[* 1]

PRESENT: Hon. Doris Ling-Cohan PART 36

Index Number : 402691/2005
DA SILVA, FRANCISCO
vs.
C & E VENTURES
SEQUENCE NUMBER : 007/008
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE
MOTION SEQ. NO. 007/008
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3, 4
Answering Affidavits — Exhibits	13, 14, 15, 16, 17, 18, 19, 20
Replying Affidavits	5-6, 7-8, 9-10, 11-12

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion & cross-motions for, inter alia, summary judgment are decided in accordance with the attached memorandum decision.

FILED
OCT 30 2008
COUNTY CLERK'S OFFICE
NEW YORK

JUSTICE DORIS LING-COHAN

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

HON. DORIS LING-COHAN

Dated: 10/14/08

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK- NEW YORK COUNTY
PRESENT: Hon .DORIS LING--COHAN, Justice PART 36

DASILVA et al.,

Plaintiffs,

-against-

C & E VENTURES, INC., et al.
Defendants,

Index No.: 402691/05

Motion Seq. No.: 007 & 008

KTA-TATOR, INC.,
Third-party Plaintiff,

-against-

L & L PAINTING CO., INC., et al.,

Ling-Cohan, J.:

Motion sequence nos. 007 and 008 are consolidated for disposition. In motion sequence no. 007, defendant Port Authority of New York & New Jersey (the Port Authority) and third-party defendant L & L Painting Co., Inc. (L&L) jointly move for an order: (a) declaring that New Jersey's law of negligence will govern all issues of liability and damages in this action; (b) granting summary judgment dismissing the complaint as to the Port Authority; (c) or, in the alternative, dismissing the claims alleging violations of New York Labor Law; and (d) dismissing the remaining cause of action against L&L. In that cause of action, defendant/third-party plaintiff KTA-KATOR, Inc. (KTA) alleges that L&L breached its contractual duty to procure insurance covering KTA. Third-party defendants American International Special Lines

Insurance Company sued herein as American International Insurance Company (AISLIC) and Commerce and Industry Insurance Company (Commerce) jointly cross-move, pursuant to CPLR 3212 (a), for summary judgment dismissing the third-party complaint as to them.

In motion sequence no. 008, KTA moves for summary judgment dismissing the complaint and all cross claims alleged against it; plaintiffs Francisco Dasilva, Maria Dasilva, Robert Dasilva, Silvia Dasilva, Marciano Debas, Daniel Martins, Graciela Tsoliakis, and Stefanos Tsoliakis cross-move for partial summary judgment as to liability on their Labor Law § 241 (6) claim; and plaintiff Marc Liard cross-moves, pursuant to CPLR 3043 (b), for leave to serve a supplementary bill of particulars.[1]

Plaintiffs were employed by L&L, which contracted with the Port Authority to remove lead-based paint from the towers of the George Washington Bridge (Bridge) and then to repaint the towers. Plaintiffs allege that they suffered lead poisoning as a direct result of the conditions in which they performed their work on the Bridge. The complaints allege violations of Labor Law §§ 200 and 241 (6).

The Port Authority's and L&L's Motion and Plaintiffs' Cross Motions

The Port Authority and L&L contend that New Jersey's law of negligence applies, and New York Labor Law does not, because four

[1] By order dated October 6, 2006, the two actions commenced by Liard were consolidated with the action filed by the other plaintiffs. Liard continues to be represented by his original counsel, as do the other plaintiffs. The worker plaintiffs, other than Liard will be designated as the Dasilva plaintiffs, where they need to be distinguished from Liard.

of the six worker plaintiffs are domiciliaries of New Jersey, and because the situs of all of the plaintiffs' injuries was New Jersey.

Labor Law § 200, which codifies the "common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (Comes v New York State Elec. and Gas Corp., 82 NY2d 876, 877 [1993]), does not differ significantly from the negligence law of New Jersey. Under Labor Law § 200, an owner will not be liable for an injury to a subcontractor's employee absent supervisory control over the employee's work and actual or constructive notice of the dangerous condition that resulted in the injury. Id.; Balladares v Southgate Owners Corp., 40 AD3d 667, 671 (2d Dept 2007); Cahill v Triborough Bridge & Tunnel Auth., 31 AD3d 347 (1st Dept 2006). Similarly, under the law of New Jersey, landowners and general contractors are not liable for injuries to employees of a subcontractor "[a]bsent control over the job location or direction of the manner in which the delegated tasks are carried out." Meder v Resorts Intl. Hotel, Inc., 240 NJ Super 470, 474, 573 A2d 922, 924 (NJ Super 1989). Accordingly, with regard to plaintiffs' Labor Law § 200 claim, there is no choice of law issue and no reason to disturb the ordinary application of the law of the forum state. See Matter of Allstate Ins. Co. [Stolarz - New Jersey Mfrs. Ins. Co.], 81 NY2d 219 (1993); Ehrlich v Hambrecht, 19 AD3d 259 (1st Dept 2005).

The situation is different with regard to plaintiffs' Labor Law § 241 (6) claim. Pursuant to the Construction Safety Act, N.J.

Stats An., § 34:5-166, et seq., the Commissioner of the New Jersey Department of Labor and Industry promulgated the Construction Safety Code (Code), a set of regulations analogous to those in the Industrial Code. However, in 1978, the Code was repealed (10 N.J.R. 258 [June 8, 1978]), and jurisdiction over construction safety standards was vested with the United States Department of Labor, under the Federal Occupational Safety and Health Act of 1970, 29 USC § 651, et seq. This court has not examined the rules promulgated by the Occupational Health and Safety Administration (OSHA) as they may pertain to safety standards in construction activities related to lead abatement, because even if such rules proved identical to applicable standards in the Industrial Code, Labor Law § 241 (6), unlike New Jersey law, "imposes a nondelegable duty of reasonable care upon owners and contractors `to provide reasonable and adequate protection and safety' to persons employed in ... all areas in which construction, excavation or demolition work is being performed." Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 348 (1998) (citations omitted). Thus, where there is a violation of a provision of the Industrial Code which mandates compliance with concrete specifications, a nonsupervisory owner or general contractor may be held vicariously liable for the negligence of another party. Id. Accordingly, the court turns to the choice of law issue.

Because the evidence that Liard and the other plaintiffs have submitted in support of their cross motions impacts on the choice of law issue, the court turns first to the Port Authority's and

L&L's contention that plaintiffs' cross motions are untimely, and that therefore, the evidence submitted in support of those cross motions is not properly before the court. Plaintiffs filed their note of issue on September 27, 2007, and the motions of the Port Authority and L&L, and of KTA, were made on or about November 26, 2007. Those motions were repeatedly adjourned on consent. Thereafter, plaintiffs cross-moved for summary judgment on February 25, 2008.

CPLR 3212 (a) provides that a motion for summary judgment must be made no later than 120 days after the filing of the note of issue, absent a court order or rule to the contrary. Here, the June 23, 2006 preliminary conference order provided that dispositive motions must be filed within 60 days of filing of the note of issue. However, despite the filing of a note of issue, with the court's permission, the parties continued to engage in discovery, through approximately December 3, 2007, when, by order of this court, the motion and cross-motion to strike the note of issue were denied. Thus, given that it is not disputed that discovery was ongoing, there is sufficient good cause presented. Moreover, even if this court were to deny plaintiffs' cross-motion for summary judgment as untimely, the evidence that they have submitted in support of their cross motions is properly before the court.

Turning, now, to the choice of law issue, Liard and the Tsoliakis plaintiffs are domiciliaries of New York. The other six plaintiffs are domiciliaries of New Jersey. The Port Authority is

a domiciliary of both New York and New Jersey. Aviles v Port Auth. of N.Y. and N.J., 202 AD2d 45, 50 (1st Dept 1994). Where "the plaintiff and the defendant [in a tort action] are domiciled in different States, the law of the situs of injury generally applies." Id. at 46, citing Neumeier v Kuehner, 31 NY2d 121 (1972). Where the plaintiff and the defendant are domiciliaries of New York, but the injury complained of occurred in another state, then, if a standard of conduct is involved, the law of the place of the tort governs, whereas if the issue involves loss allocating rules, then the rule of the common domicile will govern. Padula v Lilarn Props. Corp., 84 NY2d 519, 522(1994). Labor Law §§ 240 and 241 are primarily conduct-regulating rules, which, accordingly, do not apply to construction-related injuries sustained in another state. Id.

The Appellate Division, First Department, has recently characterized the weighing process used to decide whether a rule is "primarily" conduct-regulating or loss-allocating as "necessarily ... arbitrary" (K.T. v Dash, 37 AD3d 107, 113 [1st Dept 2006]). Applying the "analytical framework, comparing whether or not the policy underlying each jurisdiction's rule would be thwarted by application of the other's rule" (id. at 115), the court held that, where a New York plaintiff was suing a New York defendant for a rape committed in Brazil, New York law applied; see also Parrott v Coopers & Lybrand, L.L.P., 263 AD2d 316, 319 (1st Dept), affd 95 NY)2d 479 (2000) (where plaintiff and defendant were domiciliaries of New York, New York law applied to a tort committed in

California, because "New York has the greater interest in extending the protection of its own laws to its own domiciliaries.")

It appears that New Jersey law, which holds that the general law of negligence is best suited for dealing with construction-related injuries, would be thwarted by applying the Labor Law to injuries suffered as a result of activities in New Jersey. Moreover, this court is bound by the holding in Padula, that Labor Law § 241 is inapplicable to injuries sustained outside the state. Accordingly, if plaintiffs' injuries are solely attributable to their work conditions in New Jersey, then Labor Law § 241 (6) is inapplicable to their claims.

However, in addition to evidence that the worker plaintiffs suffered lead poisoning while working on the West tower of the Bridge, in New Jersey, there is evidence that, at least some of the workers suffered further lead poisoning while working in New York.

Liard testified at his deposition that, after the workers were removed from the West tower, because they had been found to have elevated blood lead levels, he and the other worker plaintiffs were assigned to work on the East tower, in New York. He testified that he worked there between one week and 10 days, during which time his lead levels "went through the roof." Nikolis Aff., Exh. H, at 77. A Quest Diagnostics report, dated May 28, 2004, states that a blood sample of Liard's, taken on May 24, 2004, approximately 10 days after he commenced working on the East tower, showed a blood lead level exceeding 100 micrograms per decaliter. Nikolis Aff., Exh. C. A report from the Lead Testing Laboratory of the New York City

Department of Health and Mental Hygiene (DOH), states that a blood sample collected from Liard on May 27, 2004, approximately seven days after his doctor instructed him not to return to work on the East tower, showed a decline in blood lead level to 91 ug/dL. DOH defines a blood lead level above 20 ug/dL as "high," a level of 45-69 ug/dL as "urgent," and a level in excess of 70 ug/dL as "emergency." Nikolis Affirm., Exh. D. A Decision and Order noticed by the Chief Judge of the United States Occupational Safety and Health Review Commission (OSHRC) on April 24, 2006, in a proceeding entitled Secretary of Labor v L&L Painting Co., Inc., OSHRC Docket No. 05-0050, states, among other things, that:

> Liard was medically removed from lead exposure on the New Jersey side of the bridge on May 14, 2004, after a test on May 7, 2004 showed his BLL to be 76 ug/dl, and he was sent to work on the New York side of the bridge. Following the removal, and during his work on the New York side, Mr. Liard's BLL increased; in fact, when Mr. Liard went to his primary physician and had another test on May 24, 2004, that test showed his BLL to be over 100 ug/dl.

Nikolis Affirm., Exh. F, at 3-4 (footnotes omitted).

Jack Caravanos, Dr.P.H., CIH, who is Professor of Environmental and Occupational Health Sciences at Hunter College, states in an affidavit that the Dasilva plaintiffs have submitted in support of their cross motion that:

> [i[t is a fundamentally recognized toxological principle that lead poisoning to the human body constitutes a cumulative insult. Lead is accumulated in the body and physiologically stored in bone and soft tissue, causing a myriad of physical injuries and/or impairments over time, that are incapable of toxological allocation.

Mandel Affirm., Exh. 4, at 4. Thus, there is persuasive evidence that Liard's injury must be attributed to both his work in New

Jersey and his work in New York. Absent a practical method of apportioning his injuries between New York and New Jersey, the injuries may be attributed to both. See Ravo v Rogatnick, 70 NY2d 305 (1987) (infant's brain injury attributable to negligent obstetrician and negligent pediatrician); Tejeda v 116 West Corp., 293 AD2d 261 (1st Dept 2002) (lead poisoning injuries not apportioned between successive landlords).

The Dasilva plaintiffs have submitted affidavits, in which they state that, after the New Jersey site where they had worked was shut down, they were all sent to work on the East tower, where they continued to work through the latter part of June, suffering progressively greater lead poisoning. They state that the work that they did there caused old lead paint to flake off on their faces, and that they inhaled lead dust that resulted from then-ongoing sandblasting. The Port Authority and L&L characterize all of these affidavits, which are identically worded, as "fabricated." Hughes Aff. at 5. The court will discuss them individually.

Martins testified unequivocally at his deposition that he had never worked on the New York tower. An affidavit that, without adequate explanation, contradicts the affiant's earlier deposition testimony must be rejected. Garcia v Jesuits of Fordham, Inc., 6 AD3d 163, 166 (1st Dept 2004); Mayancela v Almat Realty Development, LLC, 303 AD2d 207 (1st Dept 2003).

The Port Authority and L&L point out that Tsoliakis testified at his deposition that he was extremely tired while working on the New York tower, but that he did not mention having been exposed to

lead at that location, and that he wrote a workers' compensation claim on June 23, 2004, in which he stated the date of his injury as May 12, 2004, and attributed his injury to exposure to lead "while working removing paint on bridges." Hughes Aff. Exh. M. It appears that Tsoliakis was not asked, at his deposition, whether he had been exposed to lead on the New York tower, and his reference to May 12, 2004, as the date of his injury, is understandable, because that was the date he provided notice of his injury to his supervisor. Hughes Aff., Exh. M. As to the nature of his injury, he listed lead exposure as the reason that he was removed from the West tower.

Dasilva testified at his deposition that there was no lead dust on the New York tower, at the time that he worked there, but the balance of his affidavit is not contradicted by anything in his deposition. A workers' compensation form that, presumably, was prepared on the basis of Dasilva's statements to the preparer describes the location where the exposure occurred as the New Jersey side of the bridge, but that statement in no way contradicts Dasilva's affidavit statement that exposure continued on the New York side.

Contrary to the Port Authority's contention, there is no contradiction between Debas's statement in his affidavit that there was "some sandblasting" during the time that he worked on the New York tower, and his deposition testimony that, at the time that he was sent to work on the New York tower, there was not "yet" any sandblasting, because the New York side was being set up at that

time. Hughes Affirm., Exh. K, at 39. Indeed, the testimony that there was not "yet" any sandblasting implies that, subsequently, sandblasting was performed.

The Port Authority makes much of the fact that the Dasilva plaintiffs' affidavits were prepared for the specific purpose of opposing summary judgment, but that is the purpose of all affidavits that are submitted in opposition to summary judgment motions. The plaintiff workers had no reason, until faced with the Port Authority's motion, to think that such exposure to lead as they may have sustained on the New York side of the Bridge was important to the success of their claims, given that they had indisputable evidence of having been lead poisoned on the New Jersey side. Indeed, even Liard, who knew, at the time, that his blood lead level had greatly increased while he was working on the New York side, listed the place of his exposure as the West tower, on a workers' compensation claim dated July 2, 2004. Hughes Aff., Exh. D. It does not follow from this that their affidavits are necessarily false; nor does the similarity of the affidavits suggest that they are false. The affidavits were written, presumably, by counsel, for worker plaintiffs who had worked together and undergone the same experiences.

In sum, inasmuch as Liard, the Tsoliakis plaintiffs, and the Port Authority are domiciliaries of New York, and inasmuch as there is evidence that New York, as much as New Jersey, is a situs of Liard's and Stefanos Tsoliakis's injury, New York law governs those plaintiffs' claims. New York law also governs the claims of the

four Dasilva plaintiffs and of Debas, because although those plaintiffs are domiciliaries of New Jersey, their alleged injury in New York affords them the protection of New York's conduct-regulating law. However, because there is no good evidence that Martins, a New Jersey domiciliary, ever worked, or suffered an injury, in New York, his claims are governed by the law of New Jersey.

That branch of the Port Authority's motion that seeks summary dismissal of the complaint is based solely on the argument that New York law is inapplicable to the complaint. In view of the discussion above, that branch of the motion will be granted only with respect to Martins's Labor Law § 241 (6) claim. In the interest of judicial economy, Martins' Labor Law § 200 claim will be deemed a negligence claim brought under New Jersey law.

KTA's remaining claim against L&L, for breach of contract to procure insurance, will be dismissed because the contract claimed to have been breached is one between the Port Authority and L&L, to which KTA is not a party, and of which KTA does not even claim to be a third-party beneficiary.

The plaintiffs' cross motion for partial summary judgment will be denied. Declan Farrington, who was project superintendent for L&L during the repainting project, states in his affidavit in opposition to that cross motion that, at the time that the plaintiff workers worked on the East tower, no work was performed there that produced any lead dust. Hughes Aff., Exh. N. The accuracy of Mr. Farrington's affidavit is brought into question by

the Port Authority's Daily Narrative for May 27, 2004, which lists installation of dust collector pipes by L&L as one of that day's work activities on the New York tower. See Mandel Aff., Exh. 12, at 1. However, Mr. Farrington's affidavit suffices to raise a question of fact with regard to plaintiffs' descriptions of their work on the East tower.

Laird's cross motion to serve a supplementary bill of particulars to allege injury in New York, as well as in New Jersey, and to add certain sections of the Industrial Code that the other worker plaintiffs alleged, will be granted because supplementary bills should be allowed, absent prejudice to the defendant. Zahra v New York City Hous. Auth., 39 AD3d 351 (1st Dept 2007); Anthony v New York City Tr. Auth., 38 AD3d 484 (2d Dept 2007); Watson v City of New York, 273 AD2d 115 (1st Dept 2000). Here, the Port Authority cannot credibly claim to be prejudiced, because it knew, at least from the time that Liard was deposed, that he was claiming to have suffered additional lead poisoning while working on the New York tower. Liard's claim, that he continued to be lead poisoned while working in New York, is not a "completely new and different" claim from his initial claim. National Cold Storage Co. v Port of New York Auth., 26 Misc 2d 570, 573 (Sup Ct, NY County 1960), affd 17 AD2d 21 (1st Dept 1962). Indeed, it specifies no injury different in kind from the injuries initially specified. Compare Diaz v Ford Motor Co., 29 AD3d 339 (1st Dept 2006) (new injury claimed); Licht v Trans Care N.Y., Inc., 3 AD3d 325 (1st Dept 2004) (same). It "amplifie[s] and elaborate[s] upon the theory ... set

forth in the original bill of particulars and raise[s] no new theory of liability" (Scherrer v Time Equities, Inc., 27 AD3d 208, 209 [1st Dept 2006]), except for the addition of several sections of the Industrial Code, which the other worker plaintiffs have already raised.

Neither Ofulue v Port Auth. of New York and New Jersey (307 AD2d 258 [1st Dept 2003]), nor City of New York v Port Auth. of New York and New Jersey (284 AD2d 195 [1st Dept 2001]), upon which the Port Authority relies, is relevant here. In Ofulue, the plaintiff had failed timely to serve a notice of claim. In City of New York, the plaintiff had filed suit less than 60 days after filing its verified notice of claim, whereas Unconsolidated Laws § 7107 bars the commencement of an action against the Port Authority until at least 60 days after the filing of a sworn notice of claim. Here, the Port Authority does not contend that Liard failed to comply with section 7107.

KTA's Motion

Pursuant to a written contract with the Port Authority, KTA was retained as a consultant with regard to the project to repaint the Bridge towers. Labor Law § 241 imposes non-delegable duties upon "owners, contractors and their agents." A party is deemed a statutory agent when it has "the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition." Damiani v Federated Dept. Stores, 23 AD3d 329, 332 (2d Dept 2005). L&L was retained to remove lead-based paint. The unsafe conditions that allegedly brought about

plaintiffs' lead poisoning consisted in the failure to provide the workers with adequate protection from exposure to lead dust. It is undisputed that KTA paint inspectors inspected plaintiff workers' work to ascertain that old paint had been sufficiently removed, monitored weather conditions for the purpose of directing plaintiffs to paint at certain times, and not to paint at other times, and inspected the painting that was performed by plaintiffs. There is no evidence that KTA had any authority to augment or to modify the equipment or the procedures designed to protect the workers from exposure to lead dust. Plaintiffs argue, however, that KTA acted as the Port Authority's agent when, on at least two occasions it allegedly instructed them to close the door of the confined space on the West tower from which they were removing lead-based paint. Assuming the truth of plaintiffs' factual allegation, it remains the case that the dangerous conditions that allegedly resulted in plaintiffs' injuries did not consist in the workers' greater or lesser exposure to lead dust. Such exposure was inherent in the work that they were hired to perform. The unsafe conditions, on the basis of which liability may be imposed, consisted in the alleged failure of the responsible party or parties to provide the worker plaintiffs with adequate protection against contamination by lead dust. KTA is not alleged to have had any authority over the provision of such protection. Accordingly, KTA was not the Port Authority's agent, for purposes of Labor Law § 241. Damiani v Federated Dept. Stores, 23 AD3d 329, supra; see also Delahaye v Saint Anns School, 40 AD3d 679 (2d Dept 2007).

The Dasilva plaintiffs contend that, pursuant to its contract with the Port Authority, KTA was responsible for seeing to it that all work was performed to contract specifications, and that it was responsible for safety at the job site. However, Jay Cameron, a chief paint inspector for KTA, testified at his deposition that KTA entered into two successive contracts in connection with the repainting of the Bridge. The first involved the painting of the underside of the Bridge. The second, which pertained to the painting of the towers, did not, unlike the first contract, give KTA any responsibility for, or authority over, matters of safety. Indeed, when KTA proposed that it would provide environmental monitoring for the towers project, the Port Authority declined to retain KTA for that purpose. See Maniscalco Reply Affirm., Exh. M.

Nor may KTA be held liable under Labor Law § 200. Plaintiffs have not alleged any affirmative act of negligence on the part of KTA, and "[g]eneral supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability ... under Labor Law § 200." Dos Santos v STV Engineers, Inc., 8 AD3d 223, 224 (2d Dept 2004). Thus, KTA's motion is granted.

The Insurance Companies' Motion

As an initial matter, KTA contends that the insurance companies' motion is untimely. As discussed above, since, with the court's permission, the parties were engaged in discovery after the note of issue was filed, none of the cross motions are deemed untimely.

The third-party complaint alleges that KTA is an additional insured under Contractor's Pollution Liability Policy no. CPO 7618993 issued to L&L for the period from May 3, 2001 to May 3, 2004 (Policy), and under its successor contract, no. CPO 1274158, in force from May 3, 2004 to May 3, 2007; that KTA timely notified AISLIC and Commerce of plaintiffs' lawsuit; and that AISLIC and Commerce disclaimed coverage. The policies in question were issued by Commerce, and KTA has no conceivable claim against AISLIC in relation to them.

The named insured on the Policy is L&L. Pursuant to the Policy, those insured thereunder, in addition to L&L, are "[a]ny person who is or was a director, officer, partner, or employee of the Named Insured ... [and] [t]he Client for whom the Named Insured performs or performed Covered Operations ... ." Cleary Affirm., Exh. C, at 4. The Policy names as additional insureds, but only with respect to lead abatement operations performed by L&L pursuant to a written contract, "Project Owners, Property Owners, Property Managers, Project General Managers, [and] General Managers." Cleary Affirm., Exh. C, Endorsement No. 3. Plainly KTA is neither an insured, nor an additional insured, as those terms are defined by the Policy. KTA appears to argue, however, that it is an additional insured because the contract between the Port Authority and L&L required L&L to procure lead abatement liability insurance and to include the Port Authority and all subcontractors as additional insureds. See Cleary Affirm., Exh D, at 79. Leaving aside the question of whether KTA, which contracted directly with

the Port Authority, was a subcontractor, the short answer to KTA's argument is that, regardless of its obligations under its contract with the Port Authority, L&L did not have subcontractors named as additional insureds on the Policy.

Conclusion

Accordingly, it is hereby

ORDERED that the motion of the Port Authority for summary judgment is granted to the extent that Daniel Martins's cause of action alleging violation of Labor Law § 241 (6) is dismissed and the motion is otherwise denied; and it is further

ORDERED that the cross motion of plaintiffs Francisco Dasilva, Maria Dasilva, Robert Dasilva, Silvia Dasilva, Marciano Debas, Daniel Martins, Graciela Tsoliakis and Stefanos Tsoliakis for partial summary judgment is denied; and it is further

DECLARED that the claims of plaintiffs Francisco Dasilva, Maria Dasilva, Robert Dasilva, Silvia Dasilva, Marciano Debas, Graciela Tsoliakis, Stefanos Tsoliakis, and Marc Liard are governed by the law of New York; and it is further

DECLARED that the Labor Law § 200 claim of plaintiff Daniel Martins, which is deemed a claim sounding in common-law negligence, is governed by the law of New Jersey; and it is further

ORDERED that the cross motion of plaintiff Mark Liard is granted, and the supplementary bill of particulars annexed as Exhibit A to the Nikolis affirmation will be deemed served upon defendants upon service of a copy of this order with notice of entry; and it is further

ORDERED that the motion of third-party defendant L&L Painting Co., Inc. to dismiss the remaining claim of the third-party complaint against it, and the motion of third-party defendants American International Special Lines Insurance Company sued herein as American International Insurance Company and Commerce and Industry Insurance Company for summary judgment, are granted and the third party complaint is dismissed as against said third-party defendants with costs and disbursements as calculated by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion for summary judgment of defendant/third party plaintiff KTA-KATOR, Inc. is granted and the complaint is severed and dismissed as against said defendant with costs and disbursements as calculated by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

DECLARED that third-party defendants American International Special Lines Insurance Company sued herein as American International Insurance Company and Commerce and Industry Insurance Company bear no insurance obligation to defendant/third-party plaintiff KTA-KATOR in connection with this action; and it is further

ORDERED that the remainder of this action shall continue; and

it is further

ORDERED that within 30 days of entry of this order, third-party defendant L & L Painting shall serve a copy upon all parties, with notice of entry.

Dated: October 14, 2008

Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\DASILVA.c&e.wpd