

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

D32178
O/kmb

_____AD3d_____

Argued - June 23, 2011

PETER B. SKELOS, J.P.
ARIEL E. BELEN
L. PRISCILLA HALL
SHERI S. ROMAN, JJ.

2010-10408

DECISION & ORDER

Raderqui Diudone, plaintiff, v City of New York,
et al., defendants, Verizon New York, Inc., respondent,
S. DiFazio & Sons Construction, appellant.
(and a third-party action)

(Index No. 28010/04)

Morris Duffy Alonso & Faley, New York, N.Y. (Iryna S. Krachhanka of counsel), for appellant.

Ledy-Gurren Bass & Siff, LLP, New York, N.Y. (Edward J. Gorman of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant S. DiFazio & Sons Construction appeals, as limited by its brief, from so much of an order of the Supreme Court, Kings County (Sherman, J.), dated August 22, 2010, as granted that branch of the motion of the defendant Verizon New York, Inc., which was for summary judgment on the cross claim of that defendant for contractual indemnification with respect to attorneys' fees and costs incurred in the defense of this action.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The plaintiff allegedly was injured when she tripped and fell in the roadway at or near the intersection of Flushing Avenue and Broadway in Brooklyn. She commenced this action to recover damages for personal injuries against, among others, the defendants S. DiFazio & Sons Construction (hereinafter DiFazio) and Verizon New York, Inc. (hereinafter Verizon), alleging that

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they negligently performed construction work in the area where she fell, and that such negligence caused her injuries. Verizon asserted a cross claim for contractual indemnification against DiFazio. Verizon had entered into a contract with DiFazio, pursuant to which DiFazio agreed to perform excavation and repaving work near a curb on Flushing Avenue at or around its intersection with Broadway. Under the contract, DiFazio agreed to defend and indemnify Verizon for all claims arising out of DiFazio's "actual or alleged acts or omissions."

Contrary to DiFazio's contention, Verizon is entitled to indemnification for attorneys' fees and costs incurred in the defense of this action. This action arises out of DiFazio's "actual or alleged acts or omissions," and the plain and unambiguous terms of the contract do not condition DiFazio's obligation to indemnify Verizon for attorneys' fees and costs incurred in the defense of this action on a finding of fault (*see Sand v City of New York*, 83 AD3d 923; *McCleary v City of Glens Falls*, 32 AD3d 605, 609; *Pope v Supreme-K.R.W. Constr. Corp.*, 261 AD2d 523, 524-525; *DiPerna v American Broadcasting Cos.*, 200 AD2d 267, 269-270; *Vamvkaris v City of New York*, 21 Misc 3d 1148[A], 2008 NY Slip Op 52555[U] [2008]). Accordingly, the Supreme Court properly granted that branch of Verizon's motion which was for summary judgment on its cross claim for contractual indemnification with respect to attorneys' fees and costs incurred in the defense of this action.

DiFazio's remaining contention is without merit.

SKELOS, J.P., BELEN, HALL and ROMAN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court