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

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Eileen Millan

INDEX NO. 103029/06 ~~116995/05~~

MOTION DATE 2/1/08

- v -

MOTION SEQ. NO. 001

50 West 15th LLC

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by third-party defendant, Colgate Scaffolding & Equipment Corp. for an order pursuant to CPLR § 3211(a)(1) and (a)(7) dismissing the third party complaint and all cross claims against it together with costs for defending a frivolous pleading, is denied; and it is further

ORDERED that third-party defendant, Colgate, serve a copy of this order within 10 days; and it is further

ORDERED that all parties appear for a preliminary conference in Part 35 on June 24,2008, 2:15 p.m.

This constitutes the order and decision of the Court.

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

Dated: 5/30/08

J.S.C.

HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------x

EILEEN MILLAN,

Plaintiff,

Index # 103029/06

MEMORANDUM DECISION

-against-

50 WEST 15TH LLC, 15TH CONSTRUCTION LLC, and COURTNEY ASSOCIATES,

Defendants.

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50 WEST 15TH LLC, 15TH CONSTRUCTION LLC,

Third-Party Plaintiffs,

-against-

TP Index # 590705/07

PRECISION DRILLING, INC., UNIVERSAL PARKING LLC, ICON PARKING SYSTEMS LLC, TMO LLC, COURTNEY ASSOCIATES, MILFORD MANAGEMENT CORP., COLGATE SCAFFOLDING CORP., COLGATE SCAFFOLDING & EQUIPMENT CORP., ZURICH INSURANCE GROUP, ZURICH AMERICAN INSURANCE COMPANY, ZURICH NORTH AMERICA, PRECISION DRILLING'S ABC EXCESS INSURANCE CARRIER, and PRECISION DRILLING DEF UMBRELLA INSURANCE CARRIER,

Third-Party Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Third-party defendant, Colgate Scaffolding & Equipment Corp. a/s/a Colgate Scaffolding Corp. ("Colgate") moves for an order pursuant to CPLR § 3211(a)(1) and (a)(7), dismissing the third-party complaint and all cross claims against it, and for costs and attorneys' fees for

defending a frivolous pleading.

Factual Background

Plaintiff, Eileen Millan ("plaintiff") alleges that on January 20, 2006, she tripped and fell as she was walking on the sidewalk abutting the buildings located at 50 West 15th Street and 52 West 15th Street in Manhattan, due to a broken sidewalk condition. Plaintiff alleges that defendant 50 West 15th LLC ("50 West") owns the building at 50 West 15th Street, and controls and maintains the sidewalk in front of that building. It is alleged that 50 West retained defendant 15th Construction LLC ("15th Construction") as the general contractor to perform construction work at 50 West. Defendant Courtney Associates ("Courtney") allegedly owns the building at 52 West 15th Street and maintains and controls the sidewalk adjacent to such premises.

Subsequently, defendants 50 West and 15th Construction (collectively "third-party plaintiffs") commenced a third-party action against numerous parties. It is alleged that Milford Management ("Milford") owns or is related to Courtney, which owns the building at 52 West 15th Street. It is further alleged that Courtney, as owner of a parking garage located at 52 West 15th Street, leased the garage to either Universal Parking LLC, Icon Parking Systems, LLC, and TMO, LLC (collectively the "parking garage defendants"). Third-party plaintiffs claim that the parking garage defendants made special use of the sidewalk by driving cars and trucks over it, which caused damage to the sidewalk.[1]

The third-party complaint also alleges that Precision Drilling, Inc. ("Precision") is engaged in the business of rock coring and rock drilling, and that its use of heavy machinery in

[1] The parking garage defendants cross claimed against Colgate for contribution and common law indemnification. Such cross-claims are also the subject of Colgate's instant motion to dismiss.

the area where plaintiff fell allegedly caused the broken condition of the sidewalk.

Finally, it is alleged that Colgate erected scaffolds at the accident location, which caused the broken condition of the subject sidewalk. According to the third-party complaint, Colgate purchased insurance covering its work, inspected the sidewalk, and had actual or constructive notice of the sidewalk's defective or dangerous condition.

Instant Motion

In support of dismissal of the third-party complaint, Colgate's President, Peter O'Farrell ("O'Farrell") submits an affidavit in which he states that Milford contracted with Colgate for the rental of a sidewalk bridge (the "Sidewalk Bridge") at 55 West 14th Street[2] (the "rental contract"), and that the rental contract is the only relationship that Colgate has with this location. Colgate argues that it is immediately apparent from such rental contract that Colgate is not a "construction contractor," with custody and control over a construction site, performing "construction work," as the third-party complaint alleges. Colgate contends that it is an equipment supplier that merely furnished a temporary structure which sits on the sidewalk, the purpose of which is to provide overhead protection from falling debris. The Sidewalk Bridge, which was constructed pursuant to industry standard, was manually constructed from component pieces, which are carried onto the sidewalk by its workers and set up by hand. This process does not damage the sidewalks.

O'Farrell further attests that Colgate is not in the masonry business, and thus, has never performed any concrete work on sidewalks. Further, Colgate has never drilled a hole or broken a sidewalk in its entire history. In addition, Colgate does not drive any vehicles on the sidewalks

[2] The Sidewalk Bridge extends from 55 West 14th Street to 52 West 15th Street.

or place any heavy equipment on sidewalks. And, O'Farrell states, it is physically impossible for a Sidewalk Bridge to break up, drill into, or create a hole in a sidewalk. Finally, there is no reason for Colgate to deliberately break up or drill a hole in the subject sidewalk.

Furthermore, the allegations that Colgate inspected the sidewalk and had actual and constructive notice of a defective condition are misplaced. If nothing else, the allegations of the third-party complaint establish that Colgate is not the owner of the sidewalk or the building adjacent to it. Consequently, once the Sidewalk Bridge is installed, Colgate is off the site, and only returns to dismantle and remove the bridge. The allegations against Colgate regarding notice of a defective sidewalk condition are legally meaningless; even if Colgate had notice of a broken sidewalk, it would have had no legal authority to repair it. Therefore, it is inconceivable that Colgate could have caused this sidewalk condition, and notwithstanding the allegations of the third-party complaint, it had no duty whatsoever to inspect, maintain, or repair this sidewalk.

Colgate contends where the allegations of the third-party complaint are inherently incredible and flatly contradicted by documentary evidence, then dismissal of that complaint pursuant to CPLR § 3211 (a)(1) and (a)(7) is warranted.

And, since the third-party complaint contains no facts to suggest that Colgate caused damage to the sidewalk, such pleading is "frivolous" under Rule 130-1.1-a(b) of the Chief Administrator, warranting the imposition of costs and attorneys' fees in favor of Colgate.

Third-Party Plaintiffs' Opposition

Third-party plaintiffs argue that the Court should disregard O'Farrell's affidavit, on grounds that it is incompetent, inadmissable as hearsay, not based on any first hand and/or personal knowledge, and does not qualify as documentary evidence to support a CPLR §

3211(a)(1) motion to dismiss. Nor does O'Farrell refute the third-party plaintiffs' allegations, so as to conclusively establish a defense as a matter of law.

In addition, the purported rental contract between Milford and Colgate and documents referencing the industry standard, fail to refute any of the allegations contained within the third-party complaint as against Colgate, which is a fundamental requirement to succeed on a motion to dismiss.

Furthermore, nothing contained in the purported rental contract establishes (1) the manner, means, or techniques used by Colgate to furnish and install the Sidewalk Bridge, (2) that Colgate complied with the purported industry standards and/or contract upon the installation, (3) that Colgate was not responsible for creating the defective condition on the sidewalk, and (4) that Colgate did not negligently or otherwise cause plaintiff's trip and fall, accident, injuries, and damages. Indeed, third-party plaintiffs allege that Colgate's scaffold was at the very place of the cracked sidewalks and where the alleged accident occurred.

Even assuming, without conceding, that the statements contained within O'Farrell's affidavit are true, the fact that Colgate has acted or performed a certain way in the past, does not establish that Colgate has acted similarly during the subject project. Moreover, the fact that thousands of scaffolds conform to the standard does not establish that the scaffolds installed and used by Colgate in this case conformed to those standards.

Colgate also failed to lay the foundation for any of the documents submitted in support of their motion or establish that any of such documents were kept in the regular course of business. None of the documents attached as exhibits to Colgate's motion were authenticated as true, accurate, and complete, as such, they are incompetent hearsay.

Colgate failed to make a *prima facie* showing entitling it to dismissal under CPLR § 3211(a)(1) because the best evidence rule and rules against hearsay render Colgate's motion fatally defective. In addition, none of the documents submitted in support of its motion conclusively establishes a defense to the asserted claims as a matter of law.

Third-party plaintiffs maintain that they have stated a legally cognizable claim for partial, if not total, indemnification from Colgate. Thus, Colgate's motion to dismiss must be denied. Moreover, Colgate's motion is premature because Colgate has not engaged in any discovery, and has not appeared for deposition. Colgate's project file(s) contain the documents necessary for third-party plaintiffs to effectively oppose this motion and additional facts may become available throughout the course of discovery. Thus, the extent and scope of Colgate's work at the subject premises are still unknown. Until such discovery has been conducted and the full scope of Colgate's work is ascertained, Colgate's motion to dismiss should be denied.

Precision's Opposition

Precision argues that O'Farrell's conclusory statement, that because Colgate was not engaged in any construction at the subject site, Colgate could not possibly be held liable for plaintiff's injuries, is insufficient. Further, O'Farrell confirms that Colgate was hired to erect scaffolding at the site of the subject accident. Colgate's assertion that its erection of the scaffolding does not constitute construction that would have caused the dangerous condition is backed only by O'Farrell's personal opinion that the scaffolding was installed properly and could not have caused any damage to the sidewalk. Finally, O'Farrell's statement that Colgate has never been held liable for damaging a sidewalk is not conclusive evidence of Colgate's nonliability.

Precision also contends that the third-party complaint sets forth that Colgate engaged in erecting scaffolding at the subject accident site, and as a result of the work performed, or due to the presence of the scaffolding at the subject site, a dangerous condition was caused to exist. These allegations support a possible claim for common law indemnification, as Colgate by its own admission, was a sub-contractor at the subject site. Further, the third-party complaint alleges that Colgate previously agreed to defend and indemnify third-party plaintiffs. Accepting these facts as true, Precision contends that a cognizable claim for contractual indemnification has also been set forth.

Furthermore, Precision argues that caselaw supports the contention that it is possible that the scaffolding at the subject site could have caused a defect in the sidewalk, upon which the plaintiff claims to have fallen.

Finally, as the third-party complaint states a valid cause of action as against Colgate, and Precision has also alleged valid cross-claims against Colgate, this action should go forward with discovery to resolve issues of fact present in this case.

Colgate's Reply to 50 West/15th Construction and Precision's Opposition

As to third-party plaintiffs, Colgate contends that by stating that "the extent and scope of Colgate's work on the premises where plaintiff was allegedly injured are still unknown," third-party plaintiffs admit that there is no factual basis for the allegation that Colgate caused the condition that injured the plaintiff. Further, the affidavit by 50 West, which says nothing more than "the plaintiff showed [him] where the accident happened," and that "this was near the property line of the adjacent building," is a party admission that Colgate did not cause the condition.

Third-party plaintiffs' alleged need for discovery also demonstrates that the third-party complaint is based on uninformed speculation. Further, third-party plaintiffs' own discovery production demonstrates that the sole witnesses to support their pleading against Colgate are the other parties to this case.

Third-party plaintiffs' argument that Colgate failed to establish that it did not create the dangerous condition is frivolous and insufficient to defeat Colgate's motion. Furthermore, Colgate relied upon the rental contract to establish the limited scope of its undertaking, and set forth the manner, means, and techniques used by Colgate to furnish and install the bridge. Such records establish the incredible nature of the allegation that Colgate broke the sidewalk.

Additionally, third-party plaintiffs' argument that Colgate's documentary evidence fails to resolve all factual issues lacks merit, as there are no facts alleged against Colgate. In any event, Colgate's motion should be granted under CPLR § 3211 (a)(7) for failure to state a cause of action. And, the cross-claims against Colgate should be dismissed as well.

Colgate argues that since O'Farrell was at the subject site during the erection of the Sidewalk Bridge and observed its installation, his affidavit may not be rendered hearsay. Furthermore, the argument that the rental contract is inadmissable hearsay misconstrues the hearsay rule, and there is nothing inadmissable or incompetent about the rental contract, which was authenticated by O'Farrell. In addition, as third-party plaintiffs have not argued that the Sidewalk Bridge was defectively designed, their objection to the Citywide Design Standard is moot.

Finally, in the event this Court dismisses the third-party complaint and grants leave to replead, such leave should be conditioned upon third-party plaintiffs filing a motion to renew,

setting forth facts indicating that Colgate caused the dangerous condition of the subject sidewalk.

As to Precision's opposition, Colgate contends that the Sidewalk Bridge is nowhere near the broken-up sidewalk. Plaintiff's deposition transcript indicates that she walking in a westward direction on West 15th Street, toward the traffic barriers when her accident occurred. Plaintiff confirmed that the sidewalk segment with the defect which caused her to trip and fall was located behind the traffic barriers. Also close-up photographs of the accident location show that the sidewalk immediately to the left of the street sign post is in a broken condition. Colgate contends that the poles which support the Sidewalk Bridge are shown to be supported by a block of wood placed on the sidewalk, and the poles supporting the Sidewalk Bridge are nowhere near the broken sidewalk segment where plaintiff's accident occurred.

Colgate also points out that the caselaw on which Precision relies is distinguishable because the photographic evidence and plaintiff's testimony clearly establish that Colgate's Sidewalk Bridge in no way caused the defect in the sidewalk where plaintiff's alleged accident occurred. Further, plaintiff identified the accident location as an area far removed from the last supporting pole of Colgate's Sidewalk Bridge, such that there is no possibility that the weight load of Colgate's Sidewalk Bridge could have caused the defect. Accordingly, Colgate's motion to dismiss pursuant to CPLR § 3211(a)(7) should be granted.

Analysis

CPLR § 3211(a)(1): Defense Founded Upon Documentary Evidence

CPLR § 3211(a)(1) permits a party to move for judgment dismissing one or more causes of action asserted against it on the ground that "a defense is founded upon documentary evidence." Where documentary evidence and undisputed facts negate or dispose of the claims in

the complaint or conclusively establishes a defense to the asserted claims as a matter of law, dismissal is warranted (*Biondi v Beekman Hill Housing Apt. Corp.*, 257 AD2d 76, 692 NYS2d 304 [1st Dept 1999]; *Kliebert v McKoan*, 228 AD2d 232, 43 NYS2d 114 [1st Dept 1996]; *Gephardt v Morgan Guaranty Trust Co. of N.Y.*, 191 AD2d 229, 594 NYS2d 248 [1st Dept 1993]; *Juliano v McEntee*, 150 AD2d 524, 541 NYS2d 232 [1st Dept 1989]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 N.E.2d 511 [1994]; *Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]; *Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001] *citing Leon v Martinez*, 84 NY2d 83, 88, *supra*; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]).

Here, Colgate relies upon its rental contract with Milford to establish that its undertaking at the subject location was limited and could not have caused the dangerous sidewalk condition. However, nothing in the rental contract eliminates the possibility that Colgate's installation of the Sidewalk Bridge was not the cause of the broken condition of the sidewalk.

In addition, Colgate provides the affidavit submitted by its own President, Peter O'Farrell. However, affidavits do not qualify as "documentary evidence" for purposes of this rule (*see Realty Investors v Bhaidaswala*, 254 AD2d 603, 679 NYS2d 179 [3rd Dept 1988]; *Kearins v Gruberg, McKay & Stone*, 2 Misc 3d 1001, 2004 WL 316521 [Supreme Court Bronx County 2004]).

Thus, neither the rental contract nor the O'Farrell affidavit establishes that Colgate did not create the defective condition of the subject sidewalk, as a matter of law, to support dismissal pursuant to CPLR § 3211 (a)(1).

Though not dispositive, *Bivona v City of New York* (198 AD2d 61, 603 NYS2d 151 [1st Dept 1993]) is instructive. In *Bivona*, the plaintiff tripped and fell on a defective sidewalk between Sixth and Seventh Avenues. Defendant York Scaffolding & Equipment ("York") had erected a sidewalk bridge at the subject location. In moving for summary judgment, York relied upon an affidavit of its vice-president, who "was not shown to have any expertise or special knowledge" as to whether "the weight of the [sidewalk] bridge, and its long presence on the site, could not have caused" the crack in the sidewalk. The Court noted that questions of fact as to whether York's erection of the sidewalk bridge at the subject location "contributed to the happening of the accident." In other words, the presence of a sidewalk bridge on a sidewalk can give rise to liabilty for injuries caused by a defect in that sidewalk.

While it may be argued that unlike the vice-president in *Bivona*, O'Farrell has sufficient personal knowledge and expertise to opine on whether the weight and construction of Colgate's Sidewalk Bridge could not have caused the defect in the subject sidewalk, Colgate has *not* moved for summary dismissal pursuant to CPLR § 3212, but has moved pursuant to CPLR § 3211(a)(1), which cannot be supported by an affidavit from a party witness.

Therefore, Colgate's motion for dismissal pursuant to CPLR §3211(a)(1) is unwarranted.

CPLR § 3211(a)(7): Dismiss for Failure to State a Cause of Action

In determining a motion to dismiss pursuant to CPLR § 3211(a)(7), the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on such a motion is not whether the party has artfully drafted the pleading, but whether deeming the

pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.,* 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR § 3026), and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). However, in those circumstances where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept 1996], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1st Dept 1996], and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]).

Furthermore, on a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7) where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether the claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar*

Projects, Inc. v Gruzen Partnership, 148 AD2d 316, 538 NYS2d 532 [1st Dept 1989]). And, affidavits submitted by a plaintiff may be considered for the limited purpose of remedying defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]; *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]).

As to the sufficiency of the third-party complaint against Colgate, the Court notes that the liability sought to be imposed upon a third-party defendant must arise from or be conditioned upon the liability asserted against the third-party plaintiff in the main action *(BBIG Realty Corp. v Ginsberg*, 111 AD2d 91, 489 NYS2d 224 [1st Dept 1985]; *Cleveland v Farber*, 46 AD2d 733, 361 NYS2d 99 [4th Dept 1974]; *Fladerer v Needleman*, 30 AD2d 371, 292 NYS2d 277 [3d Dept 1968]). "[T]he key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is 'a separate duty owed the indemnitee by the indemnitor'" (*Equitable Life Assur. Society of U.S. v Werner*, 286 AD2d 632, 730 NYS2d 329 [1st Dept 2001] *citing Raquet v Braun*, 90 NY2d 177, 183, 659 NYS2d 237 [1997] *quoting Mas v Two Bridges Assocs.*, 75 NY2d 680, 690, 555 NYS2d 669 [1990]). The duty that forms the basis for the liability arises from the principle that "every one is responsible for the consequences of his own negligence, and if another person has been compelled . . . to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him" (*Raquet v Braun, supra, citing Oceanic Steam Nav. Co. v Compania Transatlantica Espanola*, 134 NY 461, 468 [1892]; *see*, *McDermott v City of New York*, 50 NY2d 211, 216-217, 428 NYS.2d 643 [1980]).

Third-party plaintiffs' complaint asserts causes of action against Colgate sounding in common-law indemnification. A cause of action for common-law indemnification can be

sustained only if: (1) the party seeking indemnity and the party from whom indemnity is sought have breached a duty to a third person, and (2) some duty to indemnify exists between them (*Insurance Co. of State of Pennsylvania v HSBC Bank USA*, 37 AD3d 251, 829 NYS2d 511 [1st Dept 2007] *citing Rosado v Proctor & Schwartz, Inc.*, 66 N.Y.2d 21, 24, 494 NYS2d 851 [1985] *see also Cleveland v Farber*, 361 NYS2d 99 [4th Dept [1974]). Further, a claim for common law indemnification requires that the one claiming indemnification has committed no wrong and is being held liable solely "by virtue of some relationship with the tort-feasor or obligation imposed by law"(*D'Ambrosio v City of New York*, 55 NY2d 454, 461, 450 NYS2d 149 [1982]). A claim of indemnity is not sufficiently alleged solely on the basis that the claims arose out of the same set of facts; a third-party plaintiff seeking indemnity must also allege facts which show that the third-party defendant's liability rises from the liability of the third-party plaintiff to the plaintiff. Finally, a third-party complaint for indemnity should not be held insufficient where the complaint alleges facts upon the proof of some of which defendant might be primarily liable for active negligence and upon proof of others of which defendant might be held secondarily liable for passive negligence (*Traeger v Farragut Gardens No. 1*, 201 Misc 18, 107 NYS2d 525 [Supreme Court Kings County 1951]; Administrative Code, § C26-1171.0; Civil Practice Act, § 193-a).

Third-party plaintiffs allege that Colgate installed the Sidewalk Bridge on the sidewalk abutting its premises, and that the Sidewalk Bridge caused the sidewalk to become broken and defective, causing plaintiff to fall and sustain damages. Third-party plaintiffs also allege that Colgate controlled its work at the subject location, inspected the sidewalk, caused and had actual or constructive knowledge of the sidewalk's alleged defective condition, and negligently caused plaintiff's trip and fall accident and injuries. Further, third-party plaintiffs claim that in the event

they are held liable to the plaintiff for her injuries she sustained from the defective sidewalk condition, Colgate is liable to the third-party plaintiffs due to its negligence in causing the defective condition of the sidewalk.

Consequently, accepting third-party plaintiffs' facts alleged in the complaint as true and according the benefit of every favorable inference, third-party plaintiffs' complaint sufficiently states a cause of action for common-law indemnification against, *inter alia*, Colgate for negligently causing the dangerous sidewalk condition which injured the plaintiff (*see Spring Sheet Metal & Roofing Co., Inc. v Koppers Indus., Inc.*, 273 AD2d 789, 710 NYS2d 743 [4th Dept 2000] [subcontractor's complaint stated a cause of action for common-law indemnification against manufacturers of roofing materials for amount paid to settle claim of owners of mall where subcontractors installed materials]).

The rental contract and photographs submitted in support of Colgate's motion to dismiss are insufficient to support dismissal under CPLR § 3211(a)(7), as nothing in the rental contract or photographs establish that Colgate did not cause the broken sidewalk condition upon their installation of the Sidewalk Bridge. Consequently, Colgate, in its pre-answer motion to dismiss, has not met the burden to prevail under CPLR § 3211(a)(7), showing that no viable cause of action exists against it.

In light of the above, third-party defendant's request for attorneys' fees pursuant to Rule 130-1.1-a(b) lacks merit, and is therefore, denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by third-party defendant, Colgate Scaffolding & Equipment Corp. for an order pursuant to CPLR § 3211(a)(1) and (a)(7) dismissing the third party complaint and all cross claims against it together with costs for defending a frivolous pleading, is denied; and it is further

ORDERED that third-party defendant, Colgate, serve a copy of this order within 10 days; and it is further

ORDERED that all parties appear for a preliminary conference in Part 35 on June 24,2008, 2:15 p.m.

This constitutes the order and decision of the Court.

Dated: May 30, 2008

Hon. Carol Robinson Edmead, J.S.C.