

230 W. 41st St., LLC v FCR Constr. Servs., LLC

2009 NY Slip Op 33146(U)

December 23, 2009

Supreme Court, New York County

Docket Number: 111528/06

Judge: Marcy S. Friedman

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

PRESENT: _____

PART 57

Index Number : 111528/2006
230 WEST 41ST STREET
 vs.
FCR CONSTRUCTION SERVICES
 SEQUENCE NUMBER : 003
 SUMMARY JUDGMENT

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. 003
 MOTION CAL. NO. _____

this motion ~~is~~ for summary judgment

PAPERS NUMBERED
1, 10-15
2-11

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

Memo of Law M1-M5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *and cross-motion*

rel

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED

JAN 07 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/33/09

[Signature]
MARCY S. FRIEDMAN

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
NEW YORK COUNTY: PART 57

230 WEST 41st STREET, LLC,
Plaintiff,

Index No.: 111528/06

- against -

DECISION/ORDER

FCR CONSTRUCTION SERVICES, LLC,
CIVETTA-COUSINS JV LLC, AMEC
CONSTRUCTION MANAGEMENT, INC., and
THE NEW YORK TIMES BUILDING, LLC,
Defendants.

FILED
JAN 07 2010
NEW YORK
COUNTY CLERK'S OFFICE

FCR CONSTRUCTION SERVICES, LLC,
CIVETTA-COUSINS JV LLC, AMEC
CONSTRUCTION MANAGEMENT, INC., and
THE NEW YORK TIMES BUILDING, LLC,
Third-Party Plaintiffs,

- against -

Third-Party Index No.
590222/08

JOHN V. DINAN ASSOCIATES, INC.,
Third-Party Defendant.

In this action, plaintiff 230 West 41st Street, LLC (230 LLC), owner of a building located at 230 West 41st Street in Manhattan, sues to recover for property damage allegedly sustained, as well as consultant fees incurred, as a result of excavation and construction work at an adjacent property. Defendant Civetta-Cousins JV, LLC (Civetta), the excavation subcontractor, moves for summary judgment dismissing the complaint and all cross claims as against it. Defendants the New York Times Building, LLC (NYT), FCR Construction Services, LLC (FCR), and AMEC Construction Management, Inc. (AMEC), owners/developers and construction manager, respectively (collectively, the NYT defendants), cross-move for summary judgment dismissing the complaint and all cross claims against them. They also seek summary judgment on their cross claims against Civetta for indemnification and on their third-party claims against third-

party defendant John V. Dinan Associates, Inc. (Dinan) for indemnification and contribution.¹

By separate motion, Dinan, hired by AMEC to perform seismic monitoring, moves for summary judgment dismissing the third-party complaint and any cross claims against it. The motions are consolidated for purposes of their disposition.

BACKGROUND

This action arises out of the construction of the New York Times' new headquarters building (NYT building) located at 620 Eighth Avenue, a/k/a 242-269 West 41st Street or 230 West 40th Street, in midtown Manhattan. Plaintiff's building, extending the width of the block between 40th and 41st Streets, is located on the east side of the NYT building, that is, its west wall is adjacent to the NYT building's east wall.

In the latter half of 2004, construction began on the NYT building. In October or November 2004, while excavation work was ongoing at the building site, plaintiff discovered cracks in the floor and walls of the basement of its building. As a result, plaintiff and defendants met in December 2004 to discuss how to monitor the vibration and noise resulting from the excavation work in progress. Prior to this meeting, plaintiff had retained CTSI, a seismic monitoring consultant, to monitor and record vibrations at its building during excavation. According to Michael Romano, Director of Operations for the managing agent of plaintiff's building, CTSI was retained in October 2004, at his suggestion, prior to the observation of cracks in the basement. Romano Dep., at 40-42, 48. Jerry Steele, Chief Operating Officer of the Research Foundation, City University of New York, the sole member of plaintiff, attended the

¹ To the extent that the NYT defendants' cross-motion was untimely, the court finds that good cause exists for excusing defendants' lateness of 12 days.

meeting held in December 2004, and recalled that it was discussed that CTSI would be performing seismic monitoring on behalf of plaintiff, in addition to the monitoring done by Dinan, the company retained by AMEC to perform seismic monitoring for the NYT defendants of plaintiff's building. Steele Dep., at 34-35.

Subsequently, according to Steele, noise and vibration conditions did not improve, and in February 2005, plaintiff contacted the New York City Department of Buildings (DOB) to complain about continued excessive noise and vibrations. *Id.* at 40. On February 4, 2005, the DOB issued a stop work order to AMEC, directing that excavation work stop at the NYT building site pending submission of an engineer's report "regarding the structural stability and integrity" of the adjacent western wall of plaintiff's building. The stop work order noted a visible crack in the concrete slab of the "A" level basement; an exterior wall "dropping/separating to interior wall" also in the "A" level basement; and vertical and horizontal cracks in an exterior wall. *See* Notice of Violation and Hearing, Ex. 1 to Rossi Aff. in Opp. Some days after the stop work order was issued, plaintiff and its representatives, including Steele, met with defendants' representative, Jessie Cooperman, project manager for FCR for the NYT project, and other parties involved in the NYT construction project, to address what needed to be done to get the stop work order lifted. Steele Dep., at 42-45; Cooperman Dep., at 70-71. Richard Zaloum, Civetta's engineer, prepared a report on procedures for continuing excavation (*see* Report on Excavation Procedure, Ex. 2 to Rossi Aff. in Opp.), which was submitted to the DOB. The engineer's report required monitoring and underpinning by the NYT defendants of plaintiff's building. The stop work order then was lifted, and work resumed. *See* Steele Dep., at 147-148; Dep. of Gerry Studdert [Director of Operations for the Research Foundation], at 64. No new

cracks or damages were reported after work resumed. Studdert Dep., at 71. Plaintiff continued to retain CTSI as its own consultant to monitor the excavation work until May 2005, when that work was complete. Steele Dep., at 109-110, 117; Studdert Dep., at 84.

After the excavation stage of construction was completed, approximately 10 windows on the fifth through seventh floors of the western side of plaintiff's building were damaged by the pouring of concrete "as the building went up floor by floor." Steele Dep., at 79-82. Although Steele testified that this damage occurred sometime between February 2005 and August 2005 (*id.* at 82), the bill of particulars states that the windows were damaged in July 2006. See Verified Bill of Particulars, ¶3 Ex. D to Tobin Aff. in Support of NYT defendants' cross motion. Plaintiff's witness, Gerry Studdert, testified that the window damage occurred in April 2006. Studdert Dep., at 99.

DISCUSSION

Plaintiff seeks to recover damages against defendants based on allegations of negligence in performing excavation and construction work; strict liability based on violations of the Administrative Code of the City of New York (Administrative Code) §§ 27-1031 and 27-1009; and breach of contract or, alternatively, promissory estoppel. Defendants move for summary judgment dismissing the causes of action based on negligence and strict liability on the grounds, among others, that plaintiff cannot recover in the absence of a showing of damage to its property.

It is well "settled that actual damages are an essential element of a negligence action." IGEN, Inc. v White, 250 AD2d 463, 465 (1st Dept 1998); see Mizrahi v Taic, 266 AD2d 59, 60 (1st Dept 1999); Wagner v Orlando, 32 AD2d 620, 620 (1st Dept 1969), aff'd 25 NY2d 724; Greco v National Transp. Co., 15 AD2d 462, 462 (1st Dept 1961); see also Morgan Stanley & Co. v JP

Morgan Chase Bank, N.A., ___ F Supp 2d ___, 2009 WL 2460854, *7, 2009 US Dist LEXIS 70344, *20 (SD NY 2009); Four Directions Air, Inc. v United States of Am., 2007 WL 2903942, *3, 2007 US Dist LEXIS 72882, *9 (ND NY 2007). “The fundamental principle of damages, whether the action is one for breach of contract or for a negligent act or omission, is fair and just compensation, commensurate with the loss or injury sustained from the wrongful act complained of (see, 36 NY Jur 2d, Damages, § 9).” Prudential Ins. Co. of Am. v Dewey Ballantine, Bushby, Palmer & Wood, 170 AD2d 108, 115 (1st Dept 1991) (internal brackets omitted), affd 80 NY2d 377 (1992). Thus, “[i]n negligence, no recovery may be had even where there is fault, if no injury follows.” Brazos v Brumidge, 6 AD2d 494, 496 (1st Dept 1958).

Further, a plaintiff may not recover “for potential harm in the absence of actual injury.” Niagara Mohawk Power Corp. v Ferranti-Packard Transformers, Inc., 201 AD2d 902, 903 (4th Dept 1994). “The threat of future harm, not yet realized, is not enough.” IGEN, Inc., 250 AD2d at 465, quoting Prosser and Keeton, Torts § 30, at 165 (5th ed 1984). While it has long been held that an injured party has an obligation to make reasonable efforts to minimize damages (see Mayes Co., Inc. v State of New York, 18 NY2d 549, 554 [1966]; Den Norske Ameriekalinje Actiesselskabet v Sun Printing & Publ. Assn., 226 NY 1, 7 [1919]), a plaintiff may not recover mitigation costs when “there was no injury from which to mitigate damages.” Niagara Mohawk Power Corp., 201 AD2d at 904; see Miller v Lovett, 879 F2d 1066, 1070 (2d Cir 1989)(no duty to mitigate damages until the injury causing those damages actually occurs); Ridgeview Partners, LLC v Entwistle, 354 F Supp 2d 395, 403 (SD NY 2005)(same). Moreover, if the alleged harm is purely economic, then a claim of negligence generally is not actionable. See 532 Madison Ave. Gourmet Foods, Inc. v Finlandia Ctr., Inc., 96 NY2d 280 (2001); Roundabout Theatre Co.,

Inc. v Tishman Realty & Constr. Co., Inc., 302 AD2d 272 (1st Dept 2003).

Damages for injury to real property resulting from a defendant's negligence may be measured in different ways. See Fisher v Qualico Contr. Corp., 98 NY2d 534, 539 (2002); Jenkins v Etlinger, 55 NY2d 35, 39 (1982). "[T]he proper measure of damages for permanent injury to real property is the lesser of the decline in market value and the cost of restoration." Jenkins, 55 NY2d at 39. "Recovery for temporary injury to real property may be measured by the value of the loss of use, which is determined by the decrease in the property's rental value during the pendency of the injury." Id. at 40. While a plaintiff need only present evidence of one measure of damages, plaintiff must submit some evidence of the amount of the injury. Id. at 39. An award of damages cannot be based on "speculation" as to the loss of value or cost of restoration. Id. at 40.

Here, by plaintiff's own acknowledgment, physical damage to its building was relatively minor (see Rossi Aff. in Opp., ¶ 10, Studdert Aff. in Opp., ¶ 8), consisting of cracks and floor slab separation in the basement, which plaintiff has not sought to repair. Plaintiff does not seek to recover for any damage to its property allegedly resulting from excavation work but, rather, seeks to recover its costs of approximately \$186,000 for retaining consultants to monitor the condition of the building during defendants' excavation work, in order to prevent further damage. Plaintiff also seeks the cost of approximately \$35,000 for replacing windows that were damaged after the excavation was completed.

Notwithstanding that plaintiff does not seek to recover for property damage allegedly resulting from excavation work, plaintiff argues that there was property damage and that therefore it is entitled to mitigation damages. Plaintiff, however, offers no evidence to establish

any measurable property damage, such as expert affidavits or estimates or documentation of repair costs. Plaintiff also submits no evidence as to either the decline in market value of the property or the loss of rental value. Even if mitigation damages were available, in the absence of such evidence, the court could not ensure that plaintiff receives “no more than is reasonably necessary to remedy fully the injury while avoiding uneconomical efforts.” Fisher, 98 NY2d at 539, quoting Jenkins, 55 NY2d at 39.

In sum, the evidence shows that plaintiff’s building sustained minor damage that plaintiff does not claim requires repair. While the damage is not to be condoned, plaintiff’s claim for compensation for its independent monitoring of the excavation cannot be granted under these circumstances in which plaintiff does not show quantifiable damages to its property resulting from the excavation. To hold otherwise would be to recognize a new category of potentially large damages for consultant fees for an adjoining property owner who is concerned about potential danger from neighboring construction, but does not have actual damages and unilaterally undertakes to hire its own consultants. Plaintiff does not cite, and the court has not found, authority that supports plaintiff’s claim for such damages.

Plaintiff’s claims for consulting costs based on negligence must therefore be dismissed. Similarly, plaintiff’s claims based on alleged violations of Administrative Code §§ 27-1031 and 27-1009 cannot survive in the absence of proof of actual, quantifiable damage to its property. See Cohen v Lesbian & Gay Community Servs. Ctr., Inc., 20 AD3d 309 (1st Dept 2005); Coronet Props. Co. v L/M Second Ave., Inc., 166 AD2d 242 (1st Dept 1990); Victor A. Harder Realty & Constr. Co. v City of New York, 64 NYS2d 310, 320 (Sup Ct, NY County 1946).

To the extent that the NYT defendants seek to dismiss plaintiff’s claim for damages to its

windows, their motion should be denied. Defendants fail to make a prima facie showing that their construction was not a cause of this damage to plaintiff's building. Accordingly, the burden did not shift to plaintiff to raise a triable issue of fact in this regard. See generally Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985].

In contrast, the branch of the motions of defendants Civetta & Dinan to dismiss plaintiff's window claim, or any cross or third-party claims based on the windows, should be granted. The undisputed evidence shows that the windows were damaged by the pouring of concrete as floors were built, and that neither defendant had any role in that work. Civetta did not do work above ground level, and Dinan's role was limited to seismic monitoring.

As to plaintiff's claim for breach of contract or, alternatively, promissory estoppel, plaintiff alleges that, at a meeting held in February 2005, attended by plaintiff and defendants, "its [sic] was agreed that Defendants would reimburse 230 LLC for the reasonable costs and fees incurred for its consultants and engineers in assisting Defendants in formulating a plan for the lifting of the Stop Work Order, the protection of the 230 LLC Building, and the monitoring of the construction thereafter." Verified Complaint, ¶ 44. Defendants move to dismiss this cause of action on the ground that there was no agreement.

"In determining whether a contract exists, the inquiry centers upon the parties' intent to be bound, i.e., whether there was a 'meeting of the minds' regarding the material terms of the transaction." L.K. Station Group, LLC v Quantek Media, LLC, 62 AD3d 487, 491 (1st Dept 2009), quoting Central Fed. Sav., F.S.B. v National Westminster Bank, U.S.A., 176 AD2d 131, 132 (1st Dept 1991); see Joseph Martin, Jr., Delicatessen v Schumacher, 52 NY2d 105, 109 (1981). "Mutual assent is essential to the formation of a contract and a party cannot be held to

have contracted if there was no assent or acceptance.” Maffea v Ippolito, 247 AD2d 366, 367 (2d Dept 1998); see Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp., 93 NY2d 584, 589 (1999). Further, “before the power of law can be invoked to enforce a promise, it must be sufficiently certain and specific so that what was promised can be ascertained.” Joseph Martin, Jr., Delicatessen, 52 NY2d at 109; L.K. Station Group, LLC, 62 AD3d at 492. Thus, to establish an enforceable contract, there must be an “objective meeting of the minds” (Matter of Express Indus. & Term. Corp., 93 NY2d at 589), and “definiteness as to material matters.” Joseph Martin, Jr., Delicatessen, 52 NY2d at 109. A “mere agreement to agree, in which a material term is left for future negotiations, is unenforceable.” Id.; see Miranco Contr., Inc. v Perel, 29 AD3d 873 (2d Dept 2006).

Here, plaintiff’s evidence that there was an oral agreement rests solely on the testimony of Richard Steele. At his deposition, Steele testified that, at the February 2005 meeting held after the stop work order was issued, attended by plaintiff and defendants, he spoke to Jesse Cooperman, Project Manager for FCR, about plaintiff’s expenses for engineering and vibration monitoring consultants. Steele Dep., at 51-52. Steele testified that the subject of plaintiff’s costs was raised “at the table,” and that Cooperman’s response was to tell Steele to “gather up your bills and send them to me.” Id. at 52, 66. According to Steele, there was no further conversation about payment of plaintiff’s costs at that meeting (id. at 67), and this was the only conversation he had with any of the NYT defendants about payment of plaintiff’s costs. Id. at 52. Steele acknowledged that there was no written agreement pertaining to payment of plaintiff’s expenses (id. at 61-62), and that there was no explicit oral agreement that defendants would pay plaintiff’s bills. Id. at 67. Nor was there any discussion of how much money plaintiff had spent. Id. at 65.

However, Steele testified that, based on Cooperman's statement to gather up and send him the bills, an agreement was "implied" (*id.* at 67), and it was his understanding that Cooperman agreed to pay for plaintiff's expenses. *Id.* at 68. Plaintiff then submitted bills to Cooperman (*id.* at 76-77). Cooperman testified that he received a claim for reimbursement from plaintiff (Cooperman Dep., at 88-89), and that he responded by letter, declining plaintiff's request. *Id.* at 93.

This evidence is insufficient to raise a triable issue of fact as to whether the NYT defendants agreed to pay plaintiff's costs for engineers or seismic consultants. Even assuming *arguendo* that Cooperman instructed Steele to send plaintiff's bills to him, such evidence fails to demonstrate that there was a meeting of the minds, or any more than an agreement to negotiate, which is not enforceable as a contract. See Miranco Contr., Inc., 29 AD3d at 873. Thus, even viewing the evidence in a light most favorable to plaintiff, as the court must do on a motion for summary judgment (see Branham v Loews Orpheum Cinemas, Inc., 8 NY3d 931, 932 [2007]), plaintiff fails to demonstrate that there was mutual assent or agreement to material terms, such as the amount to be paid.

Similarly, plaintiff fails to raise a triable issue of fact as to its claim based on promissory estoppel. Again, even accepting as true that Cooperman invited Steele to send bills to him, this act does not demonstrate that defendants made "a clear and unambiguous promise" to reimburse plaintiff. See Steele v Delverde S.R.L., 242 AD2d 414, 415 (1st Dept 1997); Sanyo Elec., Inc. v Pinros & Gar Corp., 174 AD2d 452, 453 (1st Dept 1991); Ripple's of Clearview, Inc. v Le Havre Assocs., 88 AD2d 120, 122-123 (2d Dept 1982), *lv denied* 57 NY2d 609.

As to the parties' indemnification claims, it is well settled that "[c]ommon-law

indemnification is predicated on vicarious liability without actual fault, which necessitates that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine.” Edge Mgt. Consulting, Inc., 25 AD3d 364, 367 (1st Dept 2006) (internal quotation marks and citations omitted), lv dismissed 7 NY3d 864. Thus, “in the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law.” Correia v Professional Data Mgt., Inc., 259 AD2d 60, 65 (1st Dept 1999).

It is further settled that entitlement to contractual indemnification “depends upon the specific language of the contract.” See Kader v City of New York, 16 AD3d 461, 463 (2d Dept 2005) (internal quotation marks and citations omitted). Moreover, “[w]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances.” Hooper Assocs., Ltd. v AGS Computers, Inc., 74 NY2d 487, 491- 492 (1989) (internal citations omitted).

The NYT defendants seek indemnification from both Civetta and Dinan. As to Civetta, section 5 of its agreement with AMEC provides that it will indemnify the owner and AMEC for “all liability, damage, loss, claims, demands and actions of any nature whatsoever which arise out of or are connected with . . . the performance of Work by the Subcontractor [Civetta].” See Civetta Motion Ex. J. Thus, the contract provides for indemnification when a claim arises out of

Civetta's work, even though Civetta has not been negligent. See Brown Two Exch. Plaza Partners, 76 NY2d 172 (1990); Quinonez v Manhattan Ford, Lincoln-Mercury, Inc., 62 AD3d 495 (1st Dept 2009); Correia, 259 AD2d at 64. As Civetta was the excavation subcontractor, it is clear that plaintiff's claims for damages allegedly caused by the excavation arise out of Civetta's work.

In opposition, Civetta fails to raise a triable issue of fact as to NYT's negligence. While there is evidence that the NYT defendants received reports on Dinan's monitoring and took complaints about vibrations and noise, these general responsibilities for safety at the site do not rise to the level of supervision or control over Civetta's work necessary to support a finding against the NYT defendants for negligence. See Conforti v Bovis Lend Lease LMB, Inc., 37 AD3d 235 (1st Dept 2007); Buccini v 1568 Broadway Assocs., 250 AD2d 466 (1st Dept 1998).

Accordingly, the NYT defendants are entitled to contractual indemnification from Civetta for defense costs and attorney's fees in defending the instant action, as plaintiff sued them – albeit, unsuccessfully – for damages (consulting fees) that allegedly arose out of Civetta's excavation. See Quinonez, 62 AD3d at 497. However, the NYT defendants are not entitled to contractual or common law indemnification against Civetta for the windows because the alleged damage to the windows did not arise out of Civetta's work.

As to the NYT defendants' claims for indemnification against Dinan, the parties' agreement provides that Dinan will indemnify NYT for claims resulting from, among other things, "the negligent performance" of its work, or "any of [Dinan's] errors or omissions." NYT Motion, Ex. U, at 2. In support of their motion, the NYT defendants fail to make a prima facie showing of Dinan's negligence in the performance of seismic monitoring and thus fail to

demonstrate Dinan's liability for defense costs under either the indemnification agreement or the common law. The NYT defendants also are not entitled to indemnification from Dinan for window damage, as the undisputed evidence is that Dinan's work did not cause the window damage.

The branch of the NYT defendants' cross motion for summary judgment on its claims against Civetta and Dinan for failure to procure insurance should also be denied. They fail to make a prima facie showing that Civetta and Dinan did not procure insurance. The burden accordingly did not shift to these defendants to raise a triable issue of fact on insurance procurement.

As to the branch of Dinan's motion seeking dismissal of the cross claims against it for indemnification, Dinan fails to make a prima facie showing that it did not perform seismic monitoring in a negligent fashion. It is therefore not entitled to dismissal of Civetta's cross claims for indemnification and contribution, or to dismissal of NYT's third-party complaint against it, except, as held above, with regard to the window damage which did not occur in connection with its work.

As to Civetta's motion for summary judgment dismissing the NYT defendants' indemnification cross claims against it, based on the above holding, the cross claims will be dismissed to the extent they seek indemnification for window damage and denied to the extent they seek indemnification for defense costs and attorney's fees.

Accordingly, it is hereby ORDERED that the motion of Civetta-Cousins JV, LLC for summary judgment is granted only to the extent that it is

ORDERED that plaintiff's complaint is dismissed against it; and it is further

ORDERED that the cross claims against Civetta-Cousins JV, LLC are dismissed to the extent the cross claims are based on damages to plaintiff's windows; and it is further

ORDERED that the cross-motion of defendants New York Times Building, LLC, FCR Construction Services, LLC, and AMEC Construction Management, Inc. (AMEC) is granted only to the extent that it is

ORDERED that plaintiff's complaint is dismissed against them except to the extent that plaintiff's claims are based on damages to its windows; and it is further

ORDERED that defendants New York Times Building, LLC, FCR Construction Services, LLC, and AMEC Construction Management, Inc. are awarded judgment against defendant Civetta-Cousins JV, LLC as to liability on their cross claims for contractual indemnification for their reasonable attorney's fees and defense costs in the instant action; and it is further

ORDERED that an assessment of the NYT defendants' reasonable attorney's fees and defense costs in the instant action shall be held at the time of trial, or after any other disposition of the instant action; and it is further

ORDERED that the motion of John V. Dinan Associates, Inc. for summary judgment is granted only to the extent that it is

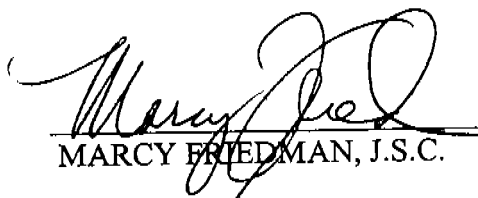
ORDERED that the third-party complaint and all cross-claims against John V. Dinan Associates, Inc. are dismissed to the extent the claims are based on damages to plaintiff's windows; and it is further

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

ORDERED that the remaining claims are severed and shall continue.

This constitutes the decision and order of the court.

Dated: New York, New York
December 23, 2009



MARCY FRIEDMAN, J.S.C.
MARCY S. FRIEDMAN

FILED
JAN 07 2010
NEW YORK
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