

**Sheridan v Port Imperial Ferry Corp.**

2009 NY Slip Op 32890(U)

December 7, 2009

Supreme Court, New York County

Docket Number: 109813/06

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN

*Justice*

PART 7

Index Number : 109813/2006

SHERIDAN, FRANCINE

vs

PORT IMPERIAL FERRY

Sequence Number : 004

DISMISS

INDEX NO. 109813/06

MOTION DATE 1/27/09

MOTION SEQ. NO. 004

MOTION CAL. NO. 112

The following papers, numbered 1 to 5 were read on this motion for summary judgment

	PAPERS NUMBERED
Notice of Motion— Affirmation — Exhibits A-W	<u>1-2</u>
Notice of Cross Motion — Affirmation—Exhibits A-D	<u>3-4</u>
Affirmation In Reply and In Opposition	<u>5</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendant/third-party plaintiff Skanska USA Building, Inc. is decided in accordance with annexed memorandum decision and order.

**FILED**

DEC 10 2009

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12/07/09  
New York, New York

J.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 7

-----X  
FRANCINE SHERIDAN,

Plaintiff,

-against-

PORT IMPERIAL FERRY CORP., ARCORP PROPERTIES  
INC. AND SKANSKA USA BUILDING, INC.,

Defendants.

-----X  
SKANSKA USA BUILDING, INC.,

Third-Party Plaintiff,

-against-

D'ONOFRIO GENERAL CONTRACTORS CORP.,

Third-Party Defendant.

-----X  
D'ONOFRIO GENERAL CONTRACTORS CORP.,

Second-Third-Party Plaintiff,

-against-

W&W GLASS, LLC. and W&W GLASS SYSTEMS, INC.,

Second-Third-Party Defendant.

-----X  
SKANSKA USA BUILDING, INC.,

Third-Third-Party Plaintiff,

-against-

W&W GLASS, LLC. and W&W GLASS SYSTEMS, INC.,

**Decision and Order**

Index No. 109813/06

T/P Index No. 590181/07

**FILED**  
DEC 10 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

Second T/P Index No.  
590689/07

Third T/P Index No.

Third-Third-Party Defendant.

-----X  
**HON. MICHAEL D. STALLMAN, J.:**

In this personal injury action, motion sequence numbers 004 and 005 are consolidated for disposition.

In motion sequence 004, third-party defendant/second third-party plaintiff D'Onofrio General Contractors Corporation (D'Onofrio General) moves for an order, pursuant to CPLR 3212, dismissing Skanska USA Building, Inc.'s (Skanska) third-party complaint and all cross claims and counterclaims against D'Onofrio General.

W&W Glass, LLC and W&W Glass Systems, Inc. (together, W&W), cross moves (1) for an order, pursuant to CPLR 3212, dismissing D'Onofrio General's third-party complaint, (2) for dismissal of Skanska's third-third party complaint and all cross claims and counterclaims, and (3) for dismissal of plaintiff Francine Sheridan's complaint and all cross claims and counterclaims.

In motion sequence 005, defendant Skanska moves (1) for an order, pursuant to CPLR 3212, dismissing Sheridan's complaint and (2) for summary judgment on its third-party claims of contractual indemnification against third third-party defendant W&W, including an award of attorney's fees, costs and disbursements incurred as a result of its defense in this action.

**BACKGROUND**

Skanska is a domestic corporation organized under the laws of the State of New York that specializes in construction and renovation projects.

D'Onofrio General is a domestic corporation organized under the laws of the State of New York that is in the general construction business for architectural finishes.

W&W is a domestic corporation that procures and installs glass materials and other objects.

The following facts are undisputed. On April 16, 2002, Port Imperial Ferry Corporation d/b/a New York Waterway (Port Imperial) entered into a lease agreement (Lease) with the New York City Department of Transportation (NYCDOT) for the right to operate and manage the West Midtown Ferry Terminal at Pier 79 (Midtown Ferry Terminal) (also known as the NY Waterway Ferry Terminal) located at 34<sup>th</sup> Street in Manhattan. The initial term of the Lease was ten years with two ten-year renewal periods. Prior to construction, the Lease was assigned to Romulus Development Corp. and it was reassigned to Port Imperial. Construction of the Midtown Ferry Terminal began shortly after the execution of the Lease, and the facility opened to the public on Monday, October 24, 2005. Prior to its opening, Skanska was retained by the New York City Economic Development Corporation (EDC) to act as the construction manager for the Midtown Ferry Terminal. Pursuant to a separate contract, W&W was retained by the EDC to install a "curtain wall," glass doors, and paneling at the site. D'Onofrio General was also retained by the EDC as one of the prime contractors for the Midtown Ferry Terminal. Its contract provided for architectural finishes, the installation of the tile floor, drywall, metal panels, tiles in the men's room and ladies' locker room. D'Onofrio was also required to install signage in various locations at the work site.

The underlying action involves a claim by plaintiff Francine Sheridan for personal injuries that she sustained on October 25, 2005 at the Midtown Ferry Terminal, the first day that the facility was open to the public. After purchasing a ticket to take a ferry to Hoboken, New Jersey, Sheridan proceeded to walk through the turnstile. She walked toward a set of double

glass doors that led to the ramps for the ferry boat and then she walked through what she believed to be an open space, but she accidentally struck the glass panel located between the set of double doors. As a result of her striking the glass partition wall at the Midtown Ferry Terminal, Sheridan suffered a broken nose and other alleged injuries. Shortly after Sheridan's accident, call medallions (emblems/decals) depicting a ferry and a Department of Transportation logo appeared on the glass panel between the two sets of double doors involved in Sheridan's accident.

After Sheridan commenced this lawsuit asserting claims for personal injury and negligence, Skanska commenced a third-party action against D'Onofrio General for common law indemnity, contractual indemnity, contribution and breach of contract for failure to procure liability insurance. D'Onofrio General then commenced a second third-party action against W&W asserting claims for common law indemnity, contractual indemnity, contribution, and breach of contract for failure to procure liability insurance and Skanska commenced a third third-party action against W&W asserting claims for common law indemnity, contractual indemnity, contribution and breach of contract for failure to procure liability insurance.

#### **Motion 005**

Skanska argues that it is now entitled to summary judgment because: (1) it was under no obligation or duty to install stickers, emblems, or decals, or direct the installation of decals onto the sliding glass doors that resulted in Sheridan's injuries, (2) Sheridan was not a third-party beneficiary between Skanska and EDC, (3) Skanska cannot be held liable for Sheridan's injuries because it adhered to the contract plans and specifications, (4) although the architect made a notation on W&W's shop drawings for decals to be provided, there is no evidence that Skanska was obligated to install the decals or direct said installation, and (5) there is no evidence to

suggest that Skanska knew or should have known that the installation of glass doors without decals would pose a dangerous condition that would likely cause injury.

Sheridan argues that Skanska is not entitled to summary judgment because: (1) Sheridan was an intended third-party beneficiary of the contract between Skanska and the EDC, (2) Skanska assumed a duty of care to ferry passengers to assure that the glass doors and partitions complied with local safe requirements requiring that decals be affixed to the doors, (3) Skanska exacerbated the dangerous condition by ignoring the fact that there was an architect's notation on the glass contractor's shop drawings showing that decals were required, and (4) Skanska remedied the defect following plaintiff's injuries demonstrating its contractual duty to monitor the construction project and to expeditiously resolve any and all defects attributed to Skanska.

To obtain summary judgment it is necessary that the movant establish his cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment" in his favor, and he must do so by tender of evidentiary proof in admissible form (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). To defeat a motion for summary judgment the opposing party must "show facts sufficient to require a trial of any issue of fact" (*id.*).

Here, Skanska has demonstrated its entitlement to summary judgment and Sheridan has not demonstrated that a material question of fact remains.

Generally, "whenever the general public is invited into stores, office buildings, and other places of public assembly, the owner is charged with the duty of providing the public with a reasonably safe premises, including a safe means of ingress and egress" (*Peralta v Henriquez*, 100 NY2d 139, 143 [2003]). Furthermore, "a landowner must act as a reasonable person in maintaining his [or her] property in a reasonably safe condition in view of all the circumstances,

including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk” (*id.* at 144). However, in this action, Skanska is not the landowner of the Midtown Ferry Terminal, and thus is under no duty to provide the public with a reasonably safe premises (*id.* at 143). Skanska was legally on the premises pursuant to an agreement with the EDC to manage the construction projects at the Midtown Ferry Terminal.

Article 5, § 5.02 of the consultant contract between Skanska and EDC provides:

“All reports, plans, drawings, tracings, specifications, documents and materials to be prepared and furnished by the Consultant pursuant to this Contract shall be prepared so as not to violate any provisions of law including, without limitation, the City Charter and Administrative Code of the City”

(Exhibit B to Affirmation of Michael Fahey, dated January 13, 2009) (Fahey Aff.). According to the terms of the agreement, Skanska was required to review all written materials associated with the project, and the review included all the reports, plans, drawings, and specifications associated with the project, which encompassed the oversight of the installation of the glass doors.

Regarding Sheridan’s claim that Skanska owed her a duty of care, the Court of Appeals has identified three sets of circumstances, as exceptions to the general rule, in which a duty of care to a non-contracting third party may arise out of a contractual obligation or the performance thereof (*Church v Callanan Indus., Inc.*, 99 NY2d 104, 111 [2002] [“a defendant who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury”]). The first exception to the general rule applies to cases where a promisor (herein, Skanska) is subject to tort liability for failing to exercise due care in the performance of its contract. That is, an exception can be found to exist if Skanska, while

engaged in discharging its contractual obligation, created an unreasonable risk of harm to Sheridan or increased a risk of harm (*id.*); [quoting *H.R. Moch Co. v Rensselaer Water Co.*, 247 NY 160 [1928]].

In this case, Sheridan argues that Skanska failed to exercise due care in that, in its capacity as construction manager for the Ferry Terminal Project, Skanska had a general duty to Sheridan and the general public to assure that the work done at the Terminal, which included the installation of the glass doors, was performed in accordance with NYC Code Charter and Rules § 4-02 (c) (1). Sheridan alleges that Skanska failed to perform its duty, and as a result, she sustained various injuries.

2 RCNY § 4-02 (c) (1) provides that “transparent glass doors and fixed adjacent transparent glass sidelights shall be marked in two areas on the glass surface thereof.” The Code states that the markings shall be at least 30 inches but not more than 36 inches and the other at least 60 inches above the ground, floor, or equivalent surface below the door (*id.* at [d] [1]). The code further states that the markings should also be at least four inches in diameter if circular, and that in addition to horizontal muntin bars, separation bars or equivalent, any of the following methods may be used to alert persons to the presence of transparent glass doors: chemical etching, sand blasting, adhesive strips, or decals may be used to alert persons to the presence of the transparent glass doors (*id.* at [d] [1] [2]). The code provides that “the use of horizontal separation bars, or equivalent at least one and one-half inches in vertical dimension that extend across the total width of the glazed area and are located at least 40 inches but not more than 50 inches above the bottom of the door is permitted in lieu of markings” (*id.*).

Skanska submitted testimony confirming that the glass doors were installed in

compliance with 2 RCNY § 4-02 of the NYC Code. The glass doors included handles or hardware, push plates, and a bollard (a vertical post of timber or iron) which were visible behind the glass panel that was located between the two sets of glass doors on the day of Sheridan's accident (Exhibit N to Callender-Lee Affirmation, pps 14-15, dated December 12, 2008) (Callender-Lee Aff.). Therefore, Skanska argues that it fulfilled its contractual obligations with respect to the installation of the glass doors and therefore owed Sheridan no duty.

Courts have held that where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation, it may give rise to a second set of circumstances demonstrating a promisor's tort liability (*see Church v Callanan Indus., Inc.*, 99 NY2d, *supra*; *see also Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136, 139-41 [2002]).

Sheridan maintains that she sustained injuries as a result of a reasonable reliance upon Skanska's continuing performance of a contractual duty that arose exclusively out of Skanska's subcontract with EDC. Sheridan avers that Skanska's architect for said project made a notation on W&W's drawings for decals to be provided on the glass doors, but despite said designation, Skanska permitted the Midtown Ferry Terminal to open to the public without the stated decals affixed to the glass doors (*see* § 62 of Callender-Lee Aff.).

The third set of circumstances that may impose tort liability upon Skanska exist if it entirely displaced EDC's duty to maintain the premises in a safe manner (*see Church v Callanan Indus., Inc.*, 99 NY2d 104, *supra*). In contrast to the first exception, under these circumstances, Skanska may indeed be liable for failing to make conditions safe for Sheridan (*id.*). In the case at bar, there is undisputed testimony in the record demonstrating that Skanska did not entirely

displace EDC's duty to maintain the premises in a safe manner. Skanska's performance was subject to the review, direction, and control of the EDC during each phase of the construction (Exhibit B to Fahey Aff.).

In regard to the first exception to the rule, there is insufficient evidence in the record to establish that through some act or omission, Skanska created or increased a risk that resulted in Sheridan's injuries. It is unclear as to how the presence of the decals on the glass doors in question would make the panels safer as opposed to less safe than it was before plaintiff's accident (*Church v Callanan Indus., Inc.*, 99 NY2d, *supra*).

Similarly, this action does not fall within the second exception in that it cannot be contended that plaintiff's accident occurred because she relied on Skanska's continued performance of its contractual duties when she sustained her injuries (*id.*). Sheridan's accident was caused when she made contact with a glass panel installed by W&W. Irrespective of whether the decals were a part of W&W's glass contract, the complaint alleges that the glass panel, and not a decal or emblem, was the instrumentality that caused the accident.

Furthermore, this action does not fall within the third exception. Sheridan has failed to present facts demonstrating that Skanska contracted to assume all of the Midtown Ferry Terminal's safety-related obligations with regard to the installation of the glass doors. For the foregoing reasons, this court cannot conclude that Skanska owed a cognizable duty to plaintiff under the circumstances of this case.

Skanska argues that it is also entitled to summary judgment on its third-party claim against W&W for contractual indemnification, including attorneys' fees, costs, and disbursements in connection with defending this lawsuit because: (1) pursuant to Article 10 (b)

of W&W's contract, W&W agreed to indemnify, defend, and hold harmless Skanska and the EDC from any and all claims for injuries, (2) Article 10 (b) also provides for actual costs and legal fees as may be incurred by the indemnified parties, and (3) irrespective of whether the decals were a part of the W&W contract, the glass panel, and not the decal, was the instrumentality that caused the accident, and thus, Sheridan's accident arose out of or in connection with W&W's work.

As stated above, to obtain summary judgment it is necessary that the movant establish his cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment" in his favor, and he must do so by tender of evidentiary proof in admissible form (*Zuckerman v City of New York*, 49 NY2d at 562). To defeat a motion for summary judgment the opposing party must "show facts sufficient to require a trial of any issue of fact" (*id.*).

Here, Skanska has demonstrated its entitlement to summary judgment on the issue of indemnity.

Article 10 of the agreement between the EDC and W&W provides:

"Indemnification. In this Article 10, EDC, its officers, directors, members, employees, and agents shall be collectively referred to as 'EDC' The Contractor shall defend, indemnify, and hold harmless EDC and the City, the Construction Manager, the Architect/Engineer, the Environmental Consultant, the Port Authority of New York and New Jersey ('PANYNJ'), Apple Industrial Development Corporation ("Apple"), Port Imperial Ferry Corp. D/b/a New York Waterway ('NY Waterway'), Pier 79 Corporation ('Pier 79 Corp'), all other lessees, licensees, permit holders and invitees of EDC and the City having a right to occupy or use the Work Site or any portion thereof, and all the foregoing entities' respective parent companies, corporations and/or partnerships"

(Exhibit V, page 21 to Callender-Lee Aff.).

Indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another person who should more properly bear responsibility for that loss because he was the actual wrongdoer (*see Atlantic Mut. Ins. Co. v Terk Tech. Corp.*, 309 AD2d 22, 28-29 [1<sup>st</sup> Dept 2003]; *County of Westchester v Welton Becket Assocs.*, 102 AD2d 34, 47 [2d Dept 1984], *affd* 66 NY2d 642 [1985]). The right to indemnification may be created by express contract, but the contract is often one implied by law to prevent an unjust enrichment or an unfair result (*id.*). In some instances the law imposes liability in a person who in fact committed no actual wrong, but who is held responsible for a loss as a matter of social policy because he is in a position to spread the risk of the loss to society as a whole (*id.*). Thus, for example, an employer may be held liable for the wrongdoing of his employee, the owner of a vehicle may be held responsible for the tortious operation of the vehicle by another which results in an injury, or an owner of property may be held liable for the wrongdoing of his contractor (*id.*). Therefore, where one who has committed no actual wrong is held vicariously liable for the wrongdoing of another, he has a right to indemnification from the actual wrongdoer (*id.*). Hence, the duty to pay is determined by the actual basis for the insured's liability to a third person (*Frontier Insulation Contr. v Merchants Mut. Ins. Co.*, 91 NY2d, 169, 178 [1997]).

Contribution involves an apportionment of responsibility where wrongdoers are in "pari delicto." Each of the wrongdoers owes a duty to the injured party, and it is a fact question for the jury as to the degree of responsibility each wrongdoer must bear for causing the injury (*County of Westchester v Welton Becket Assocs.*, 102 AD2d at 46). A contribution situation exists even if

distinct duties and different theories are used to recover against joint wrongdoers (*id.*).

CPLR 1401 provides, in relevant part, that “two or more persons who are subject to liability for damages for the same personal injury, injury to property, or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom the contribution is sought” (*Rothberg v Reichelt*, 270 AD2d 760, 762 [3d Dept 2000]). A defendant may not seek contribution from other defendants where “the alleged tort is essentially a breach of contract claim ” (*id.*). It is well settled that a claim arising out of an alleged breach of contract may not be converted into a tort action absent the violation of a legal duty independent of that created by the contract (*id.*). That legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract (*id.* at 763).

In the case at bar, the responsibility for completion of the Midtown Ferry Terminal was distributed among the design professionals, contractors, subcontractors, and engineers. If the contractors and subcontractors in fact adhered to the plans and specifications provided to them by the design professionals and exercised reasonable care and skill in the performance of their work, they will not be held responsible for any damages which occurred as a result of defects in the plans and specifications (*County of Westchester v Welton Becket Assocs.*, 102 AD2d at 48). Said determination, however, is a question of fact for the jury.

#### **Motion 004**

D’Onofrio General argues that it is entitled to summary judgment because: (1) Skanska, the third party plaintiff, has failed to establish a claim for common law or contractual indemnification, (2) there has been no finding of negligence on the part of D’Onofrio General,

and thus Skanska is not entitled to contribution, and (3) D'Onofrio General has submitted documentary evidence disputing Skanska's claim for breach agreement to secure liability insurance for it established that said insurance was procured according to the parties agreements.

In an unopposed motion, D'Onofrio General has established its entitlement to summary judgment and Skanska has failed to demonstrate that a material question of fact exists.

D'Onofrio General's President, Jerry D'Onofrio, testified that the corporation entered into a contract with the EDC to act as one of the prime contractors for the Midtown Ferry Terminal (Exhibit Q, pages 10-20 to Affirmation of Evy L. Kazansky, dated September 11, 2008) (Kazansky Aff.). It's prime contract was the general construction package for architectural finishes, which included "tile floor, drywall, metal panels, metal coping, tiles in the men's and ladies' locker rooms (*id.*). It did not include the installation of glass doors, but it did include installation of certain signage as detailed in section 1.02A of the parties agreement (Exhibit C to Kazansky Aff.). D'Onofrio testified that the contract required installation of "post and panel signs," which are similar to stop signs with a pole and sign mounted to the pole (Exhibit C to Kazansky, pages 24-35). It also included "wall-mounted, hung, panel signs" which are signs hung off a wall and then mechanically attached (*id.* at 25). They installed "ceiling-hung panel signs," "liquid crystal display," and the last item of signage was that required by the New York City Building Code as set forth in the contract (Exhibit C to Kazansky Aff.). D'Onofrio avers that his company was not asked to install the decals until after plaintiff's accident (Exhibit Q to Kandansky Aff).

Brian Barclay, the project manager for Skanska testified that Skanska did not have contracts with the other subcontractors or general contractors, and there was no provision in its

contract for the installation of decals on doors (Exhibit J to Kazansky Aff., pages 20-53). At the time of the accident, there were no decals on the doors, but soon thereafter, a representative from EDC directed D'Onofrio General to install the decals as additional work since D'Onofrio General was still at the job (*id.*).

In light of Skanska's failure to submit testimony or documentary evidence in opposition to D'Onofrio General's motion, Skanska has failed to demonstrate that a material question of fact exists.

W&W argues that it is entitled to summary judgment on its cross motion because: (1) D'Onofrio General and Skanska's causes of action for indemnification, contribution, and breach of contract for failure to procure liability insurance fail to establish W&W's negligence or that Sheridan's accident arose from work performed by W&W, (2) the breach of contract claims for failure to procure insurance should be dismissed due to the fact that the area where the alleged accident occurred is not within the scope of the work in the sub-contract, and in light of the fact that all the parties had some form of liability insurance, W&W should not be held liable for failing to purchase additional insurance.

Contrary to W&W's assertions, it did agree to indemnify D'Onofrio General from all claims. Article 4 of W&W's subcontract with D'Onofrio General provides in part:

“the subcontractor shall indemnify, defend, and hold harmless the General Contractor, Owner and Architect/Engineer and all of their agents . . . against all claims, demands, causes of action . . . .

This indemnification includes, but is not limited to any claims, damages, loss, liability or expense of any kind, which is in any way connected with the Work and which is based upon a breach of

statutory duty, or other obligation on the part of the Subcontractor where the Subcontractor is not found to have committed a negligent act or omission”

(Exhibit M to Kadansky Aff.). The record reveals that W&W was also required to obtain general liability insurance. Article 4 further provides, “Subcontractor agrees to purchase and maintain such insurance as will protect it and Contractor, including contractual coverage” (*id.*).

Moreover, D’Onofrio General was entitled to indemnification from W&W pursuant to Article 10 (b) of its agreement with the EDC (Exhibit V to Callendar-Lee Aff, page 21). The pertinent language provides in part that: “W&W shall defend, indemnify, and hold harmless EDC and the City, the Construction Manager . . . from any and all claims . . . and causes of action whatsoever, to which they may be subject arising out of (i) the acts or omissions of W&W . . . or in connection with the Contract Work or (ii) any negligence” (*id.*).

On the issue of contribution, the record reveals that W&W submitted its first shop drawings for the glass doors to the architect on July 17, 2003 and the drawings came back with notations that decals were needed to complete the glass door project (Exhibit U to Callendar-Lee Aff.); (Exhibit T, pps 22-28 to Kandansky Aff.). The record also reveals that W&W was asked to provide the decals on the doors in question and the side lites [sic] (Exhibit U to Kadansky Aff.). In November or December of 2003, a project meeting was held at which the need for decals was discussed, but W&W objected to the installation of the decals because it was not included in its curtain wall contract with the EDC (Exhibit T, pps 22-28 to Kandansky Aff.). There is also testimony in the record that, in April 2004, W&W submitted drawings to the architects a second time and the second set of drawings came back again with a notation that

decals were needed (*id.* at 34-42). In response to that notation, Skanska alleges that it made a notation on said drawings indicating that the decals would be provided by D'Onofrio General (*id.* at 43, 58). Yet D'Onofrio avers that his company was not asked to install the decals until after plaintiff's accident (Exhibit P, pps 98-99 to Callender-Lee Aff.).

As stated above, the responsibility for completion of the Midtown Ferry Terminal was distributed among the design professionals, contractors, subcontractors, and engineers. If the contractors and subcontractors in fact adhered to the plans and specifications provided to them by the design professionals and exercised reasonable care and skill in the performance of their work, they will not be held responsible for any damages which occurred as a result of defects in the plans and specifications (*County of Westchester v Welton Becket Assocs.*, 102 AD2d at 48). Nevertheless, such a determination remains a question of fact for the jury.

Accordingly, it is

ORDERED that the motion (004) third-party defendant, D'Onofrio General Contracting Corporation's for summary judgment is granted and the third-party complaint is dismissed with costs and disbursements to third-party defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

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

ORDERED that the cross motion by W&W Glass, LLC and W&W Glass Systems, Inc. for summary judgment is denied; and it is further


ORDERED that the motion (005) by defendant Skanska USA Building, Inc for summary judgment is granted to the extent that the complaint is hereby severed and dismissed as against Skanska USA Building, Inc., and the Clerk is directed to enter judgment in favor of said

defendant; and it is further

ORDERED that the branch of Skanska's motion for summary judgment concerning contractual indemnification against third third-party defendant W&W Glass, LLC is granted with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the remainder of the action is severed and shall continue.

Dated: December 7, 2009  
New York, New York

ENTER:   
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J.S.C.

**FILED**  
DEC 10 2009  
NEW YORK  
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