

**Dollard v WB/Stellar IP Owner, LLC**

2011 NY Slip Op 32921(U)

November 1, 2011

Supreme Court, New York County

Docket Number: 117084/2009

Judge: Barbara Jaffe

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE  
J.S.C.  
JUDGE

PART 5

Index Number : 117084/2009  
DOLLARD, ROSE WELSH  
VS.  
WB/STELLAR IP OWNERS  
SEQUENCE NUMBER : 001  
DISMISS  
  
CAL #44

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

n this motion to/for dismiss

PAPERS NUMBERED

1, 2, 3  
4  
5

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

FILED

NOV 04 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11/1/11  
NOV 1 2011

[Signature]  
BARBARA JAFFE  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 5

-----X  
ROSE WELSH DOLLARD,

Plaintiff,

-against-

Index No. 117084/09

Motion Subm.: 8/16/11  
Motion Seq. No.: 001

**DECISION & ORDER**

WB/STELLAR IP OWNER, LLC and DUANE  
READE, INC.,

Defendants.

-----X  
WB/STELLAR IP OWNER, LLC,

Third-Party Plaintiff,

-against-

Third-Party Index No. 590494/10

**FILED**

**NOV 04 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

THE CITY OF NEW YORK,

Third-Party Defendants.

-----X  
WB/STELLAR IP OWNER, LLC,

Third-Party Plaintiff,

-against-

Third-Party Index No. 590159/11

NEW YORK CITY ECONOMIC DEVELOPMENT  
CORPORATION and FRIENDS OF GREENWICH  
STREET, INC.,

Third-Party Defendants.

-----X  
BARBARA JAFFE, JSC:

**For WB/Stellar:**  
Jeffrey D. Fippinger, Esq.  
Law Offices of Margaret G. Klein & Assocs.  
200 Madison Ave.  
New York, NY 10016  
646-392-9250

**For Friends:**  
Dan C. Kozusko, Esq.  
Willkie Farr & Gallagher LLP  
787 Seventh Ave.  
New York, NY 10019  
212-728-8000

By notice of motion dated March 28, 2011, third-party defendant Friends of Greenwich Street, Inc. (Friends) moves pursuant to CPLR 3211(a)(7) for an order dismissing the third-party complaint against it. Defendant/third-party plaintiff WB/Stellar IP Owner, LLC (WB/Stellar) opposes.

### I. PERTINENT BACKGROUND

On April 13, 2009, plaintiff was allegedly injured when she tripped and fell on a defect on the sidewalk in front of and/or adjacent to the premises at 352 ½ Greenwich Street in Manhattan (premises), which are owned by WB/Stellar. (Affirmation of Dan C. Kozusko, Esq., dated Mar. 28, 2011 [Kozusko Aff.], Exh. B). On or about December 4, 2009, plaintiff served defendants with her summons and complaint. (*Id.*).

On or about February 2, 2011, WB/Stellar commenced the second third-party action against Friends by serving it with a third-party complaint in which it asserts causes of action against Friends for contribution and common law indemnification. (*Id.*, Exh. A). WB/Stellar alleges that if plaintiff sustained personal injuries as alleged in her complaint, “then any such injuries or damages were caused by the gross carelessness, recklessness and negligence of [Friends] and consequently, [Friends] is responsible in whole or in part for such injuries,” and that if plaintiff recovers a judgment against WB/Stellar and if such liability is imposed upon WB/Stellar due to the “primary and active negligence and/or the violation of the statute, rule, regulation and/or ordinance by [Friends] in permitting, causing creating and/or permitting to exist

the alleged conditions set forth in the plaintiff's complaint and by [Friends] generally failing to exercise due care and diligence," then WB/Stellar is entitled to common law indemnification from Friends. (*Id.*).

## II. CONTENTIONS

Friends argues that the complaint should be dismissed as WB/Stellar failed to plead any facts showing that Friends may be liable in negligence to plaintiff or underlying its claims against Friends. It observes that pursuant to New York City Administrative Code § 7-210, the duty to maintain the sidewalk on which plaintiff fell belongs solely to WB/Stellar. (Memo. of Law, dated Mar. 28, 2011).

WB/Stellar contends that its complaint against Friends is properly pleaded, but also submits the affidavit of its property manager, who therein states, upon information and belief, that Friends installed the part of the sidewalk on which plaintiff allegedly tripped, that Friends inspects, maintains, and repairs the sidewalk, and that before plaintiff's accident, Friends repaired the sidewalk. (Affirmation of Jeffrey D. Fippinger, Esq., dated Apr. 5, 2011; Affidavit of Deborah Dolan, dated Apr. 12, 2011). It thus maintains that it has sufficiently pleaded claims for contribution and common law indemnification against Friends.

In reply, Friends argues that WB/Stellar may not shift its duty to maintain the sidewalk to Friends and that neither the third-party complaint nor Dolan's affidavit specifies how Friends may have been negligent. (Mem. of Law, dated Apr. 26, 2011).

## III. ANALYSIS

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action.

In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Posner v Lewis*, 80 AD3d 308 [1<sup>st</sup> Dept 2010]). Moreover, the allegations of both the main complaint and third-party complaint must be read together and accepted as true. (82 NY Jur 2d, Parties § 187 [2011]). The court need only determine whether the alleged facts fit within any cognizable legal theory (*id.*; *Harris v IG Greenpoint Corp.*, 72 AD3d 608 [1<sup>st</sup> Dept 2010]), and whether the third-party plaintiff may ultimately establish its allegations against the third-party defendant is not part of the determination (*AG Cap. Funding Partners, L.P. v State St. Bank and Trust Co.*, 5 NY3d 582 [2005]). The court may also consider any affidavits submitted by the non-moving party to remedy defects in the complaint. (*Leon*, 84 NY2d at 88).

Pursuant to New York City Administrative Code § 7-210, the owner of real property abutting a sidewalk has the duty of maintaining it in a reasonably safe condition, and is liable for any personal or property injury proximately caused by its failure to so maintain the sidewalk, unless the property is exempt. Thus, a premises owner has a statutory nondelegable duty to maintain the sidewalk abutting its premises. (*Cook v Consolidated Edison Co. of New York, Inc.*, 51 AD3d 447 [1<sup>st</sup> Dept 2010]).

Nevertheless, a contractor may be held liable for an affirmative act of negligence that causes or creates a dangerous condition on a public sidewalk. (*Fernandez v 707, Inc.*, 85 AD3d 539 [1<sup>st</sup> Dept 2011]). Moreover, a contractor may owe a non-contracting third party a duty of care if, as pertinent here, in failing to exercise reasonable care in the performance of its duties, it “launche[s] a force or instrument of harm.” (*Espinal v Melville Snow Contractors*, 98 NY2d 136

[2002]).

Thus, irrespective of WB/Stellar's duty to maintain the sidewalk, Friends may also owe plaintiff a duty of care depending on the scope and nature of its work on the sidewalk, and may be liable for contribution and/or common law indemnification. And, as WB/Stellar alleges in the third-party complaint that Friends performed work on the sidewalk where plaintiff fell and as plaintiff alleges in her complaint that there was a defective condition on the sidewalk which caused her to fall, WB/Stellar has stated a claim for contribution and/or common law indemnification against Friends. (See eg *Soussi v Gobin*, 87 AD3d 580 [2d Dept 2011] [property owner could not be held liable for plaintiff's accident pursuant to common law principles as dangerous condition on sidewalk was created by independent contractor hired to replace sidewalk]; see also *Harakidas v City of New York*, 86 AD3d 624 [Section 7-210 did not shift tort liability to property owner for defective sidewalk where injuries caused by another party's affirmative acts of negligence]).

IV. CONCLUSION

Accordingly, it is hereby

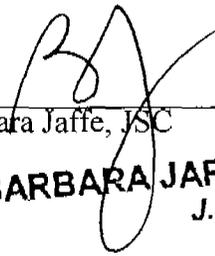
ORDERED, that third-party defendant Friends of Greenwich Street, Inc.'s motion for an order dismissing the third-party complaint is denied.

**FILED**

ENTER:

NOV 04 2011

NEW YORK  
COUNTY CLERK'S OFFICE

  
\_\_\_\_\_  
Barbara Jaffe, JSC  
**BARBARA JAFFE**  
J.S.C.

DATED: November 1, 2011  
New York, New York

NOV 01 2011