

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 23rd day of December, 2010.

P R E S E N T:

HON. LAURA L. JACOBSON,

Justice.

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LAURA M. HEALY AND LOUIS TUFINO-CANTERO,

Plaintiffs,

Interim 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.

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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.
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The following papers numbered 1 to 7 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1-3</u>
Opposing Affidavits (Affirmations) _____	<u>4-6</u>
Reply Affidavits (Affirmations) _____	<u>7</u>
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, in this action by plaintiffs Laura M. Healy and Louis Tufino-Cantero (plaintiffs) against defendant/third-party plaintiff 16th Street Development, LLC (16th Street Development) for damages sustained to their property, 16th Street Development moves for an order, pursuant to CPLR 3212, granting it summary judgment in its favor on its third-party complaint for contractual indemnification as against third-party defendant IBM Industries, Inc. (IBM).

16th Street Development was the owner of premises located at 226-228-230 16th Street, in Brooklyn, New York. 16th Street Development hired IBM to construct a residential condominium building at the premises, and entered into a written contract with it. IBM served as the construction manager for the project, and hired High Tech Construction Management, Inc. (High Tech) as the general contractor to run its day-to-day operations at the project.

A contractor agreement dated July 18, 2006, which states that it is made: “by and between IBM; High Tech . . . , hereinafter called the Contractor, and 16th Street Development, . . . hereinafter called the Owner,” contains, in article 6, an indemnification clause, which provides as follows:

“Article 6. Indemnification

To the fullest extent permitted by law, the Contractor shall indemnify, defend and hold harmless Owner and its agents and employees, 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 work or providing of materials to the extent caused in whole or in part by negligent or wrongful acts or omissions of, or a breach of this agreement by, the contractor, a subcontractor, anyone directly or indirectly

employed by them or anyone whose acts they are legally responsible.”

This contract is signed by Mark Zeldin, on behalf of 16th Street Development, lists the name of the contractor as IBM and High Tech, and, under “signature of contractor or contractor’s agent,” contains the purported signature of “A. Kogan,” which, 16th Street Development maintains, is the signature of Alexander Kogan, the principal of IBM. Alexander Kogan, however, denies that he signed this contract. A second identical contractor agreement, also dated July 18, 2006, is signed by Mark Zeldin’s partner, Semyom Vayes, and also purports to be signed by “A. Kogan.” Alexander Kogan similarly denies that he signed this contract.

The July 18, 2006 contractor agreements provided that work to be performed under this contract was to be commenced on or before August 31, 2006 and was to be substantially completed on or before November 31, 2007. The contract price to be paid by 16th Street Development to the contractor was \$2,555,200, with a 10% deposit to be paid at the signing of the contract. In addition, regular payments to the contractor of costs and expenses, as stated in itemized statements, were to be prepared every two weeks.

While Alexander Kogan denies signing either of the July 18, 2006 contractor agreements, he admits that on December 20, 2006, he, on behalf of IBM, entered into a contractor agreement between IBM, as contractor, and 16th Street Development, as the owner, which contains an identical indemnification clause. The December 20, 2006 contractor

agreement provided that work to be performed under that contract was to be commenced on or before January 5, 2007 and was to be substantially completed on or before June 10, 2008. The contract price to be paid to IBM was listed as \$3,000,000, with a 15% deposit due at the signing of the contract. In addition, itemized statements of the costs and expenses were to be prepared by IBM every two weeks.

IBM, as the contractor, entered into a Standard Form AIA Document agreement dated December 20 (with no year stated) with High Tech, as the subcontractor. As evidenced by an undated Estimate/Proposal, High Tech entered into an agreement with United Container & Construction Corp. (United Container) to perform the excavation work at the project.

On August 30, 2007, plaintiffs filed this action against 16th Street Development. Plaintiffs' complaint alleges that in the early part of 2006, 16th Street Development tore down and demolished the building at 230 16th Street, which directly abutted and adjoined the building at 232 16th Street, which is owned by them, and that in or about January 2007, 16th Street Development began making excavations on the property in preparation for the construction of the proposed condominium building. Plaintiffs further allege, in their complaint, that during the course of excavation and underpinning, 16th Street Development lowered the property at 230 16th Street in excess of 10 feet below the curb level and below the foundation of their building on 232 16th Street and removed the dirt, soil, and other materials from beneath the foundation of their building, without leaving or providing sufficient protection and support for its building and foundation, thereby weakening and

undermining its safety. Plaintiffs, in their complaint, also allege that 16th Street Development failed to provide sufficient protection and lateral and subjacent support for their property or provide a proper underpinning to protect their property from the pressure resulting from the excavation. Plaintiffs claim that as a result, their property and building have been, and continue to be, damaged in that the foundation, walls, and floors of the building were caused and continue to settle, crack, shift, and lean so that the building has become severely damaged, unstable, and unsafe.

On February 20, 2009, 16th Street Development filed a third-party summons and complaint as against IBM, and, on May 13, 2010, 16th Street Development filed an amended third-party summons and complaint to add High Tech as a third-party defendant. 16th Street Development's third-party complaint seeks contractual indemnification from IBM and High Tech pursuant to the contractor agreement dated July 18, 2006. Specifically, 16th Street Development's third-party complaint demands a judgment against IBM for damages caused as a result of the work performed by IBM or High Tech, as well as the recovery of attorneys' fees incurred by it in defending this action and any other action with respect to the claims asserted by plaintiffs. IBM filed a fourth-party complaint as against United Container and High Tech on October 13, 2009.

In support of its instant motion, 16th Street Development has submitted the affidavit of its member, Mark Zeldin, who attests that 16th Street Development hired IBM by the contract dated July 18, 2006, which was signed by him and Alexander Kogan of IBM, and

which contains an indemnification clause. 16th Street Development has also annexed the deposition testimony of Alexander Kogan. Alexander Kogan, at his deposition, admitted that he entered into a contract with 16th Street Development for the management of the construction at the project (Alexander Kogan's Dep. Transcript at 24), that IBM was to be responsible for overseeing the construction of the condominium building (*Id.* at 55), that this management, which was to be provided by IBM, included hiring the subcontractors to perform the job (*Id.* at 61), that IBM hired High Tech to perform work on the project (*Id.* at 62), and that High Tech hired United Container to perform the excavation work (*id.*).

16th Street Development requests contractual indemnification pursuant to article 6 of the July 18, 2006 contractor agreement on the basis that IBM agreed to indemnify it for claims arising out of the excavation work of United Container, which was hired by its subcontractor, New Tech. 16th Street Development also requests an immediate hearing to determine the amount of its attorneys' fees, which it seeks to recover from IBM. 16th Street Development claims that through August 2010, it has paid approximately \$100,000 in attorneys' fees to its current and former counsel, and that it continues to incur attorneys' fees.

In opposition to 16th Street Development's motion, Alexander Kogan, in a sworn affidavit submitted by him, asserts that he was never a party to the July 18, 2006 contract, and that the signature on it is not his signature. Alexander Kogan, at his deposition, also denied signing the July 18, 2006 contract (*Id.* at 23-24). Alexander Kogan, in his affidavit, attests that the only contract entered into between 16th Street Development and IBM, which

he signed, was dated December 20, 2006. Alexander Kogan, however, testified, at his deposition, that the actual work by IBM at the project commenced between September and October 2006 (which was prior to the execution of the December 20, 2006 contractor agreement) (*Id.* at 43-44), and that IBM worked on the project up until about February or March 2007 (*Id.* at 52).

16th Street Development argues that regardless of which contract was the actual contract, both the July 17, 2006 contractor agreement and the December 20, 2006 contractor agreement contained the identical indemnification clause, thereby entitling it to contractual indemnification from IBM. In opposition, Alexander Kogan contends that although IBM was contracted by 16th Street Development to manage the construction that was to take place at 226-228-230 16th Street, he never received the initial payment of a 15% deposit that was due upon the signing of the December 20, 2006 contractor agreement, nor did he ever receive any other payments from 16th Street Development which were to be paid and were due under that contract. Alexander Kogan states that in or around February or March 2007, he ceased work on the project after it was clear that 16th Street Development was not going to perform and honor the contract by paying IBM. Alexander Kogan testified, at his deposition, that he never received any compensation for his work on the project (*Id.* at 43-44), and that IBM closed in 2007. IBM points to the fact that there are no checks issued to it by 16th Street Development in connection with the work. Rather, the checks issued by 16th Street Development were made payable to High Tech. IBM argues that it, therefore, has no

obligation to indemnify 16th Street Development because the contract was “voided” since 16th Street Development “never performed on the contract” by paying it.

IBM’s argument is unavailing. IBM has not submitted any evidence that it ever attempted to have the contract declared null and void or that it ever claimed that 16th Street Development breached the contract or failed to perform on it. Moreover, IBM does not claim that 16th Street Development owes it any monies. Indeed, Alexander Kogan testified, at his deposition, that all payments were paid directly to High Tech from 16th Street Development pursuant to article 10.1 of the contract between IBM and High Tech, which provided that “[a]ll payments will get paid directly from Owner, subject for approval by IBM” (*Id.* at 39). Furthermore, Alexander Kogan admitted, at his deposition, that IBM never made any request to 16th Street Development for payment for its involvement in the project because “[t]here wasn’t enough time” since IBM closed by February or March 2007 due to IBM’s own financial difficulties, and, therefore, it never billed 16th Street Development (*Id.* at 18, 42), and that 16th Street Development did not owe IBM any money (*Id.* at 19).

IBM further points out that there is a declaratory judgment action commenced by 16th Street Development against Illinois Union Insurance Company (Illinois Union) on August 28, 2008 under index number 24627/08, seeking a declaration of insurance coverage of it as an additional insured under a policy issued by Illinois Union to IBM. IBM argues that 16th Street Development is improperly attempting to subvert that action by filing this motion in this action. This argument is rejected. 16th Street Development’s claims against Illinois

Union for its alleged breach of its insurance agreement due to its failure to provide coverage to it as an additional insured under the insurance policy issued by it to IBM is a separate issue from 16th Street Development's claim against IBM for contractual indemnification pursuant to the contractor agreement between them (*see Hunt v Ciminelli-Cowper Co., Inc.*, 66 AD3d 1506, 1510-1511 [2009]).

IBM also argues that there is a disputed fact as to when the actual damage to plaintiffs' building occurred, and in light of the fact that it contends that the only contract between it and 16th Street Development was signed on December 20, 2006, it remains to be demonstrated whether or not the negligent acts complained of by plaintiffs took place while it was contracted to perform the work at the site. While plaintiffs' complaint alleges that the damage to its property occurred when 16th Street Development starting making excavations on the property in January 2007, Mark Zeldin, at his deposition, testified that the excavation was started by United Container in the fall of 2006, and that it was stopped by a stop work order from the Department of Buildings (DOB) in October 2006 (Mark Zeldin's Dep. Transcript at 14-15). Mark Zeldin further testified, at his deposition, that plaintiffs had first complained of the damage to their property in the late fall of 2006 (*Id.* at 17). Mark Zeldin, at his deposition, also testified that there was a notice of violation and hearing dated October 8, 2006 for "failure to provide protection at sites of excavation," and for "underpinning excavation exceeding five feet below grade in various locations throughout the job site," and for "no sheeting or shoring installed to prevent trench collapse" (*Id.* at 69).

Alexander Kogan also testified, at his deposition, that a stop work order was issued in October 2006 as a result of a complaint made by plaintiffs due to cracks in the concrete on the outside wall and in the floor of the basement (Alexander Kogan's Dep. Transcript at 76-77, 114, 137-138), and that he first became aware of damage to plaintiffs' property in October of 2006 (*Id.* at 121-122), and that, at that time, United Container was performing excavation work at the site (*Id.* at 124-125). It is noted that a DOB stop work order was also issued for January 19, 2007 for failure to safeguard public and property affected by construction operation, and because excavation had caused severe structural damage to 232 16th Street (*Id.* at 77). Alexander Kogan testified, at his deposition, that the January 19, 2007 stop work order was for a continuation of the same problems with the excavation that had occurred in October 2006 (*Id.* at 64, 102).

As discussed above, Alexander Kogan denies signing the July 18, 2006 contractor agreement, and asserts that he only entered into the December 20, 2006 contractor agreement. Mark Zeldin, however, attests, in his sworn affidavit, and also testified, at his deposition, that Alexander Kogan had signed the July 18, 2006 contractor agreement (Mark Zeldin's Dep. Transcript at 32). Mark Zeldin, in his sworn affidavit, asserts that he saw the December 20, 2006 contractor agreement for the first time during discovery in this action, and that he does not recognize any of the signatures on it. Thus, there are triable issues of fact as to whether Alexander Kogan had signed the July 18, 2006 contractor agreement, the time when plaintiffs sustained their damages, and whether either the July 18, 2006 or the December 20, 2006

contractor agreement (which both contained a contractual indemnification clause) was in effect at the time that plaintiffs sustained their damages.

A party seeking contractual indemnification must establish the existence of a signed enforceable written agreement between itself and the party from whom it is seeking indemnification which provides for such indemnification (*see generally Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *Temmel v 1515 Broadway Assoc., L.P.*, 18 AD3d 364, 364 [2005]). An agreement containing an indemnification clause executed by a party after the plaintiff's damages are sustained will not be applied retroactively in the absence of evidence that the agreement was made as of a date prior to the occurrence and that the parties intended the agreement to apply as of that date (*see Mikulski v West, Inc.*, 2010 NY Slip Op 08542, *2 [2d Dept 2010]; *Lafleur v MLB Indus., Inc.*, 52 AD3d 1087, 1088 [2008]; *McGovern v Gleason Bldrs., Inc.*, 41 AD3d 1295, 1296 [2007]; *Quality King Distribs., Inc. v E & M ESR, Inc.*, 36 AD3d 780, 782 [2007]; *Temmel*, 18 AD3d at 365; *Podhaskie v Seventh Chelsea Assoc.*, 3 AD3d 361, 362 [2004]; *Pena v Chateau Woodmere Corp.*, 304 AD2d 442, 443 [2003]; *Stabile v Viener*, 291 AD2d 395, 396 [2002]).

Here, since Alexander Kogan denies signing the July 18, 2006 contractor agreement, there is a triable issue of fact as to whether it is, in fact, his signature on that agreement, as contended by 16th Street Development. There is also a triable issue of fact as to whether the damages sustained by plaintiffs, in any event, occurred while the December 20, 2006

contractor agreement was in effect, which, Alexander Kogan concedes, was executed by him, on behalf of IBM.

Consequently, the motion is held in abeyance pending resolutions of the issues of fact and the parties are directed to appear for a hearing, pursuant to CPLR 3212 (c), on February 9, 2011, at 10:00 A.M. in Room 961 at 360 Adams Street for the sole purpose of determining the factual issues of the authenticity of Alexander Kogan's signature on the July 18, 2006 contractor agreement, the validity of the July 18, 2006 and/or the December 20, 2006 contractor agreements, and whether plaintiffs' damages were sustained during the time that the contractual indemnification clause in either agreement was in effect.

E N T E R,
J. S. C.
HON. LAURA JACOBSON