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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ~~EMILY JANE GOODMAN~~ SHLOMO S. HAGLER, Justice J.S.C.

PART 17

Index Number : 112995/2009
GUAMAN, JOSE OCTAVIO
vs.
419 PARK AVENUE SOUTH
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

Third Party
Indix No
590378/10

INDEX NO. 112995/09

MOTION DATE _____

MOTION SEQ. NO. 004

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

THIS MOTION/OSC IS GRANTED ~~IN PART~~ AS SET FORTH IN THE ATTACHED SEPARATE WRITTEN DECISION & ORDER

FILED

OCT 17 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 9/19/12

Shlomo Hagler
J.S.C.

_____, J.S.C.
~~EMILY JANE GOODMAN~~

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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JOSE OCTAVIO GUAMAN,

Plaintiff,

-against-

419 PARK AVENUE SOUTH ASSOCIATES, LLC, WALTER AND SAMUEL INCORPORATED, and PRAESIDIAN CAPITAL MANAGEMENT II, LLC,

Defendants.

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Index No. 112995/09

419 PARK AVENUE SOUTH ASSOCIATES, LLC, WALTER & SAMUELS INCORPORATED s/h/a WALTER AND SAMUEL INCORPORATED and PRAESIDIAN CAPITAL MANAGEMENT II, LLC,

Third-Party Plaintiffs,

-against-

JOHN KEMP CONSTRUCTION AND DEVELOPMENT INC. and JOHN KEMP CONSTRUCTION CORPORATION,

Third-Party Defendants.

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Third-Party Index No.: 590378/10

HON. SHLOMO S. HAGLER, J.S.C.:

This action arises out of a construction site accident which occurred on August 7, 2009 at 419 Park Avenue South in Manhattan. Plaintiff Jose Octavio Guaman ("plaintiff" or "Guaman"), a construction worker, alleges that he was injured when he fell off an unguarded scaffold while painting the ceiling of the eighth floor at said location.

In motion sequence number 004, plaintiff moves, pursuant to CPLR § 3212, for partial summary judgment on the issue of liability under Labor Law § 240(1) against defendants 419 Park Avenue South Associates, LLC ("419 Park Avenue South") and Praesidian Capital Management II,

LLC ("Praesidian") (collectively "defendants),[1] and for an order setting an immediate trial on damages. In motion sequence number 005, defendants/third-party plaintiffs 419 Park Avenue South, Walter & Samuels, Inc. s/h/a Walter and Samuel, Inc. ("Walter & Samuels"), and Praesidian move, pursuant to CPLR § 3212, for an order granting conditional indemnification over and against third-party defendants John Kemp Construction and Development, Inc. ("Kemp Construction and Development") and John Kemp Construction Corporation ("Kemp Construction Corp.") (collectively "third-party defendants"). In motion sequence number 006, third-party defendant Kemp Construction Corp. moves for an order: (1) pursuant to 22 NYCRR 202.21(d), permitting it to make a late motion for summary judgment after the filing of the note of issue; (2) pursuant to CPLR § 3212, dismissing third-party plaintiffs' second cause of action for common-law indemnification and contribution; and (3) pursuant to CPLR § 3211(a)(7), CPLR § 3013, and CPLR § 3014, dismissing third-party plaintiffs' first and third causes of action for contractual and common-law indemnification, breach of contract, and contribution. Third-party defendant Kemp Construction and Development cross-moves, pursuant to CPLR § 3212, for summary judgment dismissing third-party plaintiffs' contractual and common-law indemnification and contribution claims.

Motion sequence numbers 004, 005, and 006 are consolidated herein for disposition.

BACKGROUND

419 Park Avenue South and Walter & Samuels were the owner and managing agent, respectively, of the building on the date of the accident. Praesidian was the lessee of the eighth floor.

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1. Although plaintiff's notice of motion seeks summary judgment against "defendants," plaintiff's memorandum of law makes clear that he is seeking summary judgment only against 419 Park Avenue South and Praesidian (Plaintiff's Memorandum of Law, at 1).

On April 17, 2009, Praesidian hired Kemp Construction and Development as a general contractor to perform certain construction work. Plaintiff was an employee of Kemp Construction and Development Kemp Construction Corp. is a related entity.

Plaintiff testified at his deposition that, on August 7, 2009, he was working on the eighth floor of 419 Park Avenue South for "John Kemp Construction" (Plaintiff EBT, at 23, 34-35). According to plaintiff, he was assigned to work with a partner, Edel Vargas, on the night of the accident (*id.* at 40, 45). At the time of the accident, plaintiff was on a scaffold painting pipes in the ceiling (*id.* at 55, 61). The scaffold did not have any guardrails, and none of the other scaffolds on the site had any guardrails (*id.* at 41, 58-59). In addition, plaintiff was neither provided with any safety belts nor ropes at the time of the accident (*id.* at 75-76). While painting at about 10 P.M., plaintiff put his container down on the platform of the scaffold and stood upright, hitting his head on a pipe in the ceiling (*id.* at 80). Plaintiff lost his balance and fell off the scaffold, approximately five feet to the floor below, landing on his head (*id.* at 80, 84-85). Plaintiff admitted that he had consumed one beer with his lunch at about 1:30 P.M., and another beer on his break at about 7 P.M. (*id.* at 50-51).

Edel Vargas ("Vargas") testified that he was assigned to 419 Park Avenue South on the night of the accident (Vargas EBT, at 44-45). Vargas was in a nearby room, approximately 20 feet away, when he heard a loud bang, which was plaintiff hitting the floor (*id.* at 45). Vargas immediately went over to plaintiff, who was unconscious (*id.* at 46).

John Kemp ("Kemp") testified that he is the president of Kemp Construction and Development (Kemp EBT, at 10). Kemp Construction Corp. was subsequently incorporated in 2000 (*id.* at 13). Kemp Construction and Development was hired to perform work on the eighth floor,

which included painting the ceilings in the hallway where the accident occurred (*id.* at 29). Kemp was not on site at the time of the accident and only learned of the accident a few days later (*id.* at 85, 128). According to Kemp, his company provided two scaffolds for the project (*id.* at 44, 47). However, Kemp admitted that the scaffolds did not have any guardrails (*id.* at 141). Kemp further testified that his company did not provide workers with any vests or safety nets (*id.* at 92-93).

John Mansfield ("Mansfield") testified on behalf of Praesidian (Mansfield EBT, at 8). Mansfield leased office space from 419 Park Avenue South, and hired one of the Kemp entities to work on the project (*id.* at 9, 11). Mansfield did not witness the accident (*id.* at 20).

Plaintiff commenced this action on November 17, 2009, seeking recovery for violations of Labor Law §§ 200, 240 and 241(6) and for common-law negligence. On May 6, 2010, 419 Park Avenue South, Walter & Samuels, and Praesidian commenced a third-party action against Kemp Construction and Development and Kemp Construction Corp., seeking contractual and common-law indemnification, contribution, and damages for breach of contract for failure to procure insurance.

Plaintiff filed a note of issue and certificate of readiness on August 4, 2011.

DISCUSSION

Summary Judgment Standard

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion 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 [1st Dept 2006]). "On a motion for summary judgment, issue-finding, rather than issue-determination, is key" (*Shapiro v Boulevard Hous. Corp.*, 70 AD3d 474, 475 [1st Dept 2010]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Plaintiff's Motion for Partial Summary Judgment Under Labor Law § 240(1)

Labor Law § 240(1), also known as the Scaffold Law, provides, in relevant part, that:

> All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, **scaffolding**, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, **and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed** (*emphasis added*).

Labor Law § 240(1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which proximately causes an injury (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). To succeed on liability under Labor Law § 240(1), the plaintiff must establish two elements: (1) a violation of the statute (i.e, that the owner or general contractor failed to provide adequate safety devices), and (2) that the violation was a proximate cause of the injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]). The purpose of the statute is to "protect[] workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident"

(*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520, *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citations omitted]).

Initially, the Court notes that 419 Park Avenue South, the owner, has not disputed that it may be found liable under Labor Law § 240(1). Praesidian, the lessee of the eighth floor where plaintiff was injured, also has not disputed that it may be liable under the statute. Since Praesidian hired Kemp Construction and Development, which was the general contractor and plaintiff's employer, it cannot escape liability under Labor Law § 240(1) (*see Kane v Coundorous*, 293 AD2d 309, 311 [1st Dept 2002] ["A lessee of property under construction is deemed to be an 'owner' for purposes of liability under article 10 of New York's Labor Law"]; *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984] ["owner" encompasses "a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit"]).

In this case, plaintiff has established prima facie entitlement to summary judgment on his Labor Law § 240(1) claim. Plaintiff testified that, while he was painting the ceiling, he fell from a scaffold that did not have any guardrails, and that none of the scaffolds on the site had any guardrails (Plaintiff EBT, at 41, 58-59). Plaintiff further testified that he was not given any safety belts or ropes (*id.* at 75-76). Thus, plaintiff has shown that the scaffold did not provide "proper protection," and that he was not given any other safety devices that would have prevented him from falling (*see Lezcano v Metropolitan Life Ins. Co.*, 11 AD3d 303 [1st Dept 2004] [where there was unrebutted testimony that plaintiff was injured when he fell from a scaffold without guardrails and was not provided other protective devices, defendants' liability was established as a matter of law]; *Rodriguez v Forest City Jay St. Assoc.*, 234 AD2d 68, 69 [1st Dept 1996] [where plaintiff fell from scaffold eight feet from the ground that lacked guardrails, safety devices, and the proper number of

wood planks, plaintiff established a statutory violation and that such violation was a proximate cause of his injuries]).

Defendants and third-party defendants contend that plaintiff was the sole proximate cause of his injuries, because he was intoxicated at the time of his accident. They rely on the following medical records from Bellevue Hospital: (1) an EMS patient call report, which notes that plaintiff was "found ambulatory, walking wobbly, disoriented due to alcohol consumption" (Ryan Affirm. in Opposition, Exhibit A, at BHC 000020-23); (2) an initial assessment form, which indicates that what plaintiff does to stay healthy and reduce stress is "drink" (*id.* at BHC 000041-43); (3) notes of an interview conducted by an emergency room physician, Dr. Alfred Cheng, that plaintiff consumed "6 drinks tonight" (*id.* at BHC 000046); (4) a nurse's notes indicating that plaintiff had alcohol on his breath when he was brought to the hospital (*id.* at BHC 000047); (5) a note by an attending physician in the emergency medicine department who recorded that plaintiff was intoxicated (*id.* at BHC 000048); (6) a progress note indicating that plaintiff fell "while EtOH intoxicated" (*id.* at BHC 000049-51); (7) triage notes indicating alcohol on plaintiff's breath (*id.* at BHC 000084); (8) an "Unscheduled history and Physical" assessment which records that "[t]his 57 [year old] male with no prior neuorological history who is currently intoxicated presents to Bellevue Hospital via EMS after falling last night while intoxicated on Etoh and suffering head trauma," intoxication is a "barrier to assessment," and that plaintiff's gait could not be evaluated "given patient's concurrent intoxicated state – for safety as [patient] fall risk at time of examination" (*id.* at BHC 000089); and (9) a note by Mausumi Khand, M.D. recording plaintiff's admission that he had "several beers" (*id.* at BHC 000128).

Defendants and third-party defendants also point to the deposition testimony of Dr. Alfred Cheng ("Dr. Cheng"), a supervising resident in the Bellevue Hospital emergency department on the date of plaintiff's accident (Cheng EBT, at 17-19). Dr. Cheng personally interviewed plaintiff and recorded the statement that plaintiff had consumed six drinks (*id.*). Based upon his review of the medical records, Dr. Cheng opined that plaintiff was intoxicated when he presented at the emergency room (*id.* at 27).[2]

A plaintiff's intoxication can be the sole proximate cause of an injury (*see Berman v Franchised Distribs., Inc.*, 88 AD3d 755, 756-757 [2d Dept 2011]; *Bondanella v Rosenfeld*, 298 AD2d 941, 942 [4th Dept 2002]). However, "if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation" (*Blake*, 1 NY3d at 290). If a scaffold lacks railings and other safety devices do not provide "proper protection," the plaintiff **cannot** be the sole proximate cause of the accident (*see Moran v 200 Varick St. Assoc., LLC*, 80 AD3d 581, 582 [2d Dept 2011], *lv dismissed* 17 NY3d 756 [2011] [since the scaffold lacked safety railings, plaintiff's alleged intoxication was not the sole proximate cause of his injuries]; *Podbielski v KMO-361 Realty Assoc.*, 294 AD2d 552, 553-554 [2d Dept 2002], *lv denied* 98 NY2d 613 [2002] ["Because the lack of safety devices was demonstrated to have been a proximate cause of the decedent's accident, the decedent's intoxication was not the sole proximate cause of his death"]; *Sergeant v Murphy Family Trust*, 284 AD2d 991, 992 [4th Dept 2001] [although defendant

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2. Kemp Construction Corp. also submits an affidavit from Clovus White, one of plaintiff's co-workers, who states that, prior to the accident, plaintiff "had been drinking inappropriately, both before and during his working hours unless a supervisor was present" and that "[d]rinking beer, tequila and vodka had become the norm on Friday nights on the 419 Park Avenue South project" (White Aff., ¶¶ 6, 7).

raised an issue of fact whether plaintiff was intoxicated, that issue was insufficient to defeat plaintiff's motion for partial summary judgment; "Because there is no dispute that there were no safety devices provided, this is not a case where a reasonable jury could . . . conclude[] that plaintiff's actions were the sole proximate cause of his injuries, and consequently that liability under Labor Law § 240(1) [will] not attach"] [internal quotation marks and citation omitted]; *Haulotte v Prudential Ins. Co. of Am.*, 266 AD2d 38, 39 [1st Dept 1999] ["Nor can it be said that plaintiff's alleged intoxication was the sole proximate cause of the accident"]).

While the defendants and third-party defendants contend that plaintiff's intoxication was the sole proximate cause of his accident, they have not disputed that the scaffold lacked guardrails or other safety devices. Indeed, while the plaintiff testified that the scaffold lacked guardrails (Plaintiff EBT, at 58-59), John Kemp, the president of Kemp Construction and Development and Kemp Construction Corp., also testified that the scaffolds on site did not have any guardrails (Kemp EBT, at 141). Thus, since the lack of a guardrail was a proximate cause of the accident, plaintiff cannot be deemed to be the **sole** proximate cause of his accident (*see Moran*, 80 AD3d at 582).[3]

Moreover, defendants' claim that plaintiff was required to submit an expert affidavit is without merit. Given that defendants have not disputed that the scaffold lacked a guardrail and that plaintiff fell from the scaffold, proximate causation is not beyond the ken of the average juror (*see People v Taylor*, 75 NY2d 277, 288 [1990]). Finally, defendants and third-party defendants argue

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3. At oral argument, defendants also argued that there is an issue of fact as to whether plaintiff was the sole proximate cause because he improperly assembled the scaffold. However, defendants have not offered any evidence that "(a) plaintiff had adequate safety devices at his disposal; (b) he both knew about them and that he was expected to use them; (c) for 'no good reason' he chose not to use them; and (d) had he used them, he would not have been injured" (*Tzic v Kasampas*, 93 AD3d 438, 439 [1st Dept 2012]).

that there are issues of fact as to plaintiff's credibility, given that his accident was unwitnessed. However, there is no dispute that plaintiff's accident occurred and defendants and third-party defendants have not provided any evidence to raise a substantial challenge to plaintiff's credibility as to any material fact (*see Klein v City of New York*, 89 NY2d 833, 835 [1996]; *Rivera v Dafna Constr. Co., Ltd.*, 27 AD3d 545, 546 [2d Dept 2006]; *Franco v Jemal*, 280 AD2d 409, 410 [1st Dept 2001]).

Accordingly, plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240(1) is granted as requested only against defendants 419 Park Avenue South, the owner, and Praesidian, the lessee of the eighth floor. The issue of plaintiff's damages shall await the trial of this action.

Third-Party Defendants Kemp Construction and Development and Kemp Construction Corp.'s Motions for Summary Judgment Dismissing the Third-Party Claims for Indemnification and Contribution

Third-Party Defendants Kemp Construction and Development and Kemp Construction Corp. each separately move for summary judgment dismissing the third-party claims against them for common-law indemnification and contribution, asserting that plaintiff did not sustain a "grave injury." In so moving, the third-party defendants seek leave to bring their motions after the deadline for making summary judgment motions. Neither plaintiff Guaman nor defendants/third-party plaintiffs 419 Park Avenue South, Walter & Samuels, and Praesidian oppose these branches of the third-party defendants' motions (Petersen Affirm. in Opposition, ¶ 3).

"In the absence of a court order or rule to the contrary, CPLR § 3212(a) requires summary judgment motions to 'be made no later than one hundred twenty days after the filing of the note of

"In the absence of a court order or rule to the contrary, CPLR § 3212(a) requires summary judgment motions to 'be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown' " (*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006]). Under the standard announced in *Brill v City of New York* (2 NY3d 648, 652 [2004]), leave to file a late summary judgment motion requires a showing of "good cause" for the delay in making the motion.

Here, plaintiff filed a note of issue on August 4, 2011. A so-ordered stipulation dated November 15, 2010 required motions for summary judgment to be made within 60 days of the filing of the note of issue (Mysliwiec Affirm. in Support, Exhibit 5). Kemp Construction and Development and Kemp Construction Corp. assert that, on October 7, 2011, after the deadline had already expired, plaintiff's treating physician, Dr. Jason W. Brown, issued a report indicating that plaintiff is not totally disabled (*id.*, Exhibit 7). Thus, Kemp Construction and Development and Kemp Construction Corp.'s motions regarding the grave injury issue could not have been brought until after this evidence had come to light. Accordingly, the Court finds that third-party defendants have shown "good cause" for the delay in making their motions for summary judgment.

Third-party defendants' motion for summary judgment on the grounds that plaintiff did not suffer a grave injury is based on Workers' Compensation Law § 11, which:

> [P]rohibits third-party indemnification or contribution claims against employers, except where the employee sustained a 'grave injury,' **or** the claim is 'based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered.' [*emphasis added*]

(*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 429-430 [2005]). The statute provides that a "grave injury" is one or more of the following:

> [D]eath, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or **an acquired injury to the brain caused by an external physical force resulting in permanent total disability.**

(Workers' Compensation Law § 11 [emphasis added]).

In *Rubeis v Aqua Club, Inc.* (3 NY3d 408, 417 [2004]), the Court of Appeals defined "permanent total disability" as "unemployability **in any capacity**." " 'In any capacity' is in keeping with legislative intent and sets a more objectively ascertainable than equivalent, or competitive, employment" (*id.*).

Plaintiff's verified bill of particulars alleges that he suffered a "[t]raumatic brain injury," and that "[i]t is unlikely that plaintiff will ever be able to return to his career as a construction worker" (Verified Bill of Particulars, ¶¶ 20-21, 25-26). However, the evidence indicates that plaintiff is not unemployable "in any capacity." A report dated October 7, 2011 from plaintiff's treating neurologist, Dr. Jason W. Brown, indicates that: (1) plaintiff is below average in executive function, visual/spatial, and motor skills, (2) plaintiff is above average in memory, attention, information processing speed, and verbal function, and (3) plaintiff's global cognitive score is in the above average range (Ryan Affirm. in Support, Exhibit H, at 1). In a report dated October 11, 2011, William B. Head, Jr., M.D., a neuropsychiatrist, states that he found "no residual objective evidence of any neurological involvement, or clinical evidence of brain injury on neurological examination, or cervical radiculopathy, or lumbar radiculaopathy from the accident of August 7, 2009. He does

not have a grave injury as defined under the Workers' Compensation Law as an injury resulting in total permanent disability, rendering him unemployable in any capacity" (*id.*, Exhibit J, at 17). Mitchell S. Raps, M.D., a neurologist, also indicates that "[plaintiff's] neurologic status, including cognition, is entirely normal. There is no evidence of neurologic deficits referable to the accident of 8/7/09" (*id.*, Exhibit K, at 4). In light of this evidence, and given that 419 Park Avenue South, Walter & Samuels, and Praesidian have not opposed this part of third-party defendants' motions seeking dismissal due to a lack of "grave injury," the third-party claims for common-law indemnification and contribution are dismissed.

Defendants/Third-Party Plaintiffs 419 Park Avenue South, Walter & Samuels, and Praesidian's Motion for a Conditional Order of Indemnification and Kemp Construction and Development's Cross-Motion for Dismissal of the Third-Party Claim for Indemnification[4]

Defendants/third-party plaintiffs 419 Park Avenue South, Walter & Samuels, and Praesidian move for a conditional order of indemnification pursuant to an indemnification agreement dated November 4, 2005 between Walter & Samuels and Kemp Construction and Development "pending the final determination of defendants/third-party plaintiffs' alleged negligence." 419 Park Avenue South, Walter & Samuels, and Praesidian argue that it is clear from the actions of John Kemp and the language of the indemnification agreement, that Kemp Construction and Development intended to indemnify them in this action. In addition, 419 Park Avenue South, Walter & Samuels, and Praesidian request a conditional order of indemnification to account for out-of-pocket costs due to Kemp Construction and Development's insurer's failure to defend them.

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4. Although Kemp Construction Corp. originally moved, pursuant to CPLR § 3211 (a) (7), to dismiss the third-party claims for contractual indemnification, it subsequently withdrew this branch of its motion in reply (Mysliwiec Reply Affirm., ¶ 4).

To support their position, 419 Park Avenue South, Walter & Samuels, and Praesidian submit an affidavit from Jason D. Drattell ("Drattell"), the managing member of Praesidian, who states that, in October 2005, he contacted Kemp Construction and Development to furnish the materials and labor necessary for the completion of Praesidian's suite located at 419 Park Avenue, Suite 800 (Drattell Aff., ¶ 3). According to Drattell, John Kemp of Kemp Construction and Development submitted a proposal dated October 14, 2005 and an AIA Standard Form of Agreement memorializing the terms of the proposal (*id.*, ¶¶ 4-5). Kemp provided an indemnification agreement which was separate from the proposal and AIA Standard Form of Agreement (*id.*, ¶ 6, Exhibit C). The indemnification agreement also contained an insurance procurement paragraph which required Kemp Construction and Development to purchase, at its sole cost and expense, insurance naming the owner and managing agent as additional insureds (*id.*, ¶ 7).

Drattell further states that, in April 2009, he contacted John Kemp to provide additional construction services consisting of upgrades to the office space (*id.*, ¶ 8). According to Drattell, John Kemp provided a proposal dated April 17, 2009, and informed him that he would adhere to all of the same terms and conditions for the initial build-out for the suite (*id.*, ¶¶ 9, 10, Exhibit D). Kemp advised that he would secure insurance and provide certificates of insurance pursuant to the indemnification agreement dated November 4, 2005 (*id.*, ¶ 11). Kemp subsequently provided certificates of insurance naming 419 Park Avenue South, Praesidian, and Walter & Samuels as additional insureds, with appropriate policy limits as contained in the indemnification agreement dated November 4, 2005 (*id.*, ¶¶ 12-13, Exhibit C). After plaintiff commenced this lawsuit, Drattell contacted Kemp, who stated that Kemp Construction and Development was required to defend the action pursuant to the indemnification agreement dated November 4, 2005 (*id.*, ¶ 15).

In opposition, and in cross-moving to dismiss third-party plaintiffs' contractual indemnification claim, Kemp Construction and Development[5] argues that it did not agree to indemnify 419 Park Avenue South, Walter & Samuels, and Praesidian for the 2009 project. Kemp Construction and Development submits an affidavit from its president and chief executive officer, John Kemp, in which he states that, after he submitted a bid proposal in 2009, the parties did not discuss the insurance procurement provision (Kemp Aff., ¶¶ 6, 13). Kemp faxed a certificate of insurance to Walter & Samuels with the policy limits that it requested in 2009 (*id.*, ¶ 13). Kemp believes that he spoke with an employee of Walter & Samuels named Susan Briganti (*id.*). According to Kemp, he never discussed the issue of indemnification with either Drattell or Briganti (*id.*, ¶ 14). Kemp states that, in November 2011, Drattell called him to persuade him to agree that the 2009 project was undertaken pursuant to the same AIA terms and conditions as the 2005 project; however, he refused to agree (*id.*, ¶ 18). Kemp states that he was "informed later that the AIA form contract governing the 2005-2006 construction build out contained an indemnification provision which was not part of the 2009 agreement between [Kemp Construction and Development] and Praesidian" (*id.*).

Kemp Construction and Development also points out that the specifications and notes for the 2009 project do not mention the indemnification agreement,[6] and contain a separate insurance procurement provision, requiring "[t]he contractor [to] provide copies of liability and workman's

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5. Kemp Construction Corp. also opposes third-party plaintiffs' motion for a conditional order of indemnification for the same reasons.

6. The specifications and notes indicate that "[t]he Construction Documents include architectural drawings T1.1, A1.1, A2.1, A3.1, A3.2, A3.3, A4.1, the attached specifications and tables, and all addenda issued prior to and during bidding" (Kemp Aff., Exhibit 1, at 1).

compensation insurance for the owners" (Kemp Aff., Exhibit 1 at 2). Additionally, Kemp Construction and Development asserts that in 2009 it did not act in conformance with the insurance procurement provision for the 2005 project; as the liability policy that it procured in 2009 expressly excludes coverage for injuries to Kemp Construction and Development's employees (*id.*, Exhibit 6, at JKCD 94-95).

As noted above, Workers' Compensation Law § 11 permits third-party claims for indemnification against an employer arising from the employer's injury if such third-party claims are "based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered." A determination of whether a written contract satisfies Workers' Compensation Law § 11 involves a two-part inquiry. "First, we consider whether the parties entered into a written contract containing an indemnity provision applicable to the site or job where the injury giving rise to the indemnity claim took place. Second, if so, we examine whether the indemnity provision was sufficiently particular to meet the requirements of section 11" (*Rodrigues*, 5 NY3d at 432).

In *Flores v Lower E. Side Serv. Ctr., Inc.* (4 NY3d 363, 369-370, *rearg denied* 5 NY3d 746 [2005]), the Court of Appeals held that "the common-law rule – which authorizes review of the course of conduct between the parties to determine whether there was a meeting of minds sufficient to give rise to an enforceable contract – governs the validity of a written indemnification agreement under Workers' Compensation Law § 11." "In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look . . . to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds" (*Brown*

Bros. Elec. Contrs. v Beam Constr. Corp., 41 NY2d 397, 399 [1977]). The Court must consider "the attendant circumstances, the situation of the parties, and the objectives they were striving to attain" (*Ruane v Allen-Stevenson School*, 82 AD3d 615, 616 [1st Dept 2011]).

In *Tullino v Pyramid Cos.* (78 AD3d 1041 [2d Dept 2010]), the employee of a subcontractor brought a personal injury action against a premises owner and contractors. The owner and contractors then brought a third-party action against the plaintiff's employer for contractual indemnification. The Court held that there were triable issues of fact as to whether the parties agreed to be bound by an indemnification agreement, where a purchase order indicated that the work was to be performed pursuant to the terms and conditions of a subcontract agreement entitled "Appendix A," which contained an unsigned agreement containing an indemnification provision, and where the employer procured a commercial general liability policy and filed a certificate of insurance in accordance with the terms of Appendix A (*id.* at 1042-1043).

In *Staub v William H. Lane, Inc.* (58 AD3d 933 [3d Dept 2009]), a general contractor was not entitled to summary judgment on its contractual indemnification claim against the plaintiff's employer. The general contractor's claim for indemnification was based upon an unsigned, written proposal submitted by the plaintiff's employer, which purported to incorporate the terms of AIA Contract A401. The Court held that "[g]iven the failure to provide the indemnification provision of AIA Contract A401 and the absence of any evidence that the parties agreed to that provision through either past practice or their course of conduct, we conclude that questions of fact exist regarding whether the parties agreed to be bound by the indemnification provisions of AIA Contract A401" (*id.* at 935).

Here, the Court concludes that there are triable issues of fact as to whether the parties agreed to be bound by the terms of the indemnification agreement dated November 4, 2005 for the project in 2009. While Kemp Construction and Development asserts that there was no indemnification agreement in 2009, Praesidian's managing member, Jason Drattell, avers that Kemp informed him that he would adhere to all of the same terms and conditions that existed at the initial build-out of the suite (Drattell Aff., ¶ 10). It appears that Kemp did not provide a second AIA Standard Form of Agreement in 2009, as he did for the build-out of the office suite in 2005. However, Kemp testified at his deposition that the proposal submitted in 2009 was made pursuant to the AIA contracts (Kemp EBT, at 58-59). Kemp also states that he was informed that "the AIA form contract governing the 2005-2006 construction build out contained an indemnification provision which was not part of the 2009 agreement between [Kemp Construction and Development] and Praesidian" (Kemp Aff., ¶ 18). Kemp also appears to have acted in conformance with the terms of the indemnification agreement dated November 4, 2005, because he submitted certificates of insurance naming 419 Park Avenue South, Walter & Samuels, and Praesidian as additional insureds, with the same policy limits as in that agreement (Petersen Affirm. in Support, Exhibit G). "[W]here a finding of whether an intent to contract is dependent as well on other evidence from which differing inferences may be drawn, a question of fact arises" (*Brown Bros. Elec. Contrs.*, 41 NY2d at 400).

Accordingly, the motion for conditional indemnification, and the cross-motion for summary judgment dismissing third-party plaintiffs' contractual indemnification claim, must be denied (*see Brinson v Kulback's & Assoc.*, 296 AD2d 850, 852 [4th Dept 2002], *rearg denied* 747 NYS2d 852 [4th Dept 2002] [where plaintiff's employer denied that indemnification agreement applied to contract for drugstore, but defendants asserted that it did apply, the Court held that "(b)ecause the

determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence, the issue is one of fact for the trier of fact and cannot be resolved as a matter of law"] [internal quotation marks omitted]).

Finally, 419 Park Avenue South, Walter & Samuels, and Praesidian are not entitled to a conditional order of indemnification based upon third-party defendants' insurer's refusal to defend them in this action (*see KMO-Realty Assoc. v Podbielski*, 254 AD2d 43, 44 [1st Dept 1998]).

CONCLUSION

Accordingly, it is:

ORDERED that the motion (sequence number 004) of plaintiff Jose Octavio Guaman for partial summary judgment on the issue of liability under Labor Law § 240(1) against defendants 419 Park Avenue South Associates, LLC and Praesidian Capital Management II, LLC is granted, with the issue of plaintiff's damages to await the trial of this action; and it is further

ORDERED that the motion (sequence number 005) of defendants/third-party plaintiffs 419 Park Avenue South Associates, LLC, Walter & Samuels, Inc. s/h/a Walter and Samuel, Inc., and Praesidian Capital Management II, LLC for a conditional order of indemnification is denied; and it is further

ORDERED that the motion (sequence number 006) of third-party defendant Kemp Construction Corporation is granted to the extent of granting leave to make a late motion for summary judgment and dismissing the third-party claims for common-law indemnification and contribution, and is otherwise denied; and it is further

ORDERED that the cross-motion of third-party defendant Kemp Construction and Development, Inc. is granted to the extent of dismissing the third-party claims for common-law indemnification and contribution, and is otherwise denied.

The foregoing constitutes the decision and order of the Court. Courtesy copies of this decision and order are being sent to the parties.

ENTER:

Dated: September 19, 2012
New York, New York

Hon. Shlomo S. Hagler, J.S.C.