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

PRESENT: Kornreich Justice PART 54

Boyle

INDEX NOS. 101980/01, 590758/0 & 590842/04

MOTION DATE

- v -

MOTION SEQ. NO. 6

42nd St Dev. et al

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for Judgment and Cross-motions by defendants/third-party plaintiffs for summary judgment and CVA for summary judgment

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

Cross-Motion: ☒ Yes ☐ No 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision

FILED
JAN 19 2005
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/11/05

SHIRLEY WERNER KORNREICH J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

JTION/CASE IS RESPECTFULLY REFERRED TO
JSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 54

----------X

MATTHEW BOYLE and KATHLEEN BOYLE,

Plaintiffs,

-against- INDEX NO.:101980/01

42nd ST. DEV. PROJECT, INC., 42nd ST. CO. and F.J. SCIAME CONS. CO., INC.,

Defendants.

----------X

42nd ST. DEV. PROJECT, INC., 42nd ST. CO. and F.J. SCIAME CONS. CO., INC.,

Third-Party Plaintiffs,

-against- INDEX NO.: 590758/02

ARCHER'S IRON WORKS and VALLEY FORGE INSUR. CO., s/h/a, CNA COMMERCIAL INSUR.,

Third-Party Defendants.

----------X

ARCHER'S IRON WORKS,

Second Third-Party Plaintiff,

-against- INDEX NO.: 590842/04

CANRON CONS. CORP.,

Second Third-Party Defendant.

----------X

SHIRLEY WERNER KORNREICH:

This action arises from a construction site accident. Plaintiff, an ironworker by trade, was

employed by Archer's Iron Works ("Archer") , working on the construction of an eleven-story building located at 229 West 42nd Street, New York, New York, when he was injured. 42nd Street Development Project, Inc., 42nd Street Company (together, "42nd Street") was the owner of the building, and F.J. Sciame Construction Company, Inc. ("Sciame") was the construction manager/general contractor for the project. Archer was retained by Sciame to install steel stairs on the inside of the building. Canron Construction Corp. ("Canron") was the structural steel subcontractor for the project. Valley Forge Insurance Company, s/h/a, CNA Commercial Insurance ("Valley Forge"), was the liability insurer who allegedly insured defendants against loss arising from Archer's work.

Plaintiff alleges that he was one of a six-man crew, all Archer employees, engaged in hoisting the components of steel stairs to the sixth floor. The component materials had to be hoisted through an open elevator shaft. According to plaintiff, three men were at ground level, attaching the materials to a hoisting mechanism called an electric chain fall; plaintiff was on a beam within the shaft at the sixth-floor level, operating the chain fall, and guiding the hoisted materials, in order to ensure they did not get caught on anything in the shaft; and two men were at the sixth floor landing, receiving the material. In addition two Archer employees were located on the eighth or ninth floor level of the shaft, performing actual installation work.

The assembly of steel stairs requires threaded rods, steel rods approximately six feet long, weighing approximately six pounds, which act as a kind of bolt, holding parts of the stairs together. Plaintiff alleges that, on the day of his accident, while he was working in the shaft, a threaded rod fell from two or three floors above him, where his co-workers were installing stairs, and struck him on the right side of his back and hip, injuring him.

The Court now has before it motions sequences 006, 007, 008 and 009, as well as three cross-motions. In motion sequence number 006, plaintiffs move, pursuant to CPLR 3212, for summary judgment on the issue of defendants' liability pursuant to Labor Law §§240 (1) and 241-a, and for an order setting the case down for an immediate assessment of damages. Third-party defendant/second third-party plaintiff Archer cross-moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' amended complaint. Defendants/third-party plaintiffs cross-move, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' amended complaint and for summary judgment in their favor on the third, fourth, and sixth causes of action in their third-party complaint. Third-party defendant Valley Forge Insurance Company, s/h/a, CNA Commercial Insurance ("Valley Forge") cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint as against it.

In motion sequence 007 plaintiffs move, pursuant to CPLR 3122(a) to quash a subpoena issued for deposition of its expert doctor. In motion sequence number 008, plaintiffs move, pursuant to CPLR 1010, for the dismissal or severance of the second third-party action. Finally, in motion sequence number 009, second third-party defendant Canron Construction Corp. ("Canron") moves, pursuant to CPLR 1010, to sever the second third-party action, and for a separate trial of the second third-party action; or, in the alternative, for an order striking the case from the calendar, in order to give Canron the time and opportunity to conduct discovery and to move for summary judgment, and to adjourn the trial of this matter for at least 12 months, for the same reasons.

Motion sequence 007 has been settled. Motion sequences 006, 008, and 009 are consolidated for disposition.

PLEADINGS

Plaintiffs' amended complaint asserts two causes of action. In the first, plaintiffs set forth causes of action for common-law negligence and violations of Labor Law §§200, 240 and 241(6), and in the second, plaintiff's wife puts forth a derivative claim for loss of consortium. In his Second Supplemental Verified Bill of Particulars, plaintiff also asserts that defendants violated Labor Law §241-a.

Defendants' third-party complaint alleges six causes of action, the first four against Archer, and the fifth and sixth against Valley Forge: (1) common-law indemnification; (2) contribution; (3) contractual indemnification; (4) breach of contract to procure insurance; (5) breach of contract by failure to defend and indemnify; and (6) breach of contract to obtain insurance. Archer's second third-party complaint against Canron alleges two causes of action for common law indemnification and contribution.

CONCLUSIONS OF LAW

As an initial matter, the court notes that the parties allege and argue different fact patterns with respect to what floors plaintiff and his co-workers were on (plaintiff's version is that he was on the sixth floor level, and that his co-workers were on the eighth or ninth floor; defendants proffer evidence that plaintiff and his co-workers could not have been any higher than the fifth floor level), and the date on which the accident happened (July 7 or 8, 1999). These discrepancies are of no moment, since it is uncontested that plaintiff was injured at the jobsite when a threaded rod fell on him from above.

1. Plaintiffs' Motion for Partial Summary Judgment (Motion Sequence 006)

A. Labor Law §240(1)

Labor Law § 240 (1) provides, in pertinent part:

> All contractors and owners and their agents ... in the erection ... of a building ... 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.

The statute imposes absolute liability upon owners, contractors, and their agents for injuries to workers that were proximately caused by the failure to provide safety devices necessary to protect the workers from elevation-related risks and hazards, such as "falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured." Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501 (1993). However, "not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." Narducci v. Manhasset Bay Assocs., 96 N.Y.2d 259, 267 (2001). In order to prevail on a "falling object" section 240(1) case, "[a] plaintiff must show that the object fell, while being hoisted or secured, *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute" (id. at 268; [emphasis in original]) which "would have been necessary or even expected." Id.; quoted in Roberts v. G.E., 97 N.Y.2d 737, 738 (2002).

The parties posit different ways that plaintiff's work could, or should, have been done. Plaintiff alleges that the accident could have been prevented if various provisions of the Industrial Code, which require wooden planking above and below a worker in an elevator shaft, had been complied with. Defendants contend that compliance with those sections of the Industrial Code would have rendered it impossible for plaintiff to do his job, viz., to assist in

hoisting materials for steel stairs through an open elevator shaft by means of a chain fall. Because these allegations pose a triable issue of fact with respect to "whether a statutorily enumerated protective device would have been 'necessary or even expected' to shield plaintiff, an ironworker, ..."(Bush v. Gregory/Madison Ave., LLC, 308 A.D.2d 360, 361 [1st Dept. 2003] citing Roberts, supra, and Narducci, supra), those parts of plaintiff's motion, and Archer's and defendants' cross motions which seek summary judgment on, or dismissing, plaintiff's section 240(1) cause of action, are denied.

B. Labor Law §241-a

Labor Law § 241-a provides, in relevant part:

> Any men working in or at elevator shaftways ... in the course of construction or demolition shall be protected by sound planking at least two inches thick laid across the opening at levels not more than two stories above and not more than one story below such men, or by other means specified in the rules of the [Industrial Code].

Again, the purpose of the statute is "to protect the men from being struck by objects falling from high places, and if, for any reason, these men should fall, then their fall would be limited to a maximum of one story and, thereby, less likely to be injured severely." Seiger v. Port of New York Authority, 43 A.D.2d 339, 340 (1st Dept. 1974). However, if an open shaft was reasonably required or necessary for the performance of the work, there is no violation of Labor Law §241-a. See Brzoza v. Park P.E.P. Corp., 28 A.D.2d 867 (2d Dept. 1967); Vivian v. J. W. Enterprises, Inc., 16 A.D.2d 933 (2d Dept.), lv.denied 12 N.Y.2d 642 (1962). As discussed above, a triable issue of fact exists as to whether the work itself required an open shaftway. As a result, those parts of plaintiffs' motion and defendants' and Archer's cross-motions which seek summary judgment on, or dismissing, plaintiff's section 241-a claim are denied.

2. Defendants' Cross-Motion For Summary Judgment To Dismiss Plaintiffs' Complaint

A. Labor Law Section 200

"Labor Law §200 codifies 'the common-law duty imposed upon an owner or general contractor to maintain a safe construction site' [citations omitted]." Carney v. Allied Craftsman General Contractors, 9 A.D.3d 823, 824 (3d Dept. 2004). In cases, such as this one, where an accident arises out of a contractor's method of performing its work, liability under Labor Law § 200 and common-law negligence "may not be assigned absent proof that the defendant exercised some supervisory control over the work in the course of which the plaintiff was injured." DeSimone v. Structure Tone, 306 A.D.2d 90, 90 (1st Dept. 2003). See also Carney, supra at 824.

In this case, the record demonstrates that defendants, building owner and general contractor, are not liable under section 200 and the common law. Sciame, the general contractor, coordinated the trades and liaisoned between the architects, engineers, owners and subcontractors, received site safety plans from the subcontractors, but did not directly supervise the work, and would not have stopped a laborer due to an unsafe working condition. Robert Questel, the president of Archer, specifically testified that Sciame did not supervise site safety. Indeed, Mr. Schottmuller, the project field superintendent for Sciame, knew nothing of the details of Archer's work at the project, and plaintiff testified that Sciame did not supervise his work. Defendants' general supervisory and coordinating responsibilities, thus, did not constitute the level of direct supervision and control over the injury-producing activity required to support a finding of liability for common-law negligence or violation of Labor Law §200. See Scott v. Am. Museum of Natural History, 3 A.D.3d 442, 443 (1st Dept.), rearg.denied 2004 N.Y. App. Div. LEXUS 4041 (2004); Fraioli v. St. Joseph's Seminary, 1 A.D.3d 280, 281 (1st Dept. 2003);

De La Rosa v. Philip Morris Mgmt. Corp., 303 A.D.2d 190, 192 (1st Dept. 2003). Therefore, those parts of defendants' and Archer's cross motions which seek summary judgment dismissing these claims, are granted.

B. Labor Law Section 240(1)

Labor Law §241(6) imposes a non-delegable duty upon building owners and contractors to follow specific rules and regulations promulgated by the Commissioner of the Department of Labor for the protection of workers engaged in construction work. Ross v. Curtis-Palmer Hydro-Elec. Co., supra, 81 N.Y.2d 501-2; " Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d 876, 878 (1993)(Labor Law §241(6) "imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers.") . In order to state a claim under the statute, an injured worker must specify the Industrial provision violated, and the provision must set forth a specific standard of conduct. Saleh v. Saratoga Condo., 10 A.D.3d 645, 646 (2d Dept. 2004); Paladino v. Soc'ty of N.Y. Hosp., 307 A.D.2d 343, 345 (2d Dept. 2003); Padilla v. Frances Schervier Hous. Dev. Fund Corp., 303 A.D.2d 194, 196 (1st Dept. 2003). In addition, the cited Industrial Code provision must be applicable to the facts of the case. See Quintavalle v. Mitchell Backhoe Serv., 306 A.D.2d 454, 454 (2d Dept.), lv.denied 1 N.Y.3d 501 (2003). Code provisions which simply establish general safety standards or invoke general descriptive terms are insufficient to support a claim under Section 241(6). See Ross v. Curtis-Palmer Hydro-Electric Co., supra, 81 N.Y.2d 505.

Plaintiffs allege violations of Article 1926 of OSHA and Industrial Code violations 23-1.5, 23-1.6, 23-1.7(a)(1)& (2), (b)(1)(i), (ii) &(iii)(a), (b), ©) & (f), 23-1.11(a), (b) & ©), 23-1.19(a) & (b)(1), (2) & (3)©) & (d), 23-2.1 (a)(1) & (2)(b), 23-2.3(a)(1), (2) & (3)(b), ©), (d) &

(e), 23-2.4(a) & (b)(1)(i) & (ii)(2) & (3)©)(1) & (2), 23-2.5(a)(1) & (2)(i) & (ii), (b)(1), (2), (3), (4), (5) & (6), 23-2.6(a)(1) & (2)(b) and 23-2.7(a), (b), ©), (d) & (e).

OSHA violations cannot provide the basis for a Labor Law §241(6) violation. Schiulaz v. Arnell Constr. Corp., 261 A.D.2d 247, 248 (1st Dept. 1999). Further, the majority of the provisions cited by plaintiffs in support of their 241(6) claim need no discussion other than to indicate that they are either too general to support such a claim, i.e., 12 NYCRR 23-1.5 (general responsibility of employers), 23-1.6 (responsibilities of employees), or do not apply to the facts of this case, i.e., 12 NYCRR 23-1.7 (2)(overhead hazards in areas where employees do not work), 23-1.7(b)(1)(i),(ii) & (iii)(hazardous opening into which person may step or fall), 23.(iii)(f)(dirt and debris in work areas), 23-1.11 (lumber and nail fastenings), 23-1.19 (catch platforms), 23-2.1 (maintenance and housekeeping), 23-2.4(flooring requirements in building construction), 23-2.5 (a)(1)(protection of persons in shafts which applies to persons required to work "in or at shafts, other than elevator shafts"),23-2.5(a)(2)(i) & (b)(2) & (5)(prevention of fall into shaft), 23(a)(2)(ii)(construction of stairs in shaft), 23-2.5(b)(6)(elevator cars), 23-2.6(exterior construction and catch platforms), and 23-2.7 (stairway requirements during building construction).

In his papers in opposition to Archer's cross-motion, plaintiff specifically relies on Industrial Code §§23-1.7(a)(1), 23-2.3(a), and 23-2.5(b)(4). The provisions of Industrial Code §23-2.3(a) provides for structural steel assembly and the placing of structural members. This section is inapplicable. Subsection (a)(1) requires that loads not be released from hoisting ropes until they are securely fastened in place. There is no allegation or evidence that the threaded rod was either a "load," or that it had been improperly released from a hoisting rope when it fell.

Similarly, subsections (a)(2) and (3) deal with "open web steel joists," which are not in issue here.

In a like manner, Industrial Code §23-2.5 (b) (4) is not applicable here. Although that section provides for the protection of persons in elevator shafts, it states:

> Where persons are required to perform any work at intermediate levels between stories in elevator shafts, such persons shall be provided with overhead protection from falling objects or material. Such protection shall be at least 27 inches in width and shall cover the area where the persons are working.

There has been no evidence demonstrating that plaintiff was working at an "intermediate level[] between stories in [an] elevator shaft[]."

Section 23-1.7 (a) (1) of the Industrial Code, on the other hand, is applicable here. This section is both specific (Zervos v. City of New York, 8 A.D.3d 477 [2d Dept 2004]) and applicable to the instant facts. The section provides:

> Protection from general hazards.
>
> (a) Overhead hazards.
>
> (1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot.

Labor Law §§ 241 (6) and 241-a are "to be construed in pari materia." Doucoure v. Atl. Dev. Group, LLC, __ AD3d ___, 784 N.Y.S.2d 552, 553 (1st Dept. 2004). Thus, since there is a question of fact whether section 241-a applies in this case, there is also a question of fact whether section 23-1.7(a)(1) applies. Summary judgment dismissing plaintiff's section 241 (6)

claim, based on this provision of the Industrial Code, must be denied.

Consequently, those parts of Archer's and defendants' cross-motions which seek summary judgment dismissing plaintiff's Labor Law § 241(6) claim are granted, except with respect to that part of the claim which is based on Industrial Code § 12 NYCRR 23-1.7 (a) (1), upon which section summary judgment is denied.

C. Loss of Consortium

A claim for loss of consortium is derivative of plaintiff's claim. See Pavon v. Rudin, 254 A.D.2d 143, 144 n.1 (1st Dept. 1998). Since some of plaintiff's causes of action remain, those parts of Archer's and defendants' cross-claims which seek dismissal of this cause of action are denied.

3. Defendants' Third-Party Claims Against Archer and Valley Forge

A. Archer

Defendants' third and fourth causes of action, against Archer, sound in contractual indemnification and breach of contract to procure insurance. Their sixth cause of action, against Valley Forge, is for breach of contract to obtain insurance.

"'A party is entitled to full contractual indemnification [for damages incurred in a personal injury suit] provided that the "intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (internal citations omitted).'" Masciotta v. Morse-Diesel Int'l., 303 A.D.2d 309, 310 (1st Dept. 2003), quoting Drzewinski v. Atlantic Scaffold & Ladder Co., 70 N.Y.2d 774, 777 (1987). "In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability." Correia v.

Professional Data Mgmt., 259 A.D.2d 60, 65 (1st Dept. 1999). See also De La Rosa v. Philip Morris Mgmt. Corp., supra, 303 A.D.2d 193.

Paragraph 4.6.1 of the Sciame/Archer Subcontract provides, in relevant part:

> To the fullest extent permitted by law, [Archer] shall indemnify and hold harmless [defendants] ... from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of [Archer's] Work under this Subcontract, provided that such claim, damage, loss or expense is attributable to bodily injury ..., but only to the extent caused in whole or in part by negligent acts or omissions of [Archer] ..., regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

The language clearly indicates an intention that Archer would indemnify defendants under the circumstances presented in this case. As for establishing that they were not negligent and may be held liable solely by virtue of statute, this Court has already dismissed the common-law negligence and Labor Law §200 claims as against defendants. Even though the other claims have not been dismissed as against them, defendants' only liability, in light of this Court's finding concerning defendants' negligence, would be purely statutory. Therefore, defendants are entitled to summary judgment against Archer on their contractual indemnification claim.

Defendants' fourth cause of action, against Archer, alleges that Archer breached the subcontract by failing to procure liability insurance naming defendants as additional insureds. In their moving papers, defendants argue that they are entitled to coverage under Archer's policy, and that if they are not so covered, they are entitled to summary judgment against Archer for failure to procure the required insurance.

Paragraph 16 of Rider A to the subcontract mandates that Archer must "[p]rovide all insurance requirements shown on the attached Sample Certificate of Insurance," and paragraph

17 requires Archer to "[p]rovide all additional insureds as required." The Sample Certificate of Insurance shows that Archer had to obtain general liability and excess liability insurance coverage, naming defendants as additional insureds. Defendants submit two policies which Archer obtained from Valley Forge. The first, for the period June 6, 1998 through June 6, 1999, lists Sciame as an additional insured. The second policy, covering June 6, 1999 through June 6, 2000 (the 1999 policy), although it specifically lists another entity as an additional insured, does not name either defendant as an additional insured. Plaintiff's accident fell within the coverage period of the second policy, and therein lies the problem.

Defendants assert that there are no documents indicating that Valley Forge was instructed to omit defendants from the coverage of the 1999 policy, and that defendants were omitted in error. They allege that the omission was the result of a mutual mistake, and that the proper remedy is reformation of the policy to reflect the parties' expectation that defendants would be named as additional insureds on the policy. Defendants contend that the fact that they have not specifically moved for this relief is not a problem because their cross-motion seeks "such other and further relief as the court deems proper, which furnishes the court with an adequate basis for reformation." Since defendants' notice of cross motion does seek "such other and further relief as may be just and proper," the court will consider defendants' request for reformation of the Sciame/Archer Subcontract. City of Binghamton v. Scrafini, 8 A.D.3d 835, 838 (3d Dept. 2004).

"To reform a contract based on mistake, a plaintiff must establish that the contract was executed under mutual mistake or a unilateral mistake induced by the defendant's fraudulent misrepresentation." Simek v. Cashin, 292 A.D.2d 439, 440 (2d Dept. 2002). Mutual mistake occurs "'where the parties have a real and existing agreement on particular terms and

subsequently find themselves signatories to a writing which does not accurately reflect that agreement' [citation omitted]." Ribacoff v. Chubb Group of Insur. Cos., 2 A.D.3d 153, 154 (1st Dept. 2003).

> Although mutual mistake may furnish grounds for reforming a written agreement, there is a "'heavy presumption that a deliberately prepared and executed written instrument [manifests] the true intention of the parties'" and the "proponent of reformation 'must show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties'" [citations omitted]. The party resisting pre-trial dismissal of a reformation claim must tender a "'high level'" of proof in evidentiary form, "'free of contradiction or equivocation'" [citations omitted]

N.Y. First Ave. CVS, Inc. v. Wellington Tower Assocs., L.P., 299 A.D.2d 205, 205 (1st Dept. 2002), lv.denied 1 N.Y.2d 505 (2003). See also Ribacoff,supra, 2 AD3d at 154("a party must establish his right to such relief by clear, positive and convincing evidence"); Shark Info. Servs. Corp. v. Crum & Forster Commercial Insur., 222 A.D.2d 251, 253 (1st Dept. 1995)(there is a "heavy presumption that the policy as issued by defendant insurers reflected the true intent of the parties"). "Where it is apparent that an innocent mistake occurred with respect to a named insured and it is evident that the parties intended to cover the risk, the error may be deemed mutual for purposes of reformation even though the insurer was not aware of the error." Cheperuk v. Liberty Mut. Fire Insur. Co., 263 A.D.2d 748, 749 (3d Dept. 1999)(policy had not been modified to reflect change in named mortgagee).

Here, it is not "apparent" that an innocent mistake occurred, nor have defendants demonstrated such mutual mistake by "clear, positive and convincing evidence." The 1999 policy does, in fact, specifically list another entity as an additional insured, but nowhere indicates that any defendant is so covered. Without any evidence that the parties intended, or did not

intend, to cover defendants as additional insureds on the 1999 policy, the heavy presumption that the policy as issued reflects the intent of the parties militates against coverage. As such, the Court denies reformation of the 1999 policy, and finds that defendants are not additional insureds under the 1999 policy. Since Archer did not procure the insurance naming defendants as additional insureds, as required by the subcontract, summary judgment on defendants' fourth cause of action, against Archer, is granted.

B. Valley Forge

Defendants' sixth cause of action, against Valley Forge, alleges that Valley Forge was obliged to "obtain liability insurance coverage for the benefit and in the name of [defendants] and to designate [defendants] as additional named insureds" (Third-Party Complaint, ¶ THIRTY-THIRD). As a result of Valley Forge's alleged failure to procure this insurance coverage, it "breached its agreement with the Third-Party Plaintiffs." id., ¶ THIRTY-FOURTH. The agreement referred to is the Sciame/Archer Subcontract, to which Valley Forge was not a party. Therefore, no cause of action for breach of the subcontract will lie. Summary judgment on defendants' sixth cause of action, against Valley Forge, is denied.

4. Archer's Summary Judgment Cross-Motion

Since the issues to be treated in Archer's cross-motion are the same as those considered in defendants' cross-motion, the determinations required by Archer's cross-motion are the same as those made in defendants' cross-motion, and Archer's cross-motion is denied.

5. Valley Forge's Summary Judgment Cross-Motion

The only causes of action in the third-party complaint which are alleged as against Valley Forge are the fifth and sixth, for breach of contract by failure to defend and indemnify and breach

of contract to obtain insurance, respectively. As set forth in the discussion above, there is no basis upon which defendants may bring a cause of action against Valley Forge for breach of contract. Therefore, Valley Forge's cross- motion for summary judgment dismissing the third-party complaint as against it, is granted.

6. Plaintiffs' Motion (Motion Sequence 008) and Canron's Motion (Motion Sequence 009) for Severance of the Second Third-Party Action

CPLR 1010 provides:

> The court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue thereof, or make such other order as may be just. In exercising its discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party.

Here, the second third-party Summons and Complaint were filed on August 11, 2004, three- and-a-half years after commencement of the main action, and four months after the note of issue was filed. Archer has not given any reason for its delay in commencing its action against Canron.

In its motion, Canron seeks either severance of the second third-party action, or an order striking the case from the trial calendar, scheduling a preliminary conference, or adjourning trial for at least 12 months. Having been brought into this action so late, Canron has not had a chance to conduct its own discovery, nor have the other parties had a chance to conduct discovery of Canron. Additionally, Canron has not had a chance to move for summary judgment, while every other party in this action has such a motion pending.

Archer does not oppose Canron's motion with respect to striking the case from the trial calendar, scheduling a preliminary conference, and adjourning the trial. It only opposes the

severance, arguing that the main and two third-party actions should be tried together for judicial economy and that Canron's presence in the case is essential to the determination of the various parties' liability. Archer asserts that Canron needs to be in this action because it "may be liable to the other parties ... for indemnity or contribution" (Beke 9/17/04 Affirm., ¶ 4), and that "severance or dismissal of the [second third-party] action would prejudice the other parties in the case" because severance or dismissal would prevent "adequate and accurate discovery" and would prevent the Court from "properly determining the culpability of the parties vis-a-vis one another." Id., ¶ 12.

Plaintiffs seek the severance rather than the other relief requested by Canron because, after all this time, plaintiffs feel entitled to their day in court without having to wait at least another year to have their claims adjudicated. Despite the desirability of trying these cases together, the motions for severance of the second third-party action are granted. Sciame's witness, Steven Schottmuller, testified at length on February 5, 2004 about Canron's responsibilities at the site. Even if that were the first indication that Canron's presence in this litigation might be "essential," Archer has given no reason why it did not commence its second third-party action in the two months prior to the filing of the note of issue, and has given no reason why it waited a total of six months to commence its action after Schottmuller's testimony about Canron's role at the site. See Pena v. City of New York, 222 A.D.2d 233 (1st Dept. 1995). Moreover, notwithstanding Archer's speculation about prejudice to defendants in this litigation, the fact is that defendants have not brought any claim against Canron for indemnification or contribution and have they opposed either plaintiffs' or Canron's motion for severance or dismissal of the second third-party action or claimed that they would be prejudiced by the grant

of the motions.

Canron has the right to have the time and opportunity to conduct discovery and to defend itself in the second third-party action, and plaintiffs have the right to the adjudication of their claims without further delay. See Annanquatcy v. Passeser, 260 A.D.2d 517 (2d Dept. 1999); Blechman v. I.J. Peiser's and Sons, 186 A.D.2d 50 (1st Dept. 1992). Therefore, plaintiffs' and Canron's motions to sever the second third-party action are granted. Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment (motion sequence number 006) is denied; and it is further

ORDERED that those parts of Archer's cross-motion which seek summary judgment dismissing plaintiffs' Labor Law §§240(1), 241-a and loss of consortium claims, are denied; and it is further

ORDERED that those parts of Archer's cross-motion which seek summary judgment dismissing plaintiff's Labor Law §§200, 241 (6) and common-law negligence claims are granted, except with respect to that part of the section 241(6) cause of action which is based on Industrial Code §12 NYCRR 23-1.7 (a) (1), upon which summary judgment is denied; and it is further

ORDERED that those parts of defendants' cross-motion which seek summary judgment dismissing plaintiffs' Labor Law §§240 (1), 241-a and loss of consortium claims, are denied; and it is further

ORDERED that those parts of defendants' cross-motion which seek summary judgment dismissing plaintiff's Labor Law §§200, 241(6), and common-law negligence claims, are granted, except with respect to that part of the section 241(6) cause of action which is based on Industrial Code section 12 NYCRR §23-1.7 (a) (1), upon which summary judgment is denied;

and it is further

ORDERED that the part of defendants' cross-motion for summary judgment on defendants' third and fourth causes of action against Archer, is granted, damages to be determined at trial, and the part of the cross- motion which seeks summary judgment on defendants' sixth cause of action, against Valley Forge, is denied; and it is further

ORDERED that Valley Forge's cross-motion for summary judgment dismissing the third-party complaint as against it, is granted, and the third-party complaint is severed and dismissed as against third-party defendant Valley Forge Insurance Company, s/h/a, CNA Commercial Insurance and the Clerk is directed to enter judgment in favor of Valley Forge Insurance Company, s/h/a, CNA Commercial Insurance, third-party defendant, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that plaintiffs' motion (motion sequence number 008) for the severance of the second third-party action, Index No. 590842/04, is granted; and it is further

ORDERED that Canron's motion (motion sequence number 009) for the severance of the second third-party action, Index No. 590842/04, is granted; and it is further

ORDERED that a copy of this order with notice of entry be served upon the Clerk of the Trial Support Office (Room 158), and upon the County Clerk's Office.

Dated: January 11, 2005

SHIRLEY WERNER KORNREICH, J.S.C.