

At an IAS Term, Part 21 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 7th day of March, 2011.

P R E S E N T:

HON. LAURA L. JACOBSON,
Justice.

-----X
LAURA M. HEALY AND LOUIS TUFINO-CANTERO,

Plaintiffs,

Decision/Order

- against -

Index No. 33099/07

16TH STREET DEVELOPMENT, LLC,

Defendant.

-----X
16th STREET DEVELOPMENT, LLC,

Third-Party Plaintiff,

- against -

Index No. 75160/09

IBM INDUSTRIES, INC. AND HIGH TECH CONSTRUCTION
MANAGEMENT, INC.,

Third-Party Defendants.

-----X
IBM INDUSTRIES, INC.,

Fourth-Party Plaintiff,

- against -

Index No. 75883/09

UNITED CONTAINER & CONSTRUCTION CORP. AND HIGH
TECH CONSTRUCTION MANAGEMENT, INC.,

Fourth-Party Defendants.

-----X
NEW HAMPHIRE INSURANCE COMPANY A/S/O
LAURA M. HEALY & LOUIS TUFINO-CANTERO,

Plaintiffs,

- against -

Index No. 18116/10

16TH STREET DEVELOPMENT, LLC, JOSEPH BADINTER,
P.E. AND STRACAR ENGINEER, P.C.,

Defendant.

-----X

Defendant third party plaintiff 16th Street Development, LLC (hereinafter 16th Street) moved for an order, pursuant to the Civil Practice Law and Rules 3212 seeking summary judgment on the issue of contractual indemnification against third party defendant IBM Industries, Inc. (IBM). After reading all of the submitted papers, I determined, as set forth in an Interim Order, dated December 23, 2010, that certain issues had to be determined before I could decide the question of indemnification. More specifically, I needed to determine whether there was an agreement in place with an indemnification clause at the time the plaintiff's damages were sustained.

Accordingly, this matter was set down for a hearing on February 9, 2011. On that date, attorneys appeared for the plaintiff Laura Healy, for third party defendant IBM, for defendant, third party plaintiff 16th Street and for New Hampshire Insurance Company.

The main and only witness at this hearing was Alexander Kogan, the president of IBM. On direct examination, Mr. Kogan testified that he entered into an oral contract with

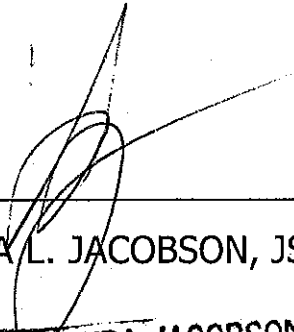
16th Street when he started work on the project and then entered into a written contract with 16th Street on December 20, 2006. All sides have acknowledged that the negligence took place during the months of August and September, 2006. Upon questioning by defendant 16th Street, Mr. Kogan acknowledged that he and the third party plaintiff had entered into an oral agreement whereby he was to perform certain work at the premises. Mr. Kogan stated, under oath, that it was his understanding, when he began the job, that if he undertook to perform the services for which IBM and 16th Street negotiated, he would be responsible to indemnify the Owners, 16th Street. That understanding was memorialized in the written contract that was signed on December 20, 2006. Further, Mr. Kogan testified that when he signed the contract, with the indemnification clause included, it was his intention that the indemnification clause was to apply retroactively.

On cross-examination, Mr. Kogan acknowledged that the purpose of the December 2006 contract was to legalize his being at the site. When he started work at the site, he didn't talk to the owner about indemnification but he was asked about whether he was insured, which he answered in the affirmative. He testified that he had no role in selecting United Container & Construction Corp. He also testified that he hired High Tech Construction Management Inc., at the behest and request of 16th Street.

Based on the foregoing, it is clear that defendant IBM, by its principal, Alexander Kogan intended to indemnify the third party plaintiff 16th Street Development as of the date he began working at the subject premises, which predated the date damages were incurred. Accordingly, the motion by defendant-third party plaintiff for an Order, pursuant to the Civil Practice Law and Rules Sec. 3212 granting it summary judgment in its favor on its third-party complaint for contractual indemnification as against third-party defendant IBM Industries, Inc. is granted.

This constitutes the decision and Order of the Court.

Enter: 1

A handwritten signature in black ink, appearing to be 'Laura L. Jacobson', written over a horizontal line.

LAURA L. JACOBSON, JSC.

HON. LAURA JACOBSON