Atanturi v Kittredge
2018 NY Slip Op 33036(U)
November 14, 2018
Supreme Court, Suffolk County
Docket Number: 14-13522
Judge: Joseph Farneti

SHORT FORM ORDER

INDEX No. 14-13522
CAL. No. 17-01890OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 2-1-18 (001)
MOTION DATE 2-22-18 (002)
MOTION DATE 3-1-18 (003)
MOTION DATE 3-15-18 (004)
ADJ. DATE 3-29-18
Mot. Seq. # 001 - MotD # 003 - MotD
002 - MotD # 004 - MG

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CHRISTIAN ATANTURI,

Plaintiff,

- against -

MAXWELL KITTREDGE as Trustee of FRANCINE S. KITTREDGE, MKL CONSTRUCTION CORP., SAGG MAIN BUILDERS INC., and KHAMSING CHITTAVONG CONSTRUCTION INC.,

Defendants.

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KHAMSING CHITTAVONG CONSTRUCTION INC.,

Third-Party Plaintiff,

- against -

PABLO AGUILER,

Third-Party Defendant.

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SAGG MAIN BUILDERS, INC.,

Second Third-Party Plaintiff,

- against -

PABLO AGUILER,

Second Third-Party Defendant.

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Upon the following papers numbered 1 to 114 read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 14, 15 - 32, 33 - 52, 53 - 68 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 69 - 73, 74 - 77, 78 - 82, 83 - 86, 87 - 89, 90 - 92, 93 - 103, ; Replying Affidavits and supporting papers 104 - 105, 106 - 107, 108 - 109, 110 - 112, 113 - 114 ; Other Memorandum of Law ; it is,

ORDERED that the motion (seq. #001) by defendant/third-party plaintiff Khamsing Chittavong Construction, Inc., the motion (seq. #002) by third-party defendant/second third-party defendant, Pablo Aguilar, the motion (seq. #003) by third-party defendants MLK Construction Corp. and Maxwell Kittredge, and defendant/second third-party plaintiff, SAGG Main Builders, Inc., and the motion (seq. #004) by plaintiff Christian Atanturi, are consolidated for the purpose this determination; and it is further

ORDERED that the motion (seq. #001) by defendant/third-party plaintiff Khamsing Chittavong Construction, Inc. for, *inter alia*, summary judgment dismissing the complaint and cross claims against it is granted to the extent indicated herein and is otherwise denied; and it is further

ORDERED that the motion (seq. #002) by third-party defendant/second third-party defendant Pablo Aguilar, for, *inter alia*, summary judgment dismissing the third-party claims against him is granted to the extent indicated herein and is otherwise denied; and it is further

ORDERED that the motion (seq. #003) by third-party defendants MLK Construction Corp. and Maxwell Kittredge and defendant/second third-party plaintiff SAGG Main Builders, Inc., for, *inter alia*, summary judgment dismissing the claim against Maxwell Kittredge is granted to the extent indicated herein and is otherwise denied; and it is further

ORDERED that the motion (seq. #004) by plaintiff for partial summary judgment in his favor on the issue of liability is granted.

Plaintiff Christian Atanturi commenced this action to recover damages for personal injuries he allegedly sustained on October 3, 2013, while working at the construction site of a new home located at 91 Briar Patch Road, East Hampton, New York. Plaintiff, who had been working outside, allegedly was injured when he walked inside the home to retrieve equipment and fell through an open hole in the living room meant for the installation of a new fireplace. As a result, plaintiff fell approximately 9 feet to the

floor of the basement below. The project's general contractor, MLK Construction Corp. ("MLK"), had been retained by the owner of the premises, defendant Maxwell Kittredge, as trustee of Francine S. Kittredge (" the Kittredges"), to oversee the construction of the new home. MLK hired various contractors for the project, including defendant/second third-party plaintiff SAGG Main Builders, Inc. ("SAGG"), which was hired to perform the trim work on the exterior windows of the new home. SAGG then subcontracted its exterior trim work to defendant/third-party plaintiff Khamsing Chittavong Construction, Inc. ("Khamsing"). Afterwards, Khamsing subcontracted the work to third-party defendant/second third-party defendant Pablo Aguilar, for whom plaintiff worked as a day laborer at the time of the accident. By way of his complaint, plaintiff alleges causes of action against defendants for common law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). Defendants joined issue denying plaintiff's claims and asserting cross claims against each other. Thereafter, Khamsing and SAGG brought separate third-party actions against Pablo Aguilar. The Note of Issue was filed October 4, 2017.

Khamsing now moves for summary judgment dismissing the complaint against it on the grounds it was neither an owner, contractor, or agent within the meaning of the statute, and it had no authority to control the method or manner of plaintiff's work. Additionally, Khamsing seeks dismissal of the cross claims against it on the basis no written indemnity or insurance agreement existed between it and the co-defendants at the time of plaintiff's accident, and it played no part in causing or augmenting plaintiff's injuries. Kittredge, MLK, and SAGG (hereinafter collectively referred to as "MLK") oppose the motion, arguing it should be denied because Khamsing erroneously failed to submit a complete set of the pleadings in the action with its moving papers, and that Khamsing failed to eliminate triable issues as to whether it acted as a statutory agent with respect to plaintiff's work at the time of the accident and, if so, whether it was delegated the authority to control the means and methods of plaintiff's work. MLK further asserts a triable issue exists as to whether post-dated agreements containing insurance and indemnification provisions executed by Khamsing and Aguilar were meant to apply retroactively to the date of plaintiff's accident.

Referencing the same agreements, MLK also moves summary judgment on behalf of itself and SAGG with respect to their cross and third-party claims for indemnification, contribution, and breach of contract against Khamsing and Aguilar. Additionally, MLK seeks summary judgment dismissing the complaint against the Kittredges on the grounds they are exempted from plaintiff's Labor Law §§ 240 (1) and 241 (6) claims, since the subject property was a single-family home intended for residential use only, and the Kittredges did not direct, control, or supervise the work at the premises. MLK further asserts that the common law negligence and Labor Law § 200 claims against the Kittredges should be dismissed, as the Kittredges did not have the authority to control or direct plaintiff's work, and they neither created nor had actual or constructive notice of the alleged dangerous condition that caused the accident.

Khamsing opposes the branch of MLK's motion seeking summary judgment on the indemnification, contribution, and breach of contract cross claims against it, arguing no evidence exits that it intended the agreements it executed after plaintiff's accident to be applied retroactively, that it did not directly or indirectly enter any agreements obligating it to procure insurance on behalf of MLK or the Kittredges, and that the existence of a triable issue as to whether MLK may be found to have negligently

caused plaintiff's accident pursuant to the doctrine of res ipsa loquitur precludes summary judgment in favor of MLK on its common law indemnification claim. Aguilar opposes the motion on a similar basis, asserting no proof exists that it intended the post-accident agreement it executed with Khamsing be applied retroactively, or that the agreement obligated it to indemnify or insure either MLK or SAGG. Aguilar moves for summary judgment dismissing the third-party complaints against him, asserting that no written indemnity or insurance agreement existed between him and the third-party plaintiffs at the time of plaintiff's accident, and that he cannot be held liable for common law indemnification where, as in this case, the plaintiff in the underlying action did not sustain a grave injury. Khamsing and SAGG oppose the branch of Aguilar's motion seeking dismissal of their contractual indemnification claims against him. They argue that the agreement executed between Khamsing and Aguilar, though signed after plaintiff was injured, was pre-dated to September 19, 2013, shortly before the accident in question occurred. As a result, Khamsing and SAGG assert that a triable issue exists as to whether the parties intended the terms of such agreement, which contains provisions requiring Aguilar to indemnify Khamsing, and to list Khamsing and SAGG as additional insureds, be applied retroactively to cover the date of plaintiff's accident.

By way of a separate motion, plaintiff moves for partial summary judgment in his favor on the issue of liability with respect to his Labor Law §§ 240 (1) and 241 (6) claims. Plaintiff avers that a *prima facie* violation of Labor Law § 240 (1) is established where, as in this case, someone removed a piece of plywood covering a hole in the floor of the unfinished home, and plaintiff was caused to fall through such hole to the basement below. The MLK defendants oppose plaintiff's motion, arguing that plaintiff failed to include copies of the complete set of the pleadings with his moving papers, and that triable issues exist as to whether plaintiff removed the plywood covering the hole in question and, if so, whether his conduct in doing so was the sole proximate cause of the accident. Khamsing opposes plaintiff's motion on the basis it was a mere subcontractor and cannot be held liable as a statutory agent, since there was no signed agreement in existence at the time of the accident giving it supervisory authority over plaintiff's work or the part of the home where the accident took place and, to the extent an oral agreement existed, it was never delegated such control.

Initially, the Court notes that while a movant's failure to include a complete copy of the pleadings is ordinarily grounds for denial of a summary judgment motion (*see* ***Wider v Heller***, 24 AD3d 433, 805 NYS2d 130 [2005]), such a procedural defect may be overlooked if the record is sufficiently complete and the opposing party has not been prejudiced (*see* CPLR 2001; ***Sensible Choice Contr., LLC v Rodgers***, 164 AD3d 705, 83 NYS3d 298 [2d Dept 2018]; ***Wade v Knight Transp., Inc.***, 151 AD3d 1107, 58 NYS3d 458 [2d Dept 2017]; ***Long Is. Pine Barrens Socy., Inc. v County of Suffolk***, 122 AD3d 688, 996 NYS2d 162 [2d Dept 2014]; ***Welch v Hauck***, 18 AD3d 1096, 795 NYS2d 789 [2d Dept 2005]). "The record is sufficiently complete when, although the movant has not attached all of the pleadings to the motion, a complete set of the papers is available from the materials submitted " (***Washington Realty Owners, LLC v 260 Wash. St., LLC***, 105 AD3d 675, 675, 964 NYS2d 137 [1st Dept 2013]; ***Pandian v New York Health & Hosps. Corp.***, 54 AD3d 590, 591, 863 NYS2d 668 [1st Dept 2008]). Therefore, notwithstanding the failure of plaintiff or Khamsing to include a copy of the complete set of the pleadings with their moving papers, where, as in this case, more than one movant has submitted a copy of the complete set of pleadings with their moving papers, the record is sufficiently

complete and the motions may be decided on their merits (*see* ***Sensible Choice Contr., LLC v Rodgers***, *supra*; ***Pandian v New York Health & Hosps. Corp.***, *supra*).

It is well-settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 574, 774 NYS2d 792 [2d Dept 2004]). 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 eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues remain which preclude summary judgment (*see* ***Winegrad v New York Univ. Med. Ctr***., 64 NY2d 851, 487 NYS2d 316). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595[1980]).

The unopposed branch of the motion by MLK for summary judgment dismissing the complaint against Maxwell Kittredge is granted. MLK has submitted undisputed evidence that the single-family residence in question was being constructed solely for residential use, and that neither the Kittredges nor any representative of their trust directed or controlled the work being performed there at the time of the accident (*see* ***Diaz v Trevisani***, 164 AD3d 750, 82 NYS3d 549 [2d Dept 2018]; ***Youseff v Malik***, 112 AD3d 617, 977 NYS2d 53 [2d Dept 2013]). Owners of a one -or-two family dwelling are subject to liability under Labor Law §§ 240 (1) and 241 (6) only if they directed or controlled the work being performed (*see* ***Duarte v East Hills Constr. Corp.***, 274 AD2d 493, 711 NYS2d 182 [2d Dept 2000]; ***Rodas v Weissberg***, 261 AD2d 465, 690 NYS2d 116 [2d Dept 1999]). The phrase "direct or control" is construed strictly and refers to the situation where the "owner supervises the method and manner of the work" (***Rimoldi v Schanzer***, 147 AD2d 541,545,537 NYS2d 839 [2d Dept 1989]; *see also* ***Duda v Rouse Constr. Corp.***, 32 NY2d 405, 345 NYS2d 524 [1973]; ***Mayen v Kalter***, 282 AD2d 508, 508-509, 722 NYS2d 760 [2d Dept 2001]). The fact that the title to an otherwise qualifying one- or two-family dwelling is held by a trust rather than an individual homeowner does not, in and of itself, preclude application of the exemption (*see* ***Holifield v Seraphim, LLC***, 92 AD3d 841, 940 NYS2d 100 [2d Dept 2012]; ***Castellanos v United Cerebral Palsy Assn. of Greater Suffolk, Inc.***, 77 AD3d 879, 880, 909 NYS2d 757 [2d Dept 2010]).

As for the Labor Law § 200 claim against Maxwell Kittredge, the statute is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]). Where a claim arises out of alleged dangers in the method of the work, there can be no recovery unless it is shown that the owner had the authority to control the means and manner of the plaintiff's work (*see* ***Rizzuto v LA. Wenger Contr. Co., Inc.***, 91 NY2d 343, 352, 670 NYS2d 816 [1998]; ***Persichilli v Triborough Bridge & Tunnel Auth***., 16 NY2d 136, 262 NYS2d 476 [1965]). By contrast, where the claim arises out of an alleged dangerous premises condition, there can be no recovery unless it is shown that the owner possessed actual or constructive notice of said condition (*see* ***Kuffour v Whitestone Const. Corp.***, 94 AD3d 706, 941 NYS2d 653 [2d Dept 2012]; ***Azad v 270 Realty Corp.***, 46

AD3d 728, 730, 848 NYS2d 688 [2d Dept 2007]). In this case, the undisputed evidence submitted by MLK establishes, *prima facie*, that Kittredge neither retained supervisory authority over plaintiff's work, nor possessed actual or constructive notice of the existence of the alleged dangerous condition (*see* ***Rizzuto v L.A. Wenger Contr. Co., Inc.***, *supra*; ***Sandals v Shemtov***, 138 AD3d 720, 29 NYS3d 448 [2d Dept 2016]; ***DiMaggio v Cataletto***, 117 AD3d 984, 986 NYS2d 536 [2d Dept 2014]).

With respect to plaintiff's motion for partial summary judgment on the issue of liability against the remaining MLK defendants, Labor Law § 240 (1) imposes absolute liability upon owners, contractors, or their agents, 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.***, 86 NY2d 487, 634 NYS2d 35 [1995]; ***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 statute must be liberally construed to accomplish the purpose for which it was formed, that is " to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owner and general contractor or their agent instead of on workers, who are "scarcely in a position to protect themselves from accident" (***Rocovich v Consolidated Edison Co.***, *supra* at 513). Moreover, an owner, contractor or agent who breaches this duty may be held liable for damages regardless of whether it actually exercised any supervision or control over the work giving rise to the injury (***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]; ***Rocovich v Consolidated Edison Co.***, *supra*).

A prime contractor hired for a specific project is subject to liability under Labor Law § 240 as a statutory agent "if it has been delegated the work in which plaintiff was engaged at the time of his injury and is therefore responsible for the work giving rise to the duties . . . imposed by [the statute]" (***Coque v Wildflower Estates Dev., Inc.***, 31 AD3d 484, 488, 818 NYS2d 546 [2d Dept 2006]). The fact that the subcontractor retained concomitant or overlapping authority to supervise the work the prime contractor hired it to perform does not negate the prime contractor's ultimate authority to supervise and control such work (*see* ***Nascimento v Bridgehampton Constr. Corp.***, 86 AD3d 189, 924 NYS2d 353 [1st Dept 2011]; ***Everitt v Nozkowski***, 285 AD2d 442, 728 NYS2d 58 [2d Dept 2001]). Furthermore, a subcontractor may be held liable as a statutory agent where the prime contractor delegated it the supervisory authority over "the work which [gave] rise to the injury" (***Nascimento v Bridgehampton Constr. Corp.***, *supra* at 193, quoting ***Headen v Progressive Painting Corp.***, 160 AD2d 319, 320, 553 NYS2d 401 [1st Dept 1990]; *see* ***Nasuro v PI Assoc., LLC***, 49 AD3d 829, 858 NYS2d 175 [2d Dept 2008]). "[E]vidence that a subcontractor delegated the requisite supervision and control to another subcontractor has been cited as forming part of the proof that the first subcontractor formerly possessed that authority, and may justify imposing Labor Law liability on the first subcontractor as a statutory agent of the general contractor (***Nascimento v Bridgehampton Constr. Corp.***, *supra* at 193; *see* ***Everitt v Nozkowski***, *supra*). In either case, once it is established that a party operated as a statutory agent, that party may be held liable for the

plaintiff's injuries regardless of whether or not it exercised its supervisory authority over his work (*see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*; ***Rocovich v Consolidated Edison Co.***, *supra*).

Here, plaintiff established his *prima facie* entitlement to partial summary judgment on the issue of liability with respect to his Labor Law § 240 (1) claim by submitting evidence that he fell through an uncovered hole in the livingroom floor of the residence, that the unfastened piece of plywood that had been previously placed over the hole was inadequate and no other safety devices such as barricades or safety tape were in place to protect him from falling or warn him of the hazard, and that this violation was the proximate cause of his injuries (*see* ***Kupiec v Morgan Contr. Corp.***, 137 AD3d 872, 26 NYS3d 779 [2d Dept 2016]; ***Norero v 99-105 Third Ave. Realty, LLC***, 96 AD3d 727 [2d Dept 2012]; ***Nasuro v PI Assoc., LLC***, 49 AD3d 829, 858 NYS2d 175 [2d Dept 2008]; ***Valensisi v Greens at Half Hollow, LLC***, 33 AD3d 693, 823 NYS2d 416 [2d Dept 2006]; ***Brandl v Ram Builders, Inc.***, 7 AD3d 655, 777 NYS2d 511 [2d Dept 2004]). Significantly, plaintiff testified that he walked into the home to retrieve an anchor for a scaffold being erected on the outside of the premises and fell into an uncovered hole in the floor of the living room through to the floor of basement below. Plaintiff testified that although he was aware of the hole, he fell into it not realizing that the plywood cover that had been placed over the opening–and which had remained there even 15 minutes prior to the accident–had been removed, and no other safety device or warning had been put in its place. Defendants failed to raise a triable issue in opposition (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr***, *supra*). The fact that plaintiff was the only witness to his accident is no bar to summary judgment, since no evidence of a conflicting theory with supporting evidence sufficient to raise a bona fide issue of credibility was presented (*see* ***Strojek v 33 E. 70th St. Corp.***, 128 AD3d 490, 10 NYS3d 12 [1st Dept 2015]; ***Weber v Baccarat, Inc.***, 70 AD3d 487, 896 NYS2d 12 [1st Dept 2010]). Further, where, as in this case, a *prima facie* violation of the statute has been established, the court rejects the speculatory and unsubstantiated assertion by MLK that plaintiff's conduct of possibly removing the plywood covering the hole himself and carelessly falling into it afterwards was the sole proximate of his injuries (*see* ***Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.***, 1 NY3d 280, 771 NYS2d 484 [2003]; ***Valensisi v Greens at Half Hollow, LLC***, *supra*; ***Brandl v Ram Builders, Inc.***, *supra*).

Khamsing also failed to raise a triable issue as to whether it is free from liability under Labor Law § 240 (1), as a mere subcontractor lacking authority over the exterior trim work which plaintiff was engaged in at the time of the accident. Even assuming, arguendo, that the agreement executed by Khamsing after the accident has no retro-active effect, a review of the record reveals that when MLK hired SAGG as the prime exterior window trim contractor, it delegated SAGG the authority to control all the exterior window trim work. SAGG delegated its authority to Khamsing when it subcontracted the obligation to perform the exterior window trim work to Khamsing. Evidence that Khamsing further subcontracted the obligation to perform the exterior window trim work to plaintiff's employer, indicates that Khamsing possessed the supervisory authority to control such work as a statutory agent in the first place (*see* ***Nascimento v Bridgehampton Constr. Corp.***, *supra*; ***Weber v Baccarat, Inc.***, 70 AD3d 487, 896 NYS2d 12 [2d Dept 2010]; ***Everitt v Nozkowski***, *supra*; ***Nasuro v PI Assoc., LLC***, *supra*). Having itself been delegated the authority of a statutory agent, Khamsing cannot escape liability by now asserting that it delegated its authority to plaintiff's employer (*see* ***Nascimento v Bridgehampton Constr. Corp.***, *supra*; ***McGlynn v Brooklyn Hosp.-Caledonian Hosp.***, 209 AD2d 486, 486, 619 NYS2d 54 [1994]). Additionally, Khamsing incorrectly asserts that it may not be held liable because plaintiff's accident

occurred as a result of an alleged dangerous condition. Contrary to Khamsing's assertion, it may be held liable for plaintiff's injuries as a statutory agent where, as in this case, it retained supervisory authority over the work in which plaintiff was engaged at the time of the accident (*see* ***Nascimento v Bridgehampton Constr. Corp.***, *supra*; ***Nasuro v PI Assoc., LLC***, 49 AD3d 829, 858 NYS2d 175 [2d Dept 2008]). Therefore, the branch of plaintiff's motion seeking summary judgment on the issue of liability with respect to his Labor Law § 240 (1) claim as against MLK, SAGG, and Khamsing, is granted. To the extent plaintiff has been granted partial summary judgment on the issue of liability with respect to his Labor Law § 240 (1) claim, the court denies, as academic, the remaining branch of his motion seeking similar relief on his Labor Law § 241 (6) claim (*see* ***DaSilva v Everest Scaffolding, Inc.***, 136 AD3d 423, 25 NYS3d 141 [1st Dept 2016]; ***Auriemma v Biltmore Theatre, LLC***, 82 AD3d 1, 917 NYS2d 130 [1st Dept 2011]; ***Yost v Quartararo***, 64 AD3d 1073, 883 NYS2d 630 [3d Dept 2009]; ***Nudi v Schmidt***, 63 AD3d 1474, 882 NYS2d 731 [3d Dept 2009]; ***Argueta v Pomona Panorama Estates, Ltd.***, 39 AD3d 785, 835 NYS2d 358 [2d Dept 2007]).

Based on the foregoing, the Court denies, as moot, the branch of Khamsing's motion seeking dismissal of plaintiff's claims against it. However, the branch of Khamsing's motion for summary judgment dismissing the contribution and common law indemnification cross claims against it is granted, as the adduced evidence indicates that Khamsing's liability for plaintiff's accident is statutory and vicarious, and that it never exercised actual supervision or control over plaintiff's work (*see* ***McCarthy v Turner Constr., Inc.***, 17 NY3d 369, 929 NYS2d 556 [2011]; ***Guzman v Haven Plaza Hous. Dev. Fund Co.***, 69 NY2d 559, 516 NYS2d 451 [1987]; ***Raquet v Braun***, 90 NY2d 177, 659 NYS2d 237 [1997]; ***Ortiz-Cruz v Evers***, 150 AD3d 622, 56 NYS3d 71 [1st Dept 2017]; ***Arteaga v 231/249 W 39 St. Corp.***, 45 AD3d 320, 847 NYS2d 5 [2d Dept 2012]). A party seeking common-law indemnification "must prove . . . that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (***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]). "[A] party's . . . authority to supervise the work and implement safety procedures is not alone a sufficient basis for requiring common law indemnification . . . If [that] party never exercises that authority because it subcontracted its contractual duties to an entity that actually directed and supervised the work, a common law indemnification claim will not lie against that party on the basis of its contractual authority alone" (***McCarthy v Turner Constr., Inc.***, *supra* at 378). Furthermore, "[t]he 'critical requirement' for apportionment by contribution under CPLR article 14 is that 'the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought'" (*see* ***Raquet v Braun***, *supra* at 183, quoting ***Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.***, 71 NY2d 599, 603, 528 NYS2d 516 [1988]).

As to the branch of Khamsing's motion seeking dismissal of the cross claims against it for contractual indemnification, it is undisputed that the initial subcontract agreement between Khamsing and SAGG was orally made, and that the written agreement executed by the parties, though dated September 18, 2013, was not signed until October 14, 2013, approximately 11 days after the date of plaintiff's accident. The preamble to the written agreement states that the document "sets forth additional terms and conditions under which Khamsing Chittavong Construction, Inc., agrees to perform work for Sagg Main Builders, Inc. . . now and any time in the future . . . [a]ll work orders and any other agreements or

undertakings, whether verbal or written, which the Subcontractor accepts and performs for the Contractor in connection with any project . . . [a]re expressly made subject to the terms and conditions set forth in this [agreement]." The agreement further states, in relevant part, as follows:

> 1. Insurance Coverage/certificates of insurance
> a) The Subcontractor shall purchase and maintain the required insurance . . . to protect and defend against all claims for loss and liability arising from injury, death and damage to persons or property arising out of the performance or nonperformance of the Subcontract work.
>
> b) The required insurance shall include workers' compensation insurance, Comprehensive Liability Insurance . . . and Comprehensive Liability.
>
> c) The Contractor shall be named as an additional insured on each of these policies . . .The Subcontractor will have an endorsement substantially in the form set forth below added to its Comprehensive General Liability Policy and its Umbrella or Excess Liability policy:
>
> It is hereby agreed and understood that the Contractor is named as an additional insured. The coverage afforded to the additional insured under this policy shall be primary insurance . . . Consistent with the forgoing, to the extent that the contractor is required to designate any person or entity as additional insured under the Contractor's policies of liability insurance, such person or entity also shall be named as an additional insured on the policies procured by the Subcontractor.
>
> 2. Indemnification
> The Subcontractor agrees to indemnify, defend and hold harmless the Contractor . . . from any and all claims, losses, costs, and damages, including but not limited to judgments, attorneys fees, court costs and the cost of appellate proceedings, which the contractor incurs because of injury to . . . any person (including but not limited to, any employee of the Subcontractor or any employee of any of its subcontractors) . . . arising out of, or in connection with, or as a consequence of the performance of the Subcontractor's work, whether same shall be labeled as full indemnification, partial indemnification, or contractual contribution. This indemnification provision is binding on the Subcontractor to the fullest extent permitted by law, and does not negate, abridge or reduce any other rights or obligations . . . described herein

Although 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]), an indemnification agreement executed after an accident has occurred may be applied retroactively where the indemnitee establishes, as a matter of law, that the agreement was made as of a date prior to the occurrence of the accident and that the parties intended that it be applied as of that date (*see* ***Cinquemani v Old Slip Assoc., LP***, 77 AD3d 603,912

NYS2d 224 [2d Dept 2010]; ***Stabile v Viener***, 291 AD2d 395,737 NYS2d 381 [2d Dept 2002]). However, indemnity agreements 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]), and where the intent of the parties must be determined by disputed evidence or inferences outside the written words of the agreement, a triable issue of fact is presented, precluding summary judgment (*see* ***Mikulski v Adam R. West, Inc.***, 78 AD3d 910, 912 NYS2d 233 [2d Dept 2010]; ***McGovern v Gleason Bldrs., Inc.***, 41 AD3d 1295, 839 NYS2d 384 [4th Dept 2007]). Moreover, an agreement is considered ambiguous where on its face, it is reasonably susceptible to more than one interpretation (***Chimart Assoc. v Paul***, 66 NY2d 570, 573, 498 NYS2d 344 [1986]). Whether a contract is ambiguous is a question of law to be resolved by the court (*see* ***W.W.W. Assoc. v Giancontieri***, 77 NY2d 157, 162, 565 NYS2d 440 [1990]), and where a "determination of the intent of the parties depends on credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence, then such determination is to be made by the jury" (***Hartford Acc. & Indem. Co. v Wesolowski***, 33 NY2d 169, 172, 350 NYS2d 895 [1973]; *see* ***Lerer v City of New York***, 301 AD2d 577, 756 NYS2d 217 [2d Dept 2003]).

Here, Khamsing failed to meet its *prima facie* burden on the motion by submitting evidence eliminating triable issues as to whether the parties intended that the indemnification agreement in question be applied retroactively (*see* ***Zalewski v MH Residential 1, LLC***, 163 AD3d 900, 82 NYS3d 40 [2d Dept 2018]; ***Barrett v Magnetic Constr. Group Corp.***, 149 AD3d 1022, 53 NYS3d 350 [2d Dept 2017]; ***Cacanoski v 35 Cedar Place Assoc., LLC***, 147 AD3d 810, 47 NYS3d 71 [2d Dept 2017]; ***Mikulski v Adam R. West, Inc.***, *supra*; ***McGovern v Gleason Bldrs., Inc.***, 41 AD3d 1295, 839 NYS2d 384 [4th Dept 2007]; ***Temmel v 1515 Broadway Assocs., L.P.***, 18 AD3d 364, 795 NYS2d 234 [1st Dept 2005]; ***Podhaskie v Seventh Chelsea Assocs.***, 3 AD3d 361, 770 NYS2d 332 [1st Dept 2004]). Significantly, it is undisputed the initial agreement between Khamsing and SAGG was orally made, and that the written agreement was not executed until 11 days after plaintiff's accident. Additionally, Khamsing's moving papers include an affidavit from its principal, Khamsing Chittavong, stating that he received an email on October 10, 2013, asking him to execute the agreement, that he subsequently signed the document and dated it October 14, 2013, but that he never agreed, at anytime prior to plaintiff's accident, to indemnify or insure SAGG. The Court notes that the agreement is dated September 18, 2013, well before the accident. Moreover, the agreement purports that the contractual indemnification and insurance requirements contained in the written contract applies "now and any time in the future . . . [to] all agreements . . . whether verbal or written." Such language is ambiguous as to whether the parties intended the agreement to be retroactive to the date Khamsing initially commenced work on the project (*see eg* ***Barrett v Magnetic Constr. Group Corp.***, *supra*; ***Podhaskie v Seventh Chelsea Assocs.***, *supra*). Moreover, during his deposition Khamsing Chittavong testified that he negotiated the agreement with SAGG verbally, and that while he recalled a requirement that he have liability insurance in place before commencing work, he could not recall whether he agreed to a requirement that he indemnify SAGG if one of his workers was injured during the project. Therefore, the branch of Khamsing's motion for summary judgment dismissing the contractual indemnification and failure to procure insurance cross claims against it is denied.

Having determined that a triable issue exist as to whether SAGG and Khamsing intended that the terms set forth in the written agreement that was executed after plaintiff's accident be applied

retroactively, including the requirements that Khamsing insure and indemnify both SAGG and MLK, the branch of the motion by MLK and SAGG for summary judgment on their cross claims against Khamsing based on contractual indemnification and the failure to procure insurance naming them as additional insureds also is denied (*see* ***Zalewski v MH Residential 1, LLC***, *supra*; ***Cacanoski v 35 Cedar Place Assoc., LLC***, *supra*; ***Mikulski v Adam R. West, Inc.***, *supra*; ***Barrett v Magnetic Constr. Group Corp.***, *supra*). The branch of the motion by MLK for summary judgment on SAGG's third-party claims against Aguilar for indemnification and breach of the agreement to procure insurance naming SAGG as an additional insured is similarly denied. The written agreement between Khamsing and Aguilar is identical to the agreement between SAGG and Khamsing, and the circumstances surrounding its execution are substantially the same. After executing the post-accident agreement with SAGG, Khamsing required that Aguilar execute an identical agreement in Khamsing's favor. Although the signature page indicates that it was not signed until 16 days after plaintiff's alleged accident, the agreement is dated September 13, 2019. The principals of Kamsing and Aguilar both testified that their initial agreement was verbal, and that it did not include any discussion relating to indemnity or additional insured requirements. An affidavit by the principal of Aguilar submitted in support of his own motion states that there was no discussion between himself and Khamsing Chittavong regarding whether Aguilar was required to indemnify or insure Khamsing, and that at no time was there any understanding that the agreement would be applied retroactively. Therefore, as discussed above, such evidence, including the temporal ambiguity relating to the date of the agreement and the date of its execution, as well as the conflicting testimonial evidence concerning whether the parties intended the agreement to be applied retroactively, raises significant triable issues of fact precluding summary judgment in SAGG's favor on its third-party claims for contractual indemnification and failure to procure insurance against Aguilar (*see* ***Zalewski v MH Residential 1, LLC***, *supra*; ***Cacanoski v 35 Cedar Place Assoc., LLC***, *supra*; ***Mikulski v Adam R. West, Inc.***, *supra*; ***Barrett v Magnetic Constr. Group Corp.***, *supra*).

The Court nevertheless grants the unopposed branch of Aguilar's motion seeking dismissal of the third-party common law indemnification and contribution claims against it, as it is undisputed that plaintiff did not suffer a grave injury as a result of the alleged accident (*see* ***Masiello v 21 E. 79th St. Corp.***, 126 AD3d 596, 7 NYS3d 35 [1st Dept 2015]; ***Lue v Finkelstein & Partners, LLP***, 94 AD3d 1386, 943 NYS2d 636 [3d Dept 2012]). Claims for common law indemnification and contribution are statutorily barred against an employer in the absence of a grave injury (*see* ***Fleming v Graham***, 10 NY3d 296, 857 NYS2d 8 [2008]; ***Ironshore Indem., Inc. v W&W Glass, LLC***, 151 AD3d 511, 58 NYS3d 10 [1st Dept 2017]; ***Grech v HRC Corp.***, 150 AD3d 829, 54 NYS3d 433 [2d Dept 2017]).

Dated: November 14, 2018

Hon. Joseph Farneti
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**