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

D31009
Y/ct

_____AD3d_____ Submitted - April 12, 2011

DANIEL D. ANGIOLILLO, J.P.
ANITA R. FLORIO
PLUMMER E. LOTT
LEONARD B. AUSTIN, JJ.

2010-00311 DECISION & ORDER

Michael F. McAllister, et al., plaintiffs, v Construction Consultants L.I., Inc., defendant third-party plaintiff-respondent, et al., defendant; C. Glasser Construction Corp., third-party defendant-appellant.

(Index No. 23389/04)

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York, N.Y. (Vanessa M. Corchia of counsel), for third-party defendant-appellant.

Brody, O'Connor & O'Connor, Northport, N.Y. (Scott A. Brody, Patricia A. O'Connor, and Joseph P. Minasi of counsel), for defendant third-party plaintiff-respondent.

In an action, inter alia, to recover damages for personal injuries, etc., and a related third-party action, the third-party defendant appeals from an order of the Supreme Court, Suffolk County (Costello, J.), dated September 24, 2009, which granted the motion of the defendant third-party plaintiff for conditional summary judgment on its third-party cause of action for contractual indemnification.

ORDERED that the order is reversed, on the law, with costs, and the motion of the defendant third-party plaintiff for conditional summary judgment on its third-party cause of action for contractual indemnification is denied as premature.

"[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor"

(*Cava Constr. Co., Inc. v Gealtec Remodeling Corp*., 58 AD3d 660, 662, citing General Obligations Law § 5-322.1; *see Reynolds v County of Westchester*, 270 AD2d 473). Here, the Supreme Court erred in granting the motion of the defendant third-party plaintiff which was for conditional summary judgment on its third-party cause of action for contractual indemnification, as there are issues of fact as to whose negligence, if any, caused the plaintiff's accident (*see Erickson v Cross Ready Mix, Inc.*, 75 AD3d 519, 524; *George v Marshalls of MA, Inc*., 61 AD3d 925, 930; *Chun v Ecco III Enters*., 268 AD2d 454, 454-455). Under these circumstances, it was premature to reach the issue of contractual indemnification (*see Erickson v Cross Ready Mix, Inc*., 75 AD3d at 524; *George v Marshalls of MA, Inc.*, 61 AD3d at 930; *Chun v Ecco III Enters*., 268 AD2d at 454-455).

The third-party defendant's remaining contention is not properly before this Court.

ANGIOLILLO, J.P., FLORIO, LOTT and AUSTIN, JJ., concur.

ENTER:

Matthew G. Kiernan
Clerk of the Court