

Diop v Madison Immobilier LLC

2009 NY Slip Op 31423(U)

June 26, 2009

Supreme Court, New York County

Docket Number: 117945/2006

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK
J.S.C. Justice

PART 2

Drop
Madison Immoblier LLC

INDEX NO. 11945/06
MOTION DATE _____
MOTION SEQ. NO. 02
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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
JUN 30 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/26/09

Luy
LOUIS B. YORK J.S.C.

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
COUNTY OF NEW YORK: PART 2

-----x
PAPA DIOP and AMY DIOP

Plaintiffs, Index #117945/2006

-against-

MADISON IMMOBILIER LLC, YOHALEM
GILLMAN & COMPANY, LLP, ROBERTO CAVALLI,
INC., and ROBERTO CAVALLI U.S.A., INC.,

Defendants.

-----x
MADISON IMMOBILIER, LLC,

Third Party Plaintiff,

-against-

RC MADISON CORP.,

Third Party Defendant.
-----x

FILED
JUN 30 2009
COUNTY CLERK'S OFFICE
NEW YORK

YORK, J.:

Motions 002 and 004 are hereby consolidated for disposition and are decided in accordance with this memorandum decision.

In this negligence action, in which it is claimed that on a snowy day plaintiff, Papa Diop ("Diop"), fractured his ankle and tibia when he slipped on the sidewalk adjacent to a Roberto Cavalli store ("the store"), which was located in a mixed commercial and residential building owned by defendant/third-party plaintiff, Madison Immobilier LLC ("Madison"), Madison

moves (motion 004) for an order granting it summary judgment dismissing the first-party complaint and any cross claims and granting it summary judgment on its third-party complaint against third-party defendant, RC Madison Corp. ("RC"), the lessee of the part of the building in which the store was located. RC moves (motion 002) for an order granting it summary judgment dismissing the third party complaint on the ground that it was not negligent and therefore owed no duty to Madison to indemnify or defend it.

Background

In November 1987, Madison's predecessor in interest, Madison Immobilier, N.V., entered into a management agreement with the Garth Organization, Ltd., whereby Garth was appointed the sole and exclusive renting and managing agent of the premises in issue, which is a five-story building located on the corner of Madison Avenue and East 63rd Street in Manhattan and bears at least two addresses, one 711 Madison Avenue for the store, and another on 63rd Street for the residential portion of the premises which has its entryway on that street. Also on 63rd Street, east of the residential entrance, was a ground floor restaurant which leased part of the building. Diop was employed by the restaurant. The store, which consists of ground floor and second floor mezzanine retail space, as well as storage space in the basement, is on the corner on Madison and 63rd Street, and has windows on both streets, but its sole entryway is on Madison

Avenue.

Madison became the building's owner in July 1999. Earlier that year its predecessor in interest entered into a lease with RC. Pursuant to that document, the leased premises consisted of portions of the first, second and basement floors, as indicated in a diagram attached to the lease as exhibit "A." The lease provides that the "[t]enant shall ... take good care of the demised premises ... and the sidewalks adjacent thereto, and ... make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements, fire or other casualty excepted" (Lease ¶ 4), and that "if the demised premises are situated on the street floor, Tenant shall, at Tenant's own expense, make all repairs and replacements to the sidewalks and curbs adjacent thereto, and keep said sidewalks and curbs free from snow, ice, dirt and rubbish" (*Id.* at ¶ 30).

The lease requires the tenant to maintain general liability insurance on behalf of the landlord and the tenant "against claims for bodily injury, death or property damage occurring in or upon the demised premises." *Id.* at ¶ 8. The lease also recites that

Tenant shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which Owner

shall not be reimbursed by insurance, including reasonable attorneys' fees, paid suffered or incurred as a result of any breach by Tenant, tenant's agents, contractors, employees, invitees or licensees, of any covenant or condition of this lease, or the carelessness, negligence or improper conduct of the Tenant's agents, contractors, employees, invitees or licensees. *Ibid.*

In addition the lease recites that "[i]n case any action or proceeding is brought against Owner by reason of any such claim [evidently referring to "claims for bodily injury, death or property damage occurring in or upon the demised premises"] the Tenant, upon written notice from Owner, will, at Tenant's expense, resist or defend such action or proceeding by Counsel, approved by Owner in writing, such approval not to be unreasonably withheld." *Ibid.*

On the evening of December 4, 2003, hearing that a snow storm was anticipated, the store's security guard, Fabian Olguin, and some coworkers applied salt to the sidewalks bordering the store. The store's assistant manager, Michelle Jean Pierre, who worked for RC testified that this was the store's usual practice, and that the staff would in the event of an anticipated snowstorm arrive at about 8:30 in the morning to shovel. The next morning, beginning at about 8:30, Olguin, Lono Djogov, the store's stock

associate, and Pierluigi Abate, the store's manager, both of whom also were employed by Art Fashion Corporation, began taking turns shoveling the many inches of snow that had fallen before they arrived.

According to Abate, at the time he arrived, neither the Madison Avenue nor the 63rd Street sides of the store had been shoveled. The store kept two shovels and salt in the basement. The shovels and salt were purchased "by or on behalf of the store." The store did not stock sand or other abrasive material. The men took turns at ten to fifteen minute intervals shoveling around the store's perimeter because it was too cold to continuously shovel. The person who was not shoveling was salting the sidewalk. When Jean Pierre arrived, she helped salt the areas that had been shoveled. Jean Pierre was equivocal as to whether there was ice on the sidewalk at that time, but Olguin testified that there was no ice that he had cleared that morning. The store opened at its usual opening time of 10:00 a.m., and the snow removal efforts ceased then or within about ten minutes. The entire time that the store's personnel were shoveling and salting that morning, it continued to snow lightly.

At about 12 noon or 1:00 p.m. the sidewalks were again covered with snow because it had begun snowing hard. Abate testified that, although he probably directed a store employee to salt again after 10:30 a.m., he did not direct anyone at the

store to shovel again that day before Diop's accident, nor did he have any recollection of anyone having done so. *Id.* at 50-51.

Jean Pierre testified (ebt at 127-128) that no one shoveled again or swept the sidewalk after the store opened and before Diop fell, but that Djogov applied salt after the store opened (*Id.* at 22). Olguin, however, testified (ebt at 17) that he shoveled and salted the sidewalks again at around 12:30 or 1:00 p.m., but that by 2:30 the areas he had shoveled were again covered with snow (*Id.* at 30-31). He further testified that other than the company for which he worked, no other companies were involved in snow clearance and salting in front of the store that day. Djogov, who was deposed, had virtually no recollection of the day.

Around 2:30-3:00 p.m. that day, Diop was walking west on 63rd Street toward Madison Avenue, somewhere either at the corner or near the store's front door on Madison Avenue, depending on the various versions given in deposition testimony, but, in any event, on the sidewalk adjacent to the store, and he slipped. Diop testified that he had been walking on an area that had been previously cleared, but still had some ice and snow. Diop at his first deposition session testified that he fell because the sidewalk was improperly cleaned and that he fell because of ice and snow. His testimony seems to have been that the ice was covered by the snow. At his second deposition session Diop reiterated his belief that the sidewalk has not been cleaned

properly, stating that he slid on snow but that inside the snow he could see that there was ice. Diop 4/16/08 ebt at 103. He also saw and felt salt. He could not remember whether after 10:30 he learned that ice was forming on the sidewalk."

Diop and his wife, suing derivatively, commenced this action in December 2006 against Madison, Yohalem Gillman & Company, LLP, Roberto Cavalli, Inc. and Roberto Cavalli U.S.A., Inc. The action was eventually discontinued as against Yohalem Gillman & Company, LLP. Aside from the claims alleged against Madison in the complaint, the complaint alleged that Roberto Cavalli, Inc. and Roberto Cavalli U.S.A., Inc. repaired and constructed the sidewalk on which Diop fell, maintained or had the duty to maintain 711 Madison Avenue, including the sidewalk, and inspected it on or before the day of the accident. It was further alleged in the complaint that Roberto Cavalli U.S.A., Inc. and its agents, servants and employees managed, operated, supervised and controlled 711 Madison Avenue and its sidewalk and that it leased or owned the premises and sidewalk. The complaint further alleged that Diop suffered serious injuries when he slipped, tripped and fell on the sidewalk.

Madison's answer asserted cross claims against Roberto Cavalli, Inc. and Roberto Cavalli U.S.A., Inc. (collectively hereinafter referred to as "the Cavalli defendants") sounding in contribution, and common-law and contractual indemnity.

Madison's answer also asserted a CPLR Article 16 defense. The Cavalli defendants defaulted in answering, and by decision signed on February 7, 2008, I granted plaintiffs' motion for a default judgement on the issue of liability against those two entities and ordered that the inquest on damages be conducted during the trial of this action.

Meanwhile, Madison commenced a third-party action against RC in early 2007. The third-party complaint alleges three untitled "causes of action." The first appears to assert a claim for contribution and/or common-law indemnification. The second cause of action asserts a claim for contractual indemnification and for a defense. The third cause of action is far from clear. While it mentions, among other things, the undertaking of a duty to procure insurance, it alleges that if plaintiffs recover a judgment against Madison, RC "will be primarily responsible therefor" and thus seeks "contribution and/or indemnification." Third-party complaint ¶¶ 17-18. No separate breach of contract cause of action was pleaded. RC's third-party answer asserted "cross-claims" sounding in contribution and indemnification against Madison and the Cavalli defendants as well as a CPLR Article 16 defense.

Shortly after the third-party action was commenced, Madison's counsel sent two letters to RC, asserting that RC was contractually obligated to maintain an insurance policy, naming

Madison as an additional insured, and requesting that RC forward the insurance information, including endorsements, the complete policy and all certificates. Madison's counsel demanded that RC assume the defense and indemnity of Madison.

The Instant Applications

RC moves for an order granting it summary judgment dismissing the third-party complaint. RC's counsel relied on the storm in progress rule to show that it owed no duty to clear the sidewalks until a reasonable time after the storm ceased, noting that a mere incomplete job of snow removal does not impose liability. RC's counsel, argues that because plaintiffs will be unable to establish a prima facie case, and because Madison has failed to introduce evidence showing that RC's efforts contributed to Diop's accident, it owed no duty to Madison to defend and indemnify it. Thus, RC asserted that the third-party action must be dismissed.

By separate motion, Madison moves for an order granting it summary judgment dismissing the Diops' complaint and any cross claims, and against RC on the third-party complaint "for defense, contractual, [sic] indemnification, common-law indemnification and breach of contract for failure to procure insurance." Notice of Motion(#004). As to the first-party action, Madison conceded that as the property owner it had a nondelegable duty to maintain the sidewalk in a reasonably safe condition. Madison observed,

however, that, pursuant to the lease, the obligation to keep the sidewalk properly cleared of snow and ice was on the tenant.

Madison relies not only on the lease, but on the testimony of two individuals from Garth, its managing agent, located on West 49th Street in Manhattan, who indicated that Madison was located in the state but not in Manhattan, that the duty to remove snow and ice was on RC, and that the part-time super who, worked a few hours a day servicing the residential portion of the building and then servicing other buildings, was not responsible for keeping the sidewalk adjacent to the store clean of the elements. In addition, its senior vice president knew of no prior complaints of snow removal in front of the store and its president, before being served with legal papers in the instant case, knew of no incident of anyone being injured outside the store.

Madison asserts that, since the accident occurred in the midst of a snowstorm, there was no duty to clean the sidewalk, and that, in any event, an incomplete clearing of the sidewalk by RC would not render RC liable to the plaintiffs, and thus it is not vicariously liable here where "plaintiff cannot show that RC . . . made the sidewalks any more hazardous as a result of its snow removal efforts" (Madison's memo of law at a point I). Madison further observes that it had no prior notice of any complaints regarding RC's snow removal efforts. Therefore,

Madison maintains that, since it was not actively negligent, and since there is no evidence that RC was negligent, plaintiffs' complaint and any cross claims must be dismissed as to it.

Madison further asserts that if there is an issue as to whether RC created a hazardous condition, via its snow removal efforts, which condition caused plaintiffs' injuries, RC's motion must be denied, since, pursuant to the lease, RC would have to indemnify Madison, including for its attorneys' fees. Madison further asserts that, because it has demonstrated that it was not actively negligent and that any liability imposed against it will merely be vicarious, as a result of any negligence on the part of RC, it will be entitled to contractual and common-law indemnification from RC. Madison also asserts that irrespective of RC's negligence, RC is liable to it for breaching its contract to procure insurance, and thus must reimburse Madison for its legal expenses, costs and disbursements in connection with this action. Therefore, Madison contends that it is entitled to summary judgment for breach of contract.

The Diops oppose both motions and argue that movants have failed to meet their prima facie burden of showing that RC's snow removal efforts did not create a hazardous condition resulting in Diop's fall and injuries. The Diops also assert that even if movants met their prima facie burden, the opposing papers

sufficiently raise an issue of fact as to whether the fall was caused by a dangerous condition negligently created by RC.

Based on the meteorological records, engineer Mark Kramer stated that, on December 5, 2003, the temperature was at or below freezing at 9:51 a.m., and steadily decreased throughout the morning and afternoon. At the time of the accident it was about 27 degrees. Snow fell through the morning and afternoon and continued until midnight, leaving a total of about 8 inches. At 2:51 the winds were blowing at 10 mph with gusts up to 23 mph.

Cannizo opined that it was negligent to repeatedly apply salt to the sidewalk while a storm was in progress and the temperature was dropping, because the salt melted the falling snow which, due to the storm's continuing nature, diluted the salt, thereby diminishing its ability to lower the precipitation's freezing point. Thus, the melted snow froze as ice, which then became covered by additional falling snow, thereby creating a latent hazard.

The plaintiffs further assert that, because Madison had a nondelegable duty to maintain the sidewalk, vicarious liability can be imposed regardless of whether Madison had notice of the dangerous condition created by RC. The Diops' counsel also speculates that although the part-time super (who is no longer

working for Garth and/or Madison) for the residential part of the premises had no duty to clear the sidewalk in front of the store, it is possible that he did so that day. However, this overlooks the deposition testimony offered by those working at the store that no one had shoveled before they arrived on the morning of December 5. The Diops' counsel asserts that even if the super had not shoveled the sidewalks adjacent to the store, "he would have clearly been aware of the sidewalk condition in front of 711 Madison Ave while he was out shoveling that day." Katter aff. at ¶ 65. In this latter regard, the Diops' counsel notes that Jean Pierre testified (ebt at 72-73) that when she was coming up 63rd Street on her way to work on the morning of the accident, the restaurant's sidewalk had been or was in the process of being shoveled. However, Garth's president testified that snow removal in front of the restaurant should have been done by someone from the restaurant.

RC and Madison reply that plaintiffs' experts' affidavits must be disregarded because plaintiffs failed to provide their CPLR 3101 (d) statements when they filed their note of issue. Movants therefore assert that they were unable to submit their experts' affidavits in reply. Madison claims prejudice because it was unaware of the experts' qualifications and expertise. Movants assert that it is unclear to them from Cannizo's affidavit and curriculum vitae whether he is qualified to opine

on the effect of the weather on salt. They also claim that his conclusions are speculative and that plaintiffs cannot show that any melted snow re-froze so as to cause the accident. They also contend that the claims Diop makes in his affidavit are self-serving and contradict his deposition testimony as to what caused his fall, and thus should be rejected as feigned.

Discussion

As a preliminary matter, to the extent that the movants urge me to reject the affidavits of plaintiffs' experts on the ground that plaintiffs failed to serve CPLR 3101 (d) statements, such request is, in the exercise of my discretion, denied since no prejudice has been demonstrated (*Howard v Kennedy*, 60 AD3d 905 [2d Dept 2009]; *Cruz v Gustitos*, 51 AD3d 963 [2d Dept 2008]; *Washington v Albany Housing Authority*, 297 AD2d 426 [3d Dept 2002]; *Simpson v Tenore and Guglielmo*, 287 AD2d 613 [2d Dept 2001]; *Cela v Goodyear Tire & Rubber Co.*, 286 AD2d 640 [1st Dept 2001]; *Downes v American Monument Co.*, 283 AD2d 256 [1st Dept 2001]; *Freeman v Kirkland*, 184 AD2d 331 [1st Dept 1992]; *But see Construction by Singletree, Inc. v Lowe*, 55 AD3d 861 [2d Dept 2008]), nor did movants move for an order granting them appropriate relief when the plaintiffs' CPLR 3101 (d) statements were not forthcoming when the note of issue was filed (*Kozlowski v Alcan Aluminum Corp.*, 209 AD2d 930 [4th Dept 1994], rearg

denied 1995 WL 42505; See also *Washington* at 101; *Cela* at 640; *Freeman* at 332). Since the issue of plaintiffs' failure to serve CPLR 3101(d) statements was raised in movants' reply papers, the Diops were not in a position to demonstrate whether there was good cause for their failure to timely provide the statements. Movants are free, if they are so advised, to make any motion they deem advisable to preclude plaintiffs from offering the experts' testimony at trial.

The branch of Madison's motion which seeks dismissal of the Diop's complaint is denied. The burden of prima facie establishing its entitlement to summary judgment is on the movant. Here, Madison has established that it had, delegated the duty with respect to snow removal to RC, that there was a storm in progress at the time of the accident (See *Espinell v Dickson*, 57 AD3d 252 [1st Dept 2008]; *Rodriguez v NYCHA*, 52 AD3d 299 [1st Dept 2008]), and that the snow removal efforts were carried out by RC, rather than by Madison. While there is no evidence that Madison, which was not located on the premises, had notice of any dangerous ice condition, Madison has failed to establish that RC did not create a hazardous condition (See generally *Martinez v City of New York*, 20 AD3d 513 [2d Dept 2005]; *Birnbaum v New York Racing Association, Inc.*, 57 AD3d 598 [2d Dept 2008]) by its snow removal efforts, and in particular, its salting methods (*Suh v Fleet Bank, N.A.*, 16 AD3d 276 [1st Dept, 2005]; See also *Wilson v*

Prazza, 306 AD2d 466 [1st Dept 2003] [Defendant prima facie showed that it did not create the icy condition by salting the steps earlier that day.]). No evidence has been offered by either Madison or RC demonstrating that the ice, which Diop testified about at his deposition, was naturally occurring and not the result of RC's snow removal efforts. Movants do not meet their prima facie burden on summary judgment by simple alleging that plaintiffs will be unable to establish that RC's snow removal efforts created a hazardous condition. Since Madison concedes that its duty with respect to the cleaning of the sidewalk was nondelegable, it would be vicariously liable for any of RC's negligence in removing snow, even absent notice on its part. See *Loguidice v Silverstein Properties, Inc.* 48 AD3d 286 (1st Dept 2008); see also *Cook v Consolidated Edison*, 51 AD3d 447 (1st Dept 2008).

Even assuming, arguendo, that the movants demonstrated that RC's snow removal efforts did not create the hazardous condition, I find that plaintiffs' opposing papers are sufficient to raise an issue as to whether those efforts created a dangerous condition. Any inconsistency between Diop's second day of deposition testimony and his affidavit in support of this motion, where the import of Diop's first deposition session testimony, was that he slipped on ice concealed under the snow, simply raises an issue of credibility for the trial. In addition, the

Diops' experts' affidavits are adequate to raise an issue as to whether RC's snow removal efforts created a dangerous condition. Accordingly, Madison's application to dismiss the Diops' complaint is denied, as is RC's motion to dismiss the third-party complaint.

The branch of Madison's motion to dismiss any cross-claims asserted against it by RC is granted. Thus, RC's indemnification and contribution claims against Madison are dismissed, since it is evident that RC would not be vicariously liable for Madison, there is no claim that Madison had a contractual duty to indemnify RC, there is no evidence that Madison was actively negligent, RC fails to dispute Madison's claims that it was not actively negligent, and since it is undisputed that it was RC's, rather than Madison's duty under the lease, to remove snow and ice and that RC would be obligated to indemnify Madison if it were determined that RC's negligence caused plaintiffs' injuries. In any event, RC does not specifically oppose dismissal of these claims.

The branch of Madison's motion which seeks summary judgement on its alleged breach of contract to procure insurance cause of action is denied. First, the complaint does not assert a separate breach of contract cause of action. Second, the lease's insurance contract procurement provision only seems to require RC to have procured insurance covering claims "occurring

in or upon the demised premises," not claims occurring "in or about" the demised premises (See e.g. *Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153 [1977]). In this regard, I note that the lease (at ¶ 4) refers to the sidewalks as being "adjacent" to the demised premises, rather than being a part of them. I further note that Madison's papers on the instant applications, while quoting from the lease's requirement that the tenant provide certificates of insurance regarding "the coverage required above" (lease rider ¶ 45), omit, when quoting from the lease section regarding, among other things, the parameters of coverage (lease ¶ 8).

This leaves Madison's application for summary judgment on its common-law and contractual indemnification claims against RC. The branch of Madison's motion which seeks summary judgment on its common-law indemnity cause of action asserted against RC is denied. Aside from the fact that RC has not yet been found liable for Diop's injuries, Madison has codefendants, the Cavalli defendants, against whom a default judgment on liability has been issued¹, evidently in connection with their maintenance of the

¹ None of the parties substantively discusses the claims against those defendants, including whether Madison would be vicariously liable for the Cavalli defendants' acts and omissions, which, according to the complaint, appears to arise out of their maintenance of the sidewalk, here where Madison conceded that it had a nondelegable duty to maintain that sidewalk and has asserted cross claims against the Cavalli defendants for contractual and common-law indemnification, as well as a CPLR Article 16 defense. No deposition testimony or

sidewalk (see *Dinino v D.A.T. Construction Corp.*, 267 AD2d 148 [1st Dept 1999]; *Freeman v Natl. Audubon Socy.*, 243 AD2d 608 [2d Dept 1997] [summary judgment on a common-law indemnification claim is improper where more than one party may be responsible]). Also, RC asserted a CPLR Article 16 defense and a "cross-claim" against the Cavalli defendants for contribution. In light of the foregoing, a determination of Madison's common-law indemnity rights *vis a vis* RC is premature, since it is unclear whether Madison will be entitled to common-law indemnification, and, if so, whether that indemnification will be full or partial (see generally *Frank v Meadowlakes Dev. Corp.*, 6 NY3d 687 [2006]; *Cunha v City of New York*, NY3d , 2009 WL 1585850; *McCarthy v 390 Tower Associates, LLC*, 32 AD3d 752 [1st Dept 2006]).

As to Madison's contractual indemnification claim, the lease provision (at ¶ 8), as is relevant, limits indemnification to damages, costs and expenses, including reasonable attorneys' fees, for which Madison shall not be reimbursed by insurance², and were "suffered or incurred as a result of" RC's, its agents or

affidavits have been provided by movants regarding the roles or responsibilities, if any, of the Cavalli defendants or their relationship, if any, to the Cavalli defendants. While it is quite possible that the claims against the Cavalli defendants will be discontinued or that plaintiffs will not attempt to show at trial that they caused any damages to them, for now they are still in the case.

²It is not revealed here whether Madison has its own insurance covering such sums in this case.

employees breaches of the lease or "carelessness, negligence or improper conduct." Since there is no evidence that Madison was actively negligent, nor is there any claim by RC that Madison was actively negligent, and since there is no question that, if liability is ultimately imposed on Madison because of RC's negligence, such negligence was within the purview of the lease's indemnification clause, Madison is granted summary judgment against RC on Madison's contractual indemnity claim. This includes appropriate attorneys' fees, costs and disbursements, which are not reimbursed by insurance, the grant of summary judgment being conditioned on Madison being found liable in the first-party action because of the negligence of RC. See *Ortiz v Fifth Avenue Building Associates*, 251 AD2d 200 (1st Dept 1998) (owner entitled to conditional summary judgment on its claim for contractual indemnification for full amount of any recovery and the owner's legal fees attributable to defending the action, where contract provided for indemnification for damages "caused by the negligence or willful act of" the proposed indemnitor, where there was a lack of showing of active negligence on the part of the owner, even though the proposed indemnitor had not yet been found negligent); see also *Lelek v Verizon New York*, 54 AD3d 583 (1st Dept 2008); *Dinino*, 267 AD2d at 149.

In conclusion RC's motion is denied, and Madison's motion is granted only to the extent that RC's indemnification and

contribution claims against Madison are dismissed, and Madison is conditionally granted summary judgment on its contractual indemnity claim against RC to the extent indicated above; Madison's motion is otherwise denied.

This is the order and decision of the Court.

Dated: June 26, 2009

Ley

J.S.C.

LOUIS B. YORK
J.S.C.

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