Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **LAWRENCE V. CULLEN** IA Part 6
Justice

SLAWOMIR BANACZYK, Plaintiff, - against - 1425 BROADWAY, LLC, et al., Defendants.	Index Number 27013 2006 Motion Date January 27, 2009 Motion Cal. Numbers 3, 4, 5, 6 Motion Seq. Numbers 4, 5, 6, 7

The following papers numbered 1 to 38 read on this motion pursuant to CPLR 3212(a) by plaintiff for partial summary judgment in his favor as against defendants 1425 Broadway, LLC (1425 Broadway) and GVA, LLC (GVA) on his claim based upon violation of Labor Law § 240(1); this motion by third-party defendant J.J. Remodeling & Restoration Co., Inc. (J.J. Remodeling) pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint and all cross claims asserted against it; this motion by defendant 1425 Broadway, LLC (1425 Broadway) pursuant to CPLR 3212 for summary judgment dismissing the claims based upon common-law negligence, and violations of Labor Law §§ 200 and 240, and portions of the claim based upon Labor Law § 241(6); and this motion by defendant/third-party plaintiff GVA, LLC (GVA) for summary judgment dismissing the complaint asserted against it, and for summary judgment in its favor as against third-party defendant J.J. Remodeling for contractual indemnity.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits.....	1-23
Answering Affidavits - Exhibits.....	24-32
Reply Affidavits.....	33-38

Upon the foregoing papers it is ordered that the motions numbered 3, 4, 5 and 6 on the calendar for January 27, 2009 are determined together as follows:

Plaintiff allegedly suffered personal injuries on September 5, 2006, at approximately 8:15 A.M., during the course of his employment as a carpenter and painter by third-party defendant J.J. Remodeling, an interior reconstruction contractor. According to plaintiff, he had been assigned by his supervisor to cut sheets of metal on the sixth floor of a new six-story building under construction at 14-25 Broadway, Long Island City, New York, and pass the cut pieces to a coworker standing on a scaffold, for the purpose of their installation for the roof. Plaintiff alleges that he cut a piece of sheet metal and then passed it to the coworker on the scaffold. He further alleges that as he proceeded to get another piece of sheet metal, he was struck in his upper back and neck by a falling piece of sheet metal. In addition to obtaining workers' compensation benefits, plaintiff commenced this action against defendant 1425 Broadway, the owner of the premises, and defendant GVA, the general contractor engaged by 1425 Broadway for the project. Plaintiff seeks to recover damages for his personal injuries, alleging violations of Labor Law §§ 200, 240(1), 240(2), and 241(6), as well as common-law negligence.

Defendant GVA impleaded third-party defendant J.J. Remodeling, asserting claims against it for common-law contribution and indemnification and contractual indemnification, and breach of contract for failure to procure liability insurance. Third-party defendant J.J. Remodeling asserted various affirmative defenses, including defenses based upon the bar of Workers' Compensation Law § 11,[1] and interposed counterclaims against third-party plaintiff GVA for common-law contribution and indemnification, and cross claims against defendants 1425 Broadway and JR Builders, Inc. Issue has been joined with respect to defendants 1425 Broadway and GVA in relation to the complaint, and issue has been joined with respect to third-party defendant J.J. Remodeling in relation to the third-party complaint. The action against defendant J.R. Builders, Inc. has been discontinued pursuant to a stipulation dated October 31, 2008.

Plaintiff filed a note of issue on July 11, 2008, and thereafter, the parties entered into a so-ordered stipulation dated September 4, 2008, in lieu of a motion to vacate the note of issue.

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[1] Third-party defendant J.J. Remodeling asserts no affirmative defense based upon the statute of frauds (General Obligations Law § 5-701).

Pursuant to that stipulation, motions for summary judgment were required to be made returnable no later than December 9, 2008. The respective motions for summary judgment are timely made.

It is well established that the 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]; Zuckerman v City of New York, 49 NY2d 557 [1980]). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his or her position (see, Zuckerman v City of New York, 49 NY2d 557, [1980] *supra*). Furthermore, the court's function on a motion for summary judgment is issue finding, not issue determination (see, Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]) or credibility assessment (see, Ferrante v American Lung Assn., 90 NY2d 623, 631 [1997]).

The statutory duty imposed by sections 240(1), 241(6) and 200 of the Labor Law places ultimate responsibility for safety practices upon owners of the worksite and general contractors (see, Gordon v Eastern Ry. Supply, 82 NY2d 555 [1993]; Russin v Picciano & Son, 54 NY2d 311 [1991]; Kowalska v Board of Educ. of the City of N.Y., 260 AD2d 546 [1999]; Sabato v New York Life Ins. Co., 259 AD2d 535 [1999]; Coleman v City of N.Y., 230 AD2d 762 [1996], affd 91 NY2d 821 [1997]). The duty imposed by sections 240 and 241(6) of the Labor Law is nondelegable, and the liability of an owner or general contractor under these sections is not dependent on whether the owner or general contractor exercised control or supervision over the work (see, Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]; Rocovich v Consolidated Edison Co., 78 NY2d 509 [1991]; Allen v Cloutier Constr. Corp., 44 NY2d 290 [1978]; Perri v Gilbert Johnson Enterprises, Ltd., 14 AD3d 681 [2005]).

Labor Law § 240(1) is addressed to situations in which a worker is exposed to the risk of falling from an elevated worksite or being hit by an object falling from an elevated worksite (see, Rocovich v Consolidated Edison Co., 167 AD2d 524, 526 [1990], affd 78 NY2d 509 [1991], *supra*). Therefore, it applies "where the accident is the result of a difference in elevation between the worker and the work being performed, or a difference between the elevation level where the worker is positioned and the higher level of the material being hoisted or secured (see, Melber v 6333 Main St., 91 NY2d 759 [1998]; Rocovich v Consolidated Edison Co., [78 NY2d 509, 514 (1991)]" (Jacome v State, 266 AD2d 345, 346

[1999]). "Falling object" liability under the statute, however, is not limited to objects that are in the process of being hoisted or secured (see, Quattrocchi v F.J. Sciame Constr. Corp., 11 NY3d 757, 758-759 [2008]), but extends also to objects that "requir[e] securing for the purposes of the undertaking" (Outar v City of New York, 5 NY3d 731, 732 [2005]). Nevertheless, "[a]n object falling from a minuscule height is not the type of elevation-related injury that this statute was intended to protect against" (Schreiner v Cremosa Cheese Corp., 202 AD2d 657, 657-658 [1994]; see, Jacome v State of New York, 266 AD2d 345, 346-347 [1999], supra; Phillips v City of New York, 228 AD2d 570, 571 [1996]).

Defendants 1425 Broadway and GVA contend that Labor Law § 240(1) does not apply because the height differential was insufficient to implicate the special protections afforded by the statute, and plaintiff cannot establish that the sheet metal fell due to the absence or inadequacy of a safety device. Defendant GVA also contends that plaintiff cannot recover under Labor Law § 240(1) because plaintiff was the sole proximate cause of the accident. Plaintiff, on the other hand, asserts that the height differential was sufficient to pose a significant risk that the sheet metal would fall and cause injuries to workers such as himself, and that in light of the nature and purpose of the work being performed at the time of the accident, defendants were obligated under Labor Law § 240(1) to use appropriate safety devices to hoist or secure the load. Plaintiff additionally asserts that his actions were not the sole proximate cause of the accident.

Neither plaintiff nor defendants have established entitlement to judgment as a matter of law on the Labor Law § 240(1) cause of action. The evidence presented by them raises triable issues of fact including the relative height of the piece of metal sheet vis-a-vis plaintiff's position when it fell (see, Mentesana v Bernard Janowitz Const. Corp., 44 AD3d 721 [2007]; Kobetitsch v P.M. Maintenance, 308 AD2d 510 [2003]; Amo v Little Rapids Corp., 268 AD2d 712, 715 [2000], mod on rearg 275 AD2d 565 [2000]; Butler v Ithaca College, 231 AD2d 974 [1996]; cf. Perron v Hendrickson/Scalamandre/Posillico [TV], 22 AD3d 731, 732 [2005]; Jacome v State of New York, 266 AD2d 345, 346 [1999], *supra*; Sutfin v Ithaca College, 240 AD2d 989 [1997]; Schreiner v Cremosa Cheese Corp., 202 AD2d 657 [1994]; see, generally Outar v City of New York, 5 NY3d 731 [2005], *supra*; Rodriguez v Tietz Ctr. for Nursing Care, 84 NY2d 841 [1994]; Endall v Sublink Ltd., 21 Misc 3d 1120[A] [2008]), whether the piece of sheet metal at issue was a material being hoisted or secured, or an object which required securing for the purposes of the undertaking at the time it fell (see, Quattrocchi v F.J. Sciame Const. Corp., 11 NY3d 757 [2008], *supra*;

Narducci v Manhasset Bay Assoc., 96 NY2d 259, 268 [2001]; see, also Outar v City of New York, 5 NY3d 731, 732 [2005], *supra*), whether adequate safety devices were provided for plaintiff's use, and whether the actions of plaintiff were the sole proximate cause of the accident (see, Weininger v Hagedorn & Co., 91 NY2d 958, 960 [1998], rearg denied 92 NY2d 875 [1998]; Delahaye v Saint Anns School, 40 AD3d 679 2007]). Under such circumstances, summary judgment with respect to the Labor Law § 240(1) claims is not warranted (see, Kobetitsch v P.M. Maintenance, 308 AD2d 510 [2003], *supra*). Thus, the motion by plaintiff for partial summary judgment in its favor as against defendants 1425 Broadway and GVA on the issue of liability on the cause of action pursuant to Labor Law § 240(1) is denied, and that branch of the motions by defendants 1425 Broadway and GVA for summary judgment dismissing the cause of action pursuant to Labor Law § 240(1) is denied.

With respect to Labor Law § 240(2), that statute applies only when scaffolding or staging exceeds 20 feet from the ground or floor (see, Wright v State, 110 AD2d 1060 [1985]). The evidence submitted by defendants 1425 Broadway and GVA indicates that the scaffolds were no more than 6 feet tall, and plaintiff has failed to demonstrate any scaffold or staging exceeded twenty feet from the ground or floor. That branch of the motions by defendants 1425 Broadway and GVA for summary judgment dismissing the cause of action asserted against them based upon a violation of Labor Law § 240(2) is granted.

Plaintiff's cause alleging violation of Labor Law § 241(6), was predicated upon alleged violations of the Industrial Code (12 NYCRR 23 et seq.). Plaintiff originally listed the following Industrial Code sections in his complaint and bill of particulars and amended bill of particulars: 12 NYCRR 23-1.5, 12 NYCRR 23-1.7(a)(1) and (2), 12 NYCRR 23-1.8(c)(1), 12 NYCRR 23-1.11 (a), (b) and (c), 12 NYCRR 23-2.3 (a)(1), (2) and (3), (b), (c), (d) and (e). Plaintiff now concedes that 12 NYCRR 23-1.5 and 12 NYCRR 23-1.11 (a),(b), and (c), and 12 NYCRR 23-2.3 (a)(2) and (3), (b), (c), (d) and (e) do not apply to the facts herein.

With respect to 12 NYCRR 23-1.7(a)(1) and (2), these rules are sufficiently specific to support a cause of action under Labor Law § 241(6) (see, Zervos v City of New York, 8 AD3d 477 [2004]; see also Terry v Mutual Life Ins. Co. of New York, 265 AD2d 929 [1999]; Murtha v Integral Constr. Corp., 253 AD2d 637, 639 [1998]). Defendants 1425 Broadway and GVA, however, assert that 12 NYCRR 23-1.7(a)(1) and (2) are inapplicable.

At the time of the accident, plaintiff was facilitating the installation of roof decking on a floor where the roof was partially open, and the work required installing metal sheets on top of C-joists. Although 12 NYCRR 23-1.7(a)(1) requires that "every place where persons are required to work ... that is normally exposed to falling materials and objects shall be provided with suitable overhead protection," it also provides that "[s]uch 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.... with a supporting structure capable of supporting a loading of 100 pounds per square foot." Regardless of whether the area where plaintiff's accident occurred was an area "normally exposed to falling material or objects," such overhead protection would have rendered the task at hand impossible to carry out (see, German v City of New York, 14 Misc 3d 1204(A) [2006]). In addition, 12 NYCRR 23-1.7(a)(2) deals with barricades to prevent persons from inadvertent entry into an exposed area. Plaintiff, however, was required to be in the area to facilitate the work being performed. Under such circumstances, neither 12 NYCRR 23-1.7(a)(1) nor 12 NYCRR 23-1.7(a)(2) apply to these facts (see, German v City of New York, 14 Misc 3d 1204(A) [2006], *supra*; see generally Cun-En Lin v Holy Family Monuments, 18 AD3d 800 [2005]).

With respect to 12 NYCRR 23-1.8(c)(1), this rule too is sufficiently specific to support a cause of action under section 241(6) (see, Bornschein v Shuman, 7 AD3d 476 [2004]). To the extent plaintiff asserts a violation of 12 NYCRR 23-1.8(c)(1), defendants 1425 Broadway and GVA argue that it is inapplicable, and in any event, was not violated. That rule provides: "(1) Head protection. Every person required to work or pass within any area where there is a danger of being struck by falling objects or materials or where the hazard of head bumping exists shall be provided with and shall be required to wear an approved safety hat. Such safety hats shall be provided with liners during work in areas or at such times where the temperature is below 55 degrees Fahrenheit." Contrary to the argument of defendants 1425 Broadway and GVA, questions of fact exist as to whether (1) there was a danger to plaintiff of being struck by a falling object or materials while in the area where he was assigned to work, (2) plaintiff had been provided a hard hat on the job by his employer, and if so, (3) the hard hat would have prevented any or all of his injuries (see Marin v AP-Amsterdam 1661 Park LLC, 60 AD3d 824 [2009]; Prince v Merit Oil of New York, Inc., 238 AD2d 561 [1997]).

With respect to 12 NYCRR 23-2.3(a)(1), that rule is sufficiently specific to support a Labor Law § 241(6) claim (see, Hasty v Solvay Mill Ltd. Partnership, 306 AD2d 892 [2003]; Young v Buffalo Color Corp., 255 AD2d 920 [1998]). It provides:

> "Structural Steel Assembly
>
> "(a) Placing of structural members.
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> "(1) During the final placing of structural steel members, loads shall not be released from hoisting ropes until such members are securely fastened in place. Structural steel members shall not be forced into place by hoisting machines while any person is so located that he may be injured thereby."

Even assuming that the metal sheets cut by plaintiff were "structural steel members," and the accident occurred during the final placement of them, the regulation applies only when hoisting ropes or machines are actually used for the placing of structural steel members (see Hasty v Solvay Mill Ltd. Partnership, 306 AD2d 892, 894 [2003], supra). Plaintiff makes no claim that hoisting ropes or machines were being used. Hence, the regulation is inapplicable.

Under such circumstances, that branch of the motions by defendants 1425 Broadway and GVA for summary judgment dismissing the claim asserted against them based upon violation of Labor Law § 241(6) is granted to the extent of dismissing the claims alleging violation of Labor Law § 241(6) which are predicated upon violations of 12 NYCRR 23-1.5, 12 NYCRR 23-1.7(a)(1) and (2), 12 NYCRR 23-1.11 (a),(b) and (c), and 12 NYCRR 23-2.3 (a)(1), (2) and (3), (b), (c), (d) and (e).

With respect to those branches of the motions by defendants 1425 Broadway and GVA for summary judgment dismissing the claims based upon common-law negligence and violation of Labor Law § 200, Labor Law § 200 codifies the common-law duty of an owner and a general contractor to provide construction workers a safe place to work (see, Rizzuto v Wenger Contr. Co., 91 NY2d 343, 352 [1998]; Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]; Jock v Fein, 80 NY2d 965, 967 [1992]; Russin v Picciano & Son, 54 NY2d 311 [1981], *supra*; Allen v Cloutier Const. Corp., 44 NY2d 290 [1978], *supra*; Biafora v City of New York, 27 AD3d 506 [2006]). To establish liability for common-law negligence or a violation of Labor Law § 200, a plaintiff must establish that the defendant to be charged had "authority to control the activity bringing about the injury to enable it to avoid or correct an

unsafe condition" (Russin v Picciano & Son, 54 NY2d 311, 317 [1981], *supra*; see, Rizzuto v Wenger Contr. Co., 91 NY2d 343, 352 [1998], *supra*; Singleton v Citnalta Constr. Corp., 291 AD2d 393, 394 [2002]), or had actual or constructive notice of the defective condition causing the accident (see, LaRose v Resinick Eighth Ave. Assoc., LLC, 26 AD3d 470 [2006]; Gatto v Turano, 6 AD3d 390, 391 [2004]; Abayev v Jaypson Jewelry Manufacturing Corp., 2 AD3d 548 [2003]). "General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence and under Labor Law 200" (Dos Santos v STV Engrs., Inc., 8 AD3d 223, 224 [2004], lv denied 4 NY3d 702 [2004]). Authority to review safety at the site is insufficient if no evidence exists that the defendant actually controlled the manner in which the work was performed (see, Loiacono v Lehrer McGovern Bovis, 270 AD2d 464, 465 [2000]). Where a claim arises out of alleged defects or dangers arising from a subcontractor's methods or materials, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged had the authority to exercise supervisory control over the operation (see, Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 505 [1993], supra; Cambizaca v New York City Transit Authority, 57 AD3d 701 [2008]).

In this instance, plaintiff testified that although he did not see the means by which the accident occurred, his coworker was standing on a scaffold and had received a piece of metal sheet from him shortly prior to his accident. Plaintiff, moreover, did not identify any purported unsafe condition present at the work site which caused his injury. Rather, he testified that the metal sheet which struck him had not already been installed because "nobody was on the roof." It appears, therefore, based upon the record, that his common-law negligence and Labor Law § 200 claims are limited to ones premised upon his suffering an injury brought about by an activity engaged in by J.J. Remodeling.

Defendants 1425 Broadway and GVA assert they are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 causes of action on the ground that plaintiff received all of his instructions and equipment from J.J. Remodeling, defendants 1425 Broadway and GVA did not exercise any supervision, direction or control over the activities of J.J. Remodeling bringing about the injury, and J.J. Remodeling provided the supplies. In support of their motion, defendants 1425 Broadway and GVA cite the deposition testimony of Vincent Aliperti and his son, George Aliperti, the owners of both 1425 Broadway and GVA, plaintiff, Jan Jakiela, the owner of J.J. Remodeling, and Janusz Czopor, the foreman of J.J. Remodeling and defendant 1425 Broadway also offers an affidavit of Vincent Aliperti. Vincent Aliperti

states that 1425 Broadway did not supervise the work of J.J. Remodeling, give any directions to any employee of J.J. Remodeling or control the method or manner in which J.J. Remodeling performed the work, or procure or control any metal sheets for use by J.J. Remodeling at or before the time of the accident.

These submissions demonstrate, *prima facie*, that defendants 1425 Broadway and GVA exercised no supervisory control over the means and methods used by third-party defendant J.J. Remodeling in performing the work of cutting and positioning the sheet metal for installation for the roof. In opposition, plaintiff has failed to raise a triable issue of fact. Although there is evidence that defendant GVA monitored and inspected the work, those duties did not rise to the level of supervision or control over J.J. Remodeling necessary to hold either defendant 1425 Broadway or GVA liable pursuant to common-law principles or under Labor Law § 200 (see, Haider v Davis, 35 AD3d 363 [2006]; Ferrero v Best Modular Homes, Inc., 33 AD3d 847 [2006]).

To the extent plaintiff, in his bill of particulars, also relies on the doctrine of res ipsa loquitur in support of his negligence claim, both defendants have established that the metal sheet had not been within their exclusive control (see, Dermatossian v New York City Transit Auth., 67 NY2d 219, 226-227 [1986]), and plaintiff has failed to raise a triable issue of fact with respect to such showing. Under such circumstances, defendants 1425 Broadway and GVA are entitled to summary judgment dismissing the causes of action asserted against them based upon common-law negligence and violation of Labor Law § 200. That branch of the motions by defendants 1425 Broadway and GVA for summary judgment dismissing the causes of action asserted against them based upon common-law negligence and Labor Law § 200 is granted.

That branch of the motion by third-party defendant J.J. Remodeling for summary judgment dismissing the cross claims asserted against it is denied. Third-party defendant has failed to demonstrate that any cross claims were asserted against it.

With respect to that branch of the motion by third-party defendant J.J. Remodeling for summary judgment dismissing the third-party claims asserted against it, "Workers' Compensation Law § 11 prohibits 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'" (Rodrigues v N & S Building Contractors, Inc., 5 NY3d 427, 429 [2005]).

"Grave injury is a statutorily-defined threshold for catastrophic injuries, and includes only those injuries that are listed in the statute and are determined to be permanent" (Blackburn v Wysong & Miles Co., 11 AD3d 421, 422 [2004]; see, Rego v 55 Leone Lane, LLC, 56 AD3d 748 [2008]). Plaintiff set forth his injuries in his bill of particulars and supplemental bills of particulars, and testified regarding them at his deposition. The medical records reflect the injuries set forth in his bills of particulars and deposition testimony. His claimed injuries, however, do not include injuries which are listed in the statute. Third-party defendant J.J. Remodeling has shown that the plaintiff did not sustain a grave injury as defined by Workers' Compensation Law § 11 and plaintiff has failed to raise a triable issue of fact in rebuttal (see, Rubeis v Aqua Club, Inc., 3 NY3d 408 [2004]; Dechnik v Fortunato Sons, Inc., 58 AD3d 793 [2009]; see, generally Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986], *supra*). That branch of the motion by third-party defendant J.J. Remodeling for summary judgment dismissing the portion of the third-party complaint for common-law contribution and indemnification is granted.

With respect to the remaining third-party claims for contractual indemnification and breach of contract, third-party plaintiff GVA alleges that third-party defendant J.J. Remodeling entered into a written subcontract whereby J.J. Remodeling agreed to indemnify it for any losses it might suffer as a result of a personal injury action by a J.J. Remodeling's employee, and to procure comprehensive general liability insurance naming it as an additional insured. Third-party plaintiff GVA also alleges that third-party defendant J.J. Remodeling has failed to undertake a defense or provide such contractual indemnification, notwithstanding its demand, and breached its promise to procure such insurance on its behalf. Third-party defendant J.J. Remodeling denies having entered into any written contract with third-party plaintiff GVA providing GVA contractual indemnification or requiring it to procure liability insurance naming GVA as an additional insured.

In support of its motion for summary judgment with respect to its third-party claim for contractual indemnification, third-party plaintiff GVA offers that which it terms a "five-page agreement." The agreement is actually comprised of two documents both of which are dated March 1, 2006. One of the documents is three pages in length, and is denominated as "SUBCONTRACTOR PURCHASE ORDER" (Purchase Order). The other document is two pages long, and is

denominated as "STANDARD FORM OF AGREEMENT BETWEEN CONTRACTOR AND SUBCONTRACTOR" (Standard Form). Third-party plaintiff GVA asserts these documents together constitute evidence that prior to plaintiff's injury, third-party defendant J.J. Remodeling entered into a written contact, containing an indemnity provision applicable to the site and job where the injury giving rise to the indemnity claim took place, and that the indemnification provision was sufficiently clear and unambiguous. Third-party plaintiff GVA also asserts these documents serve as the basis for its claim that third-party defendant J.J. Remodeling contracted to procure liability insurance naming it as an additional insured with respect to the performance of the work.

The Purchase Order and the Standard Form each bear signatures of Vincent Aliperti on behalf of GVA and Jan Jakiela on behalf of J.J. Remodeling, and name GVA as "Contractor" and J.J. Remodeling, as "Subcontractor." Although the Purchase Order makes reference to a rider, the Standard Form does not. In addition, the Standard Form does not contain any language indicating that its terms take precedence over any conflicting language of any other agreement. The Purchase Order defines the project as "1425 Broadway LLC, 214 Grosvenor Street, Douglaston, New York 11363" whereas the Standard Form document makes no reference to any job site or duration of the work. Vincent Aliperti testified at his deposition that the Purchase Order was applicable to the work which occurred at "1425 Broadway." Both documents contain an indemnity provision.

The indemnity provision in the Purchase Order, in relevant part, states:

> "To the fullest Extent Permitted by law, the Subcontractor shall indemnify and hold harmless the owner and the contractor ... from and against all claims, damages, losses and expenses, including, but not limited to attorney's fees, arising out of or resulting from the performance of the Work including but no [sic] limited to, any such claim, damage [sic] loss or expense is caused in whole or inpart by any omission of Subcontractor, any subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable. Such obligation shall not be construed to negate, abridge or otherwise reduce any other right or obligation or indemnity."

The language of the indemnity provision in the Standard Form is similar, but not identical to that contained in the Purchase Order. The indemnity provision in the Standard Form, in relevant part, provides:

> "To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner and/or Contractor and employee of either of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work, provided that such claim, damage, loss or expense is attributable to bodily injury ..., cause [sic] in whole or in part by negligent acts or omissions of the Subcontractor, ..., anyone directly or indirectly employed by [it] or anyone for whose acts [it] may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in the Paragraph 1.0."

In opposition to defendant GVA's motion, and in support of its own motion for summary judgment dismissing the third-party claims for contractual indemnification and breach of contract, third-party defendant J.J. Remodeling asserts that the signatures on the documents purporting to be those of Jan Jakiela, the "owner" of J.J. Remodeling, are forgeries, and that it did not agree in writing to indemnify third-party plaintiff GVA or any other person or entity, or to procure insurance for another, in connection with the construction project. Third-party defendant J.J. Remodeling submits, among other things, the affidavits of Jan Jakiela, Jan's daughter, Elzbieta Jakiela, and Richard Y. Picciochi, its forensic document examiner.

With respect to the affidavit of Mr. Jakiela, it is in English and no Polish version has been provided.[2] Mr. Jakiela's affidavit merely indicates that it was reviewed by Elzbieta Jakiela, who translated it to him in Polish. The affidavit of Elzbieta Jakiela, however, makes no reference to any translation of her father's affidavit. Furthermore, neither affidavit contains any statement regarding the qualifications of Ms. Jakiela as a translator or interpreter and the accuracy of her translation (see, CPLR 2101[b]; Baginski v Queen Grand Realty, LLC, 21 Misc 3d 1110[A] [2008]).

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[2] Mr. Jakiela testified at his deposition in Polish through a sworn interpreter, and counsel of third-party defendant J.J. Remodeling stated on the record during it that Mr. Jakiela cannot read English. Elzbieta Jakiela likewise testified at her nonparty deposition that her father reads "[v]ery little" English.

Notably, Jan Jakiela testified at his deposition that the signatures on the documents were not his signatures. In her affidavit, Elzbieta Jakiela denies she signed her father's name on the documents or had any authority to do so, but admitted during her nonparty deposition that she assisted her father in relation to J.J. Remodeling, by signing letters on behalf of J.J. Remodeling and serving as "interpreter," including with respect to letters, documents, insurance matters and jobs. Elzbieta Jakiela also testified that her father relied upon other people to "interpret" contracts, documents and discussions with customers for him.

Mr. Picciochi states in his affidavit that he examined the documents and handwriting exemplars provided by both Jan Jakiela and Elzbieta Jakiela and opines, that with a reasonable degree of handwriting certainty, the signatures appurtenant to the agreement were not made by either Jan Jakiela or Elzbieta Jakiela.

Third-party plaintiff GVA admits that neither Aliperti witnessed the execution of the documents by anyone on behalf of J.J. Remodeling. It argues, however, that notwithstanding whether the signatures on the Purchase Order and the Standard Form in fact are forgeries, third-party defendant J.J. Remodeling intended to be bound by the terms in the documents, including the indemnification and procurement of insurance provisions. Third-party plaintiff GVA asserts J.J. Remodeling performed its duties and was paid pursuant to the documents, and the same form documents were used in connection with an earlier job when GVA hired J.J. Remodeling as a subcontractor.

Vincent Aliperti testified that third-party plaintiff GVA had engaged third-party defendant J.J. Remodeling on two or three prior occasions. Mr. Aliperti further testified that before commencement of J.J. Remodeling's work at 1425 Broadway, he and Jan Jakiela together reviewed the documents and the scope of the work, and that Jakiela gave him a verbal estimate. He also stated that J.J. Remodeling subsequently submitted invoices requesting payment. Although Vincent Aliperti additionally testified that GVA insisted upon formal contracts if the cost of retention for subcontractors on a project was $25,000.00 or more, he admitted that 85% of the projects entered into between GVA and J.J. Remodeling did not have a formal contract. George Aliperti testified that he "believed" GVA had a policy which required executed contracts from all subcontractors performing work on site. Neither Aliperti testified as to the date and manner in which GVA received the signed documents from J.J. Remodeling.

Jan Jakiela also testified that GVA had previously engaged J.J. Remodeling on two or three occasions, but stated that only

with respect to the first engagement had there been a contract. He denied that there had been any agreement that the subsequent jobs between GVA and J.J. Remodeling would be under the same terms as the original contract, or that the Alipertis had given him a contract to sign in connection with the work at 1425 Broadway. He testified that the first contract established a budget set in advance, whereas the next job was performed according to hours worked. He also testified that he did not know what it meant to indemnify someone, stating "I'm seeing it for the first time." He further testified that he understood for each job he was required to provide a certificate of insurance, and "probably" understood that he was also required to add an additional insured under J.J. Remodeling's insurance policy. George Aliperti acknowledged that Jan Jakiela's reading and writing skills "are not the greatest. He wouldn't understand some things."

It is well settled that a forged signature renders a contract void ab initio (see, Orlosky v Empire Sec. Systems, Inc., 230 AD2d 401 [1997]; Ticor Title Guar. Co. v E.F.D. Capital Group, 210 AD2d 841 [1994], lv denied 85 NY2d 809, 810 [1995]). On the other hand, "a contract may be valid even if not signed by the party to be charged, provided its subject matter does not implicate a statute – such as the statute of frauds ... – that imposes such a requirement" (Flores v Lower East Side Service Center, Inc., 4 NY3d 363, 368 [2005])." Thus, a general contractor may bring a contractual indemnification claim against a subcontractor/employer of an injured employee, even though the prime contract containing the indemnity clause was not signed by the subcontractor or employer, where the contract would have been enforceable under the common law notwithstanding the lack of such signature (see, Flores v Lower East Side Service Center, Inc., 4 NY3d 363 [2005], *supra*). Likewise, a contract to procure insurance if not signed by the party to be charged, may still be enforceable if there is objective evidence establishing that the parties intended to be bound by it (see, generally Flores v Lower East Side Service Center, Inc., 4 NY3d 363 [2005], supra; Matter of Municipal Consultants & Publs. v Town of Ramapo, 47 NY2d 144 [1979]; Sozzi v Moishe's Moving Systems, Inc., 16 Misc 3d 1121 [A] [2007]).

Under the circumstances presented herein, questions of fact exist as to whether the purported signatures of Jan Jakiela are forgeries, and whether, despite any forgery, an agreement was reached whereby third-party plaintiff GVA and third-party defendant J.J. Remodeling intended J.J. Remodeling to be obligated to indemnify GVA and procure insurance for GVA (see, generally Zuckerman v City of New York, 49 NY2d 557, 562 [1980], supra; Staub v William H. Lane, Inc., 58 AD3d 933 [2009]). Summary judgment, therefore, is not warranted with respect to the third-party claims

for contractual indemnification and breach of contract for failure to procure insurance. That branch of the motion by third-party defendant J.J. Remodeling for summary judgment dismissing the third-party claims based upon contractual indemnification and breach of contract is denied. That branch of the motion by third-party plaintiff GVA for summary judgment in its favor and against third party defendant J.J. Remodeling on its third party claim for contractual indemnification also is denied.

Dated: May 13, 2009

LAWRENCE V. CULLEN, J.S.C.