

**Cacioppo v Permelynn of Bridgehampton, Inc.**

2014 NY Slip Op 30726(U)

March 19, 2014

Sup Ct, Suffolk County

Docket Number: 04-19740

Judge: Jr., Andrew G. Tarantino

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SHORT FORM ORDER  
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INDEX No. 04-19740

**COPY**

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 50 - SUFFOLK COUNTY

**PRESENT:**

Hon. ANDREW G. TARANTINO, JR.  
Acting Justice of the Supreme Court

MOTION DATE 6-13-12 (#007)  
MOTION DATE 9-11-12 (#008 & #009)  
MOTION DATE 9-25-12 (#010)  
MOTION DATE 12-11-12 (#011)  
MOTION DATE 1-8-13 (#012)  
ADJ. DATE 9-17-13  
Mot. Seq. #007 - MotD #008 - XMotD  
#009 - XmotD #010 - MD  
#011 - XMotD #012 - XMotD

-----X  
CATHERINE CACIOPPO, AS ADMINISTRATRIX OF:  
THE GOODS, CHATTELS AND CREDITS WHICH :  
WERE OF LOUIS A. CACIOPPO, DECEASED, AND :  
CATHERINE CACIOPPO, INDIVIDUALLY, :  
Plaintiff, :  
- against - :  
PERMELYNN OF BRIDGEHAMPTON, INC., :  
KIMCO REALTY CORPORATION, MADESIN :  
GENERAL CONTRACTING, PRO FORM :  
CONSTRUCTION CO., INC., KRYSZTOF :  
SZYMANSKI and THE BOMBAY COMPANY, INC. :  
and EAST END OPERATING CORP., :  
Defendant. :

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-----X  
PERMELYNN OF BRIDGEHAMPTON, INC. and :  
KIMCO REALTY CORPORATION, :  
Third-Party Plaintiff, :  
- against - :  
BIG ANT ELECTRIC COMPANY, INC., :  
Third-Party Defendant. :

JOSEPH C. HUBBARD, ESQ.  
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Krysztof Szymanski  
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Hauppauge, New York 11788-5108

-----X  
MADESIN GENERAL CONTRACTORS, LTD., :  
Defendant/Second Third-Party Plaintiff, :  
- against - :  
BIG ANT ELECTRIC COMPANY, INC., :  
Second Third-Party Defendant. :  
-----X

BRAVERMAN & ASSOCIATES  
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New York, New York 10017

3-19  
✍

Cacioppo v Permelynn of Bridgehampton, Inc.

Index No. 04-19740

Page No. 2

Upon the following papers numbered 1 to 144 read on this motion for partial summary judgment and this motion for summary judgment; and these cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-22; 75-89; Notice of Cross Motion and supporting papers 23-34; 35-74; 90-95; 139-144; Answering Affidavits and supporting papers 96-97; 98-99; 100-101; 102-103; 104-105; 106-110; 111-114; 115-116; 117-118; 119-120; 121-124; Replying Affidavits and supporting papers 125-127; 128-131; 132-133; 134-135; 136-138; Other Memoranda of Law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion (007) by plaintiff Catherine Cacioppo and the cross motions (008, 009, 011 and 012) by defendants/third-party plaintiffs Permelynn of Bridgehampton, Inc., Kimco Realty Corp., East End Operating Corp., Madesin Construction Co., Inc., and Bombay Company, Inc., and the motion (010) by defendant Madesin Construction Co., Inc. are consolidated for the purposes of this determination; and it is

**ORDERED** that the motion by plaintiff Catherine Cacioppo for partial summary judgment in her favor on the issue of liability as to her Labor Law §240(1) claim is denied; and it is

**ORDERED** that the cross motion by defendants/third-party plaintiffs Permelynn of Bridgehampton, Inc., Kimco Realty, and East End Operating Corp., for, inter alia, summary judgment dismissing the complaint against them is granted to the extent indicated herein and is otherwise denied; and it is

**ORDERED** that the cross motion by defendant/ second third-party plaintiff Madesin Construction Co., Inc. for, inter alia, summary judgment dismissing the complaint and the cross claims against it is granted to extent indicated herein and is otherwise denied; and it is

**ORDERED** that the motion by defendant/ second third-party plaintiff Madesin Construction Co., Inc. for an order declaring that it is entitled to summary judgment on its third-party claims over and against Big Ant Electric is granted to the extent indicated herein and is otherwise denied; and it is

**ORDERED** that the cross motion by defendant Bombay Company, Inc. for, inter alia, summary judgment dismissing the complaint and the cross claims against it is granted to extent indicated herein and is otherwise denied; and it is

**ORDERED** that the motion by defendant/second third-party plaintiff Madesin Construction Co., Inc. for, inter alia, summary judgment dismissing the cross claims for contractual and common law indemnification against it by defendant Bombay Company, Inc. is granted.

This action arises from an accident which occurred on February 20, 2004, when Louis Cacioppo, an electrician working on the renovation of a Bombay Furniture store located at the Bridgehampton Commons Shopping Center, fell from a ladder and struck his head against the concrete floor. The accident allegedly occurred when the ladder on which Mr. Cacioppo was standing slid beneath him while he was feeding electrical wire through a conduit pipe which extended along the interior ceiling of the store. Mr. Cacioppo died shortly after the accident. At the time of the accident the decedent was employed by third-party defendant, Big Ant Electric ("Big Ant"), an electrical subcontractor. The general contractor for the project was defendant/second third-party plaintiff Madesin Construction Co., Inc. ("Madesin"), which hired defendant Pro Form Construction Co., Inc., ("Pro Form") to perform the demolition, carpentry, painting and clean-up of the worksite. The worksite is allegedly owned by defendants/third-party plaintiffs Permelynn of Bridgehampton, Inc., and Kimco Realty (herein collectively referred to as "Kimco"). Defendant Bombay Company, Inc. ("Bombay"), the lessee

of subject premises, is the owner of the furniture store where the accident occurred.

On August 18, 2004, the decedent's wife, plaintiff Catherine Cacioppo, commenced the instant action, individually and in her capacity as the administratrix of the decedent's estate, under index number 04-19740. Subsequently, Ms. Cacioppo commenced another action, assigned index number 05-11966, against defendant East End Operating Corp., ("East End"), which also allegedly possessed an ownership interest in the leased premises. By order dated September 28, 2006, the court (Cohalan, J.) granted a motion by Kimco and East End for an order consolidating both actions under index number 04-19740. The complaints allege causes of action against defendants for wrongful death, common law negligence, premises liability, and violations of Labor Law §§ 200, 240 (1), and 241(6). Following commencement of the actions, defendants joined issue and asserted cross claims against each other for common law and contractual indemnification, contribution, and breach of contract. Thereafter, Madesin and Kimco both brought third-party actions against decedent's employer, Big Ant, alleging similar causes of action.

Plaintiff now moves for partial summary judgment on the issue of liability arguing defendants violated Labor Law §240(1) by failing to ensure the decedent was provided with a secured ladder and adequate safety equipment to prevent or break his fall. Plaintiff further contends, under the circumstances of the case, she should be held to a lesser degree of proof pursuant to *Noseworthy v City of New York*, 298 NY 76, 80 NE2d 744 (1948). Kimco opposes the motion and cross-moves for summary judgment, arguing that the decedent, who suffered from advanced multiple sclerosis, was the sole proximate cause of his own injuries, since he continued to climb ladders and perform work at heights despite knowledge that his illness placed him in danger of losing his balance and falling. Kimco also argues that the claims under the common law and §§ 200 and 241(6) of the Labor Law should be dismissed, as plaintiff failed to allege violations of any applicable provisions of the Industrial Code, and Kimco did not control plaintiff's work or possess notice of any alleged dangerous condition. Alternatively, Kimco seeks summary judgment in its favor over and against Bombay for contractual indemnification, since the lease agreement between the parties requires Kimco be held harmless against claims related to accidents that occur at the leased premises. Kimco further contends that it is entitled to summary judgment over and against the co-defendants and third-party defendant Big Ant, as it played no part in causing the accident and did not have actual or constructive notice of any alleged defective condition.

Madesin also opposes plaintiff's motion and cross-moves for summary judgment in its favor dismissing the complaint and cross claims against it. Madesin asserts that the decedent's insistence to work on the ladder despite his illness was the sole proximate cause of the accident. Additionally, Madesin avers that plaintiff's claims under the common law and §§ 200 and 241(6) of the Labor Law should be dismissed, as she failed to allege violations of any applicable provisions of the Industrial Code, and it did not control the decedent's work or possess notice of any dangerous condition at the worksite. By way of a separate motion, Madesin seeks an order declaring that it is entitled to summary judgment on its third-party claims over and against Big Ant on the ground that its liability to plaintiff would be purely vicarious, since Big Ant supplied the ladder used by the decedent and was the only party that exercised direct supervision and control of his work. Big Ant opposes Madesin's motion for summary judgment on the third-party complaint on the basis that such relief is premature at this time, since a triable issue exists as to whether the decedent's actions were the sole proximate cause of the accident. Bombay cross-moves for dismissal of the complaint and for conditional summary judgment on its cross claims against Madesin and Big Ant. Bombay incorporates the arguments set forth in the codefendants' motions regarding dismissal of plaintiff's Labor Law claims. Additionally, it asserts Madesin is contractually obligated to indemnify it against plaintiff's claims, and that it should not be held vicariously liable for the

decedent's injuries, since it did not play an active role in causing the accident. Madesin opposes the branch of Bombay's motion seeking indemnification against it, and cross-moves for dismissal of those claims on the grounds it did not enter a hold harmless agreement with Bombay until after the decedent's accident, and that such claims for indemnification are, in any event, barred by the arbitration clause set forth in the parties' agreement.

In support of her motion for summary judgment, plaintiff submitted an affidavit by the decedent's co-worker, nonparty witness Christopher Guerin, which states, among other things, that at time of the accident his back was turned to the decedent who had been standing a couple of feet off the ground on the second or third rung of a nearby step ladder. The affidavit states that Guerin heard a shuffling and scuffing sound behind him and, upon turning around, observed the decedent falling to the ground. It further states that Guerin observed a small accumulation of concrete dust, no more than usually accumulates at a typical worksite, on the ground where plaintiff had fallen. The affidavit also states that the decedent had a visible physical disability, as he walked and worked in a distorted manner.

At his examination before trial, Big Ant's principal, Anthony Soffia, testified that he knew the decedent for more than ten years, that they met when both men worked for the Local 25 Electrical Workers Union, and that during that time the decedent was known to have a limp when he walked. Soffia testified that he and the decedent had parted ways until they met again in 2003, when the decedent complained that he was having problems with the Union and would be giving Soffia a call in relation to possible employment opportunities. Soffia testified that the decedent called him in early 2004 and expressed interest in working for Big Ant. He testified that with the exception of explaining that he may have to work part-time if he stayed with the Union, the decedent never told him that he was on disability or that he had been afflicted with multiple sclerosis ("MS"). Soffia testified that there was nothing unusual about the decedent's work on the first day of the project, that the decedent still had the limp, and that he never observed the decedent lose his balance or stumble. Soffia testified that he did not know whether the decedent ever complained to Madesin's supervisor, Tom Witkewicz, that he was suffering from MS while working on the project. Soffia testified that Big Ant provided its workers with several ladders to be used at the worksite, and that Pro Form also had ladders available at the worksite. Soffia testified that although he observed the decedent climb up and down ladders without any difficulties, on the third day of the project he told the decedent that he would have to "let him go" because he had a "gut feeling" that he was going to get hurt on the job. Soffia testified that there were no problems with the quality of the decedent's work; rather he had a premonition something was going to happen to him. Soffia testified that, after having a change of heart the following day, he called the decedent and invited him back to work to hook up a transformer in the building. Soffia testified that the decedent was the supervisor in charge of Big Ant's work on the day of the accident, and that Chris Guerin had been assigned to assist him. Soffia testified that with the exception of speaking with the decedent very early in the morning, he did not speak with either of the men until later that day when Chris Guerin called and informed him that decedent fell from a ladder. Soffia testified he believed that the decedent had been using a green, eight-foot ladder belonging to Pro Form at the time of the accident.

At an examination before trial, Madesin's construction manager, Thomas Witkewicz, testified that upon speaking with the decedent he gleaned that decedent had been suspended by the Union due to his medical condition, and that he had been working with Big Ant while collecting disability benefits. He testified that decedent explained he had been experiencing adverse side effects to his MS medication after Madesin observed him stumble across the floor at the worksite. Witkewicz further testified he later informed Soffia of decedent's

condition and told him that he did not want the decedent to continue working on the project because of his illness. Additionally, Witkewicz testified he let Soffia know that the worksite would be closed on the day of the accident, and that he was not expecting any of Big Ant's employees to be there.

Labor Law § 240 (1) imposes absolute liability upon owners and contractors who fail to provide or erect safety devices necessary to give proper protection to workers exposed to elevation-related hazards such as falling from a height (*see Misseritti v Mark IV Constr. Co., Inc.*, 86 NY2d 487, 634 NYS2d 35 [1995]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 577 NYS2d 219 [1991]). Specifically, Labor Law § 240 (1) requires that safety devices, including scaffolds, hoists, stays, ropes or ladders be so "constructed, placed and operated as to give proper protection to a worker" (*Klein v City of New York*, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). To prevail on a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*see Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880 [1985]; *Sprague v Peckham Materials Corp.*, 240 AD2d 392, 658 NYS2d 97 [2d Dept 1997]). The question of whether the safety device at issue provided protection within the meaning of Labor Law § 240 (1) is ordinarily a question of fact for the jury (*see Garhartt v Niagara Mohawk Power Corp.*, 192 AD2d 1027, 596 NYS2d 946 [3d Dept 1993]; *Plass v Solotoff*, 283 AD2d 474, 724 NYS2d 887 [2d Dept 2001]). Moreover, "[a] fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240 (1)" (*Xidias v Morris Park Contr. Corp.*, 35 AD3d 850, 851, 828 NYS2d 432 [2d Dept 2006]; *see Hugo v Sarantakos*, 108 AD3d 744, 970 NYS2d 245 [2d Dept 2013]; *Gaspar v Pace Univ.*, 101 AD3d 1073, 957 NYS2d 393 [2d Dept 2012]). Rather, there must be evidence that the subject ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries (*see Xidias v Morris Park Contr. Corp.*, *supra* at 851; *see Melchor v Singh*, 90 AD3d 866, 935 NYS2d 106 [2d Dept 2011]; *Artoglou v Gene Scappy Realty Corp.*, 57 AD3d 460, 461, 869 NYS2d 172 [2d Dept 2008]). Moreover, liability under Labor Law § 240(1) will not attach where a worker's voluntary conduct was the sole proximate cause of the accident (*see generally Robinson v East Med. Ctr., LP*, 6 NY3d 550, 814 NYS2d 589 [2006]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 771 NYS2d 484 [2003]).

Initially, the Court finds that plaintiff is not entitled to a lesser degree of proof under *Noseworthy v City of New York*, 298 NY 76, 80 NE2d 744 [1948]. Significantly, plaintiff and defendants are on equal footing as to their access to knowledge of the events which caused the decedent's injuries, as it is undisputed that no one observed the subject accident (*see Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]; *Martone v Shields*, 71 AD3d 840, 899 NYS2d 249 [2d Dept 2010]; *Kuravskaya v Samjo Realty Corp.*, 281 AD2d 518, 721 NYS2d 836 [2001]; *Gayle v City of New York*, 256 AD2d 541, 682 NYS2d 426 [1998]). Moreover, plaintiff failed to submit any evidence from which defendants' negligence may reasonably be inferred, as nonparty witness Guerin testified that his back was turned to the decedent and he did not see how the accident occurred. Notwithstanding statements attributed to Chris Guerin that he heard "shuffling or scuffing" sounds, or that he heard "ladders slide out," where, as here, there was no visual confirmation of how the accident occurred, such evidence would require the court to engage in speculation as to the cause of the subject accident (*see Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285; *Grob v Kings Realty Assocs., LLC*, 4 AD3d 394, 771 NYS2d 384 [2d Dept 2004]; *Agius v State of New York*, 50 AD2d 1049, 1050, 377 NYS2d 735 [1975]).

Further, plaintiff failed to meet her prima facie burden on her motion, as the adduced evidence raises triable issues as to whether the ladder was defective or whether it fell as a subsequent effect of decedent's fall, and if so, whether decedent was the sole proximate cause of his accident, since he was aware that his medical

condition placed him at the risk of losing his balance while working from a height (*see Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, 771 NYS2d 484 [2003]; *Durkin v Long Is. Power Auth.*, 37 AD3d 400, 830 NYS2d 242 [2d Dept 2007]; *Busch v Erie County Indus. Dev. Agency*, 26 AD3d 845, 809 NYS2d 696 [4th Dept 2006]; *Munford v Pressmad Corp.*, 277 AD2d 135, 716 NYS2d 303 [1st Dept 2000]; *cf Lajqi v New York City Tr. Auth.*, 23 AD3d 159, 805 NYS2d 5 [1st Dept 2005] [Even if a plaintiff's medical condition may have caused him to faint or become dizzy, it could not be regarded as the sole proximate cause of the accident, since the defendant violated the Labor Law by failing to provide plaintiff with any safety device in the first place]). Significantly, plaintiff concedes the decedent suffered from multiple sclerosis for many years prior to the accident, and that he was "benched" by the Union and placed on disability because of his condition. Indeed, plaintiff submitted affidavits and reports by the decedent's doctors dated July 2002 through November 2003, which indicate that the decedent suffered weakness in his extremities, neurological deficits, and complained of falling at home and at work on multiple occasions due to his symptoms.

Having determined that a triable issue exists as to how the accident occurred and whether decedent's conduct was the sole proximate cause of such accident, the branch of the cross motions by defendants/third-party plaintiffs for summary judgment dismissing plaintiffs' claims under Labor Law §240(1) are denied (*see Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*). As to the branch of defendants/third-party plaintiffs' cross motions for summary judgment dismissing plaintiff's claims under the common law and Labor Law §§200 and 241(6), since plaintiff failed to address any of those claims in response to the cross motions seeking dismissal of the same, the claims have been deemed abandoned, and are dismissed (*see Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 962 NYS2d 102 [1st Dept 2013]; *Kronick v L.P. Thebault Co., Inc.*, 70 AD3d 648, 892 NYS2d 895 [2d Dept 2010]; *Cardenas v One State St, LLC*, 68 AD3d 436, 890 NYS2d 41 [1st Dept 2009]; *Genovese v Gambino*, 309 AD2d 832, 833, 766 NYS2d 213 [2d Dept 2003]). Accordingly, the branches of the cross motions by defendants/third-party plaintiffs for summary judgment dismissing plaintiffs' claims under the common law and Labor Law §§200 and 241(6) are granted.

Turning to the branch of Kimco's cross motion for summary judgment on its contractual indemnification claim over and against Bombay, the lease agreement between Bombay and East End states, in relevant part, that "[t]enant shall protect, defend, save harmless and indemnify Landlord . . . against all losses, claims, liabilities . . . and damages of whatever nature either (i) claimed to have been caused by or resulted from any act, omission or negligence of Tenant or its . . . employees and contractors no matter where occurring; or (ii) occurring in the Leased Premises except if caused by Landlord's negligence." Further, a rider to the lease agreement between East End and Bombay required Bombay to secure, as a condition to its tenancy, an indemnity agreement from Madesin indemnifying the landlord and its agents in relation to claims arising from work performed during the renovation project. The indemnity agreement provides as follows:

Contractor acknowledges that Tenant is contractually obligated to obtain this Agreement under a lease for its store at the Shopping Center. . . Contractor hereby agrees to INDEMNIFY, SAVE & HOLD HARMLESS East End Operating Corp., and Kimco Realty Corporation, hereinafter collectively referred as Landlord, its respective agents and employees, assigns, and architects of and from all liabilities, claims, losses, damages, injury, causes of actions and suits of whatever nature for personal injury, including death . . . arising out of . . . the work performed under this Contract, whether by Contractor or by any subcontractor. . . Contractor hereby agrees to INDEMNIFY, SAVE & HOLD HARMLESS Landlord, its agents and employees, assigns, and

architects of and from any and all costs of any nature, including without limitation, investigation, adjustment, attorney's fees, expert fees, court costs, administrative costs, and other items of expense arising out of any claim, cause of action or suit of the kind and nature herein set forth.

"A court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action in order that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed provided there are no issues of fact concerning the indemnitee's active negligence" (see *George v Marshalls of MA, Inc.*, 61 AD3d 931, 932, 878 NYS2d 164 [2d Dept 2009]; *O'Brien v Key Bank*, 223 AD2d 830, 831, 636 NYS2d 182 [3d Dept 1996]). Moreover, to obtain conditional relief on a claim for contractual indemnification, "the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of ... statutory [or vicarious] liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]; see *Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 934 NYS2d 437 [2d Dept 2011]). Here, inasmuch as the common law negligence claims against Kimco have been dismissed, and its liability under Labor Law §240(1), if any, is statutory, it is entitled to conditional summary judgment on its cross claim for contractual indemnification over and against Bombay (see *Mouta v Essex Mkt. Dev. LLC*, 106 AD3d 549, 966 NYS2d 13 [1st Dept 2013]; *Jamindar v Uniondale Union Free School Dist.*, *supra*; *Correia v Professional Data Mgt.*, *supra*). Accordingly, the court grants the branch of Kimco's motion seeking conditional summary judgment on its claims for contractual indemnification against Bombay.

As to the branch of Kimco's cross motion for conditional summary judgment on its common law indemnification claims against Bombay, Madasin, Pro Form, and third-party defendant Big Ant, a party seeking common-law indemnification "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 for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law " (*Correia v Professional Data Mgmt., Inc.*, *supra* at 65; see *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 790 NYS2d 25 [2d Dept 2005]; *Priestly v Montefiore Med. Ctr., Einstein Med. Ctr.*, 10 AD3d 493, 495, 781 NYS2d 506 [1st Dept 2004]) or, in the absence of any negligence that the proposed indemnitor "had the authority to direct, supervise, and control the work giving rise to the injury" (*Benedetto v Carrera Realty Corp.*, 32 AD3d 874, 874, 822 NYS2d 542 [2d Dept 2006]). Here, Kimco demonstrated that its liability, if any, under Labor Law §240 (1) would be purely vicarious, as it was an absentee landlord at the time of the accident and did not control the worksite. However, with the exception of third-party defendant Big Ant, Kimco failed to demonstrate that Bombay, Madasin or Pro Form were either negligent or exclusively controlled the decedent's work at the time of the alleged accident. Further, Workers' Compensation Law § 11 does not prohibit Kimco's indemnification claim against Big Ant, as the decedent's injuries were fatal (see *Rubeis v Aqua Club Inc.*, 3 NY3d 408, 788 NYS2d 292 [2008]). Accordingly, Kimco is entitled to conditional summary judgment on its third-party common law indemnification claim over and against Big Ant, pending a determination of plaintiff's claims against Kimco (see *Public Adm'r of Kings County v 8 B.W., LLC*, 40 AD3d 834, 836 NYS2d 634 [2d Dept 2007]; *Saeed v NY/Enterprise City Home Hous. Dev. Fund Corp.*,

Cacioppo v Permelynn of Bridgehampton, Inc.  
Index No. 04-19740  
Page No. 8

303 AD2d 484, 755 NYS2d 428 [2d Dept 2003]; *Frischia v New Plan Realty Trust*, 267 AD2d 197, 699 NYS2d 478 [2d Dept 1999]; *Werner v East Meadow Union Free Sch. Dist.*, 245 AD2d 367, 667 NYS2d 386 [2d Dept 1997]).

Based on the foregoing, the branch of Bombay's cross motion for conditional summary judgment on its common law indemnification claim against Madesin is denied, as Bombay failed to demonstrate that Madesin was actively negligent, or that it controlled the decedent's work at the time of the accident (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 929 NYS2d 556 [2011]; *Benedetto v Carrera Realty Corp.*, *supra*; *Correia v Professional Data Mgmt., Inc.*, *supra*). However, Bombay is granted conditional summary judgment on its cross claim for common law indemnification against Big Ant, pending the determination of plaintiff's claims against Bombay in the main action (*see Public Adm'r of Kings County v 8 B.W., LLC*, *supra*; *Saeed v NY/Enterprise City Home Hous. Dev. Fund Corp.*, *supra*; *Frischia v New Plan Realty Trust*, *supra*).

As to the branch of Bombay's motion for summary judgment on its cross claim against Madesin for contractual indemnification, a party generally will not have a viable claim for contractual indemnification against another where the contract between them is executed after the alleged loss (*see Beckford v City of New York*, 261 AD2d 158, 689 NYS2d 98 [1st Dept 1999]). Although an indemnification agreement executed after an accident has occurred may be applied retroactively where it is established as a matter of law that the parties intended the contract to apply from an earlier date (*see Lafleur v MLB Industries, Inc.*, 52 AD3d 1087, 861 NYS2d 803 [3d Dept 2008]; *Quality King Distribs., Inc. v E & M ESR, Inc.*, 36 AD3d 780, 827 NYS2d 700 [2d Dept 2007]), indemnity contracts are to be strictly construed to avoid reading into them duties which the parties did not intend to be assumed (*see Great Northern Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 823 NYS2d 765 [2006]; *Tonking v Port Auth.*, 3 NY3d 486, 787 NYS2d 708 [2004]; *Hooper Associates, Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491, 549 NYS2d 365 [1989]).

Here, Bombay failed to submit evidence demonstrating, as a matter of law, that the parties intended that the indemnification agreement be applied retroactively (*see Mikulski v Adam R. West, Inc.*, 78 AD3d 910, 912 NYS2d 233 [2d Dept 2010]; *Temmel v 1515 Broadway Assocs., L.P.*, 18 AD3d 364, 795 NYS2d 234 [1st Dept 2005]). Significantly, it is undisputed the contract between the parties was not executed until after the subject accident and did not contain any language requiring that it be applied retroactively. Additionally, the instant action is distinguishable from the cases cited by Bombay, since there was no pre-existing agreement requiring retroactive indemnification and no amendment was made to the subject agreement (*see e.g. Curreri v Heritage Prop. Inv. Trust, Inc.*, 48 AD3d 505, 852 NYS2d 278 [2d Dept 2008] [Parties executed an amendment to the agreement permitting retroactive application]; *Nephew v Klewin Bldg. Co.*, 21 AD3d 1419, 804 NYS2d 157 [4th Dept 2005] [Although the formal agreement was executed after the accident, Court allowed retroactive indemnification where it found that the parties entered a binding contract by letter which predated the accident]). Accordingly, the branch of Bombay's motion for summary judgment on its cross claim for contractual indemnification against Madesin is denied.

Finally, for the reasons stated above, the branch of Madesin's motion for summary judgment dismissing

Cacioppo v Permelynn of Bridgehampton, Inc.  
Index No. 04-19740  
Page No. 9

Bombay's cross claim for contractual indemnification is granted. Further, the branch of Madesin's motion for summary judgment dismissing Bombay's cross claim against it for common law indemnification is granted, as Madesin's liability, if any, under Labor Law §240 (1) is purely vicarious, and it submitted undisputed evidence that none of its employees were present at the time of the decedent's accident and, that it, therefore, did not supervise or control his work (*see Mouta v Essex Mkt. Dev. LLC*, 106 AD3d 549, 966 NYS2d 13 [1st Dept 2013]; *Jamindar v Uniondale Union Free School Dist.*, *supra*; *Correia v Professional Data Mgt.*, *supra*). Additionally, the branch of Madesin's motion for an order declaring its right to common law indemnification over and against Big Ant is granted, pending the determination of plaintiff's claims against Madesin in the main action (*see Public Adm'r of Kings County v 8 B.W., LLC*, *supra*; *Saeed v NY/Enterprise City Home Hous. Dev. Fund Corp.*, *supra*; *Frischia v New Plan Realty Trust*, *supra*).

Dated: March 19 2014



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A.J.S.C.

\_\_\_ FINAL DISPOSITION  X  NON-FINAL DISPOSITION