

**Nestor v Congregation Beit Yaakov**

2007 NY Slip Op 33296(U)

October 10, 2007

Supreme Court, New York County

Docket Number: 0600632/2002

Judge: Marcy S. Friedman

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

PRESENT: **Hon. Marcy S. Friedman**

PART 57

Index Number : 600632/2002

NESTOR, MARIANNE

vs

CONGREGATION BEIT YAAKOV

Sequence Number : 014

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 14

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Summary Judgment

*Nestor Ps. motion*

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

*Memos of law*

Cross-Motion:  Yes  No

PAPERS NUMBERED

1, 1A, 1B

2, 3, 4

5

M1, M2

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER.**

**FILED**

OCT 15 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10-10-07

*Marcy S. Friedman*  
\_\_\_\_\_  
J.S.C.

**Hon. Marcy S. Friedman**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY - - PART 57

MARIANNE NESTOR and  
PEGGY NESTOR,

*Plaintiff(s),*

*against*

CONGREGATION BEIT YAAKOV,  
et al.,

*Defendant(s).*

Action No. 1  
Index No.: 600632/2002

DECISION/ORDER

DR. LAWRENCE G. PAPE,

*Plaintiff(s),*

*against*

CONGREGATION BEIT YAAKOV,  
et al.,

*Defendant(s).*

Action No. 2  
Index No.: 600633/2002

DECISION/ORDER

**FILED**  
OCT 15 2007  
NEW YORK  
COUNTY CLERKS OFFICE

Present: HON. MARCY FRIEDMAN  
Justice, Supreme Court

Plaintiffs Marianne Nestor and Peggy Nestor in Action No. 1 and Dr. Lawrence Pape in Action No. 2 sue to recover for property damage allegedly resulting from construction work performed at an adjoining property owned by Congregation Beit Yaakov ("Congregation"). The Nestor plaintiffs move for summary judgment as to liability against defendants Congregation, Urban Foundation Engineering, LLC ("Urban"), and J.T. Magen & Company, Inc. ("Magen").<sup>1</sup> By separate motion, Congregation moves for summary judgment dismissing the complaint and for summary judgment on its cross-claims for indemnification against defendants Magen, Barney Skanska Construction Company ("Skanska"), MRC II Contracting, Inc. ("MRC"), and Urban.

<sup>1</sup>While plaintiffs' notice of motion does not specifically identify the parties against which it seeks summary judgment, these three defendants are identified in the body of plaintiffs' papers.

Defendants Urban, Magen and MRC also separately move or cross-move for summary judgment dismissing the complaint as against them. Defendant Skanska moves for summary judgment dismissing the complaint and all cross-claims against it and for summary judgment in its favor on its cross-claim against Urban for contractual indemnification. Defendant Watershed Partners, Inc. (“Watershed”) moves for summary judgment dismissing the complaint and all cross-claims against it, and for summary judgment on its cross-claims for contractual indemnification against co-defendants.

In a set of virtually identical papers, plaintiff Pape moves for summary judgment as to liability against various defendants, and defendants move or cross-move for summary judgment dismissing the complaint and for contractual indemnification on their cross-claims. Plaintiff Pape has now settled his claims with defendants, and the motion and cross-motions are withdrawn to the extent that they seek a determination as to liability. However, the motions for indemnification have not been resolved. The remaining motions in the Pape action are consolidated for disposition with the motions in the Nestor action.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment “the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ (CPLR 3212, subd. [b]).” (Zuckerman v City of New York, *supra*, at 562.)

These actions arise out of demolition of Congregation's existing building and construction of a new synagogue at its property located at 11-13 East 63<sup>rd</sup> Street in Manhattan. The Nestors and Dr. Pape are the owners of limestone mansions adjoining Congregation's property at 15 East 63<sup>rd</sup> Street and 9 East 63<sup>rd</sup> Street, respectively. The construction occurred between the fall of 2000 and 2001. Magen was the first construction manager for the project. Watershed was Congregation's project manager. Magen hired MRC to perform initial demolition work, and MRC performed such work from September through November 2000. It is undisputed that MRC had no further involvement with the project after that time. Magen also hired Urban as the excavation contractor. In the first phase of its work, from March 2001 through July 2001, Urban excavated below foundation level. Congregation terminated Magen in September 2001, and retained Skanska in October 2001 as its new construction manager. In October 2001, Skanska retained Urban to perform underground foundation work. Urban performed such work in November 2001.

The Nestor plaintiffs' bill of particulars, sworn to on August 21, 2002 [Ex. B to Aff. of Marianne Nestor In Support of Ps.' Summary Judgment Motion][*"Nestor Aff."*]) alleges that damages occurred on April 22, May 7, July 24, and August 13, 2001. It further alleges: "Additionally, various damages have occurred on an on-going basis during the course of construction that began in or about 2000. However, the most damage occurred during what appeared to be related to excavation below ground level following the exterior demolition of the Congregation building." A subsequent bill of particulars, sworn to on July 23, 2004, states: "Damages occurred on an on-going basis during the course of construction that began in or about 2000. The exact time and dates of all damages cannot be specified as the construction activity

was ongoing. A large portion of the damages appeared following excavation below ground level subsequent to the exterior demolition of the Congregation building.” This bill of particulars also specifies damages in March 2001, after trees encroaching on the Nestor property were removed from the Congregation property; substantial water damage on or about May 3, 2001, during excavation below foundation level; damage on or about April 23, 24 and 25, 2001, from severe vibrations in connection with excavation below foundation level; damage on or about July 24, 2001, from puncturing of the Nestor building facade with a steel beam; damage on or about August 13, 2001, when a projectile pierced the wall of the Nestor building; and worsening settling and cracking after October 2001, from failure to fill voids in the concrete area underneath the Nestor building.

#### Nestor Complaint – Summary Judgment Motions

Plaintiffs first argue that they are entitled to summary judgment against Congregation and Urban on the ground that defendants are strictly liable based on Administrative Code § 27-1031(b)(1), which provides that “[w]hen an excavation is carried to a depth more than ten feet below the legally established curb level the person who causes such excavation to be made shall, at all times and at his or her own expense, preserve and protect from injury any adjoining structures.” (See Cohen v Lesbian & Gay Community Servs. Ctr., Inc., 20 AD3d 309 [1<sup>st</sup> Dept 2005].) Administrative Code § 27-1031(b)(1) has been interpreted to impose absolute liability upon both the owner and the contractor that performs excavation work for damages caused by the excavation. (See Coronet Props. Co. v L/M Second Ave. Inc., 166 AD2d 242 [1<sup>st</sup> Dept 1990].) However, in cases finding such strict liability, “liability was determined after trial upon findings that defendants had failed to take adequate precautions to protect adjoining structures and that

defendants' activities were the proximate cause of the damage." (Id. at 243.)

Although plaintiffs submit a letter which indicates that Congregation contemplated that its project would require excavation to a depth of more than 10 feet below curb level (See Ex. A to Nestor Aff.), plaintiffs fail to submit competent evidence sufficient to establish as a matter of law that the excavation work reached this depth. Even assuming arguendo that the statute applies to the excavation work performed, there are issues of fact as to whether defendants took adequate precautions, and as to whether the excavation work was the cause of the damages sought in this action. While it is undisputed that Urban performed excavation work between March and July 2001, and while plaintiffs allege that damage to their property, including flooding and cracks, occurred on April 22 and May 7, 2001, plaintiffs do not make any factual showing on these motions that the property damage for which they seek compensation in this action is the same damage as the damage that occurred on these dates. Plaintiff Marianne Nestor's wholly conclusory deposition testimony (see e.g. Nestor Dep. [Ex. T to Skanska Motion] at 42-43, 65-67, 81-83) and her equally conclusory affidavit asserting that the damages occurred during Urban's excavation below foundation level, are insufficient to demonstrate plaintiffs' entitlement to summary judgment as a matter of law. This is particularly so, given that plaintiff acknowledges in the same affidavit that above ground demolition, which was performed before Urban commenced work on the project in the period from September to November 2000, also caused some damage. (See Nestor Aff., ¶¶ 14-21.) Accordingly, the branch of plaintiffs' motion for summary judgment based on Administrative Code § 27-1031 should be denied.

To the extent that plaintiffs argue that summary judgment should be granted on the basis of a violation of Administrative Code § 27-1032, this branch of plaintiffs' motion also should be

denied. Plaintiffs have not pleaded a violation of § 27-1032. Further, by order of this court dated May 1, 2006, plaintiffs were permitted to serve a fourth amended complaint to add a cause of action for strict liability, but only to the extent that it was predicated upon Administrative Code § 27-1031(b).

As to plaintiffs' argument that defendants Congregation and Magen should be held vicariously liable for the acts of Urban because Urban engaged in an inherently dangerous activity, the court finds that there are questions of fact for the jury. Although the issue of whether work is inherently dangerous can in certain circumstances be decided as a matter of law (see Klein v Beta I LLC, 10 AD3d 509 [1<sup>st</sup> Dept 2004]), this issue "is normally a question of fact to be determined by the jury." (Rosenberg v Equitable Life Assur. Soc'y., 79 NY2d 663, 670 [1992]; Christie v Ranieri & Sons, 194 AD2d 453, 454 [1<sup>st</sup> Dept 1993].) Here, while Urban acknowledges that it performed pile drilling, the record is devoid of any evidence, expert or other, as to what such drilling involves and whether it is inherently dangerous to adjoining property.

Plaintiffs also seek summary judgment against Congregation based on a July 26, 2001 Settlement and Cooperation Agreement ("Agreement") between plaintiffs and Congregation. Defendants Congregation, Urban, Magen and MRC move for summary judgment dismissing the complaint based on the same Agreement. Relying chiefly on paragraph 8 of the Agreement, plaintiffs argue that Congregation is bound to pay for any damages sustained as a result of Congregation's construction work. Defendants Congregation, Urban, Magen and MRC claim that paragraph 3 of the Agreement releases them from any claims for damages that were known or could have been known up to the date of the Agreement.

Paragraph 1 of the Agreement provides for payment of approximately \$65,000 “in full satisfaction of all of the following claims but no other claims: (a) the Papes’ and Nestors’ claims for legal fees and other professional fees incurred by the Papes and the Nestors through the date of this Agreement” and certain claims of the Papes for property damage. (Settlement and Cooperation Agreement [Ex. D to plaintiffs’ Notice of Motion and Concise Statement of Material Facts in Support].) It is undisputed that paragraph 1 provides no compensation to the Nestors for any property damage claims. Nor is there any other provision in the Agreement that calls for a payment to the Nestors for property damage that had occurred to date.

Paragraph 3 of the Agreement provides, in pertinent part:

except as otherwise provided in this Agreement, upon payment by the Congregation of the amount provided for in section 1 of this Agreement, the Congregation and its agents and contractors shall be completely and forever discharged by the Papes and the Nestors for any liability to the Papes or the Nestors, or all of them, for any event or occurrence, and for any action or failure to act, up to and including the date of this Agreement, provided, however, that nothing in this Agreement shall release the Congregation or its contractors and agents from liability for (a) any structural, settling or water damage not reasonably susceptible to discovery as of the date of this Agreement and caused by acts or failures to act of the Congregation and/or its contractors or agents, (b) any damage arising from the presence of an underground stream or other underground water on the Congregation Property (as observed by John Backos, R.A. (“Backos”) on or about May 10, 2001) and caused by the acts or failures to act of the Congregation and/or its contractors or agents, (c) the claims for damages that are referred to in section 4(c) of this Agreement, and (d) the Additional Claims, as defined in section 2 of this Agreement.

Paragraph 4(c), the only provision relevant to the Nestors’ claims in this action, preserves “the Nestors’ complaint of flooding, and of resulting tile and floor damage and cracking of walls and mirrors and other miscellaneous damage, all of which, the Nestors claim, occurred on or

about April 22 and May 7, 2001.”

Paragraph 8 of the Agreement provides:

The Congregation hereby acknowledges that it shall be responsible for any damage to the Pape Property or the Nestor Property that is caused by the Congregation’s construction activity. The Congregation hereby further acknowledges that it indemnifies the Papes and the Nestors for, and holds them harmless against, any liability to third persons for property damage or personal injury that is incurred by reason of any work that is performed by the Congregation and/or its contractors and/or their agents on the Pape Property or the Nestor Property. Notwithstanding anything in this Agreement to the contrary, this Agreement shall not be construed to impose upon the Congregation any obligation that would deprive the Congregation or its agents or contractors of the insurance coverage for which they have contracted or shall contract.

It is well settled that “‘interpretation of an unambiguous contract provision is a function for the court, and matters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument.’” (Chimart Assocs. v Paul, 66 NY2d 570, 573 [1986][citing Teitelbaum Holdings v Gold, 48 NY2d 51, 56].) The determination of whether a contract is ambiguous also is one of law to be resolved by the court (Matter of Wallace v 600 Partners Co., 86 NY2d 543, 548 [1995]; W.W.W. Assocs., Inc. v Giancontieri, 77 NY2d 157 [1990]) and should be based on the “contractual language alone, without reference to extrinsic evidence. The initial question, then, is whether the agreement on its face is reasonably susceptible of more than one interpretation.” (Chimart Assocs., 66 NY2d at 573; Nausch v Aon Corp., 283 AD2d 353 [1<sup>st</sup> Dept 2001].)

It is also a fundamental rule of construction that a written contract should be read as a whole. Specific clauses should be read in the context of the entire contract (Rentways, Inc. v

O'Neill Milk & Cream Co., 308 NY 342 [1955]), and “[a]ll parts of an agreement are to be reconciled, if possible, in order to avoid inconsistency.” (National Conversion Corp. v Cedar Bldg. Corp., 23 NY2d 621, 625 [1969].) Thus, “where two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect.” (HSBC Bank USA v National Equity Corp., 279 AD2d 251, 253 [1<sup>st</sup> Dept 2001][internal quotation marks and citations omitted].) Moreover, “[i]n determining the scope of contractual obligations, the reasonable expectation of the parties is a factor to be considered,” and “courts must interpret a contract so as to give meaning to all its terms.” (Greater New York Mut. Ins. Co. v Mutual Mar. Off., Inc., 3 AD3d 44 [1<sup>st</sup> Dept 2003].)

Applying these canons, the court holds that the provisions of the Agreement are not ambiguous. To the extent that there is a seeming inconsistency between paragraphs 3 and 8, the court finds that, reading the Agreement as a whole, these provisions can be reconciled and both given effect. Paragraph 3 waives property damage claims to the date of the Agreement except, as here relevant, the Nestors’ claim for the property damage referenced in paragraph 4(c) that occurred in the Spring of 2001, while Urban was performing excavation work at Congregation’s premises. Paragraph 8, read consistently with paragraph 3, provides for Congregation to be responsible for damage caused by Congregation’s construction activity that is not released by paragraph 3 – e.g., damage that occurred before the July 26, 2001 Agreement, the claims for which are preserved, or damage that occurred after the date of the Agreement.<sup>2</sup>

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<sup>2</sup>As the provisions of the Agreement can be read consistently, the Agreement is not ambiguous. Plaintiffs’ request that the court consider extrinsic evidence to construe the Agreement is therefore rejected. The court further rejects plaintiffs’ argument that their claims were preserved by a second settlement agreement made in August 2002. The Nestors were not a party to this agreement (Ex. A to Dr. Pape’s Aff. in Support of Motion for Summary Judgment), which was made between Congregation and

Contrary to Congregation's contention, the release in paragraph 3 of the Agreement thus does not "cover the entire time period within which plaintiffs claim damages." (Congregation Aff. in Opp. to Ps.' Summary Judgment Motion, ¶ 27.) However, plaintiffs are not entitled to summary judgment under paragraph 8 because, as held above, they fail to demonstrate when the property damage for which they seek compensation occurred or, more particularly, that it either occurred on April 22 and May 7, 2001 and therefore was preserved under paragraph 4(c), or that it occurred after the date of the Agreement. Conversely, defendants, with the exception of MRC, fail to show that all of plaintiffs' claims fall within the time period that is barred by the Agreement. MRC alone is entitled to summary judgment based on the Agreement because it is undisputed that its work was completed in November 2000, and there is no claim by plaintiffs that MRC's work caused any structural, settling or water damage that could not reasonably have been discovered as of the date of the Agreement. Paragraph 3 of the Agreement therefore contains no provision under which claims against MRC are preserved.

The court rejects Congregation's contention that paragraph 8 of the Agreement constitutes a severable agreement that is unenforceable for lack of consideration. "[A] contract is entire when by its terms, nature, and purpose, it contemplates and intends that each and all of its parts and the consideration therefor shall be common each to the other and interdependent." (First Sav. & Loan Assn. v American Home Assur., 29 NY2d 297, 299 [1971]; Dresdner Bank AG v Morse/Diesel, Inc., 115 AD2d 64, 68 [1<sup>st</sup> Dept 1986].) While paragraph 8 does not set forth plaintiffs' promises, the Agreement elsewhere contains numerous specific promises by plaintiffs to cooperate with Congregation so as to "facilitate" the completion of Congregation's

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Dr. Pape.

construction, including promises to permit Congregation to install survey benchmarks and motion detection devices on plaintiffs' property, and promises to work to resolve encroachments by plaintiffs' property on Congregation's property. (See Agreement, ¶¶ 4, 9.) These promises provide adequate consideration for Congregation's agreement in paragraph 8 to assume responsibility for any damage to plaintiffs' property caused by Congregation's construction activity.

In summary, defendants are not entitled to summary judgment based on the release paragraph in the Agreement. As plaintiffs have not eliminated triable issues of fact as to which of their claims for damages were excepted from the release and what damages were caused by defendants' construction work, plaintiffs also are not entitled to summary judgment based on the Agreement.

Nor have plaintiffs or defendants eliminated triable issues of fact as to whether defendants otherwise were negligent in the performance of their work. While it appears clear that plaintiffs' property sustained damages as a result of Congregation's construction, plaintiffs fail to submit any expert testimony that the damage was negligently caused. For example, although plaintiffs submit uncontradicted evidence that the construction caused vibrations and water infiltration, they make no showing that these conditions were the result of failure to exercise due care. The claims of the contractor-defendants that they were not negligent are similarly lacking substantiation on this record. For example, Skanska contends that it cannot be liable to plaintiffs for damages because it did not commence work at the premises until after excavation below foundation level was performed. However, Skanska acknowledges that Urban, its contractor, was still performing underground foundation work as of November 26, 2001,

when Skanska was already on the job. (See Aff. in Support of Skanska Summary Judgment Motion, ¶ 48.) Moreover, Skanska submits no evidence in support of its apparent contention that the work that it performed in erecting the superstructure did not cause damage to plaintiffs' property. The deposition testimony of plaintiff Marianne Nestor, on which Skanska relies, does not demonstrate that plaintiffs are not claiming damage after Skanska came onto the project. (See Nestor Dep. at 198, 202.) Skanska's apparent further claim that the above ground work could not have resulted in damage of the type that plaintiffs' claim is not supported by any expert evidence. Nor can Skanska and the other contracting defendants meet their burden on this motion of showing that they were not negligent "by merely pointing out gaps in the plaintiff's case." (Valdez v Aramark Servs., Inc., 23 AD3d 639 [2d Dept 2005].)

Defendant Watershed also moves for summary judgment dismissing the complaint on the ground that it was not negligent. Watershed makes an uncontradicted showing that, as Congregation's project manager, its duties were limited to such matters as solicitation of bids and proposals from consultants and coordination of consultants, and did not include supervision or control over the construction. (See e.g., Project Management Consulting Agreement [Ex. 1 to Watershed Motion for Summary Judgment]; Dep. of Les Bohm [Congregation's Vice President][Ex. C to Concise Statement of Material Facts in Support of Defendant Watershed's Renewed Motion for Summary Judgment] at 147-148.) There is therefore no basis for a finding of negligence against Watershed.

The Nestor plaintiffs' motion for summary judgment, and the branches of the motions or cross-motions of defendants Congregation, Magen, Urban, and Skanska for summary judgment dismissing the Nestor plaintiffs' complaint will accordingly be denied. As held above, MRC's

motion for summary judgment dismissing the complaint against it will be granted based on the release in the parties' July 26, 2001 Agreement. The branch of Watershed's motion for summary judgment dismissing the complaint will also be granted.

#### Defendants' Motions for Indemnification in Nestor and Pape Actions

Congregation also moves for summary judgment on its cross-claims for contractual indemnification against Magen, Skanska, Urban and MRC. Congregation has demonstrated as a matter of law that it did not supervise or control the design or construction of the project. (See Bohm Dep. at 254, 343 [Ex B to Persky Aff. in Opp. to Nestor Ps.' Motion for Summary Judgment].) As Congregation was not negligent and its liability can only be vicarious, there is no bar to enforcement of the indemnification provisions in its favor. (See e.g. Brown v Two Exch. Plaza Partners, 76 NY2d 172 [1990].) However, "[t]he right to contractual indemnification depends upon the specific language of the contract." (Lesisz v Salvation Army, 40 AD3d 1050 [2d Dept 2007][internal citations and quotations omitted]; Moss v McDonald's Corp., 34 AD3d 656, 657 [2d Dept 2006].)

Congregation's contract with Magen provides in pertinent part: "To the fullest extent permitted by law," Magen shall indemnify the Owner, the Owner's consultants, and agents "from and against claims, damages, losses and expenses \* \* \* arising out of or resulting from performance of the Work, \* \* \* but only to the extent caused in whole or in part by the negligent acts or omissions of the Contractor, a Subcontractor" or anyone employed by them. (Agreement between Owner [Congregation] and Contractor [Magen], ¶ 3.18.1 [emphasis in original][ Ex. C to Congregation Motion for Summary Judgment].) The indemnification provision thus is triggered only in the event of a finding of negligence on the part of Magen or its employees or

subcontractors. (See Moss, 34 AD3d at 657.) As Congregation has not established as a matter of law that Magen or its contractors was negligent, it is not entitled to summary judgment on its indemnification claim against Magen.

The indemnification provision in Skanska's agreement with Congregation provides, in pertinent part, that Skanska will indemnify the owner for all liability, claims or damages "arising out of or alleged to arise out of or resulting from (I) the performance or non-performance of the Work or the breach of this Agreement by the Construction Manager [Skanska]." (Construction Management Agreement between Congregation and Skanska [Ex D to Congregation Motion for Summary Judgment].)<sup>3</sup> Both Urban's and MRC's agreements (purchase orders) with Magen provide for indemnification in favor of Magen and the owner for claims or damages "arising in whole or in part and in any manner from the acts, omissions, breach or default of subcontractor [Urban or MRC] in connection with the performance of any work" by Urban or MRC. (Purchase Orders, ¶ 16 [Ex. G to Congregation Motion].) These contracts thus provide for indemnification when a claim arises out of the work of Skanska, Urban or MRC, respectively, even when those defendants have not been negligent. (See Brown, 76 NY2d at 178; Correia v Professional Data Mgt., Inc., 259 AD2d 60 [1<sup>st</sup> Dept 1999].) As held above, triable issues of fact exist as to whether the damages for which plaintiffs are seeking compensation in this action arose out of Skanska's and Urban's work. Thus, Congregation's request for summary judgment on its indemnification claims against Skanska and Urban should be denied on this record. To the

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<sup>3</sup>This provision further states that upon Congregation's acceptance of a certain price proposal of Skanska's, Skanska will indemnify Congregation for the negligent or other acts of any subcontractor. There is no claim here that this proposal was accepted or that Skanska is liable to indemnify Congregation for the acts of subcontractors.

extent that Congregation seeks summary judgment against Skanska based not on a showing that plaintiffs' damages arose out of Skanska's work but on the mere fact that plaintiffs have alleged a claim arising out of Skanska's work, Congregation fails to submit legal authority on whether such an allegation is sufficient to support liability under the indemnification clause. The court accordingly declines to determine this issue on this inadequately briefed record. In the Nestor action, Congregation's motion for summary judgment on its indemnification claim against MRC should be denied on the merits in view of this court's holding that this defendant has demonstrated that any claims against it based on its work are barred by the July 26, 2001 Agreement between plaintiffs and Congregation.

Skanska's motion for summary judgment on its contractual indemnification claim against Urban should also be denied. Under the agreement, dated October 17, 2001, between Skanska and Urban, Urban is required "[t]o the fullest extent permitted by law," to indemnify Skanska, Congregation and their agents "from and against any and all claims, suits, damages, [and] liabilities \* \* \* arising out of or in connection with or as a consequence of performance of the Work of the Subcontractor [Urban] under this Subcontract." (Agreement, ¶ 23.1 [Ex. X to Skanska Summary Judgment Motion].) The agreement thus requires Urban to indemnify Skanska even if Urban is not negligent. The agreement also expressly provides for partial indemnification in the event of any actual negligence on Skanska's part. (*Id.*) However, Skanska is not entitled to summary judgment because, as held above, triable issues of fact exist as to whether the damages that plaintiffs seek in this action were caused by the second phase of the work that Urban performed under its contract with Skanska. Skanska also has not eliminated issues of fact as to its own negligence.

As to Watershed's motion for summary judgment on its contractual indemnification claims, Watershed seeks indemnification from Magen and Skanska as a third-party beneficiary under Congregation's contracts with Magen and Skanska, both of which expressly cover the owner's consultants. However, as held above, triable issues of fact have not been eliminated as to whether Magen was negligent or as to whether the claimed damages arose out of work performed by Skanska or its subcontractors. Watershed's motion for indemnification should therefore be denied on this record. Finally, the branch of Watershed's motion to dismiss any cross-claims asserted against it by its co-defendants based on negligence should be granted in light of Watershed's uncontroverted showing that it did not supervise the construction and was not negligent.

The motions for indemnification in the Pape action are based on largely the same factual contentions and legal arguments as are raised in the Nestor motions, with one factual difference. The July 26, 2001 Agreement between Congregation and the Nestors and Dr. Pape preserves a claim for Dr. Pape for damages as a result of construction work in October 2000. (See Agreement, ¶¶ 2, 3.) Thus, all of the indemnification motions in the Pape action, including Congregation's motion against MRC, should be denied based on the existence of triable issues of fact, for the reasons stated in the decision of the Nestor motions.

It is accordingly ORDERED that the Nestor plaintiffs' motion for summary judgment is denied; and it is further

ORDERED that the motions of defendants Congregation, Urban, Magen and Skanska for summary judgment in the Nestor action are denied; and it is further

ORDERED that the motion of defendant MRC for summary judgment dismissing the

complaint in the Nestor action is granted; and it is further


ORDERED that the branch of Watershed's motion for summary judgment dismissing the complaint and all cross-claims against it in the Nestor action is granted; and it is further

ORDERED that the branch of Watershed's motion for summary judgment on its cross-claim for contractual indemnification in the Nestor action is denied; and it is further

ORDERED that the motions of defendants Congregation, Urban, Magen, MRC, Skanska and Watershed for summary judgment on their contractual indemnification claims in the Pape action are denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
October 10, 2007

  
MARCY FRIEDMAN, J.S.C.

**FILED**  
OCT 15 2007  
NEW YORK  
COUNTY CLERK'S OFFICE