

Hughey v RHM-88, LLC
2009 NY Slip Op 30829(U)
April 13, 2009
Supreme Court, New York County
Docket Number: 115793/04
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **JUSTICE DORIS LING-COHAN**

PART 36

Justice

Index Number : 115793/2004

HUGHEY, KEITH

vs

UNITED NATIONS DEVELOPMENT

Sequence Number : 006

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his motion to/for Summary judgment

PAPERS NUMBERED

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

1, 2

Answering Affidavits -- Exhibits _____

3, 4, 5

Replying Affidavits _____

6

Cross-Motion: Yes No

(for summary judgment)

Upon the foregoing papers, it is ordered that this motion ^{by Cushman & Wakefield, Inc.} is decided in accordance with the attached memorandum ~~and~~ decision.

(consolidated for disposition with motion Seq No. 007, 008, 009 + 010)

FILED

APR 15 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/13/09

JUSTICE DORIS LING-COHAN S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

----- X
KEITH HUGHEY and ZIPPORIA HUGHEY,

Plaintiffs,

Index No. 115793/04

- against-

RHM-88, LLC, and PRITCHARD INDUSTRIES,
INC., ONE UNITED NATIONS PLAZA
CONDOMINIUM, "JOHN DOE #1," "JOHN
DOE #2," "JOHN DOE #4," and "JOHN
DOE #5,"

DECISION AND ORDER

Motion Seq. No.:

006, 007, 008, 009
& 010

Defendants.

----- X
RHM-88, LLC,

Third-Party Plaintiff,

Third-Party
Index No. 590043/06

-against-

UNITED NATIONS DEVELOPMENT CORPORATION,

Third-Party Defendant.

-----X
ONE UNITED NATIONS PLAZA CONDOMINIUM,

Second Third-Party Plaintiff,

Second
Third-Party
Index No. 591098/06

-against-

CUSHMAN & WAKEFIELD, INC.,

Second Third-Party Defendant.

-----X
UNITED NATIONS DEVELOPMENT CORPORATION,

Fourth-Party Plaintiff,

Fourth-Party
Index No. 590355/06

-against-

CUSHMAN & WAKEFIELD, INC.,

Fourth-Party Defendant.

-----X
UNITED NATIONS DEVELOPMENT CORPORATION,

Second Fourth-Party Plaintiff,

FILED
APR 15 2009
COUNTY CLERK'S OFFICE
NEW YORK

-against-

PRITCHARD INDUSTRIES, INC.,

Second Fourth-Party Defendant,

-----X

DORIS LING-COHAN, J.S.C.:

Plaintiffs commenced this personal injury action, seeking damages for personal injuries sustained by plaintiff Keith Hughey (Hughey) allegedly resulting from a slip and fall on Sunday, January 18, 2004, on the sidewalk in front of the Millenium Hotel at One United Nations Plaza (One UNP) on East 44th Street in Manhattan.

Hughey testified at his deposition that his shift as an engineer employed by defendant Cushman & Wakefield, Inc. (C & W) at One UNP began at 11:30 P.M. C & W performed services at One, and Two United Nations Plaza, pursuant to separate contracts with each of defendants, RHM-88 LLC (RHM-88), an owner of the Millenium Hotel, One United Nations Plaza Condominium (UNPC), and One United Nations Development Corp. (UNDC).

According to his deposition testimony, at 11:15 P.M., Hughey was speaking with the doorman at the Millenium Hotel, when they heard a woman fall on the sidewalk approximately 20 feet away. Hughey testified that when he went to help the woman, he slipped and fell on the ice, hit his head, and lost consciousness.

According to the bill of particulars, as a result of the

fall, Hughey suffered head injury, post-concussion syndrome, brainstem contusion, post-traumatic vision loss, light sensitivity, soft tissue injury, and pain.

The ice was allegedly created as a result of water falling onto the sidewalk from a leaking gutter on the glass canopy attached to the facade of One UNP. The canopy extends out from the building to cover almost the entire sidewalk, and extends the length of the sidewalk, providing shelter between the hotel lobby entrance and a restaurant entrance to the east.

Plaintiff claims that the gutter is in violation of City ordinances because it is not directly connected to the sewer system. UNPC, the condominium association responsible for the common elements, including the canopy and the sidewalk, denies that the gutter is in violation of any City ordinances.

The City of New York (the City), which is not a party to this action, owns the land under both One UNP and under the sidewalk where the ice formed. In 1972, the City leased both the "sites and the buildings to be built thereon" (see ex. J to RHM-88 LLC moving aff.) at One, Two, and Three United Nations Plaza to UNDC, a public benefit corporation, for a period of not less than 99 years.

In 1997, the City agreed with UNDC to amend its lease and convert One UNP into a condominium, defendant UNPC, which initially consisted of office space and residential units. The City carved out the condominium space from the UNDC lease, sold

the residential units to defendant RHM-88 and leased the condominium office space to UNDC.

The condominium declaration did not affect UNDC's leasehold interest in Two and Three UN Plaza. Part of Two UN Plaza is occupied by the Millenium Hotel.

Under the terms of the 1997 lease amendment, the City "irrevocably designate[d] UNDC to be and act on behalf of the City, solely in the City's proprietary capacity, as the City's attorney-in-fact, coupled with an interest, for the purposes of electing the members of the board of managers of UNPC (the board of managers) and for representing the City at all Unit Owner meetings..." (see ex. I to C & W moving aff. ¶ 5).

Pursuant to Article III of the Declaration of Condominium, captioned "DEFINITIONS", (ex. D to UNPC moving aff., at 4-5), the "Common Elements" (*id.* at ¶20) of One UNP include the "related canopies" (*id.* at ¶20(c)(i)) of the wall of the building, as well as "the [l]and, and any appurtenances" (*id.* at ¶ 20(a)), and "to the extent not specifically identified as part of the Hotel Unit or as part of the Office Unit, all other parts of the Property the common use of which is necessary or convenient for the existence, maintenance or safe operation of the Property" (*id.* at ¶20(e)). The foregoing definition encompasses the sidewalk where the ice allegedly accumulated as part of the common elements of One UNP.

Article VI of the Declaration of Condominium, captioned,

"OBLIGATIONS OF BOARD OF MANAGERS AND UNIT OWNERS" provides as pertinent: "the Board of Managers shall ... operate, keep, clean and maintain and make Repairs...to, the Common Elements to maintain the same in a condition appropriate to a first-class building." (id. at 13).

In 1997, the board of managers entered into a contract with C & W, which, in section 2.1 (c), required C & W to, *inter alia*, "maintain at the Board's expense, the Building I Common Elements in clean and first-class order ... free of snow and ice at levels customarily maintained in first class buildings" (Exh. E, UNPC moving aff., at 11). It also required in subdivisions (d) and (e) that C & W "shall review and submit timely recommendations to the Board in respect of, and schedule and coordinate, all work in the Building I Common Elements ... [and] negotiate and enter into service contracts ... [for] the maintenance and operation of the Building I Common Elements." Such contract was in effect at the time of plaintiff's alleged injuries.

Also in 1997, UNDC entered an "Amended and Restated Property Management Agreement" with C & W, that expressly excluded any obligation owed by C & W to UNDC to maintain the common elements of One UNP. (Exh. L, at 4, C & W moving aff).

RHM-88 also entered an agreement entitled, "Hotel Services Agreement," with C & W in 1997 to provide services in the hotel (ex. B to RHM-88 moving aff.). That contract primarily involves HVAC services, and does not require C & W to maintain the canopy

or the sidewalk (ex. B to RHM-88 moving aff., Scope of Services).

On June 1, 2001, UNPC entered a contract with defendant Pritchard Industries, Inc. (Pritchard), entitled, "Agreement for Cleaning Services for One United Nations Plaza (Common Area)" (ex. F to UNPC moving aff.). Under that agreement, Pritchard's sole contractual responsibility with respect to the glass canopy was to clean the underneath portion and exterior overhang every three months. Thus, Pritchard was not contractually obligated to repair the allegedly leaking gutter on the glass canopy.

With respect to the sidewalk, however, the Cleaning Specifications for One UNP, annexed as ex. I to the agreement between Pritchard and UNPC, require Pritchard, in a section captioned "Sidewalks," to "[s]weep and hose all sidewalks daily, weather permitting," and "[r]emove snow or ice as soon as possible on all sidewalks ...". That agreement also obligates Pritchard, in the cleaning Specifications, under the caption, "Staffing and Duties of Day Porters," to "[h]ose sidewalks 5 days per week, Monday through Friday, weather permitting," and "[s]weep sidewalks ... daily and scrub and steam clean when necessary" (ex. G to Pritchard Mov. Aff., ex. I to contract).

Part 2 of the Cleaning specifications provides:

[Pritchard] shall furnish all labor and materials necessary to keep the Building and adjacent sidewalk areas in an optimum condition of neatness and cleanliness at all times. *The Specifications are intended as [Pritchard's] minimum obligations* rather than a limitation on its duty to maintain the Building and sidewalk in such condition.

(Ex. B to Pritchard moving aff.) (emphasis supplied).

The initial complaint named UNDC as a defendant. By order filed November 22, 2005, Hon. Marilyn Shafer granted UNDC's motion to dismiss the complaint as against UNDC for failure to file a notice of claim, but held that the crossclaims remain.

The amended complaint alleges causes of action against RHM-88, Pritchard Industries, UNPC and John Does 1-5, representing the individual members of UNPC's board of managers.

At the time that the initial complaint was filed, there was an issue as to whether the incident occurred in front of One or Two United Nations Plaza. That issue has now been resolved, and it is not disputed that the incident occurred in front of One UNP. As set forth above, the effect of the condominium declaration with respect to One UNP is to carve out the condominium from UNDC's leasehold interest in One UNP.

As a result of their respective occupancies as tenants of One UNP, neither UNDC, nor RHM-88, in light of the governing agreements, has any direct liability for maintenance of either the canopy or the sidewalk. That responsibility is placed on UNPC and its board of managers by the condominium declaration in the first instance for the maintenance of the common elements, including the sidewalk. C & W is contractually obligated to maintain the canopy and the sidewalks, and Pritchard is contractually obligated to UNPC to clean the canopies and keep the sidewalk free of snow and ice.

RHM-88 has filed a third-party-complaint against UNDC seeking common law and contractual indemnification. It also has asserted a cross-claim against UNDC for contribution and indemnification.

UNDC has filed a fourth-party-complaint against C & W seeking common law and contractual indemnification. It also has served a second fourth-party complaint against Pritchard, seeking common law as well as contractual indemnification.

UNPC has filed a second third-party action against C & W seeking contribution and common law, as well as contractual indemnification.

In motion sequence 006, C & W seeks, *inter alia*, an order requiring Pritchard to indemnify it on both common law, and contractual grounds. C & W seeks contractual indemnification from Pritchard based upon the contract between Pritchard and UNPC, which lists C & W as an indemnitee, as the board of manager's agent. The portion of the motion which seeks contractual indemnification from Pritchard is granted to the extent of granting C & W a conditional order of contractual indemnity against Pritchard.

In paragraph 15 of the contract between Pritchard and UNPC, Pritchard expressly agreed to indemnify C & W as the agent of the board of managers, as follows:

to the fullest extent permitted by law and [at] its own cost and expense, indemnify and defend the Condominium, owners of the condominium units [RHM-88 and UNDC], the Condominium's Board of Managers and Agent, their

officers, directors, agents and employees (collectively, the 'indemnitees') and save them harmless from and against any and all claims, damages, losses, liabilities, suits, actions and all expenses (including attorney's fees and disbursements) arising out of or in connection with [Pritchard's] performance of the work.

(Ex. G to Pritchard moving aff., ¶15).

A party is entitled to summary judgment on its claim for common law indemnification where it has demonstrated as a matter of law that it is free from active negligence and another party had direct control over the work giving rise to the injury (see *Rodriguez v Metropolitan Life Ins. Co.*, 234 AD2d 156 [1st Dept 1996]). Here, however, C & W had a duty to maintain the canopy and its leaking gutter; therefore, until a factual determination is made as to whether C & W's failure to maintain the canopy and the allegedly leaking gutter proximately caused Hughey's injury, C & W cannot establish as a matter of law that it is free from active negligence.

A party may not obtain contractual indemnification for its own negligence (General Obligations Law § 5-322.1¹), but it may

¹ General Obligations Law § 5.322.1 (1) provides, in relevant part, that:

[a] covenant, promise, agreement or understanding in, or in connection with . . . a contract or agreement relative to the construction, alteration, repair or maintenance of a building . . . purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence

contractually obtain partial indemnification for the damages found to be attributable due to another's negligence (see *Brooks v Judlau Contracting, Inc.*, 11 NY3d 204, 207 [2008]). Therefore, C & W may obtain a conditional order of contractual indemnification, even if that indemnification is only partial (*Brooks v. Judlau Contracting, Inc.*, 11 NY3d 204, 211 [2008]). C & W is therefore entitled to a conditional order on its motion for contractual indemnification by Pritchard; ultimate relief will depend upon a determination of whether, or to what extent, either Pritchard or C & W was negligent.

C & W's motion for common law indemnification against Pritchard is denied because an employer may not obtain common law indemnification from a third party where its employee has not suffered a "grave injury" (Workers' Compensation Law § 11).

In motion sequence 007, RHM-88 moves for summary judgment dismissing the amended complaint as against it, and awarding it contractual and common law indemnification against Pritchard. The motion is granted dismissing the complaint as against RHM-88; the motion seeking indemnification is therefore deemed moot.

The relevant agreements excluded any obligation on the part of RHM-88 to maintain the Building I Common Elements. As a mere condominium owner, RHM-88 owed no duty to plaintiff. "The individual unit owners could not be held liable for plaintiffs'

be in whole or in part, is against public policy and is void and unenforceable.

injuries resulting from a defect in a common element of the condominium that was under the exclusive control of the condominium's board of managers" (*Pekelnaya v Allyn*, 25 AD3d 111 [1st Dept 2005]). "Where control is lacking ... liability is not imposed" (*Pekelnaya v Allyn*, 25 AD3d 111, 119 [1st Dept 2005]). Thus, the complaint as against RHM-88 is dismissed and therefore the third-party action commenced by RHM-88, is also dismissed as moot.

In motion sequence 008, Pritchard moves for summary judgment dismissing the complaint against it, and dismissing all claims and cross-claims. The motion is granted to the extent of dismissing the complaint as against Pritchard, and otherwise denied; the crossclaims remain.

Pritchard owes no duty directly to Hughey, who was not a party to Pritchard's contract with UNPC (*see Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 139 [2002]). *Espinal* stated three exceptions that have evolved over time to the general rule that a contracting party assumes no liability to a person who is not a party to the contract:

(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launche[s] a force or instrument of harm" [citation omitted]; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties [citation omitted] and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely [citation omitted]

(*id.* at 140.).

Only the third exception is arguably applicable in this case. However, because the uncontroverted evidence shows that Pritchard was only required to have porters on call on weekends, the contract between UNPC and Pritchard was not sufficiently "comprehensive and exclusive ... that it entirely displaced [UNPC] in carrying out maintenance duties (id.)."

The crossclaims by Pritchard for contractual and common law indemnification, however, raise factual issues as to whether Pritchard had constructive notice of the allegedly recurring ice condition, and whether it was negligent; thus, summary judgment on the cross-claims is denied.

Pritchard argues that its contractual obligations with respect to removal of snow and ice required it to have porters on premises only between the hours of 7:00 A.M. and 12:00 A.M., Monday through Friday, and on call weekends. The subject accident occurred on a Sunday evening.

In support of this contention, Pritchard submits the affidavit of Thomas Calderone (ex. I to Pritchard moving aff.), who states, that "pursuant to contract," both the day and night shift Pritchard employees work Monday through Friday.

While Pritchard is correct that the contract requires its porters to be on duty Monday through Friday, this is only the "minimum obligation," as set forth in the contract provision cited above, and there is no provision limiting the time in which Pritchard must keep the sidewalks free of snow and ice under the

section of the cleaning specifications headed "Sidewalks." Thus, Pritchard has not established its entitlement to judgment as a matter of law on the issue of whether it breached its contractual duty to UNPC to "remove snow or ice as soon as possible on all sidewalks" (Exh. G to Pritchard moving aff at 5).

Pritchard argues that it had no notice of the ice condition at One UNP prior to January 18, 2004 (the date of the accident). Plaintiff contends that Pritchard had notice because of an earlier incident, in January 2002, involving a slip and fall on ice at the same location. That incident resulted in litigation in which Pritchard was impleaded. Pritchard responds that the impleader occurred after the incident at bar, and thus did not constitute actual notice. There is no other evidence presented of Pritchard's actual notice of the icy condition.

Plaintiff argues that the ice condition was a recurring condition that had existed since the inception of the structure, and that a question of fact is presented as to whether Pritchard either had actual notice of the condition, or is to be charged with constructive notice. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Gonzalez v American Oil Co.*, 42 AD3d 253 [1st Dept 2007]) (holding that evidence of the existence of a large patch of ice in front

of store entrance for a considerable period prior to accident was sufficient to establish factual issue).

Hughey testified at his deposition that he had observed water leaking from the gutter onto the sidewalk approximately 60 times in his 13 years of employment by C & W, and that he had reported the leak to his supervisor, Ray Moore. Hughey testified further that no effort had been made to fix the leaky gutter, and that ice accumulated on the sidewalk approximately 12 times a year. A question of fact is presented whether Pritchard had constructive notice of the allegedly recurring ice condition, resulting from the failure to repair the leaky gutter, especially in light of its contractual obligation to "sweep sidewalks daily." If the ice buildup was a recurring condition, then a factual issue is presented whether Pritchard should have discovered it in the course of its weekday sweeping of the sidewalks.

Further, plaintiff has submitted detailed evidence that Pritchard was under a contractual duty to remove snow and ice as soon as possible, and to sweep and hose the sidewalks daily, Monday through Friday. As quoted above, the contract with UNPC required Pritchard not only to remove all snow and ice as quickly as possible, but also to "furnish all labor and materials necessary to keep the Building and adjacent sidewalk areas in an optimum condition... at all times..." (Exh. G to Pritchard moving aff). As there are factual issues, the claims for

indemnification asserted by UNPC and C & W against Pritchard are not dismissed.

In motion sequence 009, UNPC moves for summary judgment (CPLR § 3212) seeking an order dismissing the complaint and all counterclaims and crossclaims against it, on the ground that plaintiffs failed to file a timely notice of claim (General Municipal Law § 50-e and 50-i), or, in the alternative, granting common law and contractual indemnification against C & W and Pritchard.

UNPC's motion is denied with respect to the dismissal of the complaint for failure to file a notice of claim, and granted in part with respect to indemnification. UNPC argues that it is "at least in part, synonymous with the City of New York" (UNPC moving aff. at 9). It also asserts that the UNPC board of managers is not a party to this action. Plaintiff states that the "John Doe" defendants 1-5 are intended to represent the individual members of the UNPC board of managers.

The City is apparently an owner of unsold shares with respect to the office units in the condominium and leased those units to UNPC; RHM-88 apparently owns the shares allocated to the remaining units. There is no proprietary lease in the parties' submissions for any of the units. As a mere owner of unsold shares and lessor, the City is not synonymous with UNPC and its board of managers. There is no basis in the record to hold that UNPC is a public benefit corporation as the General Construction

Law § 66 defines a "public benefit corporation" as "a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or to the people thereof." Indeed, it does not appear that UNPC is even a corporation. Therefore, the notice of claim requirement of the General Municipal Law does not apply to UNPC. Nor has UNPC provided a case which supports its novel claim that it is synonymous with the City of New York.

UNPC's summary judgment motion is granted, however, to the extent that it seeks conditional orders of contractual indemnification against C & W and Pritchard.

In section 6.3 of Article VI of the Property Management Contract, between C & W and UNPC, C & W agreed to indemnify the board of managers as follows:

[i]ndemnification of the Board.

Except to the extent covered by insurance under this Agreement, [C & W] shall reimburse the Board for any amounts which the Board is required to pay either in connection with, or as an expense in defense of, any civil action or proceeding instituted or maintained against the Board ... due to ... claims or injuries to person or property by reason of ... the management and operation of the Building I Common Elements caused or occasioned by negligence or willful misconduct on the part of [C & W].

(Ex. K to C & W moving aff.).

In section 6.3 of Article VI of the Property Management Contract, between UNPC and C & W, UNPC agreed to indemnify C & W as follows, as pertinent:

[I]ndemnification of Manager [C & W].

Except as provided in Section 6.3 and except to the extent covered by insurance under this Agreement, the Board shall reimburse [C & W] for any amounts which [C & W] is required to pay either in connection with, or as an expense in defense of, any civil action or proceeding instituted or maintained against [C & W] or the Board and C & W jointly or severally due to (i) damages or injuries to person or property by reason of any cause whatsoever in and about the Building I Common Elements when [C & W] is carrying out the provisions of this Agreement or acting under the express or implied directions of the Board, (ii) the condition or use of the Building I Common Elements, or (iii) acts or omissions of employees of the Board

(*Id.*)

In opposition to the motion, C & W argues that the language, "except to the extent covered by insurance," means that C & W is only liable for indemnification beyond the limits of UNPC's general liability insurance, on which UNPC was required to list C & W as an additional insured.

Paragraph 6.1 of the Property Management agreement between C & W and UNPC provides:

Insurance to be Provided by the Board and Manager
The Board agrees, at its expense, to provide and maintain insurance policies in accordance with the provisions of the Condominium Declaration. Such policies shall name Cushman & Wakefield and Cushman & Wakefield Maintenance Corporation as additional insureds.

(Ex. K to C & W moving aff.).

Article VI of the by-laws of UNPC, which are part of the Condominium Declaration, provides, as pertinent:

[s]ection 1. Insurance Requirements
The board of managers shall obtain and maintain ... commercial general liability coverage ... for injury or damage to persons or property in or upon the Property,

including the sidewalks.

(Ex. O to C & W moving aff.)

UNPC concedes that C & W is not a named insured on its general liability insurance, but contends that this policy would not, in any event, cover C & W for its own negligence because C & W is an independent contractor.

UNPC submits the affidavit of Daniel Smyrl (ex. B to UNPC aff. in opp. to C & W motion), Vice-President of Underwriting for Admiral Insurance Company, which issued its general liability policy without listing C & W as an additional insured. Mr. Smyrna asserts that C & W would not have been covered for Hughey's claim even if it had been named as an additional insured, because coverage for an additional insured only pertains to derivative liability arising from the acts of the named insured; he asserts that it would not cover the negligence of the additional insured.

C & W's allegations that UNPC breached its duty to name it as an additional insured under its liability policy is in essence a defense/claim of failure to procure insurance; thus, if established, C & W may, if appropriate, recover any damages found to be attributable to C & W from UNPC for failure to procure insurance (see *Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 114-115 [2001]; *Kinney v G.W. Lisk Co., Inc.*, 76 NY2d 215, 218 [2001]).

UNPC's motion for a conditional order of contractual indemnification from Pritchard pursuant to Paragraph 16 of its

contract with UNPC is granted. Paragraph 16 of the agreement for cleaning services between UNPC and Pritchard requires Pritchard to "obtain and maintain" four listed categories of insurance, including worker's compensation, and general comprehensive liability insurance, and list the indemnities, including UNPC, as additional insureds on those policies.

UNPC's motion for common law indemnification from Pritchard is denied pending a determination of the respective apportionment of negligence, if any, to UNPC and Pritchard. While UNPC has arguably established that it was not actively and directly negligent, the alleged failure to maintain the leaking gutter on the canopy was delegated to UNPC's agent, C & W. As C & W's principal, UNPC may still be held negligent. This bars a conditional order of common law indemnification at this stage of the proceedings.

With respect to UNPC's claim for common law indemnification against C & W, the motion is denied pursuant to Worker's Compensation Law ("WCL") § 11, which provides, as pertinent:

[a]n 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."

WCL § 11 also provides:

the terms "indemnity" and "contribution" shall not include a claim or cause of action for contribution or indemnification based upon a

provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered

(*id.*).

Therefore, UNPC's motion summary judgment on its claim for contractual indemnification against C & W is granted; UNPC is entitled to a conditional order of contractual indemnification against C & W.

In motion sequence 010, UNDC moves for summary judgment dismissing the third-party complaint of RHM-88, and the counterclaims of C & W and Pritchard. The motion of UNDC is granted in its entirety. With respect to RHM-88, as the claims asserted against RHM-88 in the complaint have been dismissed, the third-party action is rendered moot and therefore dismissed.

Moreover, as UNDC is a mere tenant of One UNP, it has no contractual duties with respect to One UNP, and no liability, either direct or contractual, for the maintenance of the canopy or the removal of ice from the sidewalk in front of One UNP. Thus, the counterclaims of C & W and Pritchard, are dismissed, as are the two fourth party actions.

Accordingly, it is

ORDERED that, motion sequence 006, by Cushman & Wakefield's for summary judgment dismissing the second third-party complaint, brought by second-third party plaintiff United Nations Plaza Condominium and dismissing the fourth party complaint by fourth-

party plaintiff United Nations Development Corp., and dismissing all crossclaims, is granted to the extent of dismissing the crossclaims filed by RHM-88, awarding it conditional orders of indemnification against Pritchard; and it is

ORDERED that, motion sequence 007, by RHM-88 LLC for summary judgment dismissing the complaint and all cross-claims as against it is granted; and it is

ORDERED that, motion sequence 008, by Pritchard Industries, Inc. for summary judgment dismissing the complaint and all counterclaims and cross-claims as against it, is granted to the extent of dismissing the complaint as against it, and awarding it a conditional order of indemnification against C & W; the cross-claims remain, and the motion is otherwise denied; and it is

ORDERED that, motion sequence 009, by United Nations Plaza Condominium's motion for summary judgment dismissing the complaint against it on the ground that no notice of claim was filed, and dismissing all counterclaims and cross-claims as against it, is granted, only to the extent of awarding UNPC conditional orders of contractual indemnification against Pritchard and C & W, and otherwise denied; and it is

ORDERED, that, motion sequence 010, by United Nations Development Corp. for summary judgment dismissing the third-party complaint by RHM-88 and the counterclaims of C & W and Pritchard as against it, is granted, with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and
it is further

ORDERED that within 30 days of entry of this order, defendant
RHM-88 shall serve a copy upon all parties with notice of entry.

Dated: April 13, 2009


JUSTICE DORIS LING-COHAN
Hon. Doris Ling-Cohan, J. S. C.

J:\Summary Judgment\hughey.rhm.wpd

FILED
APR 15 2009
COUNTY CLERK'S OFFICE
NEW YORK