
DAVINCI CONSTRUCTION OF NASSAU, INC.,^x

Third Third-Party Plaintiff,

- against -

TONY & SONS CONCRETE CORP.,

Third Third-Party Defendant.

DAVINCI CONSTRUCTION OF NASSAU, INC.,^x

Fourth Third-Party Plaintiff,

- against -

P&R CARPENTRY, INC., and CARVALHO
PREMIUM BUILDERS, INC.,

Fourth Third-Party Defendants.

OL VINEYARDS PRC, LLC,^x

Fifth Third-Party Plaintiff,

- against -

TONY & SONS CONCRETE CORP.,

Fifth Third-Party Defendant.

^x

The following papers numbered 1 to 40 read on this motion by third third-party and fifth fifth-party defendant Tony & Sons Concrete Corp. for an order granting (1) leave to file a late motion for summary judgment for good cause shown; (2) granting summary judgment dismissing the third third-party complaint and fifth third-party complaint, and any and all cross claims; (3) or in the alternative for an order precluding plaintiff from giving evidence as to certain items pursuant to CPLR 3042(c) or compelling plaintiff to serve responses to its discovery demands dated October 1, 2007. Plaintiff separately moves for an order granting partial summary judgment against defendants OL Vineyards PRC, LLC, E & G Siding Corporation, and Da Vinci Construction of Nassau, on the Labor Law § 240 cause of action. Defendant Da Vinci

Construction of Nassau cross-moves for an order granting leave to file a late motion for summary judgment and granting summary judgment dismissing the plaintiff's complaint and all cross claims and counterclaims. OL Vineyards PRC, LLC separately moves for an order (1) granting summary judgment on its claims for contractual defense and indemnification, and for breach of contract for the failure to procure insurance against E & G Siding Corp., Da Vinci Construction of Nassau, Inc., and Tony & Sons Concrete Corp.; (2) compelling E & G Siding Corp., Da Vinci Construction of Nassau, Inc., and Tony & Sons Concrete Corp. to reimburse OL Vineyards for all unreimbursed fees expended in the defense of this action and related actions and setting the matter down for a hearing as to the amount of said defense fees; and (3) granting a conditional order of indemnification over and against E & G Siding Corp., Da Vinci Construction of Nassau, Inc., and Tony & Sons Concrete Corp.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Memorandum of Law - Exhibits (A-Q).....	1-4
Supporting Affidavit-Exhibits(A-F).....	5-6
Opposing Affirmation.....	7-8
Reply Affirmation.....	9-10
Notice of Motion-Affirmation-Exhibits (A-M).....	11-14
Opposing Affirmation-Exhibits (A-C).....	15-17
Reply Affirmation.....	18-19
Notice of Cross Motion-Affirmation.....	20-22
Opposing Affirmation.....	23-24
Reply Affirmation.....	25-27
Notice of Motion-Affirmation-Exhibits (A-S).....	28-31
Opposing Affirmation-Exhibits (A-C).....	32-34
Opposing Affirmation-Exhibits (A-B).....	35-37
Reply Affirmation-Exhibits (A-D).....	38-40

Upon the foregoing papers these motions are consolidated for the purpose of a single decision and order and are determined as follows:

Plaintiff Bing Lu alleges that he sustained personal injuries on September 11, 2004 during the course of his employment when the gable he was sitting on collapsed, causing him to fall to the ground. Plaintiff was installing aluminum siding above and around the gable at the time of accident. The gable was some 16-17 feet above the ground, and was part of a condominium building that was under construction located at Sylvan Avenue, Miller Place, New

York. The subject building was part of a construction project that included twenty two new condominium units on an approximately 14 acre lot.

The subject premises are owned by defendant OL Vineyards PRC, LLC (OL Vineyards). OL Vineyards entered into a contract with E & G Siding Corporation (E & G) for the installation of aluminum siding. E & G subcontracted out a portion of its work to plaintiff's employer, GQ Construction Corporation. OL Vineyards entered into a separate contract with Tony & Sons Concrete Corp. (Tony & Sons) to install concrete foundations and exterior steps for the condominium units. OL Vineyards also entered into a separate contract with Da Vinci Construction of Nassau, Inc. (Da Vinci) for carpentry and framing work in connection with the construction of the condominium units.

The note of issue was filed on March 13, 2008, so that the 120-day period in which to serve all motions for summary judgment expired on July 10, 2008. Counsel for Tony & Sons, counsel for OL Vineyards and counsel for Da Vinci all assert that they were under the impression that the time in which to move for summary judgment had been extended to August 13, 2008. However, the parties' counsel admit that the stipulation extending said time period was never fully executed by all of the parties and was not so ordered by the court. Therefore, contrary to the movants assertions, the 120-day time period was not extended. However, as this court in its order of July 9, 2008 granted the motion by E & G's counsel to be relieved, and stayed all proceedings for a period of 30 days, some confusion existed as to whether the 120-day period was tolled. The court therefore finds good cause exists for the late submission of all of the motions and the cross motion for summary judgment.

The parties' deposition testimony:

Plaintiff Bing Lu testified that on this particular job he was employed by GQ Construction Corporation (GQ) to install aluminum siding. He states that he only speaks Chinese and that other than conversing with his bosses, he did not speak to anyone at the construction site regarding his work due to his language barrier. He stated that his employer supplied all of the equipment to perform the job, except for certain tools. He stated that prior to his accident he had completed the siding work on three to five units. On the date of the accident, he was working alone on one side of the building installing the siding and had used a scaffolding machine (a pump jack) to reach the top of the gable. He stated that he could not use the pump jack to access the area around the gable and therefore he sat with his legs straddling the gable, facing the building and was about to install a layer of plastic sheeting when gable collapsed causing him to fall to the

ground. He stated that he was sitting on the gable for a minute or two before it collapsed. Mr. Lu testified that although there were ladders at the job site belonging to his employer, a ladder could not be used to perform the work around the gable. He identified photographs taken by a co-worker some days after the accident which depict a townhouse with a wooden triangular gable. He stated that the vertical wooden supports for the gable were not in place on the day of his accident, and that none of the other townhouses he had worked on had gable supports. It is undisputed that Mr. Lu was not provided with any safety devices.

Henry Alia testified that he was employed by OLC, an acronym for Ornstein Layton & Company, a construction company and was paid by Ornstein Layton Realty Company. Mr. Alia was the project manager at the subject construction site, and he stated that it was his job to coordinate and schedule the trades and contractors and ensure quality control by conducting visual inspections. He stated that the principals of OL Vineyards, Alec Ornstein and Scott Layton were present at the construction site at times and that they were responsible for hiring the contractors, and upon Alia's recommendation for firing contractors. He stated that Da Vinci was hired to frame twenty two residential buildings, plus an additional building, and that according to log book entries they began work on either March 29 or April 5, 2004.

Mr. Alia stated that there were six different models of buildings on the site, that all of the units are models, and he identified the twenty two buildings by number. He identified building number 2 as the building where plaintiff was injured. This building was also identified as model A1, and has a decorative wooden gable. Mr. Alia stated that the subject building was framed and constructed by Da Vinci, but that there was nothing in his log which indicated whether Da Vinci had framed out the gable on building 2. He stated that there was another company on the site that installed wooden gables on other buildings. The framing out of building 2 commenced on July 22, 2004 and was completed on August 24, 2004. He stated that in order to construct the gable, temporary two by four support posts were erected by the framer or framing contractor which remained in place for eight to twelve weeks. He stated that Da Vinci was responsible for putting up the temporary supports at building 2. Mr. Alia stated that he did not recall seeing workers who installed the aluminum siding sitting on top of a gable while they performed their work.

Mr. Alia stated that plaintiff's accident occurred on September 11, 2004, a Saturday, and that neither he nor the other project manager were present at the construction site on that day. He stated that the only person present from his company on that day was a laborer whose job was to clean up after the trades. He

stated that he was informed of the accident by security, and that when he returned to work on Monday the subject gable was on the ground, that the temporary support was on the ground, and that said gable had approximately 12 to 24 nails that appeared to be bent. He stated that before September 2004 he saw workers sitting on or standing on gables while performing various jobs, but never instructed the workers to get off the gables, or told them that it was dangerous or unsafe or that the workers should use a ladder or scaffold to perform their work. He did not recall if any worker had been on top of a gable that was not supported by temporary supports. He stated that he was never informed by anyone from Da Vinci that the gables were not constructed to support a person's weight.

Mr. Alia stated that E & G were hired to install house wrap materials and vinyl or aluminum siding with metal trim on the buildings and that they began work on June 2, 2004, and was aware of the fact that this company was not doing the actual work. He stated that the concrete work was performed by Tony & Sons and that the concrete steps had been installed on building 2 prior to the installation of the aluminum siding. He stated that the temporary support columns for the gable would be moved when the concrete work was performed and would be angled away from the concrete and reattached and that the support columns would later be removed when permanent support columns were installed.

Eric Olsen the president of E & G testified that he was that company's sole employee at the construction site; that he contracted the work out to GQ pursuant to an oral agreement; and that he would walk over the job site to ensure that the carpentry work was completed so that the siding installers could commence their work. He stated he was at the site the Thursday before the accident, at which time the support posts for the subject gable were sitting in the dirt and no concrete had been poured for the steps. He first stated that the siding installers could access the area around the gable with a ladder or pump jacks, but later stated that he didn't know if someone could access the left side of the gable using the pump jack. He also stated that he observed GQ workers performing siding work while sitting on top of the gables. He stated that when arrived at the job site the Monday after the accident, he was unable to inspect the subject gable as the area had been cleaned up by the time he arrived. He was unable to recall whether there were any cement steps installed beneath the gable at the subject building. He also stated that Mr. Lu was present at the job site that Monday and that he had previously spoken with him, and that Lu speaks English.

Artie Cipoletti, Da Vinci's construction manager testified that Da Vinci performed some framing work and also subcontracted

out some of the work; that it constructed gables over the doorways; that he did not oversee the construction of said gables; that another contractor also installed gables; and that he believed that Da Vinci constructed the subject gable in building 2; that it was secured using ten penny nails, and supported by temporary four by four posts. He stated that the gables were put up prior to the installation of the concrete stairs. He stated that the temporary supports would be removed when the concrete was poured, but that they were not removed by Da Vinci and would be replaced by whoever took them out. He stated that the temporary supports were nailed to the gables and rested on the concrete. Mr. Cipoletti stated that he went to the construction site on a weekly basis to view the progress, and was not aware of the plaintiff's accident until he received notice of the within action.

Manuel Salgado, vice-president of Tony & Sons testified that pursuant to the contract with OL Vineyards it poured the footings (the base of the foundations), the foundations for the buildings and all of the concrete slabs (basement, garage, stoops and sidewalks) at the subject construction site. He stated that he personally placed the cast for the concrete for the stoop of building 2, in September 2004, that he removed the support beams in the area where the concrete was to be poured and constructed other temporary support beams which supported the gable. These temporary plywood support beams measured 2 feet by 16 inches wide and were nailed to the gable, and to a plywood base that rested on the dirt. He stated that he believed he did this work on a Friday, and that on the following Monday when he returned to take apart the cast, he saw that the gable had fallen and was laying on the side of the stoop, as were the support posts. He stated that the gable and posts both appeared to be intact. He further stated that none of the gables he had worked on were unsupported, and that he never saw a siding installer standing on a gable. He stated that the permanent support beams for the gables were installed by another contractor.

Plaintiff's motion for an order granting partial summary judgment against defendants OL Vineyards PRC, LLC, E & G Siding Corporation, and Da Vinci Construction of Nassau, on the Labor Law § 240 cause of action; and Da Vinci's cross motion for an order granting leave to file a late motion for summary judgment and granting summary judgment dismissing the plaintiff's complaint and all cross claims and counterclaims:

At the outset, that branch of defendant Da Vinci's cross motion which seeks leave to serve a late motion for summary judgment is granted for the reasons stated above.

Labor Law § 240(1) imposes absolute liability upon a owner, contractor, or their agent who fails to provide safety devices to

a worker at an elevated work site where the lack of such devices is a substantial factor in causing that worker's injuries (see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500 [1993]; Zimmer v Chemung Co. Performing Arts, 65 NY2d 513 [1985]). The statute is to be construed as liberally as possible to effectuate its purpose of providing for the health and safety of employees (see Rocovich v Consolidated Edison Co., 78 NY2d 509, 513 [1991]).

As regards OL Vineyards, it is undisputed that it failed to provide plaintiff with any safety devices which would have enabled him to perform his work at the elevated site, whether or not the support beams were in place. Furthermore, this defendant's claim that the plaintiff may have removed the support beams in order to perform the work is speculative and is not supported by the evidence, and therefore does not raise a triable issue of fact. Defendant, thus, has offered no proof to rebut plaintiff's showing that the owner failed to provide an adequate safety device which would permit him to gain access to the area around the gable, in violation of Section 240(1). "Where, as here, a violation of Labor Law § 240(1) is a proximate cause of an accident, the worker's conduct cannot be deemed solely to blame for it," and so the sole proximate cause defense does not apply (Valensisi v Greens at Half Hollow, LLC, 33 AD3d 693, 696, [2006]). Therefore, that branch of plaintiff's motion which seeks partial summary judgment against the property owner OL Vineyards on the Labor Law § 240(1), is granted.

"A prime contractor hired for a specific project is subject to liability under Labor Law § 240 as a statutory agent of the owner or general contractor only if it has been delegated the ... work in which plaintiff was engaged at the time of his injury, 'and is therefore responsible for the work giving rise to the duties referred to in and imposed by [the statute]'" (Coque v Wildflower Estates Developers, Inc., 31 AD3d 484, 488, [2006], quoting Russin v N. Picciano & Son, 54 NY2d 311, 318 [1981]). "[T]he nondelegable liability imposed by Labor Law § 240(1) attaches only to a contractor that has the authority to supervise or control the particular work in which the plaintiff was engaged at the time of his injury" (Coque v Wildflower Estates Developers, Inc., 31 AD3d at 488; Nasuro v PI Assoc. LLC, 49 AD3d 829 [2008]; Kwoksze Wong v New York Times Co., 297 AD2d 544 [2002]; Sabato v New York Life Ins. Co., 259 AD2d 535 [1999]; Velez v Tishman Foley Partners, 245 AD2d 155 [1997]; D'Amico New York Racing Assn., 203 AD2d 509 [1994]). "Once an entity becomes an agent under the Labor Law it cannot escape liability to an injured plaintiff by delegating the work to another entity" (McGlynn v Brooklyn Hosp.-Caledonian Hosp., 209 AD2d 486, 486 [1994]). Here, the evidence establishes that E & G, the aluminum siding prime contractor was delegated the siding work and had the contractual authority to supervise said

work. E & G cannot escape liability under the statute merely because it subcontracted out this work to GQ, plaintiff's employer. Therefore, as E & G was a statutory agent of the owner, that branch of plaintiff's motion which seeks partial summary judgment on the Labor Law § 240 cause of action against defendant E & G is granted.

As regards, defendant Da Vinci, the prime carpentry contractor, the evidence establishes, as a matter of law, that, was not delegated the siding work and did not have the authority to supervise and control said work. Da Vinci thus was not an agent of the owner. Therefore, that branch of plaintiff's motion which seeks summary judgment on the Labor Law § 240 claim against Da Vinci is denied, and that branch of Da Vinci's cross motion which seeks to dismiss this cause of action is granted.

Labor Law § 200 codifies the common-law duty of an owner or employer to provide employees with a safe place to work (see Paladino v Soc'y of the NY Hosp., 307 AD2d 343 [2003]; Brasch v Yonkers Constr. Co., 306 AD2d 508 [2003]). Liability for such claims will attach when the injury sustained was a result of an actual dangerous condition, and then only if the defendant exercised supervisory control over the work performed on the premises or had notice of the dangerous condition which produced the injury (see Sprague v Peckham Materials Corp., 240 AD2d 392, 394 [1997]). Here, defendant Da Vinci has met its burden of establishing that it neither directed nor controlled the method or manner in which the plaintiff conducted his work, (see Amaxes v Newmark & Co. Real Estate, 15 AD3d 321 [2005]), and neither created nor had actual or constructive notice of a defective condition (see Beltrone v City of New York, 299 AD2d 306 [2002]). Although the gable's temporary support beams were removed and replaced when the concrete was poured, there is no evidence that Da Vinci moved these support beams. Furthermore, there is no evidence that Da Vinci improperly attached the gable to the exterior of the building. OL Vineyards' assertion that Da Vinci may be liable to all parties for common law negligence on the grounds that it improperly attached the gable to the building, is based upon a hearsay statement allegedly made to Mr. Olsen by plaintiff's boss, Mr. Wong, which Olsen related at his deposition. Mr. Olsen testified that he did not see the gable after the accident, and therefore he had no personal knowledge of the number of nails used to attach the gable. Mr. Wong was not deposed as a non-party witness and he has not submitted an affidavit herein. Furthermore, OL Vineyards' project manager Mr. Alia testified that he saw the gable lying on the ground two days after accident, and that there were 12 to 24 nails in the gable that appeared to be bent. OL Vineyards thus has not raised a triable issue of fact as regards plaintiff's common law negligence claim against Da Vinci. Therefore, as plaintiff cannot satisfy the requisite elements to

sustain causes of action based on Labor Law § 200 and common-law negligence (see Lombardi v Stout, 80 NY2d 290 [1992]; Nasuro v PI Assoc. LLC., supra; Fumo v NAB Constr. Corp., 19 AD3d 436 [2005]; Sattar v Natural Stone Indus., 19 AD3d 681 [2005]; Loreto v 376 St. Johns Condominium, Inc., supra; Gatto v Turano, 6 AD3d 390 [2004]), that branch of defendant Da Vinci's cross motion which seeks to dismiss plaintiff's claims for a violation of Labor Law § 200 and its common law negligence claim, is granted.

Plaintiff's request for summary judgment on its claims for common law negligence and for a violation of Labor Law §200 is denied as to E & G, as there is no evidence that this defendant actually exercised supervisory control over the plaintiff, or that it created or had notice of a dangerous condition. Inasmuch as a motion for summary judgment searches the record, plaintiff's Labor Law §200 and common law negligence claim against E & G is dismissed.

That branch of Da Vinci's cross motion which seeks summary judgment dismissing plaintiff's claim for a violation of Labor Law § 241(6) is granted. Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers (see Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 878 [1993]). In order to establish his Labor Law § 241(6) claim, plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code regulation that is applicable given the circumstances of the accident, and which sets forth a concrete or "specific" standard of conduct, rather than a provision which merely incorporates common law standards of care (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d at 503-505; Ares v State, 80 NY2d 959, 960 [1992]; Fair v 431 Fifth Avenue Assocs., 249 AD2d 262, 263 [1998]; Vernieri v Empire Realty Co., 219 AD2d 593, 597 [1995]; Adams v Glass Fab, Inc., 212 AD2d 972, 973 [1995]). Plaintiff must also present some factual basis from which a court may conclude that the regulation was in fact violated (Herman v St. John's Episcopal Hospital, 242 AD2d 316, 317 [1997]; Creamer v Amsterdam H.S., 241 AD2d 589, 591 [1997]). Here, plaintiff, in opposition to Da Vinci's cross motion, fails to address this issue and thus concedes that it cannot establish any violation of any applicable provision of the Industrial Code as regards this defendant.

That branch of Da Vinci's cross motion which seeks dismissal of all cross claims and counterclaims is granted as to the cross claim and counterclaim asserted against it by second third-party defendant Tony & Sons for indemnification and contribution. This defendant has failed to demonstrate that any other cross claims or counterclaims were asserted against it.

Tony & Sons's motion for an order granting (1) leave to file a late motion for summary judgment for good cause shown; (2) granting summary judgment dismissing the third third-party complaint and fifth third-party complaint, and any and all cross claims; and in the alternative for an order of preclusion:

That branch of Tony & Son's motion which seeks leave to file a late motion for summary judgment is granted.

That branch of Tony & Sons' motion which seeks to dismiss Da Vinci's third third-party complaint against Tony & Sons is granted. Da Vinci may not maintain a claim against Tony & Sons for common-law contribution and indemnification, as plaintiff Lu's claims against Da Vinci are dismissed. Furthermore, as no contractual agreement was entered into between Da Vinci and Tony & Sons, the claim for contractual indemnification and breach of an agreement to procure insurance are must be dismissed.

That branch of Tony & Sons' cross motion pursuant precluding plaintiff from giving evidence as to certain items pursuant to CPLR 3042(c) or compelling plaintiff to serve responses to its discovery demands dated October 1, 2007, is denied in view of the parties stipulation of October 10, 2008.

The remainder of Tony & Sons' cross motion which seeks to dismiss OL Vineyards' fifth third-party action, and the request in the alternative for an order of preclusion is discussed below.

OL Vineyards PRC, LLC motion for an order (1) granting summary judgment on its claims for contractual defense and indemnification, and for breach of contract for the failure to procure insurance against E & G, Da Vinci and Tony & Sons (2) compelling E & G, Da Vinci and Tony & Sons to reimburse OL Vineyards for all unreimbursed fees expended in the defense of this action and related actions and setting the matter down for a hearing as to the amount of said defense fees; and (3) granting a conditional order of indemnification over and against E & G, Da Vinci, and Tony & Sons:

OL Vineyards in its third fifth-party complaint asserts causes of action against Tony & Sons, E & G and Da Vinci for common-law contribution, common-law indemnification, contractual defense and indemnification, and breach of contract based upon the alleged failure to procure insurance.

"Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person [internal quotation marks

and citations omitted]" (Godoy v Abamaster of Miami, Inc., 302 AD2d 57, 61-62 [2003]). Since there has been no determination of the culpability, if any, of Tony & Sons, OL Vineyards' request for summary judgment on the cause of action for common-law contribution against this contractor is denied as premature. As regards Da Vinci, since plaintiff's claims against this prime contractor have been dismissed, OL Vineyards' request for summary judgment is denied and said claim is dismissed.

OL Vineyards request for common law contribution against E & G is granted, as this defendant is jointly and severally liable to the plaintiff on the Labor Law § 240 claim.

It is well established that where an owner's liability is predicated solely on Labor Law § 240(1) and is not predicated on a finding of negligence on its part, it has a common-law right to indemnification from a contractor if the contractor's own negligence contributed to the accident or the contractor directed, supervised and controlled the work giving rise to the injury (see Buccini v 1568 Broadway Assocs., 250 AD2d 466, 468 [1998]; Marek v DePoalo & Son Bldg. Masonry Inc., 240 AD2d 1007, 1008 [1997]; Malecki v Wal-Mart Stores, Inc., 222 AD2d 1010, 1011 [1995]). To establish a claim for common-law indemnification, "the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (Correia v Professional Data Mgt., 259 AD2d 60, 65 [1999]; accord Coque v Wildflower Estates Developers, Inc., 31 AD3d 484 [2006]; Priestly v Montefiore Med. Ctr., Einstein Med. Ctr., 10 AD3d 493, 495 [2004]) or "in the absence of any negligence" that the proposed indemnitor "had the authority to direct, supervise, and control the work giving rise to the injury" (Hernandez v Two E. End Ave. Apt. Corp., 303 AD2d 556, 557 [2003]).

Here, OL Vineyards' liability under Labor Law § 240 is purely statutory and vicarious. Therefore, in order to be entitled to summary judgment for common-law indemnification against Tony & Sons, E & G and Da Vinci, OL Vineyards is required to prove, as a matter of law, that each of these third-party defendants were "either negligent or exclusively supervised and controlled plaintiff's work site" (Reilly v DiGiacomo & Son, 261 AD2d 318 [1999]; see Perri v Gilbert Johnson Enters., Ltd., 14 AD3d 681, 685 [2005]; Hernandez v Two E. End Ave. Apt. Corp., supra, at 558).

The evidence submitted fails to establish that either Da Vinci or E & G were negligent or that they actually supervised and controlled plaintiff's work or the work site. Therefore, that branch of OL Vineyards' motion which seeks summary judgment on the

third-party claims for common-law indemnification against DA Vinci and E & G is denied, and the request for a conditional order of indemnification is denied.

As regards Tony & Sons, there is no evidence that this prime contractor had the authority to direct, supervise and control the siding work performed by plaintiff. However, in view of the sharply conflicting testimony of the plaintiff and Tony & Sons' vice-president Mr. Salgado, as well as the testimony of the OL Vineyard's project manager and that of other prime contractors, as to whether or not the posts supporting the gable were in place at the time of plaintiff's accident, a triable issue of fact exists as to whether Tony & Sons may have any liability for the accident. Therefore, that branch of Tony & Sons' cross motion which seeks to dismiss the claims for common-law contribution and common-law indemnification is denied, and that branch of OL Vineyard's motion which seeks summary judgment in its favor on these claims is denied.

That branch of OL Vineyards' motion which seeks a conditional order of indemnification is denied, as no determination as to the relative culpability, if any, of Tony & Sons' has been made (see Benedetto v Carrera Realty Corp., 32 AD3d 874 [2006]; Perri v Gilbert John Enters., Ltd., 14 AD3d 681, 685 [2005]).

That branch of OL Vineyards' motion which seeks a conditional order of indemnification is denied as to Da Vinci and E & G, as there has been no showing that these defendants bear any liability for the plaintiff's accident.

Section 8 of each of the separate contracts between OL Vineyards and Tony & Sons, E & G and Da Vinci, provides that "in any action at law or suit in equity shall be brought against the Owner, or any of its officers, employees or agents, for or on account of the failure, omission or neglect of the Contractor, or his sub-contractors or his employees or agents to do or perform any of the covenants, acts, matters or things by this Contract undertaken to be done or performed by the Contractor or his sub-contractors, or employees or agents thereof, or for any injury done to property or persons and caused by the negligence or alleged negligence of the Contractor or his sub-contractors or employees or agents thereof then the Contractor shall immediately assume and take charge of the defense of such actions or suits in like manner and to all intents and purposes as if said actions or suits had been brought directly against the Contractor. The Contractor shall also indemnify and save harmless the Owner, its officers, employees and agents, from any loss, cost or damage whatever arising out of such actions or suits in like manner and to all intents and

purposes as if said actions or suits had been brought directly against the Contractor."

As regards the defense clause, plaintiff's claims against OL Vineyards do not solely arise out of the alleged acts of the prime contractors. Rather, plaintiff alleged acts of negligence as well as statutory violations on the part of OL Vineyards. Furthermore, the defense clause does not appear to contemplate an action or suit by a subcontractor's employee. Therefore, as the contractual defense clause does not provide coverage under these circumstances, OL Vineyards' request for relief on this cause of action is denied. That branch of OL Vineyards motion which seeks to compel E & G, Da Vinci and Tony & Sons to reimburse it for all unreimbursed fees expended in the defense of this action and related actions is also denied.

The general rule as to indemnification clauses is that "when a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (Tonking v Port Auth. of N.Y. & N.J., 3 NY3d 486, 490 [2004], quoting Hooper Assoc. v AGS Computers, 74 NY2d 487, 491 [1989]; Wrighten v ZHN Contracting Corporation, 32 AD3d 1019, [2006]; Gilbert v Albany Med. Ctr., 21 AD3d 677, 678-679 [2005]; Baginski v Queens Grand Realty LLC, 21 Misc 3d 1110A [2008]).

The contractual indemnification provision does not violate General Obligations Law § 5-322.1, as it does not specifically require the contractor to indemnify the property owner for its own negligence. However, as the indemnification clause does not specifically include the claims of a prime contractor's sub-contractor's employees, it cannot be said that indemnification for claims by GQ's employees was "the unmistakable intent of the parties" (Solomon v City of New York, 11 AD2d 383, 388 [1985] [internal quotation marks omitted]). Therefore, neither Tony & Sons', Da Vinci, or E & G can be required to indemnify OL Vineyards for a claim brought by an employee of E & G's subcontractor (Sumba v Clermont Park Assoc., LLC, 45 AD3d 671 [2007], appeal dismissed 10 NY3d 732 [2008]; Vigliarolo v Sea Crest Constr. Corp., 16 AD3d 409, 410 [2005]). Therefore, that branch of OL Vineyards' motion which seeks summary judgment on its third-party claims for contractual indemnification against Da Vinci, E & G and Tony and Sons is denied, and that branch of Tony & Sons' cross motion which seeks to dismiss the OL Vineyards' third-party claim for contractual indemnification claim is granted.

OL Vineyards' third-party complaint alleges that Tony & Sons, E & G and Da Vinci each breached their respective prime contracts in that they failed to procure insurance as required under the

contracts. The evidence submitted herein establishes that each prime contractor purchased insurance which provided coverage to OL Vineyard as an additional insured. However, the insurers disclaimed coverage, and OL Vineyard commenced a declaratory judgment action against the insurers and the prime contractors, in Supreme Court, Suffolk County, entitled OL Vineyards PRC, LLC v Sirius America Insurance Company, et. al, Index No. 17188/2007. The court therein, in an order dated May 12, 2008, declined to make a determination as regards E & G's insurer's duty to defend, and determined that Tony & Sons' insurer has a duty to defend OL Vineyard in the main action and consolidated related actions.

The insurance policies submitted herein establishes that Da Vinci and Tony & Sons purchased liability policies with a blanket endorsement for contractually designated additional insureds. OL Vineyards also acknowledges that E & G procured an insurance policy and does not assert that said policy did not conform to the contractual requirements. Therefore, OL Vineyards' claim that Da Vinci, Tony & Sons and E & G each breached their obligation to procure insurance is untenable. The insurers refusal to defend and indemnify OL Vineyards under the coverage purchased by the prime contractors does not alter this conclusion (see Perez v Morse Diesel Int'l, Inc., 10 AD3d 497, 498 [2004]; KMO-361 Realty Assoc. v Podbielski, 254 AD2d 43 [1998]). As noted above, Tony & Sons' insurer is providing a defense to OL Vineyards. Moreover, contrary to OL Vineyards' assertion the fact that a prime contractor's insurer may have a duty to defend its insureds pursuant to a contract of insurance does not as a matter of course establish a cause of action for contractual indemnification. Therefore OL Vineyards' request for summary judgment on the cause of action for breach of contract is denied.

Dated: January 21, 2009
D:37

J.S.C.