

**Walia v Junqueira**

2009 NY Slip Op 30972(U)

April 28, 2009

Supreme Court, New York County

Docket Number: 104944/06

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **WALTER B. TOLUB** Justice

PART 15

Index Number : 104944/2006

**WALIA, BALWINDER**

VS.

**JUNQUEIRA, PAULO A.**

SEQUENCE NUMBER : 007

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is consolidated and with motion seq. 006 and decided in accordance with the within memorandum decision

**FILED**

APR 30 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 4/26/09

*[Signature]*

J.S.C.

**WALTER B. TOLUB**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**WALTER B. TOLUB**

PRESENT: \_\_\_\_\_

PART 15

Index Number : 104944/2006
<b>WALIA, BALWINDER</b>
vs.
<b>JUNQUEIRA, PAULO A.</b>
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

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Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is consolidated & decided in accordance with the memorandum decision in motion seq. 007

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

Dated: 4/20/09

**WALTER B. TOLUB** 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  
COUNTY OF NEW YORK: PART 15

-----X  
Balwinder Walia,

Index No.:  
104944/06

Plaintiff,  
-against-

Paulo A. Junqueira, RRZ Trucking  
Company LLC, Mayrich Construction Corp.,  
Total Safety Consulting, LLC, TSC,  
Total Safety Consulting Inc., Element-  
West 59<sup>th</sup> Street LLC and Plaza  
Construction Corp.,

Defendants.

-----X  
Mayrich Construction Corp.,  
Element-West 59<sup>th</sup> Street LLC,  
and Plaza Construction Corp.,

Third-Party Plaintiffs,

-against-

Cross River Contracting,

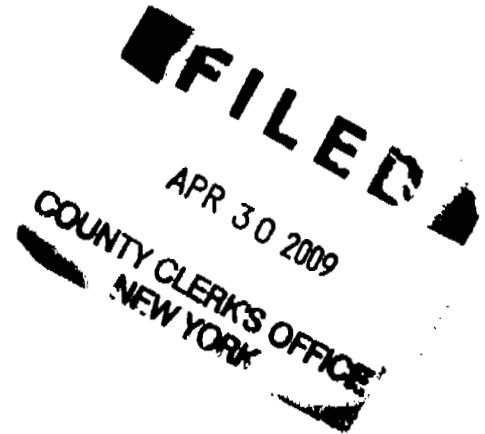
Third-Party Defendant.

-----X  
**Tolub, J.:**

Motion sequence numbers 006 and 007 are hereby consolidated  
for disposition.

This action arises out of a motor vehicle accident which  
occurred on February 24, 2006 in Manhattan on West 60<sup>th</sup> Street.

In motion sequence 006, plaintiff Balwinder Walia moves,  
pursuant to CPLR 3212, for summary judgment against defendants  
Paulo A. Junqueira (Paulo) and RRZ Trucking Company LLC's (RRZ) on  
the issue of liability. Defendants and third-party plaintiffs



Mayrich Construction Corp. (Mayrich), Element-West 59<sup>th</sup> Street LLC (Element) and Plaza Construction Corp. (Plaza) cross-move, pursuant to CPLR 3212, for summary judgment on their cross claim for common-law indemnification against defendants Paulo and RZZ.

In motion sequence 007, defendants Total Safety Consulting, LLC and TSC, Total Safety Consulting Inc. (together Total) move, pursuant to CPLR 3212, for (1) summary judgment dismissing the complaint and all cross claims and counterclaims; or, in the alternative, (2) an order granting common law and contractual indemnification as against defendants Element and Plaza.

#### **BACKGROUND**

Plaintiff claims that while driving his Lincoln Town car eastbound on West 60<sup>th</sup> Street in Manhattan, a fully loaded dump truck, owned by defendant RZZ and driven by defendant Paulo, exited a construction site (the site) and broadsided his car. The site was located in the middle of the block between Amsterdam and West End Avenues. On the date of the accident, defendant Element was the owner of the premises being constructed at the site (the project). Element hired defendant Plaza to serve as general contractor for the project. Defendant Mayrich was retained by Plaza to serve as a foundation and excavation contractor for the project. Defendant Total provided the site safety manager for the project. Defendant Paulo was employed as a livery driver by third-party defendant Cross River Contracting

(Cross River).

Plaintiff testified that, as he was driving down the one way street, he observed the truck for less than one second before it hit the right side of his car. Plaintiff maintains that there was nothing obstructing his view of the roadway as he approached the location of his accident. In addition, plaintiff noted that he did not observe any construction or traffic signs on the subject roadway, nor did he see anyone directing traffic in this area. Plaintiff also testified that, at the time of his accident, there was no flagman near the gate located at the exit to the site.

Anthony Mignogna (Mignogna), who was working as a flagman for Mayrich on the date of the accident, testified that Mayrich had put up an eight foot high construction fence to block off West 60<sup>th</sup> Street from the job site. As a result, a truck leaving the site through the front gate would not be able to see the traffic coming down West 60<sup>th</sup> Street. Thus, it was necessary to have a flagman present in the proximity of the gate to safely guide the exiting trucks onto the street. Specifically, Mignogna explained that, without a flagman at the gate the trucks would enter the roadway "blind" as to the traffic proceeding on West 60<sup>th</sup> Street (Plaintiff's Notice of Motion, Exhibit G, Mignogna Deposition, at 49). In addition, Mignogna maintained that Mayrich was the only entity to provide a flagman at the gate, and

that no other company was empowered to wave trucks through the gate.

Mignogna also explained that, on the date of the accident he was the only flagman working at the construction site. At the time of the accident Mignogna was not manning the gate because he was stationed at the corner of West 60<sup>th</sup> Street and West End Avenue, approximately 200 to 250 feet down the road from the gate, where other trucks were readying to enter the site. Mignogna testified that, from this vantage point, he had a clear view of the gate, and that he personally witnessed plaintiff's accident. Mignogna asserted that there was no one waving trucks out of the job site in the gate area at the time of the incident.

Police Officer Kurt Lewis was the responding officer to the scene of the accident. Mr. Lewis testified that he spoke to plaintiff and Paulo after the accident, and that both men agreed that there was no flagman or traffic control device where the accident happened. Mr. Lewis authenticated his police report and confirmed that he had signed it. In his police report, Mr. Lewis noted that "there was no traffic control or flag person directing traffic flow present" (Plaintiff's Notice of Motion, Exhibit D, Lewis' Police Report). Mr. Lewis maintained that, if there had been conflicting views of how the accident occurred, he would have written down each version in his report.

Timothy Searvant, the site safety manager for Total,

testified that Total was hired to oversee safety issues on the project. Mr. Searvant, who was at the site on the day of the accident, investigated the accident as part of his duties. Mr. Searvant stated that, when he spoke to Paulo after the accident, Paulo told him that he had "pulled out because the flagger wasn't there" (Plaintiff's Notice of Motion, Exhibit I, Searvant Deposition, at 43).

Mr. Searvant also noted that he spoke to Mignogna at the scene of the accident and that Mignogna told him that he was not at the gate when the accident happened. Mr. Searvant added that Vincent Giordano, Mayrich's supervisor, also confirmed Mr. Mignogna's version of the events. After speaking to the parties, Mr. Searvant prepared an incident report for Total, wherein he stated that Paulo had "proceeded to leave the site without stopping and looking, and without the benefit of a flagman" (Plaintiff's Notice of Motion, Exhibit E, Total Incident Report).

In contrast to testimonies of the above-mentioned witnesses, defendant Paulo testified that, immediately prior to the accident, a flagman, who was standing approximately a half a car length away from the open gate, signaled for him to exit the site onto West 60<sup>th</sup> Street. Paulo could not remember any details regarding the flagman, though he stated that the flagman was almost run over by the plaintiff's car. Paulo explained that,

as he was exiting the site, a taxi driver, who was traveling at a high rate of speed, hit his truck. Paulo also maintained that, after his accident, he told the police officer that the flagman had stopped traffic and signaled for him to leave the site.

Paulo admitted that, when he started moving through the gate, he could not see West 60<sup>th</sup> Street to his left, as his sight was blocked by the fence and a trailer. In addition, Paulo testified that he did not brake from the time he started driving until his wheels were approximately two feet off the curb and he saw a "shade" that he later identified as plaintiff's car (Plaintiff's Notice of Motion, Exhibit J, Paulo Deposition, at 132-133). Paulo stated that, immediately thereafter, plaintiff struck his truck with his car. Paulo noted that he spoke to both the police and the safety monitor after the accident, and that he was aided by an interpreter when he gave his statement to the police.

#### DISCUSSION

"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 [1<sup>st</sup> Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden

then shifts to the motion's 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 [1<sup>st</sup> Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1<sup>st</sup> Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224, 226 [1<sup>st</sup> Dept 2002]).

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN HIS FAVOR AS TO LIABILITY AGAINST DEFENDANTS PAULO AND RRZ [motion sequence 006]

"Vehicle & Traffic Law § 1141 provides that the driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right-of-way to all vehicles approaching on the roadway to be entered or crossed" (*Gandolfo v DeMasi*, 28 AD3d 606, 607 [2d Dept 2006]; *Loweth v Estate of Cusack*, 273 AD2d 283, 283 [2d Dept 2000]). The evidence in this case establishes that Paulo failed to yield the right of way to plaintiff (*Loweth v Estate of Cusack*, 273 AD2d at 283; *Burns v Mastroianni*, 173 AD2d 754, 755 [2d Dept 1991]).

In support of his motion, plaintiff submitted deposition testimonies, Total's accident report and Mr. Lewis' police report, whereby it was clearly established that Paulo exited the

site while unable to see passing traffic, and that he did not attempt to stop until immediately before hitting plaintiff's car. It should be noted that, contrary to defendants Paulo and RRZ's contention, the police report, which reflects Paulo's assertion that a flagman was not present as he exited the site, is admissible evidence in this case (see *Rosenblatt v Venizelos*, 49 AD3d 519, 519 [2d Dept 2008]; *Griffin v Pennoyer*, 49 AD3d 341, 341 [1<sup>st</sup> Dept 2008]; *Abramov v Miral Corporation*, 24 AD3d 397, 398 [2d Dept 2005]; *Grange v Jacobs*, 11 AD3d 582, 583 [2d Dept 2004]).

The fact that Paulo's view was obstructed was not a justification for his failure to yield (see *Gandolfo v DeMasi*, 28 AD3d at 607; *Murchison v Incognoli*, 5 AD3d 271, 271 [1st Dept 2004]). Under such circumstances, Paulo was "clearly negligent in failing to see that which, under the facts and circumstances, he should have seen by the proper use of his senses" (*Feder v Greco*, 240 AD2d 364, 364 [2d Dept 1997]; *Ferrara v Castro*, 283 AD2d 392, 393 [2d Dept 2001]). It should be noted that Paulo's conclusory assertion that, before making the turn he looked to his left, is also insufficient to raise a triable issue of fact (see *Griffin v Pennoyer*, 49 AD3d at 342).

Further, defendants Paulo and RRZ's assertion that plaintiff's vehicle was moving too fast was speculative in light of Paulo's testimony that he did not see the "shade" of

plaintiff's car until immediately before the impact (see *Meliarenne v Prisco*, 9 AD3d 353, 354 [2d Dept 2004]). In fact, there is also no evidence in this case of any condition that would have required plaintiff to reduce his speed, and, as such, as plaintiff had the right-of-way, he was "entitled to anticipate that [Paulo] would obey the traffic laws" requiring him to yield (*Zadins v Pommerville*, 300 AD2d 1111, 1112 [4<sup>th</sup> Dept 2002], quoting *Namisnak v Martin*, 244 AD2d 258, 260 [1<sup>st</sup> Dept 1997]; *Aiello v City of New York*, 32 AD3d 361, 362 [1<sup>st</sup> Dept 2006]; *Jordan v City of New York*, 12 AD3d 326, 326 [1<sup>st</sup> Dept 2004]). Moreover, there is no evidence that plaintiff had any opportunity to avoid the collision (*id.*).

Thus, "[b]y entering traffic without yielding as required by law," defendant Paulo "was negligent as a matter of law in colliding with plaintiff's automobile, and his negligence was a proximate cause of the accident" (*Ferrara v Castro*, 283 AD2d at 393).

In addition, New York State Vehicle and Traffic Law § 1173 requires that a driver of a vehicle emerging from a driveway stop at the point nearest the roadway to be entered where the driver has a view of approaching traffic. Here, defendant Paulo admitted that he exited the site without attempting to stop until he was just about to hit plaintiff's vehicle. Thus, as this violation contributed to the accident, as well, Paulo is also

negligent as a matter of law for this reason.

Under New York State Vehicle and Traffic Law § 388, defendant RRZ, as the owner of the vehicle driven by defendant Paulo, is vicariously liable for his actions (*Hassan v Montuori*, 99 NY2d 348 [2003]). Accordingly, plaintiff is entitled to summary judgment in his favor as to liability as against both defendants Paulo and RRZ.

TOTAL'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE COMPLAINT AND ALL CROSS CLAIMS AND COUNTERCLAIMS AGAINST IT [motion sequence 007]

"To maintain a negligence cause of action, plaintiff must be able to prove the existence of a duty, breach and proximate cause" (*Kenney v City of New York*, 30 AD3d 261, 262 [1<sup>st</sup> Dept 2006]; *Marasco v C.D.R. Electronics Security & Surveillance Systems Company*, 1 AD3d 578, 579 [2d Dept 2003]; *Zavaro v Westbury Property Investment Company*, 244 AD2d 547, 547-548 [2d Dept 1997]).

Because a finding of negligence must be based upon a breach of duty, a threshold and dispositive question in this case is whether Total, as the site safety consultant, owed a duty of care to plaintiff, a non-contracting party to the contractual arrangement between Plaza and Total (*Church v Callanan Industries, Inc.*, 99 NY2d 104, 110 [2002]; *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002]; *Timmins v Tishman Construction Corporation*, 9 AD3d 62, 65 [1<sup>st</sup> Dept 2004]).

"[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d at 138). In the case of *Espinal v Melville Snow Contractors, Inc.* (*supra*), the Court identified three sets of circumstances as exceptions to this general rule, in which a duty of care to non-contracting third parties may arise out of a contractual obligation or the performance thereof (*id.* at 140; see *Church v Callanan Industries, Inc.*, 99 NY2d at 111; *Timmins v Tishman Construction Corporation*, 9 AD3d at 66). Based upon the circumstances of this case, plaintiff fails to qualify under any of the exceptions.

The first set of circumstances arises where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d at 139). This conduct has also been described as "'launch[ing] a force or instrument of harm'" (*Church v Callanan Industries, Inc.*, 99 NY2d at 111, quoting *H.R. Moch Company v Rensselaer Water Company*, 247 NY 160, 168 [1928]). Here, there is no evidence in the record that Total's performance of its work created or increased the risk for plaintiff's accident beyond the risk which existed before Total entered into any contractual undertaking (see *Church v Callanan Industries, Inc.*, 99 NY2d at

112 [no evidence that defendant's incomplete performance of its contractual duty to install guide-railing created or increased the risk of plaintiff's divergence from roadway beyond the risk which existed before the contractual duty arose]).

The second set of circumstances giving rise to a promisor's tort liability arises where the plaintiff has suffered injury as a result of a reasonable reliance upon the defendant's continuing performance of a contractual obligation (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d at 140; see also *Eaves Brooks Costume Company v Y.B.H. Realty Corporation*, 76 NY2d 220, 226 [1990]). Here, as evidence in the record indicates that plaintiff had never encountered a truck exiting the work site before, it cannot be said that plaintiff detrimentally relied on Total's continued performance of its contractual obligation to assist in maintaining safety at the site.

The third set of circumstances wherein tort liability will be imposed upon a promisor is "'where the contracting party has entirely displaced the other party's duty to maintain the premises safely'" (*Church v Callanan Industries, Inc.*, 99 NY2d at 112, quoting *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d at 140; *Palka v Servicemaster Management Services Corporation*, 83 NY2d 579, 589 [1994]). Here, Total's contractual duty to serve as site safety manager at the premises was not of the type of "comprehensive and exclusive" property maintenance obligation

that would entirely displace Plaza's duty to maintain the premises safely (*Timmins v Tishman Construction Corporation*, 9 AD3d at 66, quoting *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d at 141).

Mr. Searvant testified that his duties at the site included complying with Plaza's site safety plan, and conducting site orientation for the subcontractor employees. Mr. Searvant maintained that Plaza created the documents to be used at the site orientation. These documents outlined the basic rules and regulations for site safety. In addition, Mr. Searvant stated that Plaza conducted regular safety inspections at the site.

Mr. Searvant further explained that he did not hold any safety meetings with the employees of the subcontractors. However, he did have the authority to step in and correct unsafe job conditions, as well as stop work, in the event that he observed an unsafe condition. Mr. Searvant noted that Mayrich coordinated safety in regard to the comings and goings of the trucks at the site. In addition, Mayrich was responsible for providing a flagman to direct truck traffic in and out of the site and to stop traffic in the street.

Mr. Searvant acknowledged that, prior to the date of the accident, he complained to Mayrich about the conduct of the trucks going in and out of the construction site, however, he never stopped work, wrote up, or fined Mayrich. Mr. Searvant

maintained that he was not aware of any prior complaints about the conduct of the trucks, and that he never observed a truck leaving the gate without a flagman present. Mr. Searvant further noted that, because the area was also being used as a main entrance for workers to come in and out of the site, it was not convenient to lock the gate when the flagman was not present.

It should be noted that Mr. Mignogna testified that, prior to the date of the accident, an individual by the name of "Tim" from Safety may have had conversations with him about the use of flags, rather than hand signals, when directing vehicles out of the site.

Kenneth Faulds, Plaza's on-site superintendent, testified that Plaza was responsible for safety at the job site, including making sure that the conditions at the site were safe for the workers, as well as the general public. Plaza retained Total as its safety consultant to make recommendations and to provide a site safety person at the site. Mr. Faulds explained that Total was not exclusively involved with safety at the project, as "everybody is responsible" (Paulo/RRZ Affirmation in Opposition, Exhibit C, Fauld Deposition, at 20). Mr. Faulds also explained that he conducted daily safety inspections of the project and, if he saw an unsafe condition at the site, he would notify the contractor to remedy it. He also had the authority to stop work if he thought that it was necessary. In addition, if Mr.

Searvant had a problem rectifying an unsafe condition, Mr. Faulds would step in and rectify it.

Based upon these considerations, this court concludes that the alleged negligence of Total in performing its contractual obligations did not breach any duty to plaintiff. In any event, Total is entitled to summary judgment dismissing plaintiff's complaint against it, as it has established that it did not create or have actual or constructive notice of the existence of an allegedly dangerous condition that caused plaintiff's accident (see *Cruceta v Funnel Equities, Inc.*, 18 AD3d 693, 694 [2d Dept 2005]; *Labella v Willis Seafood*, 296 AD2d 382, 382 [2d Dept 2002]). The plaintiff, in opposition, failed to raise a triable issue of fact (*id.*; *Ezzo v 2102 Union Boulevard, Inc.*, 278 AD2d 447, 447 [2d Dept 2000]).

As such, it is not necessary for this court to address that part of Total's motion seeking common-law indemnification as against co-defendants Plaza and Element. However, as Total has not demonstrated that it is entitled to summary judgment dismissing all cross claims and counterclaims as against it, nor has it even identified such claims, Total is not entitled to summary judgment dismissing all cross claims and counterclaims as against it.

DEFENDANTS MAYRICH, ELEMENT AND PLAZA'S CROSS MOTION FOR SUMMARY  
JUDGMENT IN THEIR FAVOR ON THEIR CROSS CLAIM AGAINST DEFENDANTS  
PAULO AND RRZ FOR COMMON-LAW INDEMNIFICATION [motion sequence  
006]

Initially, defendants Paulo and RRZ argue that the motion of defendants Mayrich, Element and Plaza for common-law indemnification as against them is untimely, because it was not filed within 120 days of the filing of the Note of Issue, as set forth by CPLR 3212. As such, Paulo and RRZ assert that the late filing requires a showing "good cause" on the part of these defendants in order for the court to consider their motion.

However, because the subject application is actually a cross motion, although filed after the expiration of the 120-day period, it may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief "nearly identical" to that sought by the cross motion (*Lapin v Atlantic Realty Apartments Company, LLC*, 48 AD3d 337, 337 [1<sup>st</sup> Dept 2008]; *Conklin v Triborough Bridge and Tunnel Authority*, 49 AD3d 320, 321 [1<sup>st</sup> Dept 2008]; *Filannino v Triborough Bridge and Tunnel Authority*, 34 AD3d 280, 281 [1<sup>st</sup> Dept 2006]).

Here, as the cross motion is largely based upon the same arguments set forth in the timely motion for summary judgment, i.e. violations of Vehicle and Traffic Law §§ 1143 and 1173, as well as common-law negligence, the court will entertain the instant cross motion.

"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'" (*Perri v Gilbert Johnson Enterprises, Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Management*, 259 AD2d 60, 65 [1<sup>st</sup> Dept 1999]; *Priestly v Montefiore Medical Center/Einstein Medical Center*, 10 AD3d 493, 495 [1<sup>st</sup> Dept 2004])).

As it has been established previously that defendants Paulo and RRZ are liable for negligence that proximately caused plaintiff's accident, the issue to be decided herein is whether defendants Mayrich, Element and Plaza are also liable for some negligence that contributed to the causation of the accident. Paulo and RRZ maintain that negligence on the part of these defendants in failing to take proper safety precautions contributed to plaintiff's accident, and thus, that these defendants are not entitled to common-law indemnification as against them.

Specifically, Paulo and RRZ contend that these defendants failed to post warning signs to alert drivers of the construction site exit, failed to have a flagman present at the gate, failed to provide an unobstructed view of the road, and failed to lock the gate when the exit was unattended by a flagman. In addition, Paulo and RRZ note that, if, in fact, a flagman was present, as

Paulo testified, said flagman was negligent in waving Paulo into the street.

As to defendant Element, a review of the record reveals that Element, the owner of the premises, was not regularly present at the site, nor was it responsible for maintaining safety at the site. Thus, as defendant Element is not guilty of some negligence that contributed to the accident, Element is entitled to summary judgment in its favor on its cross claim for common-law indemnification as against Paulo and RRZ.

As to defendants Mayrich and Plaza, the threshold issue to be determined is whether Mayrich, as the entity in charge of the trucks entering and exiting the site, as well as providing the necessary flagmen, and Plaza, the general contractor in charge of overall safety at the site, owed a duty of care to plaintiff, a non-contracting party to the contractual arrangement between Mayrich and Plaza (see *Timmins v Tishman Construction Corporation*, 9 AD3d at 65).

In ascertaining whether Mayrich and Plaza owed a duty of care to plaintiff, only the third exception to the general rule that "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" applies in this case (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d at 138). This third exception requires that it be determined whether the contracting party entirely displaced the

other party's duty to maintain the safety of the premises.

Here, the fact that a flagman was not present at the gate could be deemed a proximate cause of plaintiff's accident. An issue of fact exists as to whether Mayrich, as the entity in charge of the trucks entering and exiting the site, as well as providing the necessary flagmen, entirely displaced Plaza's overall duty to maintain safety at the site.

Thus, defendants Mayrich and Plaza are not entitled to summary judgment in their favor on their cross claim for common-law indemnification as against defendants Paulo and RRZ.

#### **CONCLUSION AND ORDER**

Accordingly, it is hereby

**ORDERED** that plaintiff Balwinder Walia's motion (motion sequence number 006), pursuant to CPLR 3212, for summary judgment in his favor as to liability against defendants Paulo A. Junqueira (Paulo) and RRZ Trucking Company LLC (RRZ) is granted; and it is further

**ORDERED** that defendants and third-party plaintiffs Mayrich Construction Corp. (Mayrich), Element-West 59<sup>th</sup> Street LLC (Element) and Plaza Construction Corp. (Plaza)'s cross motion, pursuant to CPLR 3212, for summary judgment in their favor on their cross claim for common-law indemnification against defendants Paulo and RZZ is granted as to defendant Element only, and the motion is otherwise denied; and it is further

**ORDERED** that defendants Total Safety Consulting, LLC and TSC, Total Safety Consulting Inc. (together Total)'s motion (motion sequence number 007), pursuant to CPLR 3212, for (1) summary judgment dismissing the complaint as against them is granted, and the complaint is dismissed as to these defendants, and the Clerk is directed to enter judgment in favor of these defendants, with costs and disbursements as taxed by the Clerk; and the motion is otherwise denied; and it is further

**ORDERED** that the remainder of the action shall continue.

Counsel for the parties are directed to appear for a pre-trial conference on June 5, 2009 at 11:00AM in room 335 at 60 Centre Street.

DATED: 4/28/09

ENTER:

WALTER B. TOLUB J.S.C.

**FILED**  
APR 30 2009  
COUNTY CLERK'S OFFICE  
NEW YORK