SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY** IAS PART 16
Justice

PANAGIOTIS KORFIATIS, ET AL,	INDEX NO. 5297/02
Plaintiffs,	MOTION DATE JULY 31, 2007
- against -	
AMERICAN SLATE COMPANY, ET AL,	MOTION CAL. NO. 19 & 20
Defendants.	MOTION SEQ. NUMBERS 7 & 8

The following papers numbered 1 to 22 read on this motion by the defendant/third-party plaintiff American Slate Company (American) pursuant to CPLR §3212 for summary judgment dismissing the complaint and all cross claims and counterclaims, or in the alternative to dismiss the plaintiffs' complaint or precluding any use of the pallet involved in the accident as evidence during trial as a sanction for spoliating evidence or, in the second alternative granting the defendant/third-party plaintiff summary judgment against the co-defendant and third-party defendants for indemnification; and on the motion by defendants Western Star Transportation (Western Star), Brad Grey, Lee Cadwallader and Jim Lohman pursuant to CPLR §3212 for summary judgment dismissing the complaint and all cross claims.

	PAPERS NUMBERED
Notice of Motion/Affid(s)-Exhibits.....	1 - 8
Answering Affidavits-Exhibits.....	9 - 18
Reply Affidavits.....	19 - 22

Upon the foregoing papers it is ordered that the motions are determined as follows:

This is an action to recover money damages for personal injuries allegedly suffered as a result of an accident that occurred while the plaintiff was unloading slate from a flat bed truck on November 9, 2001 in front of 409 West 39th Street, New York, New York. The plaintiffs instituted causes of action based upon violations of Labor Law §§ 200, 240(1) and 241(6) and common law negligence.

At the time of the accident the plaintiff was employed as the foreman for Central Construction, Inc. (Central). Central was hired by third-party defendant Meyerowitz/Satz Realty Corp. (Meyerowitz/Satz) to perform construction work for a building located at 232 East 64th Street, New York.

In connection with the renovation work, the managing agent of Meyerowitz/Satz ordered fifteen slabs of slate from American to be delivered to a lot located at 409 West 39th Street. The slate was packed on two wooden A-frames and bound to the frame with metal bands. One frame held eight (8) slate pieces and the other seven (7) pieces. The slate was picked up from American by Western Star's driver, defendant Jim Lohman and delivered to Western Star's storage yard. The slate was then picked up by defendant Brad Grey, (a.k.a. Brad Hendrix), another driver from Western Star, and delivered to the 39th Street lot. Defendant Grey testified at his deposition that another employee of Western Star loaded the A-Frames containing the slate onto his truck and that he did not load the truck himself. He further testified that he visually checked the A-frames and did not notice anything unusual about the condition of the frames or the slate.

A representative for American testified at his examination before trial that some of the slate American sold was received already mounted onto A-frames by suppliers, and would be shipped out in the same condition. On occasion, however, American would repackage an order and bind the slate to an A-frame themselves for shipping. The representative for American testified that he did not know if the specific shipment involved in this accident was one that it had packaged itself or had come prepackaged.

The defendant Lee Cadwallader is the vice-president of defendant Western Star. He testified at his examination before trial that it was common in the shipping industry to ship goods such as slate and glass on an A-frame. He further testified that it was the custom and practice of Western Star to visually check an A-frame packed with slate for damage before it would ship such materials. The Western Star driver would strap the A-frame on the truck to prevent the frame from shifting during transport.

On the day before the accident, the plaintiff was instructed that a truck was delivering slate to the 39th Street lot and that he was to unload the delivery in the lot. The plaintiff testified that while he had unloaded slate with a machine on prior occasions, on the day of the accident there was no machine at the lot. Without the use of a machine, the Central employees decided to unload the slate by hand. In order to remove the slate from the A-frames, the plaintiff had to cut the metal bands which secured the pieces of slate to the A-frame and remove the pieces individually. The plaintiff testified that when he got on the truck to unload the slate he did not notice anything wrong with the pallets or the slate. The slate on the first A-frame was removed without a problem. The plaintiff testified that when he cut the first band on the second A-frame it exploded, pushed him backwards and the slate fell on his leg pinning him to the truck bed. The plaintiff testified that he does not know what caused the A-frame to explode.

The branches of the defendants' motion for summary judgment dismissing plaintiff's Labor Law §§ 200, 240(1) and 241(6) causes of action are granted without opposition. The Labor Law §§ 200, 240(1) and 241(6) claims must be dismissed against the movants as those provisions are only

applicable to owners and contractors, agents of owners, contractors or those who exercise supervision or control over the laborer (See Wysocki v Balalis, 290 AD2d 504 [2002]; Mills v Niagara Mohawk Power Corp., 262 AD2d 901 [1999]). Here, since the movants were not owners or contractors, and did not exercise supervisory control, there can be no liability under the labor law provisions.

With respect to plaintiff's remaining causes of action sounding in common law negligence, a party moving for summary judgment must show by admissible evidence that there are no material issues of fact in controversy and that they are entitled to judgment as a matter of law (See Alvarez v Prospect Heights Hosp. Ctr., 68 NY2d 320 [1986]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Viewing the evidence in the light most favorable to the plaintiffs and drawing all reasonable inferences in its favor, the defendant American failed to make a prima facie showing of entitlement to judgment as a matter of law on the common law negligence cause of action. The deposition testimony of the American representative was that he did not know if it actually packed the slabs of slate onto the A-frame and secured them on the frame itself before it shipped the slate. American, therefore, failed to show that it did not create or have notice of a defective condition which was the proximate cause of the plaintiff's injuries (See Erikson v J.I.B. Realty Corp., 12 AD3d 344 [2004]). Inasmuch as American has not shown that it was free from negligence, it has failed to make a prima facie showing of its entitlement to summary judgment on its claims for common law indemnification (See Singh v Congregation Bais Avrohom K'Krula, 300 AD2d 567 [2002]; Barabash v Farmingdale Union Free School Dist., 250 AD2d 794 [1998]).

With respect to the motion by Western Star for summary judgment, the evidence submitted by the defendants Western Star, Brad Grey, Lee Cadwallader and Jim Lohman established that Western Star, Brad Grey, Lee Cadwallader and Jim Lohman did not pack the slate onto the A-frame. Western Star and its employees simply loaded the A-frames onto their vehicles and visually inspected the A-frames, but did not notice anything wrong with the slate or A-frame. The deposition testimony of the plaintiff was that when he went to unload the slate after Western Star had delivered it, he did not notice anything wrong with the A-frame or bands. The evidence, thus, established these defendants', prima facie entitlement to relief as they did not create or have actual or constructive notice of any defective condition (See Baxter v Jackson Terrace Assoc., LLC, 43 AD3d 968 [2007]).

The opponent of a summary judgment motion must present admissible evidence that is sufficient to raise an issue of fact (See Zuckerman v City of New York, 49 NY2d 557 [1980]). In opposition to the defendants' prima facie showing, the plaintiffs failed to raise a triable issue of fact. The majority of the expert affidavit submitted by the plaintiffs concerns how the A-frame was constructed and how the slate was packed on the frame. This part of the opinion is irrelevant to these defendants as they did not construct the frame or pack the slate on the frame. The allegations in the expert's report that Western Star should have provided a bubble-type level

and power hoisting equipment are insufficient to raise a triable issue of fact (See Haberman v Cheesecake Factory Rests., 43 AD3d 293 [2007]; Shlomian v 151 West Assoc., LLC, 40 AD3d 618 [2007]; Reyes v City of New York , 29 AD3d 667 [2006]). Insofar as the power hoisting equipment is concerned, the expert did not show that same was required by industry standards to do so. In fact, the plaintiff testified that it was his normal practice to unload slate by using a machine provided by his employer. Furthermore, the expert did not establish that the lack of power hoisting equipment was a proximate cause of the A-frame exploding when the plaintiff cut a band on the frame. Additionally, the opinion set forth by plaintiff's expert concerning the lack of a bubble type level also does not raise a triable issue of fact, as again, the expert does not cite any industry standards in this regard and, in fact, the expert subsequently states that it was the responsibility of American to provide such a level. In any event, there is no evidence that the lack of a bubble type level was, in any way, the proximate cause of the accident. Accordingly, the complaint and all cross claims against defendants Western Star, Brad Grey, Lee Cadwallader and Jim Lohman must be dismissed.

As to that branch of American Slate's motion to dismiss plaintiffs' complaint or preclude plaintiffs from presenting evidence at trial as to the condition of the pallet as a sanction for spoliating evidence, American argues that it must be presumed from the evidence that the plaintiffs intentionally reassembled the pallet to deprive the defendants of evidence necessary to present its defense. This argument is without merit. The defendant American has not shown that the subject pallet was reassembled by the plaintiffs in bad faith or that it has been deprived of evidence necessary to present its defense (See Denoyelles v Gallagher, 40 AD3d 1027 [2007]; Yechieli v Glissen Chemical Co., 40 AD3d 988 [2007]; Bjorke v Rubenstein, 38 AD3d 580 [2007]).

Dated: DECEMBER 13, 2007

Peter J. Kelly, J.S.C.