At an IAS Term, Part 39 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of June 2007.

P R E S E N T:

HON. GLORIA M. DABIRI,

Justice.

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JEWAN MARAJ and DEOKIE MARAJ,

Plaintiff(s),

- against -

Index No.:10631/04

LIAT, LLC, DANIEL LLC, DANNY'S CONSTRUCTION CORP., AJIM CONSTRUCTION INC. and MIRIAM DEVELOPMENT, INC.,

Defendant(s).

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LIAT, LLC and DANIEL, LLC,

Third Party Plaintiffs,

- against -

Index No.:75842/04

AJIM CONSTRUCTION, INC.,

Third Party Defendants.

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The following papers numbered to read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1, 2, 4
Opposing Affidavits (Affirmations)	3, 5, 6, 7
Reply Affidavits (Affirmations)	8
Affidavit (Affirmation)	
Other Papers	

Upon the forgoing papers defendant/ third-party plaintiff LIAT, LLC (LIAT) moves for an order granting (a) summary judgment (CPLR 3212) dismissing the plaintiffs' complaint and (b) summary judgment against the co-defendant/ third-party defendant AJIM Construction, Inc. (AJIM) on LIAT's claims for contractual and common law indemnification. AJIM moves for partial summary judgment (a) dismissing the second, third, fourth, fifth and sixth causes of actions of the third party complaint and (b) dismissing the cross-claim of defendant Miriam Development Inc. (Miriam), in the main action, for common law indemnification. Jewan Maraj (plaintiff) and Deoakie Maraj (collectively, plaintiffs) cross-move, pursuant to CPLR 3212, for summary judgment against all defendants on their Labor Law § 240 (1) cause of action.

Procedural History and Background Facts

This action arises from a February 9, 2004 work-site accident in which plaintiff fell from a ladder and sustained various injuries. The accident occurred during the course of a project which involved the construction of six new three family homes at 179-189 Newport Street/ 824 Rockaway Avenue in Brooklyn, New York (Newport project). Plaintiff filed a claim with the Workers' Compensation Board (Board) on or about March 11, 2004. At an administrative hearing held before the Board, AJIM maintained that the plaintiff was not its employee at the time of the accident. A determination by the Board is pending.

On or about April 1, 2004, plaintiffs commenced an action against LIAT, the

owner of the premises and general contractor, and Danny's Construction Corporation (Danny's) alleging *inter alia* claims under Labor Law §§ 200, 240 and 241. Thereafter, on or about July 19, 2005, plaintiffs commenced a second action against AJIM, his employer and the interior sub-contractor, and Miriam. On or about July 30, 2004, LIAT instituted the third-party action against AJIM. The two actions and third-party action were consolidated by order of this court on July 14, 2006.

On or about October 10, 2003, AJIM, a company owned and operated by Mr. Ashad Ajim, entered into a written contract with Joseph Cohen for the performance of construction related services at the Newport project. Mr. Ajim testified at his deposition that AJIM performed work at the Newport project under a contract with Joseph Cohen of "Miriam Development," who he believed was the owner of Miriam. AJIM had performed work for Cohen prior to the Newport project. Mr. Ajim further testified that when they entered into the contract, Joseph Cohen did not indicated whether he was acting on behalf of a business entity. According to Mr. Ajim, payments for work performed at the Newport project came from Joseph Cohen. AJIM annexes to its motion photocopies of checks made payable to AJIM Construction with "Yevool, Inc."[1] printed in the upper left hand corner, and dated January 9, 2004 through March 23, 2004.

The plaintiff worked for AJIM pursuant to a verbal agreement with Ashad Ajim

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[1]Ilan Cohen testified that Yevool, Inc. is a management company which he independently owns and created to manage his checking account. In this regard he states "[t]he only purpose for Yevool is to write checks, management."

made in late December 2003. According to Mr. Ajim, plaintiff was not an employee, but rather a contract worker, assigned to clean floors and remove light debris at the Newport project. The agreement provided for payment upon the completion of plaintiff's work. Mr. Ajim testified that plaintiff did not perform any painting for AJIM nor did he work on ladders. Mr. Ajim contends that plaintiff was paid in full, at the end of his service, by check in the amount of $1,500.00, dated February 7, 2004 and personally given to the plaintiff on that date.

Mr. Ajim testified that on February 9, 2004, the date of plaintiff's accident, the project was at a stand still because compound on the walls was wet and needed to dry prior to painting. Mr. Ajim testified that he was not at the work site on February 9, 2004 and was not aware of the plaintiff's accident until he received a telephone call from Joseph Cohen regarding his receipt of the summon in this action.

Plaintiff testified that on Monday, February 9, 2004, he was picked up by Mr. Ajim and brought to the work site between 8:00 and 8:30 AM. The plaintiff testified that the previous Friday he was assigned by Ajim "to [the third] floor to do the priming and painting" and on Monday told by Mr. Ajim to continue the work he was doing. Plaintiff testified that, at the site, there were four A-frame aluminum ladders, one eight feet and three six feet ladders. AJIM also had two non- adjustable scaffolds, six feet high and three feet wide. Plaintiff went to the third floor of the fourth building to continue painting the dining room, specifically the corners where the ceiling and walls meet.

Building plans indicate that the third floor dining room's cathedral ceiling arched between nine feet and twelve feet six inches high. However, plaintiff testified that the dining room ceiling arched between thirteen and fifteen feet in height. Plaintiff testified that because the two scaffolds were in use, he set up the eight foot A-frame ladder. According to plaintiff, he asked whether he could use the scaffold "but [the workers] said no because they were using it." Plaintiff indicated that for a few days prior to his accident he had used a scaffold to paint the third floor, including the dining room.

On the date of the accident plaintiff went up and down the ladder approximately ten to twelve times with no difficulty, moving the ladder along the work area and setting the two side braces in place. Plaintiff testified that the ladder had four rubber feet. Just prior to plaintiff's fall he was standing on the top most step, not the top platform, using a brush to paint the area where the ceiling and walls met. Plaintiff testified that as he was stretching to reach the area he was painting he felt the ladder move and he fell to the ground. After he fell, plaintiff crawled downstairs to where others were working. One of the workers called Mr. Ajim who arrived within a few minutes. Plaintiff was then taken by Mr. Ajim's son to the hospital.

Plaintiffs' Labor Law § 240 (1) Claim

Plaintiffs moves for summary judgment on their Labor Law § 240 (1) claim. Labor Law § 240 (1) provides that:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not

> direct or control the work, 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."

Labor Law § 240 (1) was enacted to "prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*Ross v Curtis-Plamer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993] [emphasis omitted]). In order to accomplish this goal, the statute places the responsibility for safety practices and safety devices on owners, general contractors, and their agents who "are best situated to bear that responsibility" (*id.* at 500; *see also Zimmer v Chemung County Perf. Arts*, 65 NY2d 513, 530 [1985]). The statute is to be construed as liberally as possible in order to accomplish its protective goals (*Martinez v City of New York*, 93 NY2d 322, 326 [1999]). However, "[n]ot every worker who falls at a construction site ... gives rise to the extraordinary protections of Labor Law § 240 (1)" (*Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 267 [2001]; *Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, 288 [2003]). Rather, only those accidents proximately caused by a Labor Law § 240 (1) violation will result in the imposition of liability under the statute.

In cases involving ladders or scaffolds that collapse or malfunction for no apparent

reason, there is a presumption that the ladder or scaffolding device was not good enough to afford proper protection (*Blake,* 1 NY3d at 289 n.8; *Lesisz v Salvation Army*, – AD3d – 2007 WL 1560089; *Johnson v Flatbush Presbyterian Church*, 29 AD2d 862 [2006]; *Hanna v Gellman*, 29 AD3d 953 [2006]).

Here, plaintiff offers evidence that he fell from an unsecured eight foot A-frame ladder, while painting walls and a ceiling approximately twelve to thirteen feet high. While doing so, the unsecured ladder began to move. Plaintiff's testimony demonstrates, as a matter of law, that the ladder was not "so constructed, placed and operated as to give proper protection" to the plaintiff, thus establishing a statutory violation of Labor Law §240 (1) (*Blake*, 1 NY3d at 289 n.8; *Guzman v Gumley-Haft, Inc.,* 274 AD2d 555, 556 [2000]; *see Smith v Pergament Enters.*, 271 AD2d 870, 872 [2000]; *Bryan v City of New York*, 206 AD2d 448, 449 [1994]; *Palacios v Lake Carmel Fire Dept. Inc.*, 15 AD3d 461 [2005]; *Romano v Hotel Carlyle Owners Corporation*, 226 AD2d 441, 442 [1996]).

The burden therefore shifts to the defendants to raise a triable issue of fact "that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident. If defendant[s'] assertions in response fail to raise a fact question as to these issues, the plaintiff must be accorded summary judgment"(*Blake*, 1 NY3d at 289 n.8). In opposition to plaintiffs' motion defendants' rely upon the deposition testimony of Ashad Ajim and Ilan Cohen. Mr. Ajim testified that he contracted with plaintiff for plaintiff to clean the floors and remove light debris from the work area and that plaintiff

did not work on ladders. Mr. Ajim testified that the Friday before the subject accident was plaintiff's last day of work and that on Sunday, February 7, 2004, plaintiff was paid in full for his services. Mr. Ajim indicated that to his knowledge plaintiff did not perform any painting at the work site and that he did not know whether the painting subcontractor hired plaintiff to complete work on its behalf.

Mr. Ajim offered that on the date of the accident the project was at a stand still and no one was at the site. According to Mr. Ajim the project was shut down for two weeks, after he learned that the compound was too wet to paint. Mr. Ajim contends that he was not present at the work site when the plaintiff was injured and that he only learned of the plaintiff's accident after Joseph Cohen contacted him after he received a summon. Mr. Ajim's testimony contradicts plaintiff's testimony that Mr. Ajim arrived at the work site shortly after his accident and that plaintiff was driven to the hospital by Mr. Ajim's son.

Here, defendants raise an issue of fact as to the circumstances surrounding the alleged accident and whether the plaintiff's injuries were proximately caused by a violation of the statute (*see Blake*, 1 NY3d at 287; *6243 Jericho Realty Corp. v AutoZone, Inc.*, 2006 NY Slip Op 1605, 2 [2006] *citing Rodriguez v New York City Hous. Auth.*, 194 AD2d 460, 462 [1993]; *Anderson v Schul/Mar Constr. Corp.*, 212 AD2d 493 [1995]). Based upon the forgoing, the defendants' have raised a triable issue of fact warranting denial of summary judgment on plaintiff's Labor Law §240 claim (*Anderson*, 212 AD2d 493; *Gordon*, 82 NY2d at 561).

LIAT's Common Law Indemnification Claim

Defendant/ third party plaintiff LIAT argues that they are entitled to indemnification from AJIM based upon common law and contractual indemnification. LIAT contends that the plaintiff took instructions directly from either Ashad Ajim or his son, and that AJIM directed, supervised and controlled the work being performed. According to plaintiff's testimony, he was directed by AJIM to continue painting the third floor on the date of the accident. Plaintiff testified that he was not aware of anyone from LIAT being present at the work site, nor was he familiar with anyone by the name of Cohen. Furthermore, AJIM supplied the materials, paint, ladders and scaffolds for the project, as there were no general contractors on the job. LIAT argues that common law indemnification is warranted in this instance as their liability is purely vicarious based upon the liability of their subcontractor AJIM.

AJIM opposes LIAT's motion on the ground that (1) plaintiff was not AJIM's employee at the time of the accident; (2) the issue of employment has been litigated at length during the Workers' Compensation Board hearing and the decision is pending, rendering this application premature and (3) in the event the Board finds that the plaintiff is entitled to Workers' Compensation, then the common law indemnification claim is barred by Workers' Compensation Law Section 11.

To establish a claim for common law indemnification, "the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability

but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident or . . . had the authority to direct, supervise, and control the work giving rise to the injury" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2005] [internal quotation marks and citations omitted]; *Hernandez v Two E. End Ave. Apt. Corp.*, 303 AD2d 556, 557 [2003] ["A subcontractor may be obligated to indemnify under the common law upon proof that . . . it had the authority to direct, supervise, and control the work giving rise to the injury"]).

Summary judgment on indemnification is generally premature where "there has been no determination as to the proximate cause of injury or who was liable for the accident" (*see e.g. Iurato v City of New York*, 18 AD3d 247, 248 [2005], *lv dismissed* 6 NY3d 806 [2006]). When there is no proof, as a matter of law, "that the proposed indemnitor 'was either negligent or exclusively supervised and controlled plaintiff's work site'" then summary judgment should not be granted (*Perri*, 14 AD3d at 685 [internal quotation marks and citations omitted]).

LIAT contends that it hired AJIM, who in turn engaged the services of the plaintiff for the Newport project. If plaintiff's version of the events is credited, there is no dispute that AJIM had supervisory control and authority over the work being performed by plaintiff at the time of his injury. Ashad Ajim does not contest that AJIM was contracted to complete the interior of the homes, including painting; had the authority to ensure that work was completed as specified in the blue prints; had the authority to stop work if it

was being done in an unsafe manner; and provided all materials, such as paint, for the completion of the job[2]. However, as AJIM correctly points out, the Workers' Compensation Law precludes a third-party claim for common law indemnification against the employer of the injured plaintiff (*see Work. Comp. Law* § 11; *Boles v Dormer Giant, Inc.*, 4 NY3d 235, 240 [2005]). Based upon the forgoing, LIAT's application for summary judgment based upon common law indemnification is denied without prejudice.

Contractual Indemnification

LIAT and AJIM both move for summary judgment, in their favor, on LIAT's claim for contractual indemnification from AJIM.

AJIM, moves for summary judgment dismissal of LIAT's claim on the ground that the claim is premature until the Workers' Compensation Board's decision is rendered. AJIM further contends that the agreement upon which LIAT's claim for contractual indemnification is based "is legally unenforceable because it is ambiguous and it lacks essential material terms, and there was no meeting of the minds." In this regard AJIM points out that the identity of the company to receive indemnification, referred to in the October 10, 2003 contract, was never specified.[3]

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[2]AJIM's contract provides, in pertinent part: "(1) Contractor to frame, sheetrocking, compound, plastering and painting (sic.) the whole house. (2) Contractor to supply all labor and material to the house."

[3]The October 10, 2003 contract reads as follows: "AGREEMENT, DATED 10-10-03 BETWEEN ----- (THE COMPANY) HAVING AN OFFICE AT 160-15 HILLSIDE AVENUE, JAMAICA, AND _____ (THE CONTRACTOR) HAVING AN OFFICE AT: _____

AJIM's claim that LIAT's contractual indemnity claim is premature until a finding is rendered by the Workers' Compensation Board is without merit. "Workers' Compensation Law § 11 permits an owner to bring a third-party claim against an injured worker's employer in only two circumstances: where the injured worker has suffered a 'grave injury' or the employer has entered into a written contract to indemnify the owner" (*Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 365 [2005]). Thus, regardless of the Board's finding, it is still necessary to determine whether AJIM entered into a written contract to indemnify LIAT.

The indemnification clause of the parties' October 10, 2003 agreement reads:

> "INDEMNITY. THE COMPANY SHALL NOT BE RESPONSIBLE FOR ANY MATTER RELATING TO THE CONSTRUCTION OF IMPROVEMENTS ON THE PROPERTY AND ANY OTHER WORK PERFORMED UNDER THIS AGREEMENT. THE CONTRACTOR SHALL INDEMNIFY THE COMPANY IT (sic.) AFFILIATES, DIRECTORS, SHAREHOLDERS, OFFICERS & EMPLOYEES AND HOLD EACH OF THEM HARMLESS AGAINST ALL LIABILITIES, CLAIMS, DAMAGES, RELATED TO COST & EXPENSES INCLUDING REASONABLE ATTORNEY'S FEES RELATING TO OR ARISING OUT OF ANY ACT OR OMISSION OF THE CONTRACTOR, ITS SUB-CONTRACTORS AGENTS OR EMPLOYEES AT ANY TIME, INCLUDING WITHOUT LIMITATION LIABILITIES FOR PERSONAL INJURY OR PROPERTY DAMAGE AND LIABILITIES OCCURRING ON THE ADJACENT PROPERTY." [emphasis added]

"General Obligations Law § 5-322.1 prohibits contractual indemnification when the promisee's negligent actions were responsible for the accident 'in whole or in part.' A

provision that authorizes indemnification for the general contractor's [or owners] own negligence is void as against public policy and unenforceable (*Brooks v Judlau Contr., Inc.*, 39 AD3d 447 [2007]; *see Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997]).

Here, the agreement contemplates indemnification of the promisee (the "company") even in situations where it is found to be negligent and does not contain language limiting AJIM's obligation to that permitted by law or to the extent of AJIM's negligence (*Itri Brick & Concrete Corp.*, 89 NY2d at 795; *Lesisz v Salvation Army*, – AD3d – 2007 WL 1560089). Such a clause may be enforced where the party to be indemnified is found free of any negligence (*Cabrera v Board of Educ. of City of New York*, 33 AD3d 641, 643 [2006]; *see also Balladares v Southgate Owners Corp.*, 40 AD3d 667 [2007]). Thus, a determination as to the enforceability of the indemnification provision cannot be made until there is a finding as to whether LIAT (the company) was negligent (*id.*).

Moreover "[w]hile the meaning of a contract is ordinarily a question of law, when a term or clause is ambiguous and the determination of the parties' intent depends upon the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact" (*Amusement Business Underwriters v American International Group, Inc.*, 66 NY2d 878, 880 [1985]; *Joseph v Rubinstein Jewelry Mfg. Co., Inc.*, 18 AD3d 615, 615 [2005]; *Mejia v Trustees of Net Realty Holding*

Trust, 304 AD2d 627, 628 [2003]).

Here, the indemnification clause requires AJIM to indemnify "THE COMPANY IT (sic.) AFFILIATES, DIRECTORS, SHAREHOLDERS, OFFICERS & EMPLOYEES." However the identity of the company referred to cannot be ascertained from the language of the contract. The contract only indicates that the subject company has an office at "160-15 HILLSIDE AVENUE, JAMAICA." The printed name on the first signature line states simply "JOSEPH COHEN" and does not indicate his title or whether he is acting as a representative of LIAT or some other entity. A determination as to the parties' intent requires further inquiry into extrinsic facts, thus, precluding summary judgement (*Joseph*, 18 AD3d 615).

Miriam's Cross-Claim for Indemnification

In its answer Miriam interposed a cross-claim for contribution, and common law and contractual indemnification from AJIM. Miriam admits that it engaged the services of, and/or hired, and/or contracted with, the defendant AJIM, and asserts that "[u]pon information and belief MIRIAM DEVELOPMENT was used as a 'trade name.'"

AJIM now seeks dismissal of Miriam's cross-claim on the ground that there is no legal entity known as Miriam Development Inc. as admitted in Miriam's answer and the testimony of Ilan Cohen, owner of LIAT.[4] Ilan Cohen testified that, to his knowledge, an

[4]Miriam has submitted no opposition to AJIM's application, nor appeared in opposition.

entity by the name of Miriam Development does not exist. He further testified that he was the owner of a real estate brokerage company named "Miriam Home Sales, Inc.," which was in existence up until approximately May 13, 2004, but has been inactive since approximately 1998 or 1999. Counsel for AJIM affirms that a search for "Miriam Development" was conducted on the official New York Department of State website which resulted in no business entity being found under such name. Therefore, AJIM contends, Miriam Development is not a proper party to this proceeding and its cross-claims should be dismissed.

However, the testimony of Mr. Ajim was that he was entering into the contract with Joseph Cohen, either as an individual or as a representative of Miriam Development. Mr. Ajim testified that he was contacted directly by Joseph Cohen regarding the Newport project. He then went to Mr. Cohen's office located at 160 Hillside Avenue, Jamaica, Queens to a building with the name Miriam Development posted outside. Mr. Ajim further testified that he believed that Mr. Joseph Cohen was the owner of Miriam Development, and that he had no knowledge of an entity called Miriam Home Sale Inc. Throughout his work on the Newport Project, Mr. Ajim reported progress directly to Joesph Cohen or a project manager named Alex who indicated that he worked for Miriam Development. Mr. Ajim testified that he was only familiar with Ilan Cohen in as much as he would see him in the offices of Miriam Development.

Ilan Cohen, owner of LIAT, testified that Joseph Cohen is his brother and was

engaged as a consultant for LIAT between October 2003 and February 2004. He also testified that LIAT currently maintains its business office in Flushing, New York, but that "they used to be at 160-15 Hillside Avenue, Jamaica, New York 11432." Ilan Cohen further testified that Joseph Cohen entered into the October 10, 2003 contract with AJIM as a "representative"of LIAT. Ilan Cohen indicated that the typed agreement was a form agreement generally used by LIAT to enter into agreements with contractors.

Moreover, AJIM has not provided a sufficient foundation for the admissibility, as a business record, of an "online information" document which it submits to show that an entity by the name of Miriam Development was not authorized to do business in the State of New York (*see* CPLR 4518[a]; *Sta-Brite Servs. v Sutton*, 17 AD3d 570, 571 [2005]). Questions of fact on this issue require denial of AJIM's motion to dismiss Miriam's cross-claim. Accordingly, it is

ORDERED, that LIAT's motion for summary judgment is denied, without prejudice, as indicated herein, and it is further

ORDERED, that plaintiffs' cross-motion for summary judgment on their Labor Law §240 claim is denied, and it is further

ORDERED, that AJIM's motion for summary judgment is denied, and it is further

ORDERED, that all parties are to appear in the Jury Co-ordinating Part on July 16, 2007.

This constitutes the decision and order of the court.

E N T E R,

J.S.C.

HON. GLORIA DABIRI