

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

D25545  
O/kmg

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - November 24, 2009

MARK C. DILLON, J.P.  
FRED T. SANTUCCI  
ANITA R. FLORIO  
L. PRISCILLA HALL, JJ.

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2008-07256

DECISION & ORDER

Kevin J. Tarpey, et al., plaintiffs, v Kolanu Partners, LLC, et al., defendants third-party plaintiffs-appellants, et al., defendants, S&C Products Corp., et al., defendants third-party defendants; Metal Sales Co., Inc., third-party defendant-respondent.

(Index No. 16319/05)

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Mullholland, Minion & Roe, Williston Park, N.Y. (John A. Beyrer of counsel), for defendants third-party plaintiffs-appellants.

Lewis, Scaria & Cote, White Plains, N.Y. (Deborah A. Summers of counsel), for third-party defendant-respondent.

In an action to recover damages for personal injuries, etc., the defendants third-party plaintiffs, Kolanu Partners, LLC, and RC Dolner, Inc., appeal, as limited by their brief, from so much of an order of the Supreme Court, Queens County (Weiss, J.), dated July 10, 2008, as denied that branch of their motion which was for summary judgment on their third-party cause of action for contractual indemnification insofar as asserted against the third-party defendant Metal Sales Co., Inc., and granted that branch of the cross motion of the third-party defendant Metal Sales Co., Inc., which was for summary judgment dismissing the third-party cause of action for contractual indemnification insofar as asserted against it.

ORDERED that the order is modified, on the law, (1) by deleting the provision thereof denying that branch of the motion of the defendants third-party plaintiffs which was for summary judgment on the third-party cause of action for contractual indemnification insofar as asserted by the defendant third-party plaintiff Kolanu Partners, LLC, against the third-party defendant Metal Sales Co., Inc., and substituting therefor a provision granting that branch of the motion, and (2) by deleting the provision thereof granting that branch of the cross motion of the third-party defendant Metal Sales

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Co., Inc., which was for summary judgment dismissing the third-party cause of action for contractual indemnification insofar as asserted against it and substituting therefor a provision denying that branch of the cross motion, as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

The facts and procedural history of this case are set forth in the companion appeal (*see Tarpey v Kolanu Partners, LLC*, \_\_\_\_\_AD3d\_\_\_\_\_ [Appellate Division Docket No. 2008-08158, decided herewith]).

The Supreme Court properly denied that branch of the motion of the defendants third-party plaintiffs, Kolanu Partners, LLC (hereinafter Kolanu), and RC Dolner, Inc. (hereinafter RC Dolner), which was for summary judgment on the third-party cause of action for contractual indemnification insofar as asserted by RC Dolner against the third-party defendant Metal Sales Co., Inc. (hereinafter Metal Sales), a sub-subcontractor on the project. RC Dolner, the general contractor on a project to construct residential condominiums, failed to establish, prima facie, that it lacked control over the work site or notice of the allegedly dangerous condition, thus precluding a finding, as a matter of law, that it was not negligent (*see Hirsch v Blake Hous., LLC*, 65 AD3d 570, 571; *Lane v Fratello Constr. Co.*, 52 AD3d 575, 576; *Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708-709).

However, because there has been no finding that RC Dolner was actually negligent, and RC Dolner's negligence, if any, cannot be determined as a matter of law, the Supreme Court erred in granting that branch of Metal Sales' cross motion which was for summary judgment dismissing the third-party cause of action for contractual indemnification insofar as asserted against it (*see Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795; *Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179; *Keating v Nanuet Bd. of Educ.*, 40 AD3d at 708).

In addition, Kolanu, the owner of the premises, was found to be free from negligence by the Supreme Court, and the plaintiffs have not appealed from that finding. There is no evidence in the record that Kolanu had control over the work site or notice of the allegedly dangerous condition. Therefore, contrary to Metal Sales' contention, since Kolanu is free from negligence, enforcement of the indemnity agreement as to Kolanu would not run afoul of General Obligations Law § 5-322.1(1), because it would not require Metal Sales to indemnify Kolanu for injuries arising out of Kolanu's own negligence (*see General Obligations Law § 5-322.1[1]*; *Ostuni v Town of Inlet*, 64 AD3d 854; *cf. Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d at 795). Consequently, that branch of the motion of Kolanu and RC Dolner which was for summary judgment on the third-party cause of action for contractual indemnification insofar as asserted by Kolanu against Metal Sales should have been granted.

DILLON, J.P., SANTUCCI, FLORIO and HALL, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court

