

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

D28161  
H/ct

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

Argued - June 18, 2010

JOSEPH COVELLO, J.P.  
DANIEL D. ANGIOLILLO  
RANDALL T. ENG  
JOHN M. LEVENTHAL, JJ.

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2009-09840

DECISION & ORDER

Katherine Masi, et al., plaintiffs, v Kir Munsey Park  
020 LLC, et al., respondents, et al., defendant,  
Whole Foods Market Group, Inc., doing business as  
Whole Foods Market, appellant.

(Index No. 22337/07)

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Callan, Koster, Brady & Brennan, LLP, New York, N.Y. (Kenneth S. Merber and  
Meredith F. McBride of counsel), for appellant.

Perez & Varvaro, Uniondale, N.Y. (Denise A. Cariello of counsel), for respondents.

In an action to recover damages for personal injuries, etc., the defendant Whole Foods Market Group, Inc., doing business as Whole Foods Market, appeals, as limited by its brief, from so much of an order of the Supreme Court, Queens County (McDonald, J.), dated June 19, 2009, as denied that branch of its motion which was for summary judgment on its cross claim against the defendants Kir Munsey Park 020 LLC, and Kimco Realty Corporation for contractual indemnification.

ORDERED that the order is affirmed insofar as appealed from, with costs, and, upon searching the record, summary judgment is awarded to the defendants Kir Munsey Park 020 LLC, and Kimco Realty Corporation dismissing the cross claim for contractual indemnification asserted against them by the defendant Whole Foods Market Group, Inc., doing business as Whole Foods Market.

August 3, 2010

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MASI v KIR MUNSEY PARK 020 LLC

The Supreme Court properly denied that branch of the motion of Whole Foods Market Group, Inc., doing business as Whole Foods Market (hereinafter Whole Foods), which was for summary judgment on its cross claim for contractual indemnification of an attorney's fee, since it did not make a prima facie showing of entitlement to judgment as a matter of law (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). The lease agreement between Whole Foods and the defendants Kir Munsey Park 020 LLC, and Kimco Realty Corporation (hereinafter together the respondents) contained no express indemnification provisions pertaining to personal injury actions filed by third parties, and no such indemnification clause could be implied from the language of that agreement (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492; *Schultz v Bridgeport & Port Jefferson Steamboat Co.*, 68 AD3d 970; *Sumba v Clermont Park Assoc., LLC*, 45 AD3d 671, 672).

Moreover, this Court has the authority to search the record and award summary judgment to a nonappealing party with respect to an issue that was the subject of the motion before the Supreme Court (*see Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429-430). Upon searching the record, we award summary judgment to the respondents dismissing the cross claim for contractual indemnification asserted against them by Whole Foods.

COVELLO, J.P., ANGIOLILLO, ENG and LEVENTHAL, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court