Fundus v Scarola
2021 NY Slip Op 32433(U)
November 24, 2021
Supreme Court, New York County
Docket Number: Index No. 154030/2014
Judge: David Benjamin Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART** **IAS MOTION 58EFM**

Justice

----------X

INDEX NO. 154030/2014

KENNETH FUNDUS and TERESA FUNDUS,

Plaintiffs,

- v -

MOTION SEQ. NO. 004, 005, 006, and 007

MICHAEL SCAROLA, JOSEPH ALFIERI, CAROL CUDDY, MWS RIGGING CONSULTANTS LLC,ROGER PARADISO, MICHAEL TADROSS, COLUMBIA PICTURES INDUSTRIES, INC., THE STOP & SHOP SUPERMARKET COMPANY LLC,FIRST NATIONAL SUPERMARKETS, INC., M&M HOLDING CORP., AHOLD LEASE, U.S.A., INC., AHOLD U.S.A., INC., AHOLD USA ADMINISTRATIVE SERVICES LLC,GREENWICH STREET PRODUCTIONS, INC., AMBLIN' ENTERTAINMENT, INC., AMBLING MANAGEMENT COMPANY, LLC, AMBLING PROPERTY INVESTMENTS, LLC, MEN IN BLACK, INC., JOHN DOE 1-10, XYZ, INC. 1-10, and XYZ, LLC 1-10,

DECISION + ORDER ON MOTION

Defendants.

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 217, 221, 231, 232, 239, 240, 241, 242, 243, 250, 251

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 218, 222, 237, 238

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 219, 223, 235, 236, 244, 245, 246, 247, 248

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 220, 224, 225, 226, 227, 228, 229, 230, 233, 234, 249

were read on this motion to/for SUMMARY JUDGMENT.

Motion sequence numbers 004-007 are hereby consolidated for disposition.

In this personal injury action commenced by Kenneth Fundus ("plaintiff") and Teresa Fundus ("Mrs. Fundus") (collectively "plaintiffs") against defendants Michael Scarola, Joseph Alfieri, Carol Cuddy, MWS Rigging Consultants LLC ("MWS"), Roger Paradiso, Michael Tadross, Columbia Pictures Industries, Inc. ("Columbia"), The Stop & Shop Supermarket Company LLC ("Stop & Shop")[1], First National Supermarkets, Inc. ("FNS"), M&M Holding Corp. ("M&M"), Ahold Lease, U.S.A., Inc. ("Ahold Lease"), Ahold USA Administrative Services LLC ("Ahold USA"), Greenwich Street Productions, Inc. ("Greenwich"), Amblin' Entertainment, Inc. ("AEI"), Amblin Management Company LLC ("AMC"), Ambling Property Investments, LLC ("API"), Men In Black, Inc. ("MIB"), John Doe 1-10, XYZ, Inc. 1-10, and XYZ, LLC 1-10:

1) Paradiso, Tadross and Greenwich move, pursuant to CPLR 3212 (mot. seq. 004), for summary judgment dismissing all claims against them;

2) Scarola, Alfieri, Cuddy, Columbia, AEI, MWS, Astoria Studios Inc. ("ASI"), Astoria Studios Limited Partnership ("ASLP"), Astoria Studios Limited Partnership II ("ASLP II"), and Kaufman Astoria Studios ("Kaufman") move, pursuant to CPLR 3212 (mot. seq. 005) for summary judgment dismissing all claims against them;

3) Stop & Shop and M&M move, pursuant to CPLR 3212 (mot. seq. 006), for summary judgment dismissing all claims against them, as well as for summary judgment on their cross claim for indemnification against Greenwich; and

4) Plaintiffs move, pursuant to CPLR 3212 (mot. seq. 007), for summary judgment: a) on their first cause of action (negligence) against Greenwich, Stop & Shop, and M&M; and b) on their claims pursuant to Labor Law §200, §240(1), and §241(6) against ASLP II (second, third and fourth causes of action, respectively).

FACTUAL AND PROCEDURAL BACKGROUND

This action arises from an incident on April 26, 2011 ("the April 2011 accident") in which plaintiff was injured while working at a sound stage at 291 Tuckahoe Road in Yonkers,

[1] Stop & Shop answered as The Stop and Shop Supermarket Company LLC i/s/h/a as Ahold Lease U.S.A., Inc., Ahold U.S.A., Inc., Ahold USA Administrative Services LLC, Tops Markets LLC i/s/h/a First National Supermarkets, Inc., and M&M Holding Corp. Doc. 162. FNS was Stop & Shop's predecessor in interest and the Ahold entities were Stop & Shop's parent affiliates. Doc. 163 at par. 2.

New York ("the sound stage"). Plaintiff went to the sound stage to retrieve plywood which was to be used during the production of the film "Men In Black 3" ("MIB3"), which was being filmed at a studio in Queens. Doc. 1. Plaintiffs commenced this action on April 25, 2014 by filing a summons and complaint against Scarola, Alfieri, Cuddy, MWS, Paradiso, Tadross, Columbia, Stop & Shop, FNS, M&M, Ahold Lease, Ahold USA, Greenwich, AEI, AMC, API[2], MIB, and John Doe 1-10, XYZ, Inc. 1-10, and XYZ, LLC 1-10. Doc. 1. In their complaint, plaintiffs alleged that defendants: 1) were negligent (first cause of action); 2) violated Labor Law §200 (second cause of action); 3) violated Labor Law §240(1) (third cause of action); and 4) violated Labor Law §241(6) (fourth cause of action). Mrs. Fundus alleges a claim for loss of consortium (fifth cause of action). Doc. 1. In his bill of particulars, plaintiff alleged that the April 2011 accident occurred in the parking lot of the sound stage when "he was struck by wood that was negligently and improperly stacked by defendants." Doc. 83 at pars. 2-4.

On June 11, 2014, Stop & Shop and M&M filed their answer in the captioned action, denying all substantive allegations of wrongdoing, asserting various affirmative defenses, and asserting a cross claim for, inter alia, contractual indemnification as against Greenwich. Doc. 27. Paradiso, Tadross and Greenwich also answered and asserted cross claims for contribution and common-law and contractual indemnification against their codefendants. Doc. 116.

On June 19, 2014, plaintiffs commenced a separate action in this Court ("the second action"), under Index Number 156032/14, against Scarola, Alfieri, Cuddy, MWS, Paradiso, Tadross, Columbia, Astoria Studios Incorporated ("ASI"), Astoria Studios Limited Partnership ("ASLP"), Astoria Studios Limited Partnership II ("ASLPII"), Kaufman Astoria Studios, Inc. ("Kaufman"), Greenwich, AEI, AMC, API, MIB, John Doe 1-10, XYZ, Inc. 1-10, and XYZ,

[2] Plaintiffs' claims against AMC and API were discontinued by stipulation filed October 28, 2014. Doc. 37.

LLC 1-10.[3] Doc. 1. filed under Ind. No. 156032/14. In the second action, plaintiff alleged that he was injured on June 20, 2011 ("the June 2011 accident") when struck by an improperly secured steel beam while working at 34-12 36th Street in Astoria, New York. Docs. 84, 115. In their complaint in the second action, plaintiffs set forth the same five causes of action as those herein. Doc. 115.

On February 16, 2015, plaintiffs moved in the second action for a joint trial with the captioned action. By order filed April 8, 2015 (Doc. 26 filed under Ind. No. 156032/14), this Court (Mills, J.) granted the motion. Doc. 42; Doc. 41 filed under Ind. No. 156032/14.[4]

At his deposition, plaintiff testified that he was a member of the Local 52 Motion Picture Studio Mechanics Union since 1979 and that, in April, 2011, he was employed as a construction grip[5] at the filming of MIB3 at Kaufman, a movie studio located in Queens. Doc. 120 at 21-22, 58. Although he believed that Entertainment Partners ("EP") was his employer because it issued his paychecks, he was not certain. Doc. 120 at 16, 22, 31. As a construction grip, he built and dismantled film sets. Doc. 120 at 22. His supervisor on the job was Scarola, the head construction grip/best boy, who was employed by Alfieri.[6] Doc. 120 at 23, 428. He also was

---

[3] Although the second action was commenced in 2014, the Request for Judicial Intervention in the captioned action, filed January 6, 2015, does not mention any related action.

[4] Although some of the parties represent in their motion papers that the captioned action was "consolidated" for joint trial with the second action, this is incorrect. Justice Mills' order did not even mention the term "consolidation." Rather, the actions maintained their separate identities, as evidenced by the fact that neither caption was changed and Justice Mills directed that "notes of issue and statements of readiness [be filed] in each [action]." Doc. 41. Unfortunately, however, the parties have created some unnecessary confusion herein by treating the actions as if there had been a true consolidation. Specifically, some of the motions to be decided herein address issues pertaining to the April 2011 accident and the June 2011 accident. Since the captioned action only involves allegations arising from the April 2011 accident, this decision will only address motions relating to that incident. Any motions pertaining to claims arising from the June 2011 incident will be addressed in a decision in the second action which, as noted previously, was filed under Index Number 156032/14. To ensure that all branches of motion sequences 004-007 pertaining to the April 2011 and June 2011 accidents are decided, this Court instructed the parties to file all of the motions to be decided herein in the second action as well.

[5] A construction grip assists in building and dismantling movie sets and in packing and unpacking parts of sets from storage.

[6] A best boy is the assistant to either the gaffer or the key grip on a movie set.

directed and instructed by Alfieri, the construction coordinator. Doc. 120 at 28. EP did not direct his work on the set and, other than handling payroll and workers' compensation insurance, it had no role in the production of MIB3. Doc. 120 at 31, 163-165. Cuddy was the unit manager/construction manager on MIB3 and Columbia was the production company for the film. Doc. 120 at 33.

On or about April 26, 2011, Scarola directed plaintiff to travel to the sound stage to obtain 200 sheets of plywood from a 40' container and bring them back to Kaufman in order to build sets for MIB3. Doc. 120 at 58-60. The plywood was sold to Columbia or MIB by Alfieri, who leased the container. Doc. 120 at 62, 70-71, 428, 454. An employee of Alfieri's assisted in loading the plywood into the container, which was located in a parking lot at the sound stage. Doc. 120 at 63, 149.

Plaintiff arrived at the sound stage at 7 a.m. and worked with three other men to unload the plywood. Doc. 120 at 61, 66, 147-148. He did not see any vehicles at the sound stage and saw no people other than his coworkers. Doc. 120 at 71. Neither Scarola, Alfieri, nor Cuddy were present at the Yonkers studio, although Scarola's "best boy", Jerry, was the foreman of the crew which loaded the plywood. Doc. 120 at 66. The sound stage, which plaintiff believed was leased by Scarola, was not used to film any part of MIB3. Doc. 120 at 141-145.

Plaintiff entered the container and, while standing in it, began to remove the plywood, which was "heavy" and measured about 4' x 8' x ¾, one sheet at a time. Doc. 120 at 66-67, 71-72, 151. He slid the plywood sheets out of the container and his co-workers grabbed them as he did so. Doc. 120 at 71-74. He claimed that he was injured when he pulled out a piece of plywood, the stack of plywood shifted, struck him in the head, and pinned him to the wall of the

container. Doc. 120 at 72-77. Although one of plaintiff's co-workers witnessed the incident, plaintiff did not know who that person was. Doc. 120 at 79.

While unloading the plywood, plaintiff told Jerry that the job was unsafe because there were not enough workers assisting him. Doc. 120 at 85-86. He maintained that there should have been two people sliding the plywood out of the container instead of just one since then he "probably would have [had] two people against the wall to hold the load up and feed it out instead of just one person." Doc. 120 at 87.

Plaintiff said that the plywood was improperly stacked but, when he was asked how it should have been stacked, he replied: "I don't know. It should have been stringers separating it, pieces of board, two by four or whatever. It should have been loaded a different way so that we could have taken it out with a forklift of some sort." Doc. 120 at 87-88. Although plaintiff said that the person who stacked the wood was present at the sound stage when he was injured, he did not know who the individual was. Doc. 120 at 75.

Columbia directed and controlled the work of the production crew at Kaufman. Doc. 120 at 169-170. However, neither Columbia nor Kaufman stacked the plywood at the sound stage. Doc. 120 at 88. He did not know whether Scarola, Columbia, or Cuddy had any knowledge regarding how the wood was stacked. Doc. 120 at 167-168. Plaintiff was not familiar with AEI. Doc. 120 at 88. Plaintiff knew Paradiso as a location manager at some of the movie sets he had worked at, but Paradiso did not supervise plaintiff on MIB3 and had no involvement in producing it. Doc. 120 at 132-133. 145-146, 426. Similarly, he had worked with Tadross, a producer, but Tadross did not supervise him or work on the production of MIB3. Doc. 120 at 133-134, 145-146, 426. Further, Greenwich did not supervise him or work on MIB3. Doc. 120

at 134-135, 145-146. Nor was plaintiff aware of any involvement that Stop & Shop, M&M, or FNS had with the sound stage. Doc. 120 at 156-157.

According to plaintiff, EP was a payroll company which created daily work reports at Kaufman reflecting who was present and who did which job. Doc. 120 at 161-162. It also provided workers' compensation insurance, although he maintained that he did not work for the company and did not know who paid the premiums for the insurance. Doc. 120 at 164. To his knowledge, EP had no other involvement in the production of the film. Doc. 120 at 165.

Alfieri testified at his deposition that, in April 2011, he was employed as a construction coordinator employed by Columbia and EP. Doc. 123 at 14-16, 22. At that time, he worked on MIB3 at Kaufman. Doc. 123 at 20-21. Alfieri was directed by the production designer, the art director, and the producer (Doc. 123 at 45-46), and had the authority to direct Scarola and plaintiff on MIB3. Doc. 123 at 65, 70. Scarola was plaintiff's sole supervisor unless he delegated such supervision to his best boy. Doc. 123 at 70.

Scarola, the key construction grip and an employee of EP, was in charge of the grip department, which built sets. Doc. 123 at 31-34, 62. He hired plaintiff to work as a grip on MIB3 and was plaintiff's supervisor on the project as well. Doc. 123 at 65-66, 70.

Although Alfieri, Scarola, and plaintiff were employees of EP, Alfieri believed that it was Columbia, and not EP, which had the right to hire and fire them. Doc. 123 at 34-35.

Prior to the alleged incident, Patty Willett, the production office coordinator, who ran the construction crew and who worked under Cuddy, the unit production manager, who "was in charge of everything", called Alfieri and told him that she had some plywood available at the sound stage. Doc. 123 at 71-78, 93, 185, 200.[7] Since the plywood was needed on the MIB3 set

[7] Alfieri explained that, although Cuddy "ran everything", she had to delegate construction related issues to Willett because "the job was so big [that Cuddy] couldn't do it all." Doc. 75.

at Kaufman, Alfieri told Scarola to send some people, including plaintiff, to the sound stage to retrieve it. Doc. 123 at 71-72, 75, 78.

A few days after plaintiff's April 2011 accident, Alfieri learned that plaintiff was injured when plywood fell on him at the sound stage. Doc. 123 at 67, 71-72, 82. Alfieri never spoke to plaintiff about the incident. Doc. 123 at 86. Based on an accident report generated after the incident, Alfieri believed that Joe Damiano was a witness to the occurrence. Doc. 123 at 97-98. Although Alfieri attempted to speak to Damiano about the accident, the latter did not wish to discuss it. Doc. 123 at 98-100.

According to Alfieri, the sound stage was owned by a supermarket across the street and was leased to Tadross, a movie producer, and Paradiso. Doc. 123 at 90-92. Tadross and Paradiso owned Greenwich, a production company which used the sound stage. Doc. 123 at 95-96, 179-180. Neither Greenwich, Tadross, nor Paradiso were involved in the production of MIB3 or supervised plaintiff on the project. Doc. 123 at 182, 185-186. Nor did they lease the container in which the plywood was stored. Doc. 123 at 183-184. Alfieri maintained that the container would have been rented by one of the Amblin entities named. Doc. 123 at 183-184, 197. He did not know who loaded the plywood into the container. Doc. 123 at 185.

Scarola testified that, in April, 2011 he was employed by EP and was working on MIB3 at Kaufman. Doc. 124 at 12. He was hired by Alfieri as a key construction grip and his duties included hiring and supervising the grip crew, which built and dismantled movie sets, as well as participating in the actual construction. Doc. 124 at 11, 15-16, 22. Scarola in turn hired plaintiff as a grip on the MIB3 project. Doc. 124 at 16, 22. Both plaintiff and Scarola were members of the Local 52 International Alliance of Theatrical Stage Employees Union. Doc. 124 at 16-17.

During the production of MIB3, Alfieri asked Scarola to send plaintiff and three other workers to the sound stage to pick up the plywood and the latter did so. Doc. 124 at 59.

After the incident, Scarola received a call advising him that plaintiff had been injured, although he could not recall the details of the conversation or who called him. Doc. 124 at 51-53. When plaintiff returned to work, Scarola did not speak with him about how the accident occurred. Doc. 124 at 61.

Scarola was not aware of any investigation into the incident and did not believe that Paradiso, Tadross, Greenwich, or the sound stage were involved in the production of MIB3. Doc. 124 at 125, 141. Scarola did not know who loaded the plywood into the container, never saw the container, and did not know who owned the plywood or the container. Doc. 124 at 142. He insisted that nobody involved in the production of MIB3 had a trailer at the sound stage. Doc. 124 at 144.

Paradiso, a movie producer, testified that he had no role in the production of MIB3. Doc. 125 at 10-12. In 2011, Paradiso was employed by Greenwich and ran a sound stage called Yonkers Stage, located at 285 and 291 Tuckahoe Road in Yonkers. Doc. 125 at 14-18. Paradiso owned Greenwich with Tadross. Doc. 125 at 22. Paradiso believed that Stop & Shop leased the premises from M&M and that in or about 2007, Stop & Shop was purchased by "Ahold". Doc. 125 at 20.

According to Paradiso, production companies renting the sound stage were allowed to bring containers to the premises to store their materials, including furniture, props and other items. Doc. 125 at 71, 82. The companies would usually padlock their equipment in the containers and had no obligation to tell Greenwich what they were storing, so long as it was not flammable. Doc. 125 at 53, 66, 71. Although Paradiso said that Willet was a production

manager who rented the sound stage for film production companies, he could not recall precisely when she did so. Doc. 125 at 50. He did not know whether Willett stored any plywood at the sound stage or whether there was any plywood stored in any of the containers at the site. Doc. 125 at 53, 56-57. Paradiso maintained that only entities involved in film production at the sound stage were permitted to bring a container to the property or use one that had been left there. Doc. 125 at 101. Greenwich leased or loaned a container at the site but did not recall to whom. Doc. 125 at 38.

At his deposition, Tadross admitted that he and Paradiso were partners in Greenwich, but insisted that he had no involvement in the production of MIB3. Doc. 126 at 9-10, 12. Nor did Tadross have any knowledge of plaintiff's accident or of Greenwich having storage containers or storing any wood at the sound stage. Doc. 126 at 10-11, 26.

Damiano, a construction grip on the MIB3 production, was employed by EP and supervised by Scarola. Doc. 127 at 11-12.[8] His duties included building sets and assisting carpenters. Doc. 127 at 12. He recalled traveling to the sound stage, at the request of Scarola, to pick up plywood for the production of MIB3, as well as the fact that plaintiff was present. Doc. 127 at 17-20, 23-24. However, he did not recall any accident in which plaintiff was involved. Doc. 127 at 16. In fact, when he was shown the accident report naming him as a witness, he denied providing any of the information therein. Doc. 127 at 25-28. Damiano recalled that it took he and his coworkers several hours to load the plywood onto a truck. Doc. 127 at 33.

Prior to the April 2011 accident, Stop & Shop, the lessee of the property where the sound stage was located, entered into a license agreement with Greenwich pursuant to which the latter was permitted to use the premises, which had been leased to Stop & Shop by M&M, as a movie

[8] He subsequently testified, however, that he was supervised by Columbia. Doc. 127 at 47.

and television studio. Doc. 175 at pars. 1.2 and 5.1. The license agreement provided, among other things, that Greenwich was required to maintain the premises in good condition (Doc. 175 at pars. 5.4 and 5.5); Stop and Shop had the right to re-renter to inspect the premises (Doc. 175 at par. 6.3); Greenwich was required to hold harmless and indemnify Stop & Shop and M&M for any personal injury claims arising from the use of the premises, including costs and attorneys' fees incurred in defending any such claim (Doc. 175 at par. 8.1); and Greenwich was required to procure general liability insurance naming Stop & Shop and M&M as additional insureds. Doc. 175 at par. 7.4.

Plaintiffs filed a note of issue on September 23, 2020. Doc. 108.

Motion for Summary Judgment by Paradiso, Tadross and Greenwich (Mot. Seq. 004)

Paradiso, Tadross and Greenwich now move, pursuant to CPLR 3212 (mot. seq. 004), for summary judgment dismissing all claims against them. Doc. 112.[9] In support of the motion, they claim that they had no role in the production of MIB3 but were merely the lessees of the sound stage. Doc. 113. They insist that they did not provide the plywood which injured plaintiff or direct anyone involved with MIB3 to come to the sound state to retrieve the wood. Doc. 113. Additionally, they claim that they did not even know that the plywood was at the site or how long it was there. Doc. 113.

Scarola, Alfieri, Cuddy, Columbia, AEI, MWS, ASI, as well as ASLP, ASLP II, and Kaufman, which are not parties to this action, oppose the motion in part. Doc. 231. However, as explained below, the claims against these defendants have been discontinued and, thus, this

[9] The motion by Paradiso, Tadross, and Greenwich seeks the dismissal of all claims arising against them from plaintiff's April 2011 and June 2011 accidents. As noted previously, the allegations in the captioned action solely involve the April 2011 accident, and this decision will only address that occurrence. Since Paradiso, Tadross and Greenwich filed the identical application as motion sequence 002 under Index Number 156032/14 (Doc. 72 filed under Ind. No. 156032/14), the claims involving the June 2011 accident will be addressed in a separate decision in the second action.

Court need not consider their papers.

Plaintiffs argue in opposition that Stop & Shop, M&M, and Greenwich, as "owners operators and maintainers of the subject premises", owed a duty of care to plaintiff which was breached when they created a dangerous condition by improperly stacking the plywood. Doc. 243 at 27.[10] In support of this argument, plaintiffs cite Paradiso's testimony that Greenwich owned a container at the premises but did not know who was using it. Thus, claim plaintiffs, Stop & Shop, M&M, and Greenwich had constructive notice of the dangerous condition "for a period of months." Doc. 243.

In an affidavit in opposition to the motion, plaintiff claims that the plywood had been used in another movie and was stored in the container for several months (Doc. 242 at par. 6), whereas he had previously testified that he thought it had been used in another movie. Doc. 120 at 166-167. Plaintiff described the occurrence as follows:

> To start the sheets had to be pulled one sheet at a time until enough room had been created between the container wall and the plywood. I removed a top sheet of plywood and then removed a bottom sheet to get in between the wall of the container and the plywood. I was able to create about one foot of space to work in between the wall and the plywood. Workers would then squeeze toward the rear of the container to help remove the plywood by pushing the sheets from the rear.
>
> ***
>
> As I was pulling out the bottom sheet of plywood – that had nothing on top of it, my entire body was pinned against the wall of the container when the entire top layer of plywood shifted, and one-half of the lower stack of plywood also shifted onto my body. I remained under the crushing weight of the plywood until my co-worker [sic] were able to remove enough sheets of plywood to get me out.

Doc. 242 at pars. 9-10.

In reply, Stop & Shop, M&M and Greenwich argue that plaintiff has failed to create an issue of fact. They further allege that plaintiff's accident was not foreseeable. Additionally, they

[10] It is unclear why plaintiff raise these arguments against Stop & Shop and M&M since the motion was made by Tadross, Paradiso, and Greenwich.

maintain that the affidavit of Steven Schneider, P.E., plaintiffs' expert engineer (Doc. 180), discussed below, is speculative and unsupported by facts in the record. Doc. 250.

At oral argument, Stop & Shop, M&M and Greenwich argued that they did not create or have notice of the allegedly dangerous condition. Tr. at 19. Plaintiffs' counsel also represented that plaintiffs were not pursuing any Labor Law claims in connection with the April 2011 accident (Tr. at 24); that plaintiff was withdrawing its claims against Scarola, Alfieri, Cuddy, MWS, Paradiso, Tadross, Columbia, AEI, API, AMC, MIB, Ahold USA, Ahold Lease, and FNS (Tr. at 24-25); that the only remaining claims were against Stop & Shop, M&M, and Greenwich (Tr. at 25); and that plaintiffs' claims were limited to "property defect conditions" at the sound stage (Tr. at 27-28).

Motion for Summary Judgment by Scarola, Alfieri, Cuddy, Columbia, AEI, MWS, ASI, ASLP, ASLP II, and Kaufman (Mot. Seq. 005)

Scarola, Alfieri, Cuddy, Columbia, AEI, MWS, ASI, ASLP, ASLPII, and Kaufman move, pursuant to CPLR 3212 (mot. seq. 005), for summary judgment dismissing all claims against them arising from the April 2011 and June 2011 accidents. Although these defendants essentially argue that they had no involvement in causing the April 2011 accident, their contentions are addressed almost exclusively to the June 2011 accident.[11]

Greenwich[12] opposes the motion in part, asserting that, if the motion is denied, then its cross claims against the movants should survive. Doc. 237.

Plaintiffs do not oppose the motion.

[11] The identical motion has been filed in the second action under motion sequence 004. Doc. 137 filed under Ind. No. 156032/14.
[12] As noted above, the claims against Tadros and Paradiso were discontinued.

Motion By Stop & Shop and M&M For Summary Judgment Dismissing All Claims Against Them And For Summary Judgment On Their Cross Claim For Contractual Indemnification Against Greenwich (Mot. Seq. 006)

Stop & Shop and M&M move, pursuant to CPLR 3212 (mot. seq. 006), for summary judgment dismissing all claims against them, as well as for summary judgment on their cross claim for contractual indemnification against Greenwich. Doc. 162. In support of the motion, Stop & Shop and M&M argue that they had no involvement with the storage of the plywood or with plaintiff's activities at the sound stage and, thus, there is no viable claim of negligence against them. Doc. 163. Stop & Shop and M&M further assert that they are entitled to contractual indemnification from Greenwich pursuant to the license agreement. Doc. 163.

In opposition, Greenwich argues that there is no evidence that the container was defective or that it had actual or constructive notice of any dangerous condition. Doc. 235. It further asserts that Schneider's affidavit is without a factual basis and fails to raise an issue of fact. Doc. 235. Additionally, Greenwich claims that, if a question of fact exists regarding the negligence of Stop & Shop and M&M, then those defendants would be precluded by General Obligations Law ("GOL") § 5-322.1 from obtaining contractual indemnification, and Greenwich's cross claims against them must survive. Doc. 235.

Scarola, Alfieri, Cuddy, Columbia, AEI, MWS, ASI, ASLP, ASLPII, and Kaufman submit reply papers (Docs. 244, 245, 247), but they need not be considered given the discontinuance against these entities.

Plaintiffs' Motion For Summary Judgment On Its Negligence Claims Against Stop & Shop, M&M, and Greenwich And Its Labor Law Claims Against ASLP II (Mot. Seq. 007)

Plaintiffs move, pursuant to CPLR 3212 (mot. seq. 007), for summary judgment: a) on their first cause of action (negligence) against Greenwich, Stop & Shop, and M&M; and b) on their claims pursuant to Labor Law §200, §240(1), and §241(6) against Astoria Studios Limited

Partnership II (second, third and fourth causes of action, respectively).[13] In support of their motion, plaintiffs submit, inter alia, the affidavit of Schneider, who opines, inter alia, that, based on his review of the pleadings, discovery responses, and plaintiff's deposition transcript and affidavit in support of the motion, that "defendants negligently created a dangerous condition . . . by not storing construction materials in a secured manner to prevent sliding, falling and collapsing, and this negligence constituted a failure to provide, proper, reasonable, and adequate protection to the plaintiff and was the proximate cause of the plaintiff's injury" (Doc. 180 at par. 20); "the defective storage of the plywood sheet was a proximate cause of [plaintiff's] injury" (Doc. 180 at par. 8) and that the allegedly dangerous "condition was created by the individuals licensed to use the property and therefore did not require constructive notice". Doc. 180 at par. 10.

Scarola, Alfieri, Cuddy, Columbia, AEI, MWS, ASI, ASLP, ASLP II and Kaufman oppose the motion but their opposition is limited to the June 2011 accident and is thus irrelevant herein. Docs. 225, 226.

Greenwich opposes plaintiffs' motion on essentially the same grounds it set forth in support of its motion for summary judgment (mot. seq. 004). Doc. 233. Greenwich also argues that, if plaintiffs raise an issue of fact regarding the negligence of Stop & Shop and/or M&M, then Stop & Shop and M&M would be barred by GOL § 5-322.1 from seeking indemnification from Greenwich. Doc. 233.

In reply, plaintiffs argue that Greenwich is liable since it created or had constructive notice of the dangerous condition. Doc. 249. They further assert that Greenwich failed to establish its prima facie entitlement to summary judgment but rather relied on gaps in plaintiffs'

[13] The identical motion has been filed in the second action, relating to the June 2011 accident, under motion sequence 003. Doc. 99 filed under Ind. No. 156032/14.

case. Doc. 249. Further, plaintiffs maintain that Schneider's affidavit establishes that Greenwich stored the plywood in a negligent manner. Doc. 249.

LEGAL CONCLUSIONS

Summary Judgment Standard

On a motion for summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this showing is made, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 NY2d at 324).

Motion for Summary Judgment by Greenwich (Mot. Seq. 004)[14]

It is well settled that, in order to establish a premises liability claim, a plaintiff must prove that defendant created or had actual and/or constructive notice of the dangerous condition which caused the alleged injury (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]).

Here, Greenwich has established its prima facie entitlement to summary judgment dismissing all claims against it with the exception of the contractual indemnification claim by Stop & Shop and M&M. Tadross and Paradiso, the owners of Greenwich, testified that they did not know that there was plywood stored in containers at the sound stage. Tadross did not even know that there were containers at the sound stage. Paradiso testified that some companies working at the sound stage stored their equipment inside the containers and padlocked them, and

[14] As noted previously, although Tadross and Paradiso also moved for summary judgment under motion sequence 004, the claims against them have been discontinued.

were not required to tell Greenwich what they were storing, so long as it was not flammable.[15] Additionally, plaintiff admitted at his deposition that an employee of Alfieri loaded the wood into the container. Doc. 120 at 63, 149. Therefore, Greenwich has made a prima facie showing that it did not create or have actual notice of any dangerous condition involving the plywood. It is clear that Greenwich could not have been on constructive notice of the contents of the containers, much less that the contents presented any danger.

Notably, plaintiff's own deposition testimony, submitted by Greenwich, does not establish that the plywood was improperly stacked. As discussed above, when plaintiff was asked how the plywood should have been stacked, he replied: "I don't know. It should have been stringers separating it, pieces of board, two by four or whatever. It should have been loaded a different way so that we could have taken it out with a forklift of some sort." Doc. 120 at 87-88. He further stated that he "probably would have [had] two people against the wall to hold the load up and feed it out instead of just one person." Doc. 120 at 87. However, such vague testimony is "at best, speculative as to causation" (*Scholar v Citadel Estates, LLC*, 177 AD3d 440, 441 [1st Dept 2019] [citations omitted]).

Although plaintiffs correctly argue that the license agreement required Greenwich to maintain the property where the sound stage was located, there is no evidence that it failed to do so. Therefore, all claims against Greenwich are dismissed with the exception of the cross claim by Stop & Shop and M&M seeking contractual indemnification against it.

Here, the license agreement specifically required Greenwich to indemnify and hold harmless Stop & Shop and M&M from any personal injury claims arising from its use of the sound stage. Despite Greenwich's argument that it is not required to indemnify Stop & Shop and

[15] Although wood is of course flammable, this fact is irrelevant to the allegations herein.

M&M because such indemnification is barred by GOL § 5-322.1, this contention is without merit where, as here the license agreement was between sophisticated business entities and the agreement also contained an insurance procurement provision requiring Greenwich to obtain general liability insurance naming Stop & Shop and M&M as additional insureds (*See Gary v Flair Beverage Corp*., 60 AD3d 413 [1st Dept 2009] [citations omitted]). Although the claims against Stop & Shop and M&M are to be dismissed for reasons discussed below, those entities have incurred costs and attorneys' fees in defending this action and are entitled to recover these monies from Greenwich pursuant to the license agreement (*Gary*, 60 AD3d at 415).

Finally, Greenwich's motion is denied to the extent any claims are asserted against it in connection with the June 2011 accident.

Motion for Summary Judgment by Scarola, Alfieri, Cuddy, Columbia, AEI, MWS, ASI, ASLP, ASLP II, and Kaufman (Mot. Seq. 005)

Since plaintiff has discontinued its claims against the movants in motion sequence 005, the branch of the motion addressing the April 2011 accident is denied as moot. The branch of the motion relating to the June 2011 accident is also denied since there are no claims alleged regarding that incident in the captioned action. The motion by these defendants relating to the June 2011 accident will be addressed in motion sequence 004 filed under Index Number 156032/14.

Motion By Stop & Shop and M&M For Summary Judgment Dismissing All Claims Against Them And For Summary Judgment On Their Cross Claim For Contractual Indemnification Against Greenwich (Mot. Seq. 006)

The claims against Stop & Shop and M&M are dismissed since, as noted above, plaintiff's testimony fails to establish that he was injured due to a hazardous condition at the sound stage. Additionally, as Stop & Shop and M&M assert, even if there had been a dangerous condition at the premises, they would not be liable, even with a right of reentry to inspect, since

they were not in possession of the premises and had no involvement with the operation during which plaintiff was allegedly injured (*Dirschneider v Rolex Realty Co. LLC*, 157 AD3d 538, 539 [1st Dept 2018]).

Additionally, for the reasons discussed in connection with Greenwich's motion, i.e., the indemnification and insurance procurement provisions of the license agreement, Stop & Shop and M&M are entitled to summary judgment on their claims for contractual indemnification against Greenwich. Although the claims by plaintiff against Greenwich are dismissed, Greenwich is nevertheless liable to Stop & Shop and M&M for any costs or attorneys' fees they incurred in defending the captioned action (*Gary*, 60 AD3d at 415).

Plaintiffs' Motion For Summary Judgment On Its Negligence Claims Against Stop & Shop, M&M, and Greenwich And Its Labor Law Claims Against ASLP II (Mot. Seq. 007)

Given the foregoing discussion regarding plaintiff's vague testimony about causation, as well as his testimony that the accident occurred because he did not have enough assistance loading the plywood, the branch of plaintiff's motion seeking summary judgment against Greenwich, Stop & Shop, and M&M is denied, regardless of the fact that Stop & Shop did not oppose the application. There is no basis for plaintiffs' contention that Stop & Shop, M&M, and/or Greenwich had constructive notice of the allegedly dangerous condition for "a period of months." Doc. 243. The branch of plaintiff's motion seeking summary judgment against ASLP II is also denied since all claims against it arise from the Labor Law causes of action discontinued by plaintiff's counsel in connection with the April 2011 accident. In any event, plaintiff has submitted no evidence that ASLP II had any involvement with the sound stage. However, the denial of the motion as against ASLP II is only in connection with the plaintiff's April 2011 accident, and any claims against it regarding the June 2011 accident will be addressed under motion sequence 003 filed under Index Number 156032/14.

Nor does Schneider's affidavit entitle plaintiffs to summary judgment insofar as he "merely assumed the ultimate fact of causation" by concluding that the plywood was improperly stacked (*Kleinberg v City of New York*, 27 AD3d 317, 318 [1st Dept 2006]). Although Schneider represents that he relied on plaintiff's deposition testimony in rendering his opinion regarding causation, plaintiff failed to adequately explain why the accident occurred and/or how it was caused by the improper stacking of the plywood (*See DeCongelio v Metro Fund, LLC*, 183 AD3d 449 [1st Dept 2020] [expert affidavit deemed speculative where expert did not visit the site of the incident and based the expert opinion on photographs and plaintiff's deposition testimony]).

Although plaintiffs rely on *Maheshwari v City of New York*, 2 NY3d 288 (2004) in asserting that an owner of land owes people on its property a duty of reasonable care to keep the premises in safe condition, that case is clearly distinguishable insofar as it concerns a claim of negligent security. Additionally, the Court of Appeals dismissed the complaint against the defendant in that action based on the absence of causation and foreseeability.

Plaintiffs also rely on *Richardson v David Schwager Assoc.*, 249 AD2d 531, 531-532 (2d Dept 1998). However, that case is also distinguishable since the defendant's motion for summary judgment was denied because, unlike here, there were issues of fact regarding whether it or its contractor created the condition.

Additionally, plaintiffs rely on *Blanco v 866 Morris Park Realty Mgt., LLC*, 167 AD3d 475 (1st Dept 2018), which is also distinguishable. *Blanco* involved a plaintiff who slipped on wet steps, a transitory condition. Defendant's motion for summary judgment was denied on the ground that it failed to establish when it last cleaned the area before the incident. This case is clearly different, since the plywood was concealed in containers to which Stop & Shop, M&M,

and Greenwich had no access.

The remainder of the parties' contentions are either without merit or need not be addressed in light of the findings above.

Accordingly, it is hereby:

ORDERED that the branch of the motion by defendants Roger Paradiso, Michael Tadross and Greenwich Street Productions, Inc. seeking summary judgment dismissing all claims against Paradiso and Tadross (mot. seq. 004) is denied as moot, as all claims against Paradiso and Tadross have been discontinued by plaintiffs' counsel; and it is further

ORDERED that the branch of the motion by defendants Roger Paradiso, Michael Tadross and Greenwich Street Productions, Inc. seeking summary judgment dismissing all claims against Greenwich Street Productions, Inc. (mot. seq. 004) is granted to the extent of dismissing all claims against Greenwich Street Productions, Inc. except for the contractual indemnification claims against it by defendants Stop & Shop Supermarket Company LLC and M&M Holding Corp.; and it is further

ORDERED that the motion by defendants Michael Scarola, Joseph Alfieri, Carol Cuddy, Columbia Pictures Industries, Inc., Amblin' Entertainment, Inc., MWS Rigging Consultants LLC, Astoria Studios Inc., Astoria Studios Limited Partnership, Astoria Studios Limited Partnership II, and Kaufman Astoria Studios seeking summary judgment dismissing the complaint pursuant to CPLR 3212 (mot. seq. 005) is denied as moot, as plaintiffs' counsel has discontinued all claims against said defendants in the captioned action, which relates only to plaintiff's accident of April 2011; and it is further

ORDERED that the motion by defendants Stop & Shop Supermarket Company LLC and M&M Holding Corp. seeking dismissal of all claims against them pursuant to CPLR 3212, as

well as for summary judgment on their cross claim for contractual indemnification against defendant Greenwich Street Productions, Inc. (mot. seq. 006) is granted in all respects; and it is further

ORDERED that this matter is referred to a Special Referee to hear and report, or hear and determine (if the parties so stipulate in writing), pursuant to CPLR 4317, the amount that defendants Stop & Shop Supermarket Company LLC and M&M Holding Corp. spent on costs and attorneys' fees in defending this action, plus interest, from the date of commencement of this action, so that defendant Greenwich Street Productions, Inc. may indemnify said defendants for such expenses; and it is further

ORDERED that within 30 days of the date of notice of entry of this order, plaintiffs' counsel is to serve a copy of this order with notice of entry, together with the Special Referee Information Sheet, on the Special Referee Clerk (Room 119) at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50R) for the earliest convenient date; and it is further

ORDERED that, in the event the parties do not agree to hear and determine, then, in accordance with C.P.L.R. Rule 4403 and 22 N.Y.C.R.R. § 202.44(a), following the filing of the report and notice to each party of the filing of the report, plaintiffs shall move to confirm or reject all or part of the report within fifteen (15) days after notice of the filing of the report. If plaintiffs fail to do so, then defendant Greenwich Street Productions, Inc. shall so move within thirty (30) days after notice of the filing is given (*see Gould v Venus Bridal Gown and Accessories Corp.*, 148 Misc2d 589 [Sup Ct, NY County 1990]); and it is further

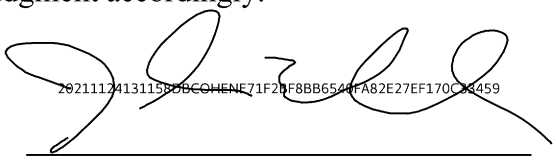
ORDERED that the branch of plaintiffs' motion seeking summary judgment on their first cause of action (negligence) against defendants Greenwich Street Productions, Inc., the Stop

& Shop Supermarket Company LLC, and M&M Holding Corp. (mot. seq. 007) is denied; and it is further

ORDERED that the branch of plaintiffs' motion seeking summary judgment on their claims pursuant to Labor Law §200, §240(1), and §241(6) against Astoria Studios Limited Partnership II (second, third and fourth causes of action, respectively) (mot. seq. 007) is denied as moot, as plaintiffs have withdrawn all Labor Law claims in the captioned action; and it is further

ORDERED that all claims against defendants Ambling Property Investments LLC, Ambling Management Company LLC, Ambling Property Investments LLC, Men In Black, Inc. Ahold Lease, U.S.A., Inc., Ahold USA Administrative Services LLC, and First National Supermarkets, Inc. in the captioned action are discontinued; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.



11/24/2021
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE