Party Defendant/Fifth Third-Party Defendant Europa Construction Corp. (Europa), fell on the bed of a truck located at the ground level of a multi-story building construction project at 250 West Street

in New York, New York City. Defendant/Second Third-Party Plaintiff/ Fourth Third-Party Plaintiff/ El-Ad 250 West LLC (El-Ad) was the fee owner of the premises and defendant/third-party plaintiff/third third-party plaintiff New Line Structures (New Line) was the construction manager. New Line retained and entered into an agreement with third-party defendant/second third-party defendant/fifth third-party plaintiff A & V Interiors Inc. (A & V) as the carpentry and drywall contractor who subcontracted a portion of its work to Europa.

Motion sequence numbers 001, 003, and 004 have been consolidated for disposition.

In motion sequence 001, Europa moves to dismiss A & V's third-party complaint pursuant to CPLR 3211 (a); 3211 (a) (7); and 3211 (c) (2).

In motion sequence 003, El-Ad and New Line move, pursuant to CPLR 3212, for an order granting summary judgment and dismissing plaintiffs' complaint. El-Ad and New Line also move for summary judgment on their claims for indemnification against A & V in the third-party and second third-party actions and granting summary judgment against Europa for indemnification in the third third-party and fourth third-party actions.

In motion sequence 004, A & V, moves, pursuant to CPLR 3212, for an order granting its motion for summary judgment against Europa on A & V's claim for contractual indemnity and dismissing as moot the third-party complaint by New Line and the second third-party complaint by El-Ad.

FACTUAL ALLEGATIONS

Plaintiff's deposition

At a deposition which took place on March 13, 2017, plaintiff testified that he was injured on September 8, 2012, at 250 West Street in Manhattan while working for Europa. On the date of his accident, plaintiff was working with a co-worker and carrying cement bags from the basement

of the premises to the seventh floor. Plaintiff's boss, whose name was "Nito," instructed plaintiff that a delivery truck had arrived for Europa. The truck was delivering 25- pound sand and cement mix bags which were located on wooden pallets and were to be removed.

When the flatbed truck arrived, plaintiff recalls that it pulled inside of the building to meet a concrete platform ramp. Plaintiff recalls that he and Nito placed three pieces of wood on the ground on which the truck drove to elevate the truck about 15 inches to meet the platform. Plaintiff believes that the truck did not belong to Europa. Plaintiff testified that the truck was on a slant with the back of the truck raising upwards.

Plaintiff's accident took place while he and Nito were on the back of the truck and he was pushing a pallet with a jack. The cement bags on the pallets were piled about five feet high with plastic holding them in place. Plaintiff had been working on the truck for about ninety minutes prior to his accident. Plaintiff maintains that he was pushing the pallet when stones and bricks began to fall.

Plaintiff specifically testified:

> "Q. Where were you pushing the pallet to?
> A. I was pushing the pallet to get inside the building. While I was pushing it, we were almost at the end of the unloading. That's when the sand with bricks started to fall while I was pushing. I tripped, and when I tripped while I pushed, I fell on top of the pallet, yes."

NYSCEF DOC. NO. 246, at 66.

Plaintiff further testified:

> "Q. What did you trip on?
> A. I tripped on the pallet. When I tripped, there was cement on the floor - - I don't know where it came from – mixed with stones, and I – my two feet slipped, and I fell on top."

Id. at 73.

Plaintiff testified:

"Q. Now, you also mentioned that there was cement on the floor that was mixed with stones, is that correct?
A. Correct.
Q. Was that on the floor of the truck?
A. Yes.
Q. Did you either slip or trip on the cement or the mixed stones that were on the floor?
MR. CALLAHAN: Objection.
A. I tripped and then I got unbalanced and then I slipped because I was doing strength.
MR. MORRIS: Strength?
THE INTERPRETER: YES."

Id. at 73-74.

At plaintiff's second deposition date which took place on March 29, 2017, plaintiff testified:

"Q. When your right foot stepped on the stone, did your left foot then contact the pallet?
A. Yes.
Q. Did your right foot ever contact the pallet?
A. No.
Q. And were there any other stones in the area?
A. No.
Q. So it was just one stone on the flatbed truck?
MR. FORD: Objection to form. You can answer.
A. Yes."

NYSCEF DOC. NO. 248, at 240.

Plaintiff did not know where the subject stone came from. Plaintiff later testified that despite his earlier testimony, there were no bricks, nothing fell from the pallet during the unloading process, and that he did not slip in cement mixed with stones.

Plaintiff recalls that prior to removing the pallet, he had told Nito that it was too heavy to move and believed that more workers were needed to assist with unloading the truck. He also asked Nito if there was additional equipment which they could utilize. Plaintiff maintains that he did not have any contact with anyone at A & V, nor did A & V direct his work or provide equipment. All of his direction came from Nito or another unnamed worker.

Alcides Rodriguez's deposition

Alcides Rodriguez (Rodriguez) testified that he works as the vice president of Europa. In September of 2011, Europa entered into a contract with A & V for leveling and concrete work at a construction site located at 250 West Street. El-Ad was the owner of the project. Rodriguez recalls that Europa purchased a certificate of insurance and sent it to A & V.

Europa's work began at the subject premises on September of 2011. The highest ranked employee of Europa at the time of plaintiff's accident was Edgar Inga (Inga) who directed the workers and oversaw Europa's work. Plaintiff reported to, and was supervised by Inga, and a foreman from Europa would tell plaintiff how to perform his job.

Rodriguez maintains that he would walk the site and that in September of 2012, Europa had four or five employees at the site. Europa owned flatbed trucks and would bring materials to the site on such trucks. He recalls that no one complained to him about difficulties loading or unloading materials. Rodriguez did not know if any temporary wooden planks were utilized on the ground to drive the truck on in order to raise the vehicle to the loading dock.

Rodriguez learned of plaintiff's accident when he was notified by an employee that plaintiff was carrying a bag and tripped and fell. This description of what occurred was confirmed to Rodriguez by Inga who told him that plaintiff tripped on the loading dock. Rodriguez did not recall if Inga told him the exact location of the accident. He testified that no one from A & V directed the means and methods by which Europa performed its work.

Edgar Inga's deposition

Inga testified that on September 8, 2012, he was working for Europa as a foreman at the project at 250 West Street at which Europa was performing concrete work. He was taking directions from Rodriguez. Inga recalls that at the site, there was a loading dock with a platform

and a deck to match the truck level. If the truck was not level with the loading dock, the workers would utilize pieces of wood to raise the height of the truck by several inches.

When a truck pulled up to the loading dock, workers utilized hand trucks to remove the pallets. Inga maintains that plaintiff as well as a worker from Europa named "Nito" and three individuals were working on the truck at the time of plaintiff's accident. Inga was on the truck at the time of the accident, but he did not observe the moment when plaintiff got injured. He recalls that Nito and plaintiff told him that plaintiff hurt himself when he had pushed the hand truck with cement. He did not recall hearing about debris on the truck which caused plaintiff to slip and did not observe any debris or problems with the condition of the truck.

Inga recalls that each time a pallet was unloaded, he would check and sweep the truck to ensure that small pieces of cement did not fall to the surface of the truck or to the ground as the hand truck could get caught on particles, debris, or rocks. He maintains that on the date of plaintiff's accident, the hand truck did not get caught on anything. The task of cleaning the bed of the truck belonged to Europa.

Inga maintains that New Line, the project manager, did not tell the workers how to perform the work or unload the truck.

James Carnavalla's deposition

James Carnavalla (Carnavalla), owner of A & V, testified that A & V was conducting work at 250 West Street in September of 2012. A & V was contracted to perform leveling work at the premises and was adding concrete to the existing floors. A & V hired Europa as a subcontractor for the concrete floor work. Europa utilized cement materials for its work which were delivered by a truck.

Carnavalla visited the site several days a week and recalls that A & V had about 20 to 30 workers reporting daily to the site. Carnavalla's employees did not make any complaints about difficulties unloading trucks at the loading dock. If he observed A & V workers performing work in an unsafe manner, he would alert the foreman. He however, was not checking if Europa workers performed work in an unsafe manner and did not have any recollection of stopping Europa's work. Europa was in charge of cleaning all of its dirt, debris, or trash.

Carnavalla maintains that A & V did not provide any tools, equipment, materials, or supervision. He also maintains that he did not explain the scope of work to Europa. He believes that Rodriguez learned of what needed to be completed at the project during a project meeting with New Line.

Michael Castaldo's deposition

Michael Castaldo (Castaldo) testified that he works for New Line, a construction management company, as a general superintendent. New Line was the construction manager at 250 West Street and was hired by El-Ad, who Castaldo believes was the owner and developer. New Line hired subcontractors at the site and was responsible for coordinating the trades.

Castaldo was at 250 West Street ten or twelve hours a week and would walk the site in the mornings. If he observed an unsafe condition, he had the authority to stop work until it was resolved. A & V was hired for carpentry, drywall, framing, and layout work by El-Ad with the involvement of New Line. New Line had one labor foreman and the other laborers worked through subcontractors. The trades themselves provided their own laborers and were responsible for housekeeping and their own safety.

There was a loading dock area at the premises at which trucks would back up to a platform. There were instances where the trade would have to build a ramp or contraption to level the back of the truck with the platform.

Castaldo believes that Europa was a subcontractor for A & V and performed concrete work. He learned of plaintiff's accident from a site safety manager who was present at the site. He spoke with Al Rodriguez, the owner of Europa, and was told that plaintiff twisted his back picking up a bag.

Castaldo did not know if New Line had a site safety plan for 250 West Street. He maintains that no one was stationed in the loading dock area to observe the loading or unloading of the trucks. Castaldo was unaware of protocol for loading or unloading the trucks for deliveries.

DISCUSSION

MOTION SEQUENCE NUMBER 003

Labor Law § 200

El-Ad and New Line contend summary judgement must be granted in their favor dismissing plaintiff's complaint. "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 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] (citations omitted); *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

The moving defendants contend that plaintiff's allegations of common law negligence and a violation of Labor Law § 200 must be dismissed.

Labor Law § 200 (1) provides, in pertinent part, as follows:

> "[a]ll 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 ."

Liability pursuant to Labor Law § 200 may be based either upon the manner in which the work is performed or actual or constructive notice of a dangerous condition inherent in the premises. In order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's method or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*see Rizzuto v L.A. Wenger Contr. Co.,* 91 NY2d 343, 352 [1998]; *see also Hughes v Tishman Constr. Corp*., 40 AD3d 305, 311 [1st Dept 2007] (liability under a means and methods analysis "requires actual supervisory control or input into how the work is performed")). When the accident arises from a dangerous condition on the property, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident (*see Murphy v Columbia Univ.,* 4 AD3d 200, 202 [1st Dept 2004]).

El-Ad and New Line argue that there is no evidence to establish that plaintiff's work at the specific time of the accident was directed or controlled by either defendant. They contend that Europa solely and exclusively engaged in, directed, and controlled the unloading of their trucks in the loading dock area and no personnel from any other entity directed the Europa employees how to perform this task. El-Ad and New Line further argue that there is no testimony that either defendant had created the condition on which plaintiff tripped, or had actual or constructive notice

of the condition. They argue that that to the extent that any wood pieces were placed underneath the truck for leveling purposes, such pieces were placed by employees of Europa and no other entity directed them to do so.

In opposition, plaintiff testified that he lost his footing when he stepped on a stone and slipped, which in turn caused him to catch his foot on the pallet, trip, and fall forward. Plaintiff argues that it is unknown how long the stone existed on the truck and that it remains unclear from where it originated.

Also opposing the motion, Europa argues that despite the site having a loading dock which was higher than the level of the delivery trucks, El-Ad and New Line did nothing to correct the condition. Europa also contends that El-Ad and New Line fail to demonstrate that they did not have notice of the subject condition which caused plaintiff's fall. Europa contends that defendants' assertion that the origin of the stone was a result of spilling from the cement bags has no basis in the record. Europa argues that due to El-Ad and New Line's failure to identify any source of the stone, it may reasonably be inferred that it was present on the truck bed for the entire ninety-minute duration while plaintiff was working.

First, with regards to whether El-Ad or New Line supervised the manner of the injury producing work, plaintiff testified that his direction came from Europa and there is no indication that anyone other than Europa supervised or directed him during the offloading process. Furthermore, according to plaintiff's testimony, his injury resulted from tripping and falling on an object located on the truck and it is unclear to the court, based upon a review of plaintiff's testimony, how the wooden beams placed under the truck impacted, contributed to, or corelated with his accident and the causation of his injuries. Furthermore, plaintiff testified that he and Nito placed the three pieces of wood on which the truck drove over to elevate the truck and there is no

indication that he was instructed or supervised to perform such work by either of the moving defendants.

With regards to El-Ad and New Line's argument that they also did not have notice of the subject condition, plaintiffs fail to demonstrate that the object on which plaintiff tripped was an inherently dangerous condition at the premises and was not instead produced as a result of the manner of the work (*see Cappabianca v Skanska USA Bldg. Inc.,* 99 AD3d 139, 145 [1st Dept 2012] (holding "the water would not have been present but for the manner and means of plaintiff's injury-producing work"); *McCormick v 257 W. Genesee, LLC*, 78 AD3d 1581, 1582 [4th Dept 2010] (holding that a protruding pin stored at a site which caused plaintiff to fall was not a defect in the property, but was created by the manner in which plaintiff performed the work); *Lombardi v Stout*, 178 AD2d 208, 211 [1st Dept 1991] (holding that accident was caused not due to an inherently dangerous condition, but a defect in the tools and method or negligent acts of the subcontractor)). According to the testimony, the subject stone appeared while plaintiff was performing his work and in the process of pushing the pallet.

In any event, the moving defendants demonstrate that they did not have actual notice of or create the subject condition. As to the argument regarding constructive notice, generally, constructive notice is found when the alleged dangerous condition is visible, apparent, and exists on defendant's premises for a sufficient period of time to allow the defendant to discover and remedy it (*see Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]). However, constructive notice can also be established by evidence that a recurring dangerous condition existed in the area of the accident that was routinely left unaddressed by the defendant (*see Uhlich v Canada Dry Bottling Co. of N.Y.*, 305 AD2d 107, 107 [1st Dept 2003]).

Here, there is no evidence in the record establishing how long the subject condition existed prior to plaintiff's accident, nor is there any evidence of any complaints made to the moving defendants regarding the alleged stone. The stone was not located on a fixed location at the construction site itself, but was located on a delivery truck from an outside area, which was not in the control of the moving defendants. Plaintiff testified that he did not previously observe the stone on the truck, that he did not see it prior to the pallet being lifted, and when asked if the stone was underneath the pallet which was removed he replied "supposedly" (NYSCEF DOC. NO. 248, at 245). Furthermore, Inga testified that Europa was sweeping between every pallet and there is no indication that Inga or any other workers on the truck observed the stone.

Therefore, El-Ad and New Line have demonstrated that they did not supervise or instruct the injury producing work. As to their argument regarding notice, there is also no indication that the moving defendants had actual or constructive notice of the subject condition. As they have met their burden, the part of El-Ad and New Line's motion seeking summary judgment dismissing the claims for a violation of Labor Law § 200 and common law negligence must be granted.

Labor Law § 241 (6)

El-Ad and New Line also contend that plaintiffs' Labor Law § 241 (6) claim must be dismissed.

Labor Law § 241 (6) provides, in pertinent part:

> "[a]ll contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection for workers and to comply with specific safety rules which have been set forth by the Commissioner of the Department of Labor (*see St. Louis v Town of N. Elba*, 16 NY3d 411, 413 [2011]). In order to demonstrate liability pursuant to Labor Law § 241 (6), it must be shown that the defendant violated a specific, applicable regulation of the Industrial Code, rather than a provision containing only generalized requirements (*see Nostrom v A.W. Chesterton Co.,* 15 NY3d 502, 507 [2010]).

Plaintiff's complaint alleges violations of Industrial Code sections 23-1.5, 23-1.7, 23-2.1, 23-5, 23-6, 23-7, 23-8, 23-9, 23-10, and Section 1926 of O.S.H.A. However, plaintiff only opposes the dismissal of sections 23-1.7 (d) and (e) (2). Therefore, to the extent plaintiff alleges violations of sections 23-1.5, 23-2.1, 23-5, 23-6, 23-7, 23-8, 23-9, 23-10, such sections have been deemed abandoned and defendants are entitled to summary judgment dismissing those parts of plaintiffs' Labor Law § 241 (6) claim predicated on those abandoned and conceded provisions *(see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] (holding that where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned)).

Also, to the extent that plaintiff alleges violations of O.S.H.A, O.S.H.A. claims cannot form the basis of a Labor Law § 241 (6) claim (*see Schiulaz v Arnell Constr. Corp*., 261 AD2d 247, 248 [1st Dept 1999].

Industrial Code § 23-1.7

El-Ad and New Line contend that plaintiffs' alleged violations of Industrial Code section 23-1.7 must be dismissed.

Industrial Code section 23-1.7 (d) and (e) provides:

> "(d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.
>
> (e) Tripping and other hazards. (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered. (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed."

Section 23-1.7 (d) (e) (1) and (2) have been held to be sufficiently specific to sustain a cause of action under Labor Law § 241 (6) (*see Velasquez v 795 Columbus LLC*, 103 AD3d 541, 541 [1st Dept 2013] (holding that section 23-1.7 (d) is specific to sustain a cause of action under Labor Law § 241 [6]); *Picchione v Sweet Constr. Corp*., 60 AD3d 510, 512 [1st Dept 2009] (holding Industrial Code § 23-1.7 [e] [1] is sufficiently specific to impose liability under Labor Law § 241 [6]); *Singh v Young Manor, Inc*., 23 AD3d 249, 249 [1st Dept 2005] (Industrial Code § 23-1.7 [e] [2] is specific to support plaintiff's Labor Law § 241 [6] claim).

El-Ad and New Line argue that the cement or sand mixed with stones on which plaintiff allegedly fell was a byproduct of the work underway at the premises at the time of the accident, and was not a foreign substance. They contend that section 23-1.7 (d) is further inapplicable because it applies to areas such as a floor, passageway, walkway, scaffold, platform or other elevated working surface, and not on the bed of the truck where plaintiff was working. El-Ad and New Line further argue that regarding section 23-1.7 (e), plaintiff did not fall in a "passageway" and that even if the truck bed is considered a "working surface" the object on which he fell was integral to the work being performed.

In opposition, plaintiffs contend that triable issues of fact exist as to the alleged violations of the Labor Law. Plaintiffs argue that section 23-1.7 (d) was violated because the accident took place on a working surface and that the stone on which plaintiff tripped either fell from the bags on the truck or was related to cement work. Plaintiff contends that according to the testimony, a foreign substance caused him to slip. Plaintiffs also contends that there are triable issues of fact as to whether defendants violated section 23-1.7 (e) (2) as there is no testimony that the stone was an integral part of plaintiff's work or if it was from the materials in the process of being unloaded.

Here, questions of fact exist as to where the subject stone originated from on which plaintiff allegedly tripped and whether it was or was not consistent with the work being performed or was from an outside source. It is also unclear whether the area on which plaintiff was working on the back of the truck could be considered to be a work platform as discussed by the Industrial Code. Therefore, the part of defendants' motion seeking to dismiss the claims of violations of Industrial Code sections 23-1.7 (d) (e) (1) and (2) must be denied.

Contractual Indemnification

El-Ad and New Line argue that they are entitled to summary judgment as to their claims for contractual indemnification as against A & V.

El-Ad and New Line contend that New Line, as agent for El-Ad as "Owner" and A & V, the "Trade Contractor," entered into a "Trade Contractor Agreement" which included the following clause regarding indemnification:

> "19.1 To the fullest extent permitted by applicable law, Trade Contractor shall indemnify, defend (if requested by Owner and/or Construction Manager), and hold harmless Owner and Construction Manager and each of their parent companies, corporations, subsidiaries and affiliated

> companies, including joint ventures and partnerships, and their respective agents, consultants, principals, members, partners, directors, officers and employees from and against all claims or causes of action, lawsuits, damages, losses, judgments, liens and expenses (including, but not limited to, reasonable attorney's fees and legal costs and expenses), for personal or bodily injury, sickness, disease or death or injury to or destruction of tangible property including loss of use arising from, or in connection with, the performance of the services by Trade Contractor under this Agreement irrespective of the cause and/or type of such injury, cost, damage or loss. This indemnification shall survive completion of the Project and/or earlier termination of this Agreement. With regard to any and all claims or lawsuits against Owner and/or Construction Manager or their respective parents, subsidiaries or affiliated companies by any employee or independent contractor of Trade Contractor or employee of Trade Contractor's subcontractor, consultant or vendor or brought by anyone for whose acts either Trade Contractor or its subcontractors, consultants or vendors may be liable, the indemnification obligation under this Agreement shall not be limited in any way by the amount or type of damages, compensation or benefits payable by or for Trade Contractor or its subcontractors, consultants or vendors under workers' compensation acts, disability benefit acts or other employee benefit acts. Owner and/or Construction Manager reserve the right to have separate legal counsel (chosen by Owner and/or Construction Manager) retained for their defense, which costs shall be borne by Trade Contractor under its defense obligation under this Section."

NYSCEF DOC. NO. 258.

"A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Kennelty v Darlind Const.*, 260 AD2d 443, 446 [2d Dept 1999] (quotation marks and citations omitted)). To establish entitlement to full contractual indemnification, "the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgmt., Inc*., 259 AD2d 60, 65 [1st Dept 1999]. "[T]he extent of the indemnification will depend on the extent to which defendant's negligence is found to have proximately caused the accident" (*Ramirez v Almah, LLC*, 169 AD3d 508, 509 [1st

Dept 2019]). Furthermore, while an indemnification clause which insulates an indemnitee from liability for its own negligence is void pursuant to section 5-322.1 of the General Obligations Law, the indemnification clause is not void where the indemnitee is found to have been free of negligence (*see Crouse v Hellman Constr. Co., Inc.,* 38 AD3d 477, 478 [1st Dept 2007].

El-Ad and New Line contend that the only evidence of any negligence is attributable entirely to Europa, A & V's subcontractor, which performed all work. They argue that Europa directed, controlled, supervised, and performed the work. El-Ad and New Line contend that there are no facts or evidence which establish any negligence on their behalf, and that neither El-Ad nor New Line directed or controlled any portion of plaintiff's work, created or caused any defective or dangerous conditions, or had actual or constructive notice of any condition which caused plaintiff's injury.

Here, because El-Ad and New Line have met their burden and demonstrated that they were not negligent and because section 19.1 of the "Trade Contractor Agreement" specifies the indemnification responsibilities of A & V and requires that they provide indemnification for damages and lawsuits arising from, or in connection with, the performance of its services, the part of El-Ad and New Line's motion seeking summary judgment as to contractual indemnification must be granted.

El-Ad and New Line also argue that they are entitled to summary judgment as to their claims for contractual indemnification as against Europa. El-Ad and New Line contend that they are third-party beneficiaries of the contract between A & V and Europa (*see* NYSCEF DOC. NO. 252). The court addresses this indemnification clause below in its review of motion sequence 001 and 004.

MOTION SEQUENCE NUMBERS 001 and 004

In motion sequence 001, Europa contends that A & V's cause of action for contractual indemnification must be dismissed on the grounds that the indemnification clause it entered into with Europa is void pursuant to the General Obligations Law. A & V opposes Europa's motion for contractual indemnification. In motion sequence 004, A & V contends that summary judgment for contractual indemnification against Europa should be granted in its favor because A & V was not negligent and because plaintiff worked exclusively under Europa's direction and control.

Section 2.3 (b) of the "Agreement Between Contractor and Subcontractor" dated September 25, 2011 which was entered into between A & V and Europa provides:

> "(b) Contractor hereby agrees to indemnify and hold Owner, the Fee Owner, the agents and employees of each of the foregoing and any and all mortgagees and ground lessors, if any, harmless from and against any and all claims, damages, liabilities, costs, expenses and fees (including reasonable attorneys' fees and disbursements) by reason of any liability arising out of or in consequence of the performance of this Contract (and or imposed by law upon any and all of them) because of bodily injuries, including death at any time resulting there from, sustained by any person or person and damage to property, whether such injuries to person or damages to property are due or claimed to be due to any negligence of Contractor or Owner or for any reason."

NYSCEF DOC. NO. 252.

Europa argues that the indemnification clause with A & V purports to require Europa to indemnify A & V for any claims related to bodily injury or property damage even if such claims arise out of A &V 's own negligence. Europa argues that in addition, the indemnification clause does not contain the language "to the fullest extent permitted by law" which allows for indemnity under an otherwise void indemnification claims. Europa contends that A & V has failed to meet its prima facie burden to demonstrate that it was completely free of negligence, as A & V failed to address the absence of a lift or other means to access the raised loading dock, as there was a differential between the truck and the platform. Finally, Europa contends that it cannot be held

negligent as Europa's foreman, Inga testified that Europa swept the bed of the truck after each pallet was unloaded.

In opposition and support of its own motion for summary judgment, A & V argues that while it entered into the "Agreement Between Contractor and Subcontractor," the agreement does not bar its claim for contractual indemnification because A & V was not negligent. A & V argues that it is clear from the four corners of the contract that the term "owner" was a repeated reference to A & V while the term "contractor" was a repeated reference to Europa. They argue that although Europa and A & V are both referred to as a "contractor" near the top half of the first page of the agreement does not mandate any different reading.

In opposition to A & V's motion, plaintiff contends that there are triable issues of fact as to whether the moving defendants were negligent or violated Labor Law § 200, and that plaintiff does not know where the rock originated which caused his fall.

To the extent that Europa contends that the General Obligations Law would render the indemnification provision unenforceable, pursuant to section 5-322.1 of the General Obligations Law, where an indemnitee is found to not be negligent, an indemnification provision which is missing "saving language" is still enforceable (*see Alesius v Good Samaritan Hosp. Med. & Dialysis Ctr.*, 23 AD3d 508, 508 [2d Dept 2005] (holding that section 5-322.1 of the General Obligations Law will not prevent enforcement of an indemnification provision "where the party to be indemnified is found to be free of any negligence")).

Here, plaintiffs have not alleged in their complaint that A & V was negligent pursuant to the common law or violated Labor Law § 200. Instead, they only argue that El-Ad and New Line were negligent.

Furthermore, Europa fails to demonstrate that A & V was negligent in causing plaintiff's accident, that it supervised the injury producing work, or that it had notice of the subject condition which caused his injury. There is no indication from a review of plaintiff's testimony or any expert testimony that suggests that plaintiff fell due to any elevation or slant of the truck. Carnavalla testified that A & V did not provide any supervision over the injury producing work. He specifically testified that A & V did not provide any tools, equipment, materials, or supervision to Europa; that he did not explain the scope of work to Europa; and that he believes that Rodriguez learned what needed to be done at the project from New Line.

Also, plaintiff testified that he was supervised by Europa and there was no indication that A & V supervised plaintiff's work. Finally, Europa fails to demonstrate that A & V had any notice of the subject condition which caused plaintiff to fall, specifically the stone or sand on which he slipped.

Under the facts of this case, even though the indemnification clause is missing "saving language," it does not run afoul of section 5-322.1 of the General Obligations Law, because Europa fails to demonstrate that A & V was negligent. Therefore, A & V's motion for summary judgment for contractual indemnification should be granted, and the part of Europa's motion seeking to dismiss A & V's claims for contractual indemnification must be denied.

Europa also contends that A & V's claims against it for contribution and common law indemnification pursuant to section 11 of the Workers Compensation Law must be dismissed.

"An employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004]. "[T]he moving party bears the burden of establishing an absence of grave injury;

it is not the burden of the party moved against to show the presence of a grave injury" (*Way v Grantling*, 289 AD2d 790, 793 [3d Dept 2001]).

Section 11 of the Workers Compensation Law specifically provides in part:

> "[a]n employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

Europa contends that plaintiff alleges that he suffered a pneumothorax collapsed lung, L4-5 herniations requiring surgery, and various bulges in the cervical and thoracic spine allegedly requiring future surgery.

As Europa has demonstrated that plaintiff has not suffered a grave injury pursuant to the statute due to his alleged injuries and because A & V fails to demonstrate that it would otherwise be entitled to common law indemnification or contribution, the part of Europa's motion seeking to dismiss such claims must be granted.

Europa also contends that A & V's claim for breach of contract for failure to procure insurance in favor of A & V by failing to name A & V as an additional insured must be dismissed. Europa argues that the principle of Europa, Rodrigues, testified that it complied with its obligation to procure insurance in favor of A & V, that it produced a discovery response disclosing a certified insurance policy from First Mercury Insurance Company which contains an "Additional Insured" endorsement, and that page CG 20 37 07 04 of the policy demonstrates that Europa purchased commercial general liability insurance. Europa also argues that it purchased an excess policy

through American Empire Surplus Lines Insurance Company. Europa alternatively argues that the breach of contract claim is time barred by the statute of limitations.

In opposition, El-Ad and New Line contend that in a separate action captioned *First Mercury Insurance Company v State Farm Mutual Automobile Insurance Company, Europa Construction Company et. al.* (Sup. Ct. NY County, Index No. 650065/2018) the primary liability insurance carrier for Europa, First Mercury Insurance Company, is seeking to disclaim any and all coverages for Europa. El-Ad and New Line argue that a disclaimer on the primary policy could lead to a disclaimer of coverage of Europa's excess policy. El-Ad and New Line argue that while Europa's counsel is arguing that Europa obtained insurance with First Mercury that includes coverage for contractual liability to cover paragraph (b) which includes the subject indemnity provision, First Mercury is arguing that its policy provides no coverage for contractual liability to cover paragraph (b).

Also, in opposition, A & V correctly contends that the part of Europa's motion that states that the breach of contract cause of action violates the statute of limitations is without merit. Since Europa's amended motion that raises this defense was first filed in August of 2020, such defense is untimely as the third-party complaint was filed on November 20, 2019. Also A & V contends that in any event, Europa failed to procure insurance on behalf of A & V as evidenced by the disclaimer from the carrier.

Upon reviewing the fifth third-party complaint, the cause of action at issue states that Europa was required to procure insurance for A & V and name A & V as an additional insured. Europa produces its contract with First Mercury Insurance Company dated May 23, 2012 for the policy period of May 27, 2012 to May 27, 2013, which includes an additional insured provision. The agreement discusses who is considered to be an insured and states that "[w]ho is an insured is

amended to include as an additional insured any person or organization for whom you are performing operations when you have agreed in writing in a contract or agreement that such person is an additional insured on your policy" (NYSCEF DOC. NO. 155).

Although, First Mercury Insurance Company disclaimed coverage and started its own separate action in this Court, this does not negate the fact that Europa agreed to provide insurance coverage, made efforts to obtain such insurance coverage, and entered into a contract for insurance and an excess policy (*see Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004] (insurer's refusal to indemnify does not change conclusion that party purchased the liability policy required under the contract); *see also Sicilia v City of New York*, 127 AD3d 628, 629 [1st Dept 2015] (a denial of coverage letter does not establish that a party failed to procure the required insurance)).

Therefore, because Europa has met its burden through the production of the subject insurance policy which includes provisions for additional insureds status, A & V's cause of action for breach of contract for failure to purchase insurance must be dismissed.

Finally, to the extent that A & V contends, in a generalized statement, that the third-party complaints of New Line and El-Ad should be dismissed as moot, such application is denied Contractual indemnification and breach of contract issues remain to be determined.

CONCLUSION and ORDER

Accordingly, it is

ORDERED that Europa Construction Corp.'s motion to dismiss (sequence 001) is granted only to the extent that the causes of action against it for common law indemnification, contribution, and failure to procure insurance are dismissed; and it is further

ORDERED that El-Ad 250 West LLC and New Line Structure's motion for summary judgment (sequence 003) is granted with the exception of the part of the motion seeking to dismiss the alleged violations of Industrial Code sections 23-1.7 (d) and (e) (2) which is denied; and it is further

ORDERED that the part of A & V Interiors Inc.'s motion for summary judgment (sequence 004) for contractual indemnification is granted; and it is further

ORDERED that the remainder of the motions are denied in all respects.

This constitutes the decision and order of the Court.

12/23/2021
DATE

RICHARD LATIN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE