At an IAS Term, Part 18 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 30th day of April, 2015.

PRESENT:

HON. BERNADETTE BAYNE,
Justice.

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ANTHONY BARRETT,
Plaintiff,

- against -

Index No. 8348/11

MAGNETIC CONSTRUCTION GROUP CORP., ANLAR LLC, NOMAD HOTELS, LLC, GFI 1170 BROADWAY LLC, GFI CAPITAL RESOURCES GROUP, INC., GFI HOTEL COMPANY, LLC, 1170 BROADWAY ASSOCIEATES, LLC, AND THE HADDAD ORGANIZATION, LTD.,
Defendants.

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The following papers numbered 1 to 9 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 3-5
Opposing Affidavits (Affirmations)	6
Reply Affidavits (Affirmations)	7-8
Affidavit (Affirmation) Affirmation in Response to Plaintiff's Motion	9
Other Papers	

Upon the foregoing papers, defendant/third-party plaintiff Magnetic Construction Group Corp. (Magnetic) and defendants Nomad Hotels, LLC, GFI 1170 Broadway LLC, GFI Capital Resources Group, Inc., GFI Hotel Company, LLC, and the Haddad Organization, Ltd., (collectively referred to as the Hotel Defendants) move for an order, pursuant to CPLR

3212, granting them summary judgment in their favor with respect to their claims for contractual indemnification from third-party defendant MJE Inc. (MJE).[1] MJE moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the third-party complaint.

The parties' motions are denied.

In the main action, plaintiff Anthony Barrett, a laborer employed by the demolition subcontractor MJE, suffered injuries on February 4, 2011, when a section of a wall that he was dismantling fell onto the scaffold on which he was standing, causing the scaffold to collapse and plaintiff to fall to the ground. Plaintiff thereafter commenced the instant action against the various defendants, including the owner, Haddad Organization, Ltd. (Haddad), 1170 Broadway Associates (1170 Broadway), the long term lessee of the site, and Magnetic, a general contractor hired by 1170 Broadway to serve as construction manager for a project involving the building, known as the Nomad Hotel. Plaintiff alleged causes of action against defendants premised on common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6). After the commencement of the main action, Magnetic commenced the third party action

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[1] The court notes that, unless there are claims that the court has overlooked, or unless there are other pleadings that have not been submitted with the motion papers, Magnetic is the only third-party plaintiff and is the only party that has pled a claim against MJE for contractual indemnification. As the court is denying the motion brought by Magnetic and the Hotel Defendants in any event, it need not determine the effect of this apparent pleading failure on the right of the Hotel Defendants to the relief they have requested in their motion. The court also notes that the relief relating to plaintiffs claims in the main action requested by defendants in their motion papers was addressed in this court's order dated November 5, 2014, which is discussed below.

against MJE, in which Magnetic alleged causes action for contractual indemnification, attorneys' fees pursuant to the subcontract, and breach of insurance procurement provisions of the subcontract.

After joinder of issue, and the completion of discovery, the parties moved for summary judgment relating to plaintiffs' causes of action in the main action, and Magnetic[2] and MJE made the instant motions relating to the third-party contractual claims. In a November 5, 2014 order, the court granted plaintiff summary judgment with respect to liability as against the defendants on his Labor Law §§ 240 (1) and 241 (6) causes of action. The court also granted defendants' summary judgment motion to the extent that it dismissed plaintiff's claims based on common-law negligence and Labor Law § 200. The court, however, reserved decision with respect to the motions relating to the third-party action that are decided herein.

Workers' Compensation Law § 11, as amended by the Omnibus Workers' Compensation Reform Act of 1996 (L 1996, ch 635, § 2), prohibits most third-party claims for contribution or indemnification against an employer for injuries sustained by an employee acting within the scope of employment. But the statute sets forth two exceptions: the employer may be impleaded when the employee has sustained a "grave injury" or when there is a "written contract entered into prior to the accident or occurrence by which the employer

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[2] Although the Hotel Defendants also move for summary judgment on these contractual claims, the court identifies Magnatic as the movant for the sake of grammatical simplicity and in light of the fact that the Hotel Defendants' claims are dependent on the terms of the contract entered into between Magnetic and MJE.

had expressly agreed to contribution to or indemnification of the claimant" (Workers' Compensation Law § 11).[3]

Relevant here is the second exception based on an indemnification clause agreed to as part of a written contract. As long as the parties' intent to be bound by the writing is manifested by their words and deeds, nothing in section 11 requires that the writing be signed in order for the writing to be enforceable (*see Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 369-371 [2005]; *DiNovo v Bat Con, Inc.*, 117 AD3d 1130, 1131 [3d Dept 2014]; *Ruane v Allen-Stevensen School*, 82 AD3d 615, 616 [1st Dept 2011]). Indemnity contracts, however, are strictly construed to avoid reading into them duties that the parties did not intend to be assumed (*see Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 417 [2006]; *Tonking v Port Auth. of N.Y. & N.J*, 3 NY3d 486, 490 [2004]). Accordingly, an agreement executed after the occurrence of the accident will not be applied retroactively to allow indemnification for the accident in the absence of evidence that the agreement was made as of a date prior to the occurrence of the accident and that the parties intended the contract to apply as of that date (*Meabon v Town of Poland*, 108 AD3d 1183, 1185 [4th Dept 2013]; *Mikulski v Adam R. West, Inc.*, 78 AD3d 910, 911-912 [2d Dept 2010]; *LaFleur v MLB Indus., Inc.*, 52 AD3d 1087, 1088 [3d Dept 2008]; *Podhaskie v Seventh Chelsea Assoc.*, 3 AD3d 361, 362 [1st Dept 2004]).

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[3] Workers Compensation Law § 11 also does not bar a party from recovering on a cause of action based on the breach of an insurance procurement clause of a contract (*see Murphey v Longview Owners, Inc.*, 13 AD3d 346, 346 [2d Dept 2004]; *Cristales v Chase Manhattan Bank*, 278 AD2d 271, 272 [2d Dept 2000]).

Here, Magnetic, in support of its motion, has submitted an unsigned copy of a document that identifies itself as a subcontract made between Magnetic and MJE on November 8, 2010 (Subcontract). This unsigned copy of the Subcontract contains a broad indemnification provision favoring Magnetic, the owner, and the project architect requiring MJE to hold those entities harmless for any injury or death caused by any act or omission by MJE relating to the subcontract or the prosecution of the work (*see* subcontract ¶ 9) (Westerman Affirmation, Exhibit N). Magnetic has also submitted a copy of this same Subcontract, executed on March 25, 2011, that is included as part of a package of documents relating to the project, such as the project drawings and specifications, progress schedules, insurance requirements and other documents relating to the Nomad Hotel project (Westerman Affirmation, Exhibit O).[4] In order to authenticate the Subcontract, Magnetic relies on the deposition testimony of Julio Mejia, MJE's vice-president, and the person who negotiated with Magnetic, who states that he only signed the Subcontract in March, when MJE's portion of the job was almost completed (Mejia deposition at 160). Mejia additionally concedes that he had signed a letter addressing the procurement of insurance as a condition of MJE performing work on the project (Mejia deposition at 170-171). While Mejia also concedes that, in addition to obtaining insurance, that MJE was also responsible for any accidents that

[4] The court notes that the executed copy of the Subcontract contained in Exhibit O is missing page 6, which is the page on which the hold harmless provision appeared in the unsigned copy of the agreement attached as Exhibit N. As MJE has not addressed this issue in its motion/opposition papers, the court has not made any determination as to the effect of the omission of the page 6 from the copy of the executed Subcontract submitted to the court.

arose from MJE's work, the deposition transcript shows that the questions and answers relating to this issue do not appear to refer or relate to any writing given or shown to Mejia prior to the date of the accident (Mejia deposition at 171-172).

In view of the applicable requirements noted above, Magnetic's submissions fail to show, as a matter of law, that the Subcontract, in unsigned form, was in force or effect at the time of the February 4, 2011 accident (*see DiNovo*, 117 AD3d at 1131-1132; *Ruane*, 82 AD3d at 616; *cf. Flores*, 4 NY3d at 370-371), or that the Subcontract that Mejia concededly signed on March 25, 2011, a date more than a month after the accident, was intended to be applied retroactively (*see Meabon*, 108 AD3d at 1185; *Mikulski*, 78 AD3d at 912; *LaFleur*, 52 AD3d at 1088; *McGovern v Gleason Builders, Inc.*, 41 AD3d 1295, 1296 [4th Dept 2007]; *Podhaskie*, 3 AD3d at 363-364). In this regard, Magnetic's initial moving papers contain no factual allegation suggesting that MJE was provided with the Subcontract at any time before it was executed, or that the parties had a course of dealing that would suggest that MJE was aware it was bound by a written indemnification agreement at any time prior to the execution of the Subcontract (*see Timmons v Barrett Paving Materials, Inc.*, 83 AD3d 1473, 1476-1477 [4th Dept 2011], *lv denied in part & dismissed in part* 17 NY3d 843 [2011]). In addition, the plain language of the executed Subcontract stating that it was made on November 8, 2010, does not unambiguously suggest that the parties intended it to be effective as of that date as opposed to the March 25, 2011 date on which it was executed (*compare McGovern*, 41 AD3d at 1296 *with Pena v Chateau Woodmere Corp.*, 304 AD2d 442, 444 [1st Dept 2003]).

While Magnetic, as discussed below, has submitted additional proof addressing some of these issues in its reply and opposition to MJE's motion, such proof cannot be considered in evaluating Magnetic's prima facie showing (*see Poole v MCPJF, Inc.*, ___ AD3d ___, 2015 NY Slip Op 03142 *1 [2d Dept 2015]). As such, Magnetic has failed to demonstrate its prima facie entitlement to summary judgment, and its motion must be denied regardless of the sufficiency of MJE's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

In any event, even if Magnetic is deemed to have established its prima facie burden, MJE has demonstrated the existence of factual issues warranting denial of the motion. In this regard, Mejia, in an affidavit submitted in support of MJE's own motion and in opposition to Magnetic's motion, states that, although MJE had a relationship with Magnetic prior to the Nomad Hotel project, Magnetic had never before asked MJE to execute a written contract prior to March 25, 2011. Mejia further asserts that, although MJE began working on the Nomad Hotel jobsite in November 2011, Magnetic did not provide MJE with a copy of the contract or request that it be signed it until March 25, 2011. This affidavit demonstrates the existence of factual issues as to whether the unsigned Subcontract may be deemed to have been in effect prior to the accident, and as to whether the Subcontract executed on March 25, 2011 should be given retroactive effect (*see DiNovo*, 117 AD3d at 1131-1132).[5]

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[5] The court notes, however, that MJE's assertion that Magnetic's indemnification claim is not ripe is without merit (*see Best v Tishman Constr. Corp. of N.Y.*, 120 AD3d 1081, 1082 [1st Dept 2014]; *Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 616-617 [2d Dept 2011]; *see also McCabe v Queensboro Farm Products, Inc.*, 22 NY2d 204, 208-209 [1968]).

Assuming, without deciding, that Mejia's affidavit is sufficient to demonstrate MJE's initial summary judgment motion burden, the affidavit from Louis Guzman, Magnetic's executive director, and the supporting documents submitted with it are sufficient to demonstrate the existence of factual issues warranting denial of MJE's motion. Notably, Guzman asserts, among other things, that Magnetic attached its contract with 1170 Broadway Associates and the Subcontract, a list of insurance requirements and other project documents to a letter of intent that it sent to MJE at the time it notified MJE that it had been awarded the demolition subcontract.[6] Guzman further asserts that, although the contract was not formally executed until later, MJE was directed to commence work pursuant to the written contract as of November 9, 2010. Of note, Mejia concedes that MJE started work on the project based on this letter of intent (Mejia deposition at 176).[7]

There are thus factual issues as to whether the unsigned Subcontract must be deemed to have been in effect as of the time of plaintiff's accident and/or whether the executed copy signed after the accident must be given retroactive effect (*see Flores*, 4 NY3d at 370-371;

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[6] The court notes, although the Subcontract does not specifically require that MJE obtain insurance naming Magnetic or the owner additional insureds, the Subcontract does incorporate by reference the terms of Magnetic's contract with 1170 Broadway (Subcontract ¶ 3), which contract, at paragraph 12.1, requires, among other things, that any subcontractor obtain insurance naming the owner and construction manager as additional insureds under the policies.

[7] While the unsigned copy of the November 9, 2010 letter of intent submitted by Magnetic appears to support Guzman's assertion that the Subcontract was sent to MJE, its language does not unambigously bind MJE to the terms of the Subcontract. In this regard, the letter of intent states, "Pending the formal agreement between Magnetic . . . and [MJE] it is further agreed that a detailed scope of work in which includes the contract documents and addenda's list attached. It is further agreed that said subcontractor shall abide by Magnetic['s] project schedules and project requirements."

McGovern, 41 AD3d at 1296; *Podhaskie*, 3 AD3d at 363-364) requiring denial of both Magnetic's motion and MJE's motion.

This constitutes the decision and order of the court.

ENTER,

Bernadette Bayne

BERNADETTE BAYNE
Supreme Court Justice

FILED

MAY -8 2015

KINGS COUNTY CLERK'S OFFICE