STATE OF NEW YORK
SUPREME COURT **COUNTY OF RENSSELAER**

RODERICK F. LAFLEUR, JR.,

Plaintiff,

-against-

Index No.: 210301
RJI No.: 41-0772-2004

MLB INDUSTRIES, INC., HANNAFORD BROS. CO. and CENTURY II MALL ASSOCIATES,

Defendants.

MLB INDUSTRIES, INC.,

Third-Party Plaintiff

-against-

ALLTEK ENERGY SYSTEMS, INC.,

Third-Party Defendants.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

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DECISION/ORDER

George B. Ceresia, Jr., Justice

Plaintiff commenced the instant action seeking to recover for injuries sustained

when he fell while removing an exhaust hood from the deli section of a grocery store run by defendant Hannaford Bros. Co. Defendant and third-party plaintiff MLB Industries contracted with Hannaford to replace the existing four foot hood with an eight foot hood. MLB thereafter subcontracted a portion of the work to third-party defendant Alltek Energy Systems, plaintiff's employer. Defendant and third-party plaintiff MLB Industries has moved for summary judgment seeking a determination that it is entitled to a defense and indemnification pursuant to contractual indemnification. Third-party defendant Alltek Energy Systems has cross-moved for summary judgment dismissing the third-party action pursuant to Workers' Compensation Law § 11 on the ground that the plaintiff did not receive a grave injury in the accident and that there was no written contract entered into prior to plaintiff's accident.

Summary judgment is a drastic remedy which should only be granted when it is clear that there are no triable issues of fact (see Andre v Pomeroy, 35 NY2d 361, 364 [1974]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see also Bush v St. Clare's Hosp., 82 NY2d 738, 739 [1993]). In order to meet this burden when seeking dismissal of a cause of action, a party must submit evidence which negates any meritorious cause of action encompassed by the pleadings (Franceschi v Consolidated Rail Corp., 142 AD2d 915 [3d Dept 1988]; see also

Hirsh v Bert's Bikes and Sports, 227 AD2d 956 [4th Dept 1996]; Wilder v Rensselaer Polytechnic Inst., 175 AD2d 534 [3d Dept 1991]). It is only when the movant has established a right to judgment as a matter of law that the burden shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of material fact (see Zuckerman v City of New York, 49 NY2d 557 [1980]). The Court will then view the evidence in a light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference, and determine whether there is any triable issue of fact (see Boyce v Vazquez, 249 AD2d 724, 726 [3d Dept 1998]; Martin v Briggs, 235 AD2d 192, 196 [1st Dept 1997]; Simpson v Simpson, 222 AD2d 984, 986 [3d Dept 1995]).

In 2002, MLB Industries entered into a contract with Hannaford Bros. to renovate one of Hannaford's grocery stores. The work included installation of a four foot exhaust hood in the deli department. Alltek performed the installation pursuant to a subcontract with MLB Industries which expressly provided that Alltek would indemnify MLB Industries for any losses arising out of Alltek's work. The subcontract to install the hood was completed as of June, 2002, Alltek was paid in full, and Hannaford accepted the work. More than one year later, Hannaford decided to install additional deli equipment which required a larger exhaust hood. It contracted with MLB Industries for the removal of the existing four foot hood and the installation of a new eight foot hood. Apparently because of the size of the project and the desire to proceed expeditiously, MLB Industries

did not follow its usual procedures with respect to formal subcontracts. Rather, it requested a proposal from Alltek. Alltek responded with a simple letter proposing to remove the existing hood and replace it with the larger one for a specified price. No additional terms or conditions were set forth. Before Alltek would actually order the new hood, it required some written confirmation from MLB Industries. James M. Dawsey, MLB Industries' vice president of operations, wrote "approved by MLB" on the letter proposal and signed his name.

Alltek then ordered the equipment and upon delivery began removing the old hood. Plaintiff was injured in the process of removal of the old hood on September 17, 2003. Alltek thereafter completed the removal and installation process within a few days. In November, 2003, MLB Industries submitted a proposed formal subcontract which indicated that it was an amendment of the prior 2002 subcontract and which purported to make all of the terms and conditions of the prior subcontract applicable to the subsequent subcontract. Alltek executed such subcontract based upon the belief that it was required to do so to get paid for its work. There was no discussion or negotiation of any of the terms of the letter proposal or the subsequent formal subcontract.

Workers' Compensation Law § 11 provides that an employer of an injured worker will not be liable to any other person for contribution or indemnity unless the injured employee sustained a grave injury, as defined therein, or the employer entered into a written contract providing for contribution or indemnification prior to the subject accident

(see Guijarro v V.R.H. Const. Corp., 290 AD2d 485, 486 [2d Dept 2002]). There is no claim that the plaintiff herein sustained a grave injury, as defined in the statute. However, defendant and third-party plaintiff MLB Industries contends that there was a written contract providing for contractual indemnification, while third-party defendant Alltek contends that there was no written agreement with respect to contractual indemnification at the time of the accident.

Workers' Compensation Law § 11 has not been construed to expand the limitation on contractual indemnification. Thus, while there must be a written agreement of some sort, it need not be signed by the parties (see Flores v Lower E. Side Serv. Ctr., Inc., 4 NY3d 363, 367-370 [2005]). Moreover, the contractual indemnification agreement may be contained in a blanket agreement which does not specifically refer to the contractual work giving rise to the injury (see Rodrigues v N & S Bldg. Contrs., Inc., 5 NY3d 427, 430 [2005]) or may be pieced together out of other contracts between the same parties (see Gilbert v Albany Med. Ctr., 21 AD3d 677, 678 [3d Dept 2005]). The written agreement may be found in a letter proposal even though a formal contract containing an indemnification clause was not executed until after an injury (see Nephew v Klewin Bldg. Co., Inc., 21 AD3d 1419, 1421 [4th Dept 2005]). Even a written contract which is executed after the accident, but which provides that it was made as of a date prior to the injury and evidences an intent that it be applied retroactively has been held sufficient (see Manns v Norstar Bldg. Corp., 4 AD3d 799, 800 [4th Dept 2004]; Pena v Chateau

Woodmere Corp., 304 AD2d 442, 444 [1st Dept 2003]; Stabile v Viener, 291 AD2d 395, 396 [2d Dept 2002]).

In the instant action, there is no evidentiary proof that the parties entered into a blanket agreement covering all subcontracts entered into or to be entered into between MLB Industries and Alltek. Mr. Dawsey submitted an affidavit alleging that MLB sends out blanket purchase orders which cover the subcontractor for the year. There is no proof that such a blanket "purchase order" was sent to Alltek. Moreover, MLB Industries submitted a purported copy of such blanket "purchase order" which is merely a blank subcontract form. It does not contain any dates, the identity of any subcontractor, nor does it contain any terms which would indicate that it is intended as a blanket agreement rather than a specific subcontract. "Such conclusory statements do not constitute the prima facie evidentiary showing that is required of the proponent [or opponent] of a summary judgment motion (see, Winegrad v New York Univ. Med. Ctr., supra, at 852-853)." (Christiana v Benedictine Hosp. 248 AD2d 910, 913 [3d Dept 1998]; see also Lowell v Peters, 3 AD3d 778 [3d Dept 2004])

The transcripts of examinations before trial of employees of MLB Industries and Alltek indicate that they never discussed or negotiated contractual indemnification with respect to the subject subcontract. Moreover, the letter proposal did not refer to or mention any other agreements which contained a contractual indemnification clause. It is also evident that at the time Alltek sent its letter proposal, it did not consider installation

of a new hood, more than one year after acceptance of the smaller hood, to be a modification or alteration of the prior completed subcontract. In the absence of any reference to prior practices between the parties in the writings attributable to the instant subcontract, the fact that other subcontracts contained indemnification clauses does not indicate that the subject agreement did. Furthermore, the transcripts of the examinations before trial indicate that there was no negotiation or discussion with respect to whether the formal subcontract executed in November, after the injury, would be retroactive. The November subcontract does not set forth an effective date or in any other manner express an intent that it be applied retroactively (see Temmel v 1515 Broadway Assoc., L.P., 18 AD3d 364, 365-366 [1st Dept 2005]).

It is therefore determined that there was no written agreement entered into prior to plaintiff's injury which provided for contractual indemnification. As such, the third-party claim is barred by Workers' Compensation Law § 11.

Accordingly it is

ORDERED that the cross-motion for summary judgment dismissing the third-party complaint is hereby granted. The motion for summary judgment granting the relief demanded in the third-party complaint is hereby denied.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for the third-party defendant, who are directed to enter this Decision/Order without notice and to serve all other counsel with a copy of this

Decision/Order with notice of entry.

Dated: Troy, New York
March 8 ,2007

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

Notice of Motion dated November 29, 2006; Affidavit of Scott W. Bush, Esq. sworn to June 29, 2006 with Exhibits 1-6 annexed;
Affidavit of James M. Dawsey sworn to June 28, 2006 with Exhibits 1-5 annexed;
Notice of Cross-Motion dated December 21, 2006; Affidavit of Maureen G. Fatcheric, Esq., sworn to December 21, 2006 with Exhibits A-I annexed;
Affidavit of Michael O'Connor sworn to December 21, 2006;
Affidavit of Scott W. Bush, Esq. sworn to December 29, 2006 with Exhibit A annexed;
Reply Affidavit of Maureen G. Fatcheric, Esq., sworn to January 3, 2007.