[* 1]

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

PRESENT: JUDGE SHIRLEY WERNER KORNREICH PART 54

Justice

Index Number : 115579/2002

CAWLEY, ANDREW

VS

NEW YORK UNIVERSITY

Sequence Number : 008

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 5/3/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... 1-12	1 - 7
Answering Affidavits — Exhibits _____	3 - 8
Replying Affidavits _____ & papers on Motion Seq. 009	9 - 12

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED
AUG 06 2007
COUNTY CLERK'S OFFICE
NEW YORK

SPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

d: 7/31/07

HON. SHIRLEY WERNER KORNREICH J.S.C.

one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

----------X

ANDREW CAWLEY and ELEANOR CAWLEY,

Plaintiffs,

-against-

NEW YORK UNIVERSITY, BRENNAN CONSTRUCTION CORP., GEORGE BRESLAW & SONS, INC., and BRESLAW PLUMBING, INC.,

Defendants.

----------X

NEW YORK UNIVERSITY and BRENNAN CONSTRUCTION CORP.,

Third-Party Plaintiffs,

-against-

BRESLAW PLUMBING, GEORGE BRESLAW & SONS, INC., MATRIX MECHANICAL CORP., and PARAGON SHEET METAL, INC.,

Third-Party Defendants.

----------X

NEW YORK UNIVERSITY and BRENNAN CONSTRUCTION CORP.,

Second Third-Party Plaintiffs,

-against-

FOX ELECTRIC, INC.,

Second Third-Party Defendants.

----------X

Index No. 115579/02

DECISION & ORDER

Third-Party
Index No. 590883/05

SHIRLEY WERNER KORNREICH, J.

Motion Sequences 008 and 009 are hereby consolidated for disposition.

I. Motions Before the Court

In this action arising out of a construction accident, defendants/third-party defendants, George Breslaw & Sons, Inc., and Breslaw Plumbing (collectively "Breslaw"), move in motion sequence 008 for summary judgment dismissing all claims against them in the amended complaint and the third-party complaint. Third-party defendants Matrix Mechanical Corp. ("Matrix") and Paragon Sheet Metal ("Paragon") move in motion sequence 009 for summary judgment dismissing the amended complaint, the third-party complaint and all cross-claims against them. Defendants/third-party plaintiffs, R.P. Brennan General Contractors s/h/I as Brennan Construction Corp. ("Brennan") and NYU University ("NYU") cross-move to amend their pleadings and for summary judgment on their common law and contractual indemnification claims against Breslaw, Paragon and Matrix.

II. The Parties & the Construction Project

Plaintiff alleges that he was injured when he stepped into a hole on a construction site located on the 10th floor of 719 Broadway in Manhattan, which was owned by defedant/third-party plaintiff NYU. Brennan was the general contractor for the project. Third-party defendant Paragon was plaintiffs' employer. Third-party defendant Matrix was the HVAC subcontractor. It is undisputed that Paragon was wholly owned by Matrix. Breslaw was the plumbing subcontractor on the project.

III. Procedural History

Plaintiffs' brought this action against Brennan and NYU in July of 2002. In March of 2005, plaintiffs brought a second action against Breslaw. Plaintiff filed a note of issue in this action on January 28, 2005. On or about July 29, 2005, NYU and Brennan brought a third-party

action for apportionment, common law indemnification, contractual indemnification and failure to procure insurance against Breslaw, Matrix and Paragon. Breslaw admits that it defaulted in answering the third-party complaint.[1] Paragon and Matrix answered the third-party complaint, and interposed cross-claims and a counterclaim on October 10, 2005.

Plaintiffs' claims under the Labor Law §§ 200, 240(1) and 241(6) against Brennan and NYU were dismissed by order of the court, dated January 9, 2006, but plaintiffs were given leave to amend their §241(6) claim to allege a violation of §23-1.30 of the Industrial Code.

On June 8, 2006, the court issued an order consolidating this action and the third-party action with the action by plaintiffs against Breslaw, which had been pending before Justice York in this court under index number 104367/05. In the order of consolidation, the court set a deadline for Breslaw, Paragon and Matrix to move for summary judgment of 45 days after the last deposition. The last deposition was Brennan's deposition, which was conducted on November 15, 2006.

By order of the court dated July 19, 2006, upon reargument, the court reinstated plainitffs' claims under Labor Law §200 against Brennan and NYU, ruling that there was an issue of fact as to whether they could be liable for a defective condition on the premises that caused an injury to plaintiff. On October 3, 2006, the court issued an order dismissing plaintiffs' §241(6) claim based on §23-1.30 of the Industrial Code.

At the outset the court *sua sponte* corrects an error made in the July 19, 2006 order, which

---

[1]Brennan and NYU's one year in which to move for a default judgment for indemnification against Breslaw, pursuant to C.P.L.R. §3215, will begin to run when and if judgment is entered against Brennan and/or NYU in the main action. *Multari v. Gladin Arms Corp.*, 28 A.D.2d 122, 124-125 (2nd Dept. 1967).

should have reinstated plaintiffs' claims against NYU and Brennan based upon common law negligence. *Liss v. Trans Auto Systems, Inc.*, 68 N.Y.2d 15, 20 (1986). Therefore, plaintiffs' remaining claims against NYU and Brennan arise under §200 and the common law.

IV. Factual Background

A. Facts Relating to the Main Action

Plaintiff testified that on the day of the accident he was working for Paragon. Motion 009, Tr. 5/17/04, Exh. I, p. 9. His foreman and sole supervisor on the job was Larry Burgess. *Id.* at 9-10 & 66. Plaintiff stated that on the day of the accident he was assigned by Mr. Burgess to hang duct work. *Id.* at 14-15. Plaintiff had been working in the area for a few minutes when his co-worker asked him if a magic marker on the floor was his. *Id.* at 17-18. Plaintiff made a motion to see what his co-worker was talking about, stepped backward and fell in a square hole. *Id.* He described the area where he fell as a 2 foot by 3 foot hole, 6 to 8 inches deep, that had been cut for a pipe chase. *Id.* Plaintiff did not recall seeing anyone working in the hole and did not know who created it or when it was created. *Id.*

There is conflicting evidence as to whether the hole was part of Breslaw's work. Breslaw's witness, Paul Weisenberg, testified that the hole into which plaintiff stepped had nothing to do with Breslaw's work and was not created by Breslaw. Motion 008, Exh. I, Tr. 1/25/06, pp. 28 and 30-31. Mr. Weisenberg admitted that there were no other plumbers working on the project. *Id.* at 11. As of June 2002, Breslaw was mid-way through "roughing," which involves the installation and insulation of pipes. *Id.* at 19. Breslaw installed waste pipes, vent pipes and water pipes. *Id.* at 20. When shown a picture of the site of the accident, Mr. Weisenberg identified insulated water pipes, a chair carrier and an uninsulated drain pipe. *Id.* at

21-22. He also stated that the picture showed that Breslaw's work was completed because the pipes were insulated. *Id.* At his second deposition, he said that the openings made by Breslaw were circular holes, 3 to 6 inches in diameter. Motion 008, Exh. K, Tr. 7/28/06 at 26. He stated that Breslaw did not install any floor drains or depressions; only drains that went from chases or perimeter walls through "core" holes in the floor slab between the 9th and 10th floors. *Id.* at 14 and 33-34.

Brennan's witnesses tell a different story. When asked if the hole into which plaintiff fell was created by the plumbers, Brennan's construction supervisor, Robert Normoyle, testified that it was "created for the plumbers," and was "an existing condition" around which Brennan or Turbo, the concrete subcontractor, poured concrete about three to four weeks before the accident. Motion 009, Exh. N, Tr. 11/15/06, pp. 27-28. He said the dimensions of the hole were 30 inches square and 5 or 6 inches deep. *Id.* at 30-31. Benny, a Brennan laborer, informed Mr. Normoyle of the accident right after it happened. *Id.* at 50-51. Mr. Normoyle went to the site of the accident and saw plumber and plumbing tools in the area. *Id.* at 53. When Mr. Normoyle arrived, plaintiff said that he had fallen off a ladder and hit an opening in the concrete slab. Id. at 15-16 & 49. Mr. Normoyle's report of the accident, dated June 5, 2002, states that plaintiff fell into an open hole where plumbers were installing floor drains and completing roughing. Mr. Normoyle's affidavit states that ten minutes after the accident he saw two plumbers and plumbers' tools in the area and spoke to a plumber named Breslaw. Mr. Normoyle further avers that Breslaw was installing floor drains at the time.

Paragon's Vice President, Glenn Boyd, also testified that the hole was related to plumbing. He said that it was a drain or clean-out that could be used to snake out a pipe. Motion

009, Exh. M, Tr. 10/12/06, p. 33. He said the hole was "saw-cut," which is not the type of cut a sheet metal worker would make. *Id.* at 33-34.

There is conflicting testimony regarding the responsibility for covering holes on the site. Mr. Normoyle said the duties of the laborer, Benny Abeni, who was employed by Brennan, "absolutely" included providing protection for floor openings, which he would cover with planks. Motion 008, Exh. L, Tr. 9-10. He stated that it was the plumbers' responsibility to cover holes that they made. *Id.* 9-10. From the time that the concrete was poured until the accident occurred, Mr. Normoyle was on the site daily. Motion 009, Exh. N, Tr. 11/15/06, pp. at 33-35. Until 6:45 a.m. on the day of the accident, the hole was covered with plywood and caution tape was erected around its perimeter. *Id.* The plywood over the hole had been "flipped up." *Id.* at 53-54. Mr. Normoyle's affidavit states that it was Breslaw's responsibility to cover a depression unless they were actively working in it

Brennan's project supervisor, Craig Hackett, disagreed that Benny's duties included protection of holes. Mr. Hackett testified that Benny's protection responsibilities did not include covering holes unless they were left overnight. Motion 009, Exh. J, p. 22.

There also is a factual dispute as to whether Breslaw had workers on the site on the day of the accident. The parties agree that the accident occurred on June 4, 2002. Mr. Normoyle's report of the accident is dated June 5, 2002. He explained that either he misdated the report or he wrote it the day after the accident. However, as previously noted, he testified that he was at the site of the accident 10 minutes after it occurred, saw Breslaw workers and plumbing tools, saw that the hole was uncovered and spoke to a plumber named Breslaw. In reply, Breslaw presents the affidavit from its chief financial officer, Natalya Shifrina, stating that Breslaw's records show

that none of Breslaw's employees were on the site on June 4, 2002. Breslaw also relies on Brennan's daily progress report, dated June 5, 2002, which mentions the accident.

B. Facts Relating to Indemnification & Failure to Procure Insurance

Breslaw was hired to do the plumbing work pursuant to a purchase order numbered 5109, dated March 14, 2002 ("Breslaw Purchase Order"). Motion 008, Exh. M. Brennan's Purchase Order is on a form with a Brennan letterhead and was signed by Brennan and Breslaw. NYU is listed under "Ship To" on the Breslaw Purchase Order. In the Breslaw Purchase Order, Breslaw agreed to:

> indemnify and hold as harmless from any and all damages we may sustain by reason of injury...to persons...which may arise in connection with any work performed under this order or any subsequent work performed on this project....

It is unclear whether "we" refers to NYU, Brennan or both. Further, the terms of the indemnification clause includes a promise to indemnify NYU or Brennan for injuries that result from their own negligence. The Breslaw Purchase Order requires Breslaw to obtain workmen's compensation and public liability insurance, but it does not state that Brennan and/or NYU must be named as additional insureds.

In opposition to Breslaw's motion, Brennan and NYU have produced a second indemnification agreement executed by Breslaw on June 6, 2002, after the date of the accident, which states that Breslaw will indemnify the Owner and its agents from claims for personal injuries, "arising out of or in consequence of the performance of this order ...whether such injuries...are due or claimed to be due to any negligence of yours, or for any other reason, except for our or our [sic] indemnity's sole negligence." *See*, Affidavit of Michael Brennan, sworn to on 1/9/07, Exh. C. The June 6, 2002 form also required Breslaw to name Brennan " and the

client" as "additionally insured." *Id.*

With respect to Paragon and Matrix, Brennan and NYU rely on a purchase order numbered 5110, dated March 14, 2002 (Matrix Purchase Order), which does not mention Paragon. The Matrix Purchase Order has an indemnification clause identical to the Breslaw Purchase Order. Brennan and NYU submit a second indemnification agreement by Matrix, dated March 22, 2002 [Affidavit of Michael Brennan, sworn to on 1/9/07, Exh. AJ, signed by Glenn Boyd, who, according to his deposition testimony, is the Vice-President of both Matrix and Paragon. The second Matrix agreement has the same indemnification and insurance clauses as the June 6, 2002 form signed by Breslaw.

V. Discussion

A. Motions for Summary Judgment Dismissing the Amended Complaint

Breslaw's motion for summary judgment dismissing the amended complaint is denied as there are issues of fact, including whether Breslaw was working in the area on the day of the accident, whether Breslaw was working in the hole at that time and whether it uncovered the hole to work in it. Breslaw's evidence that it was not on site on June 4, 2002, and that they did not create the hole, merely raises an issue of fact, which cannot be disposed of in summary fashion. The testimony of Mr. Normoyle is circumstantial evidence that Breslaw uncovered the hole and was working in it when the accident happened. His testimony is sufficient to raise jury issues as to Breslaw's responsibility for the accident.[2]

The court's July 19, 2006 order stating that the only issue of fact was whether Brennan

---

[2]It is not necessary to rely on the expert affidavit submitted by NYU and Brennan to reach the conclusion that there are issues of fact as to Brelaw's negligence.

and NYU were negligent in failing to maintain the premises was made in connection with a motion by Brennan and NYU. The court did not rule that Breslaw, Matrix and Paragon could only be held liable for a defect in the premises.

The motion by Brennan and NYU for summary judgment dismissing the amended complaint is denied because they have not eliminated the issue of fact, recognized in the court's order of July 19, 2006, as to whether the premises itself was an unsafe place to work due to the uncovered opening. *Murphy v. Columbia University*, 4 A.D.3d 200 (1st Dept. 2004). Brennan's witness admitted that its laborer, Benny, was responsible for protection and there is evidence that the hole was not covered when the accident occurred. As Breslaw denies removing the protection, there is an issue of fact as to whether the hole was properly protected. NYU, as owner, and its agent, Brennan, were responsible for the condition of the premises.

B. Contractual and Common Law Indemnification[3]

Breslaw's motion for summary judgment dismissing the claims against it by Brennan and NYU for common law and contractual indemnification must be denied because there is a question of fact as to whether they will be found to be negligent. The contractual indemnification clause in the Breslaw Purchase Order could require Breslaw to indemnify Brennan and NYU for their own negligence, in violation of G.O.L. §5-322.1, if NYU and Brennan were found to be negligent. *Itri Brick & Concrete Corp. v. Aetna Cas. & Surety Co.*, 89 N.Y.2d 786, 795, fn. 5 (1997)(indemnification for injuries arising "'from the work' without

[3]Although Brennan and NYU admit that their cross-motions for summary judgment were untimely, they may be considered in searching the record because Breslaw, Paragon and Matrix moved to dismiss all claims against them. *Filannino v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280 (1st Dept. 2006).

regard to who or what caused the injury" invalid where general contractor ***found to be negligent***). Here, a trial is necessary to determine whether Brennan and NYU were negligent in failing to provide safe premises in which to work and, therefore, the validity of the agreement is a question of fact. The June 6, 2002 Breslaw agreement is not applicable because it post-dates the accident.

With respect to the motion by Matrix, the March 22, 2002 agreement was signed before the accident and states that all prior agreements "are merged in this order, which alone completely expresses our agreement." Therefore, the indemnification clause in the March 22, 2002 form is applicable to the contractual indemnification claims against Matrix.

However, Matrix and Paragon are entitled to summary judgment dismissing the contractual indemnification claims because there is no proof in the record that the accident arose out of Matrix's "performance of this order." It is undisputed that plaintiff was working for Paragon and Matrix was not on the site. Although it is agreed by the parties that Paragon is wholly owned by Matrix, there is no evidence in the record to support disregarding the corporate form. *Billy v. Consolidated Machine Tool Corp.*, 51 N.Y.2d 152, 163 (1980)(party seeking to disregard the corporate form must show that direct intervention by parent in management subsidiary to extent that separate corporate form is completely ignored); *see also Morris v. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 141-142 (1993). Paragon is entitled to summary judgment dismissing the contractual indemnification claim because it was not a party to the agreements signed by Matrix.

Turning to common law indemnification, Breslaw is not entitled to dismissal of the common law indemnification claims of Brennan and NYU because those entities will be entitled

to indemnification if the jury determines that they are free from negligence and Breslaw is held to be negligent. *Trustees of Columbia University, Plaintiff, v. Mitchell/Giurgola Associates*, 109 A.D.2d 449 (1st Dept. 1985)(common law indemnification predicated on vicarious liability of one who has not participated in wrongdoing to some degree). Here, there are issues of fact as to whether NYU's agent, Brennan, and/or Breslaw will be found to be negligent and, therefore, the common law indemnification claims against Breslaw cannot be decided at this juncture.

However, Paragon and Matrix are entitled to dismissal of the common law indemnification claims of NYU and Brennan. Matrix cannot be held liable for common law indemnification because it was not supervising or directing plaintiff's work at the time of the accident. *Russin v Louis N. Picciano & Son*, 54 NY2d 311 (1981). Paragon is entitled to dismissal because, as plaintiff's employer, it cannot be held liable for common law indemnification where, as here, plaintiff did not suffer a "grave injury," Workers' Compensation Law §11.[4] The court also dismisses the contribution claims of NYU and Brennan against Paragon based upon §11. The contribution claims of Matrix are dismissed as moot, as there is no evidence that Matrix was negligent.

C. Failure to Procure Insurance

Breslaw is entitled to summary judgment dismissing the third-party claim by Brennan and

---

[4] The statute provides as follows: An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

NYU for failure to procure insurance. The Breslaw Purchase Order did not require Breslaw to obtain insurance naming Brennan and NYU as additional insureds.

As Paragon was not a party to the agreements on which Brennan and NYU rely, Paragon is entitled to summary judgment dismissing the third-party claims of Brennan and NYU for failure to procure insurance. *Adams v. Boston Properties Limited Partnership*, 837 N.Y.S.2d 86 (1st Dept. 2007).

With respect to Matrix, summary judgment is granted dismissing the third-party claim for failure to procure insurance, as there is no proof that Matrix committed a negligent act for which its liability insurance would be triggered. As additional insureds, NYU and Brennan only would enjoy the same protection as the named insured, Matrix. *Wong v. N.Y. Times Co.*, 297 A.D.2d 544, 547 (1st Dept. 2002)("additional insured" well-understood in insurance industry to mean same protection as named insured). The agreement to obtain insurance by Matrix did not require it to procure insurance for its subsidiary, Paragon.

D. Cross-Claims of Matrix and Paragon

The cross-claims and counterclaim of Matrix and Paragon against Brennan, NYU and Breslaw for failure to procure insurance and for contractual indemnification are dismissed in searching the record, as Matrix and Paragon have presented no evidence of a promise to obtain insurance on their behalf, or to indemnify them. As the claims of NYU and Brennan against Matrix and Paragon for common law indemnification and contribution have been dismissed, the cross-claims of Paragon and Matrix against NYU and Brennan for the same relief are dismissed as moot. The cross-claims by Matrix and Paragon against Breslaw for contractual indemnification, common law indemnification, failure to procure insurance and contribution are

dismissed as moot because there is no remaining direct or third-party claim against Matrix or Paragon.

VI. Motion to Amend

Brennan and NYU seek to amend their answer to add the affirmative defense of release with respect to claims by Breslaw, Paragon and Matrix. In addition, they seek to amend to place their claims for common law indemnification, contractual indemnification and failure to procure insurance against Paragon, Matrix and Breslaw in a single pleading.

Parties may amend their pleadings, or supplement them at any time, by leave of the court. CPLR 3025(b). The decision whether to grant the amendment is committed to the court's discretion. *Heller v. Provenzano, Inc.*, 303 A.D.2d 20, 22 (1st Dept. 2003). Although CPLR 3025 provides that leave to amend pleadings is to be freely granted, "leave should be denied where the proposed claim is palpably insufficient." *Pasalic v. O'Sullivan*, 294 A.D.2d 103, 104 (1st Dept. 2002). *See Monteiro v. R.D. Werner Co.*, 301 A.D.2d 636, 637 (2d Dept. 2003) ("A proposed amendment that is plainly lacking in merit will not be permitted."). "It is incumbent upon the movant to make some evidentiary showing that the claim can be supported." *Morgan v. Prospect Park Associates Holdings, L.P.*, 251 A.D.2d 306 (2d Dept. 1998), quoting *Cushman & Wakefield, Inc. v. John David, Inc.*, 25 A.D.2d 133, 135 (1st Dept. 1966).

The motion to amend to reassert the claims for contractual indemnification, common law indemnification and failure to procure insurance as cross-claims against Paragon, Matrix and Breslaw is denied. With the exception of the third-party claims against Breslaw for contractual and common law indemnification, all of the claims sought to be reasserted as cross-claims have been dismissed. The remaining claims against Breslaw are preserved in the Brennan/NYU third-

party complaint against Breslaw.

With respect to the amendment to assert releases as affirmative defenses, the motion is denied. There are no remaining claims to release by Matrix and Paragon. Although the court disagrees with Breslaw's claim that the release was limited to Breslaw's claims for payment,[5] Breslaw defaulted in answering the third-party complaint and has not asserted a claim against NYU or Brennan. Therefore, there is no claim against which to defend by reliance on the Breslaw release. Accordingly, it is

ORDERED that the court's order of July 19, 2006 is amended *sua sponte* to state that the common law claims of Brennan and NYU were reinstated; and it is further

ORDERED that Breslaw's motion for summary judgment dismissing the third-party action and all claims by all parties against it is granted solely to the extent that the claims by Brennan and NYU against Breslaw for failure to procure insurance are dismissed and all cross-claims by Matrix and Paragon against Breslaw are dismissed as moot, and in all other respects the motion is denied; and it is further

ORDERED that the motion by Matrix and Paragon for summary judgment dismissing the third-party complaint and all claims against them is granted, the third-party claims by NYU and Brennan against Matrix and Paragon are dismissed and the cross-claims and counterclaim by Matrix and Paragon against Brennan, NYU and Breslaw are dismissed as moot; and it is further

ORDERED that the cross-motions by NYU and Brennan for summary judgment are

---

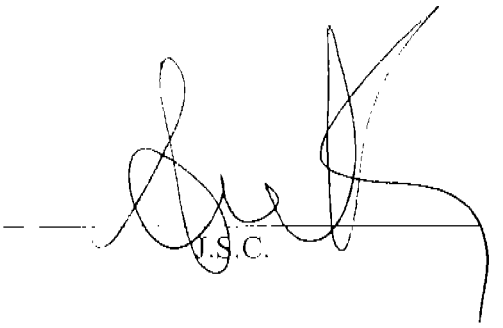
[5]The release, dated July 17, 2003, is a release of "any actions, causes of actions [sic], ...judgments, claims, and demands which shall or may arise out of or be incidental to, work undertaken or performed under and/or pursuant to Company's Subcontracts...& CO #'s 5109/5276/5356 CO 13R & 5359 CO 5R including all modifications thereto."

denied; and it is further

ORDERED that the motion by NYU and Brennan to amend their pleadings is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly and sever the remainder of the action which shall continue.

Dated: July 31, 2007



J.S.C.