

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

D33943  
N/kmb

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Argued - December 13, 2011

ANITA R. FLORIO, J.P.  
ARIEL E. BELEN  
SHERI S. ROMAN  
SANDRA L. SGROI, JJ.

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2010-10200

DECISION & ORDER

Kathryn Aberman, et al., plaintiffs-respondents,  
v Retail Property Trust, et al., defendants  
third-party plaintiffs-appellants; Guy Pratt,  
Inc., third-party defendant-respondent.

(Index No. 9762/09)

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Fiedelman & McGaw, Jericho, N.Y. (Joseph Horowitz of counsel), for defendants  
third-party plaintiffs-appellants.

The Nolan Law Firm, New York, N.Y. (William Paul Nolan of counsel), for  
plaintiffs-respondents.

Law Offices of Todd M. McCauley, LLC, New York, N.Y. (Shirley J. Spira of  
counsel), for third-party defendant-respondent.

In an action to recover damages for personal injuries, etc., the defendants third-party  
plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Nassau  
County (Brandveen, J.), dated September 1, 2010, as granted those branches of the third-party  
defendant's motion which were for summary judgment dismissing the third-party causes of action  
for common-law and contractual indemnification and the plaintiffs' second amended complaint  
insofar as asserted against the third-party defendant.

ORDERED that the appeal from so much of the order as granted that branch of the  
third-party defendant's motion which was for summary judgment dismissing the plaintiffs' second  
amended complaint insofar as asserted against it is dismissed, as the appellants are not aggrieved by  
that portion of the order (*see* CPLR 5511; *Mixon v TBV, Inc.*, 76 AD3d 144, 156-157); and it is  
further,

February 14, 2012

Page 1.

ABERMAN v RETAIL PROPERTY TRUST

ORDERED that the order is modified, on the law, by deleting the provision thereof granting that branch of the third-party defendant's motion which was for summary judgment dismissing the third-party cause of action for contractual indemnification, and substituting therefor a provision denying that branch of the motion; as so modified, the order is affirmed insofar as reviewed, without costs or disbursements.

The plaintiff Kathryn Aberman allegedly sustained personal injuries when she slipped and fell on ice in the parking lot of premises owned by the defendant Retail Property Trust (hereinafter Retail). Thereafter, the injured plaintiff, with her husband, suing derivatively, commenced this action against Retail and the defendants Control Building Services, Inc., and Control Construction Co., Inc. (hereinafter together Control). Control managed and provided maintenance services for the premises. Retail and Control commenced a third-party action against Guy Pratt, Inc. (hereinafter Pratt), which provided snow removal services at the premises. The third-party complaint asserted causes of action for, among other things, common-law and contractual indemnification. The plaintiffs subsequently filed a second amended complaint which asserted causes of action against Pratt.

The Supreme Court properly granted that branch of Pratt's motion which was for summary judgment dismissing the third-party cause of action for common-law indemnification. Pratt established, prima facie, that the injured plaintiff's accident was not due solely to its negligent performance or nonperformance of an act solely within its province (*see Schultz v Bridgeport & Port Jefferson Steamboat Co.*, 68 AD3d 970, 972). In opposition, Retail and Control failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

However, the Supreme Court should have denied that branch of Pratt's motion which was for summary judgment dismissing the third-party cause of action for contractual indemnification, because Pratt failed to establish, prima facie, that it did not breach the relevant contract by failing to perform one or more of the services for which it was retained (*see Abramowitz v Home Depot USA, Inc.*, 79 AD3d 675, 677; *Baratta v Home Depot USA*, 303 AD2d 434, 435).

We decline Retail and Control's request to search the record and award them summary judgment on the third-party cause of action for contractual indemnification.

FLORIO, J.P., BELEN, ROMAN and SGROI, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court