SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

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

SERGEO ARAENAS,	INDEX NO. 22085/2005
Plaintiff,	MOTION DATE October 16, 2007
- against -	
EUROPEAN BUILDERS & CONTRACTORS CORP., et al.,	MOTION CAL. NO. 2
Defendants.	MOT. SEQ. NUMBER 1

The following papers numbered 1 to 11 read on this motion by the defendant The Classon Realty, LLC for summary judgment dismissing the plaintiff's complaint and for summary judgment on its cross-claims for indemnification. The plaintiff cross-moves for leave to amend his supplemental verified bill of particulars.

	PAPERS NUMBERED
Notice of Motion/Affid(s)-Exhibits.....	1 - 4
Notice of Cross Motion/Affid(s) in Opp.-Exhibits...	5 - 8
Affid(s) in Opp.-Exhibits.....	9 - 10
Replying Affirmation.....	11

Upon the foregoing papers the motion and cross-motion are determined as follows:

This action arises out of a workplace accident that took place on April 24, 2005 at a construction site. On that date, the plaintiff was working for the defendant European Builders & Contractors Corp. ("European") as a carpenter. The defendant The Classon Realty, LLC ("Classon"), the owner of the premises where the accident occurred, contracted with European to provide construction services at the premises at issue.

The accident occurred while the plaintiff was cutting wood molding on a table saw that was provided by European. The plaintiff testified at his deposition that a piece of wood he was cutting got stuck and then was pulled into the blade quickly along with his left hand which was injured as a result. The plaintiff averred that the table saw was supposed to be equipped with a plastic safety guard assembly which would cover the blade, but, at the time of his accident, that safety device was missing.

As to the branch of the motion to dismiss the plaintiff's Labor Law §200 cause of action, where an accident is the result of a dangerous or

defective condition at the premises, liability is predicated upon the party at issue either creating the condition or having actual or constructive notice of the condition (See, Gambino v Mass. Mut. Life Ins. Co., 8 AD3d 337; DeBlase v Herbert Constr. Co., 5 AD3d 624; Paladino v Soc'y of the N.Y. Hosp., 307 AD2d 343, 345). Here, however, since the theory of liability is based upon the manner in which certain work was being performed, specifically cutting wood on a table saw, liability will attach only if the party to be charged exercised supervision and control over the work performed at the site or had actual or constructive notice of the unsafe practice causing the accident (See, Comes v New York State Electric and Gas Corporation, supra).

While it is ultimately the plaintiff's burden at trial to establish a prima facie case of negligence against the defendants, on a motion for summary judgment it is incumbent upon the moving party to present evidence in admissible form showing their entitlement to judgment in its favor as a matter of law (See, e.g., Zuckerman v City of New York, 49 NY2d 557).

In the present case, Classon established prima facie entitlement to judgment as a matter of law with the deposition testimony of its employee, Ed Wydra, that it did not supply the table saw involved in the accident nor did anyone from Classon exercise any control over how the plaintiff accomplished the tasks he was assigned at the job site.

In opposition, the plaintiff failed to raise an issue of fact. The mere presence of Classon's representatives at the work site is insufficient to establish an issue of fact (See, Putnam v Karaco Industries Corporation, 253 AD2d 457). Nor does the fact that they may have checked the progress and quality of the work performed establish control (See, Alexandre v City of New York, 300 AD2d 263; Jacobsen v Grossman, 206 AD2d 405). The plaintiff's assertion that the contract required Classon to "hire" a safety engineer is factually incorrect. The provision cited by the plaintiff is part of the itemization of job costs and is listed under the exclusions therefrom. Specifically, the contract only states that Classon was to "pay" for a safety engineer. At best, the evidence establishes Classon exercised only general supervisory duties over the project not giving rise to liability under Labor Law §200, as there was no proof adduced of its "actual authority to control the activity [that brought] about the injury" (Reilly v Newireen Associates, 303 AD2d 214; see also, Martin v Paisner, 253 AD2d 796; Putnam v Karaco Industries Corporation, supra).

In support of its motion to dismiss the plaintiff's Labor Law §241[6], Classon's sole argument is that the plaintiff failed to cite, in either the complaint or the bill of particulars, the specific sections of the Industrial Code allegedly violated by the defendants. In opposition, the plaintiff cross-moves for leave to amended his supplemental bill of particulars to include six sections of the Industrial Code, to wit 12 NYCRR 23-1.5[a] and [c][1]; 23-1.12[c][2] and [3] as well as 12 NYCRR 19.8[a] and [d].

Generally, leave to amend a pleading must be liberally granted (See e.g., CPLR §3025[b]; Lang v Dachs, 303 AD2d 645). Even after a note of issue is filed and a defendant serves a summary judgment motion, meritorious amendments to a bill of particulars may be made provided "no new factual allegations" are made, "no new theories of liability" are raised and "no prejudice to the defendants" is caused (See, Kelleir v Supreme Indus. Park, LLC, 293 AD2d 513; see also, Walker v Metro-North Commuter R.R., 11 AD3d 339, 340-41). Moreover, a plaintiff's failure to specify the particular sections of the Industrial Code upon which he intends to rely is not automatically fatal to his claim (See, Dowd v City of New York, 40 AD3d 908, 911; Latino v Nolan & Taylor-Howe Funeral Home, Inc., 300 AD2d 631). Nevertheless, proposed amendments that are "devoid of merit and are legally insufficient" are not permitted (See, Duffy v Wetzler, 260 AD2d 596; see also, Lang v Dachs, 303 AD2d 645).

Industrial Code section 23-1.5[a] "is a regulation that relates to general safety standards and, accordingly, will not provide a basis for a claim under Labor Law § 241(6)" (Greenwood v Shearson, Lehman & Hutton, 238 AD2d 311, 312). Similarly, Industrial Code section 23-1.5[c][1] is also a generic directive which is not actionable (See, Maday v Gabe's Contr., LLC, 20 AD3d 513). As such, these proposed amendments are without merit and will not be permitted.

The court will also not permit the amendment to add two discrete sections from part 19 of the Industrial Code [12 NYCRR] as that entire part was repealed, effective October 1, 1997.

However, the court will permit the amendment of the supplemental bill of particulars to add sections 23-1.12[c][2] and [3]. Initially, these sections are sufficiently specific to be actionable under Labor Law §246[6] (See, Haider v Davis, 35 AD3d 363). In addition, these sections, which require table saws "be equipped with a guard which covers the saw blade" as well as "a spreader securely fastened in position and with an effective device to prevent material kickback", are not new theories nor do these amendments raise any new factual allegations. The absence of a safety guard on the table saw has been very essence of the plaintiff's claim and Classon has been aware of this since service of the original bill of particulars wherein the plaintiff pled, in paragraph five, that the defendants were negligent "in failing to have the proper saw guard installed". In addition, the section requiring a spreader also is not a new theory. In the bill of particulars the plaintiff claims the defendants were negligent "in failing to maintain the safety guard and mechanisms of the . . . table saw" and the plaintiff's expert engineer averred in his affidavit that on the model table saw involved in the plaintiff's accident, "the guard, anti-kickback and spreader come a single safety unit installed and placed over the rotating blade".

Any claims of prejudice are unavailing since the permitted amendments are not based upon new facts and are universally based upon previously pled theories of negligence which the defendant has had more

than ample opportunity to investigate during the discovery phase of this litigation.

Accordingly, the branch of the Classon's motion to dismiss the plaintiff's claim pursuant to Labor Law §241[6] is denied and the plaintiff's cross-motion is granted only to the extent that the plaintiff may serve an amended supplemental bill of particulars alleging the defendants violated sections 23-1.12[c][2] and [3] of the Industrial Code within ten days of the date of this order (See, CPLR §3025[b]).

The branch of Classon's motion for summary judgment on its claim for contractual indemnification, including attorney's fees, against European is granted without opposition (See, Tranchina v Sisters of Charity Health Care System Nursing Home, Inc., 294 AD2d 491; Kanarvogel v Tops Appliance City, Inc., 271 AD2d 409; Onorino v Halmal Equities, Inc., 267 AD2d 286; Mackey v Beacon City School District, 216 AD2d 534).

Dated: January 10, 2008

Peter J. Kelly, J.S.C.