

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D15598
O/cb

_____AD3d_____

Argued - April 19, 2007

A. GAIL PRUDENTI, P.J.
STEVEN W. FISHER
MARK C. DILLON
THOMAS A. DICKERSON, JJ.

2006-04741

DECISION & ORDER

Estate of Jose Martinez, etc., plaintiff, v Hollywood Atrium Gym, defendant third-party plaintiff-respondent, 235 Mill Street, Inc., defendant-respondent; Delca Air Conditioning & Heating Corp., third-party defendant-appellant.

(Index No. 14163/03)

Shayne, Dachs, Stanisci, Corker & Sauer, Mineola, N.Y. (Norman H. Dachs and Jonathan A. Dachs of counsel), for third-party defendant-appellant.

Rivkin Radler, LLP, Uniondale, N.Y. (Evan H. Krinick, Harris J. Zakarin, Laurine M. Rubin, and Melissa M. Murphy of counsel), for defendant third-party plaintiff-respondent and defendant-respondent.

In an action to recover damages for personal injuries, the third-party defendant appeals, as limited by its brief, from so much of an order of the Supreme Court, Nassau County (Jonas, J.), dated March 21, 2006, as granted that branch of the motion of the defendants Hollywood Atrium Gym and 235 Mill Street, Inc., which was for a conditional order of indemnification.

ORDERED that the order is modified, on the law, by deleting the provision thereof granting that branch of the motion which was for a conditional order of indemnification in favor of the defendant 235 Mill Street, Inc., and substituting therefor a provision denying that branch of the motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

June 19, 2007

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ESTATE OF JOSE MARTINEZ v HOLLYWOOD ATRIUM GYM

The Supreme Court erred in determining that 235 Mill Street, Inc., was entitled to a conditional order of indemnification since only Hollywood Atrium Gym (hereinafter Hollywood) was a party to the third-party action. However, the Supreme Court correctly determined that Hollywood was entitled to a conditional order of indemnification. The admissible evidence established that Hollywood was not negligent and that the third-party defendant exercised exclusive direction, supervision, and control over the plaintiff's decedent and his work (*see Perri v Gilbert Johnson Enters. Ltd.*, 14 AD3d 681, 684-685).

PRUDENTI, P.J., FISHER, DILLON and DICKERSON, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court