

**Kielty v AJS Constr. of L.I. Inc.**

2010 NY Slip Op 30604(U)

March 19, 2010

Supreme Court, Richmond County

Docket Number: 103213/05

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3

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Index. 103213/05  
Motion No.: 004  
005

KERI KIELTY,

*Plaintiff*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

*against*

AJS CONSTRUCTION OF L.I. INC.,  
MRP FAMILY HOLDINGS, LLC,  
AURORA CONTRACTORS, INC.,  
AJS CONSTRUCTION, INC.,  
AJS CONSTRUCTION & PROJECT MANAGEMENT, INC.,  
and NY CONSTRUCTION & PAVING, INC.,

*Defendants*

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AJS CONSTRUCTION, INC. and  
AJS CONSTRUCTION & PROJECT MANAGEMENT, INC.,

*Third-Party Plaintiffs*

**Third-Party Index No.:**  
**A103213/05**

*against*

NY CONSTRUCTION & PAVING, INC.,

*Third-Party Defendants*

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The following items were considered in the review of the following motions for summary judgment.

<u>Papers</u>	<u>Numbered</u>
AJS Notice of Motion and Affidavits Annexed	1
AJS Answering Affidavits	2
AJS Replying Affidavits	3
MRP Notice of Motion and Affidavits Annexed	4
NY Construction answering Affidavits	5
Plaintiff answering Affidavits	6
MRP Replying Affidavits	7
AJS Sur-Replying Affidavits	8

**Exhibits**

Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Defendants/Third-Party Plaintiffs AJS Construction, Inc. and AJS Construction & Project Management, Inc. (collectively “AJS”) moved for summary judgment seeking common law indemnification against Defendants NY Construction & Paving, Inc. (“NY Construction”) pursuant to CPLR §3212. AJS’s motion is denied.

Defendant/Third-Party Plaintiff MRP Family Holdings, LLC (“MRP”) moved for summary judgment seeking contractual indemnification against Third-Party Defendants AJS pursuant to CPLR §3212. MRP’s motion is granted.

Defendant/Third-Party Plaintiff MRP’s motion for summary judgment seeking common law indemnification against Third-Party Defendants AJS pursuant to CPLR §3212 is granted.

Defendant/Third-Party Plaintiff MRP’s motion for summary judgment seeking common law indemnification against Defendants NY Construction pursuant to CPLR §3212 is granted.

**FACTS**

This is an action for personal injuries allegedly sustained by the Plaintiff when she was caused to fall in the parking lot of a shopping center. Plaintiff alleges that, on the afternoon of August 31, 2004, she tripped and fell on broken asphalt/debris in a pathway located in the parking lot of a shopping center owned by MRP. The shopping center was undergoing construction/renovation (the “Project”) and MRP retained AJS as construction manager for the Project. As part of the Project, the parking lot was to be demolished and reconstructed. AJS subcontracted the parking lot demolition to NY Construction. NY Construction was the only subcontractor hired to perform demolition and construction in the parking lot.

NY Construction performed the work in sections so as to allow the existing stores in the shopping mall to remain operational throughout the Project. Pathways for pedestrians and motor vehicles were created through the construction areas. These pathways were lined with orange barrels and construction fencing to keep pedestrians out of the construction zone and to keep any construction debris out of public areas. Despite these precautions, the pedestrian walkway used by plaintiff was located next to an active construction zone and the debris that plaintiff allegedly tripped over was a piece of asphalt of the type that NY Construction used in the Project.

Both MRP and AJS signed the “General Conditions of the Contract for Construction” (the “Contract”) as the general document that set forth the respective responsibilities of the parties during the Project. AJS was obligated to keep the area adjacent to the construction zones clear of any debris pursuant to Paragraph 3.15 of the Contract. MRP specifically ordered its cleaning crews not to clean construction debris in the parking lot or the areas around the construction zones. In addition to AJS’s contractual debris-monitoring obligations, Terri Bevacqua, MRP’s property manager of the shopping mall, casually inspected the construction area each morning that she worked at the Project site. If a hazardous condition was detected, Ms. Bevacqua would notify AJS or NY Construction to have the condition remedied. Several employees from all parties were at the project site on a daily basis to ensure that the Project’s goals were met and proper safety precautions were being taken. Steven DiPietro, the project manager of the Project, performed routine inspections every morning and evening at the construction site to ensure that public areas were free from potentially hazardous construction debris. No party reported seeing the hazardous condition prior to the occurrence of the accident.

Paragraph 3.18 of the Contract required AJS to purchase insurance coverage for the Project and to include MRP as an insured under the insurance contract. This paragraph also acted to indemnify MRP for any damage or injury resulting from the negligence of AJS or one of its subcontractors. There is also a proposal which allows AJS to be indemnified by NY Construction for any liability that arises as a result of NY Construction’s negligence. However, the proposal is not signed by either party and is not an enforceable contract.

## DISCUSSION

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact” (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion”<sup>1</sup> Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.<sup>2</sup> On a motion for summary judgment, the function of the court is issue finding, and not issue determination.<sup>3</sup> In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.<sup>4</sup>

In order to demonstrate a prima facie entitlement to judgment as a matter of law granting common law indemnification, the party seeking indemnification must demonstrate that it is merely vicariously liable for the negligent acts of another and that the party seeking indemnification has committed no wrong. In other words, the party must not have been responsible for the underlying injuries to any degree.<sup>5</sup> In order to prevail, the party must not have caused or created the conditions that gave rise to the accident. Furthermore, the party must show that it did not know, and in the

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<sup>1</sup> *Marine Midland Bank, N.A., v. Dino*, et al., 168 A.D.2d 610 [2d Dept 1990]

<sup>2</sup> *American Home Assurance Co., v. Amerford International Corp*, 200 A.D.2d 472 [1<sup>st</sup> Dept 1994]

<sup>3</sup> *Weiner v. Ga-Ro Die Cutting*, 104 A.D.2d 331 [2d Dept 1984]. *Aff’d* 65 N.Y.2d 732 [1985]

<sup>4</sup> *Glennon v. Mayo*, 148 A.D.2d 580 [2d Dept 1989]

<sup>5</sup> *Buchwald v. Verizon N.Y., Inc.*, 2008 NY Slip Op 5435, 2 [4th Dept 2008]

exercise of reasonable care could not have known, that the condition that caused the accident existed.<sup>6</sup>

Once the moving party has made a showing of sufficient evidence, the burden shifts to the party opposing summary judgment to put forth evidence in admissible form to establish a triable issue of fact.<sup>7</sup>

Negligence, whether of the plaintiff or defendant, is usually a question of fact. It should be submitted to the jury if there is a valid line of reasoning and permissible inferences from which rational people can draw a conclusion of negligence on the basis of the evidence presented.<sup>8</sup>

### **AJS's Motion for Summary Judgment Against NY Construction**

AJS argues that it is entitled to summary judgment against NY Construction for common law indemnification because NY Construction allegedly created the hazardous condition when it allowed a piece of asphalt from the parking lot demolition to emanate beyond the barricaded work area.

In order to demonstrate a prima facie entitlement to judgment as a matter of law granting common law indemnification to AJS, it must demonstrate that it is merely vicariously liable for the acts of NY Construction and that AJS has committed no wrong. AJS must not have caused or created the conditions that gave rise to the accident. Furthermore, AJS must show that it did not know, and in the exercise of reasonable care could not have known, that the condition that caused the accident existed.<sup>9</sup>

AJS has set forth sufficient evidence to satisfy its initial burden under the law to show that it

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<sup>6</sup> *Rosado v. Proctor & Schwartz, Inc.*, 66 N.Y.2d 21 [1985]; *Buchwald*, supra

<sup>7</sup> *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]

<sup>8</sup> *Nallan v Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 429 N.Y.S.2d 606 [1980]

<sup>9</sup> *Rosado*, supra; *Buchwald*, supra

is entitled to common law indemnification from NY Construction. AJS offers substantial evidence indicating that NY Construction was responsible for creating the debris that emanated beyond the barricaded work area. AJS was not involved in the parking lot renovation. NY Construction was the only subcontractor hired to perform demolition and construction in the parking lot and the debris was located adjacent to one of NY Construction's active construction zones. The debris was a piece of asphalt of the type that NY Construction would use in the renovation of the parking lot.

AJS also offers evidence showing it did not have any actual notice of the debris in the walkway. This is substantiated by the testimony of Steven DiPietro, project manager for AJS, who inspected the public areas for debris every morning when he arrived and every evening before he left. However, the accident occurred during the mid-afternoon hours in between the morning and evening inspections. There is no record of AJS having discovered the hazardous condition.

Finally, AJS indicates that there has been no assertion as to the amount of time the hazardous condition had existed, which precludes a finding of constructive notice on the part of AJS. Indeed, "constructive notice requires a showing that the condition was visible, apparent, and existed for a sufficient period of time before the accident to permit defendants to discover it and take corrective action."<sup>10</sup> Since there has been no evidence presented to show the amount of time the hazardous condition existed, AJS has satisfied its burden of showing that it did not have constructive notice of the hazard's presence.<sup>11</sup>

Since AJS has satisfied its initial burden, the burden now shifts to NY Construction to raise the existence of a triable issue of fact.<sup>12</sup>

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<sup>10</sup> *Porcari v. S.E.M. Mgt. Corp.*, 184 A.D.2d 556, 584 N.Y.S.2d 331 [2d Dept 1992]

<sup>11</sup> *Moss v. JNK Capital Ltd.*, 85 N.Y.2d 1005, *Fasolino v Charming Stores*, 77 NY2d 847, 848; see also, *Cafiero v Inserra Supermarkets*, 195 AD2d 681, *affd* 82 NY2d 787; *Paolucci v First Natl. Supermarket Co.*, 178 AD2d 636).

<sup>12</sup> *Zuckerman, supra*

NY Construction alleges that AJS is not entitled to common law indemnification because AJS' had responsibilities under Paragraph 3.15 of the Contract with MRP to maintain the area free from waste materials and rubbish produced by its work under the Contract. Paragraph 3.15 of the Contract is titled "Cleaning Up" and states:

"3.15.1 - The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work, the Contractor shall remove from and about the Project waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials.

3.15.2 - If the Contractor fails to clean up as provided in the Contract Documents, the Owner may do so and the cost thereof shall be charged to the Contractor."

There is no similar contract between AJS and NY Construction in which NY Construction explicitly assumes the duty of care to clean up the areas surrounding the construction zone. However, the existence of the Contract wherein AJS explicitly assumes the duty of care to clean up construction debris, regardless of who created it, indicates that a triable issue of fact exists concerning the extent to which AJS maintained the duty of care to remove construction debris from public areas.

Further, AJS ignores its own citation in its papers that liability in a slip and fall accident can be established if "the defendant knew, *or in the exercise of reasonable care*, should have known, that the condition existed." (Emphasis added).<sup>13</sup> NY Construction alleges that AJS failed to exercise reasonable care in the execution of its responsibilities under the Contract to maintain the premises free from construction debris. A reasonable jury may find that AJS's twice daily inspection of the construction zone was not reasonable and that an additional routine afternoon inspection should have been included. Since a reasonable jury may find that AJS would have discovered the hazardous condition if it had taken more reasonable precautions, NY Construction has satisfied its burden of showing the existence of a triable issue of material fact.

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<sup>13</sup> *Porcari*, supra

## MRP's Motions for Summary Judgment Against AJS

### Contractual Indemnification

MRP argues that it is entitled to summary judgment against AJS for contractual indemnification because AJS indemnified MRP for any negligence on behalf of AJS or any of AJS's subcontractors pursuant to the Contract.

In order to demonstrate a prima facie entitlement to judgment as a matter of law granting contractual law indemnification, MRP must show the existence of a valid contract that contains a provision requiring AJS to indemnify MRP under the given circumstances. MRP must then show that the circumstances of the accident giving rise to MRP's indemnity claim fall within the language of the contractual provision granting indemnity. The accident must not be wholly attributable to negligence, if any, on the part of AJS.<sup>14</sup>

Paragraph 3.18 of the Contract is titled "Indemnification" and states:

"To the fullest extent permitted by law and to the extent claims, damages, losses or expense are not covered by Project Management Protective Liability insurance purchased by the Contractor in accordance with Paragraph 11.3, the Contractor shall indemnify and hold harmless the Owner, architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable,

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<sup>14</sup> *Brooks v. Judlau Contr., Inc.*, 11 N.Y.3d 204 [2008]

regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 3.18.”

AJS has raised the issue that the copy of the contract provided by MRP for the purposes of the instant motion is not identical to the contract actually signed by the parties. However, the material aspects of this Contract, as it applies to this suit, are substantially the same and there is no difference as to the allocation of responsibility. Therefore, this court recognizes the contract provided by MRP as a complete and accurate representation of the agreement between the parties.

The Contract was signed by MRP and AJS. AJS has not argued that the Contract or indemnification provision in particular did not constitute a valid agreement between the parties. The provision above covers claims of the kind asserted by the Plaintiff in the present action since Plaintiff’s claims arise out of AJS’s “performance of the Work” under the Contract.

MRP further argues that the debris that caused Plaintiff’s accident was created by NY Construction, AJS’s subcontractor and, consequently, their negligence caused the accident. AJS’s behavior falls within the scope of Paragraph 3.18, which entitles MRP to contractual indemnification, because the debris was alleged to have been caused by the negligence of AJS or NY Construction, their subcontractor. Since MRP has demonstrated the existence of a valid contract containing an indemnification provision that covers claims of the type asserted by the Plaintiff, and that the claim arose as a result of the negligence of AJS or one of its subcontractors, MRP has satisfied its initial burden of demonstrating its entitlement to summary judgment on the issue of contractual indemnification.

Since MRP has satisfied its initial burden, the burden now shifts to AJS to establish the existence of a triable issue of fact.<sup>15</sup>

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<sup>15</sup> *Zuckerman, supra*

AJS contends that the indemnification provision violates General Obligations Law Section 5-322.1, thereby preventing MRP from seeking contractual indemnification, since the provision would require AJS to indemnify MRP for damages caused by MRP's own negligence. Section 5-322.1(1) states in part:

“A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, 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 be in whole or in part, is against public policy and is void and unenforceable;...This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent.”

The indemnification provision contained in Paragraph 3.18 of the Contract explicitly allows MRP to be indemnified for the portion of damages attributable to the negligence of AJS or its subcontractors. The contractual language contemplates partial indemnification and is intended to limit AJS's contractual indemnity obligation solely to the negligence of AJS or its subcontractors. Leaving MRP liable for the negligent actions of AJS would be contrary to the intent of General Obligations Law §5-322.1 that payment of damages be made according to fault.<sup>16</sup> Since the indemnification provision only obligates AJS to indemnify MRP for any damages caused by AJS's own negligence or the negligence of its subcontractors, and not the negligence of MRP, the indemnification provision does not violate Section 5-322.1.<sup>17</sup>

AJS has failed to demonstrate the existence of a triable issue of material fact. Therefore, in the event that MRP is held responsible, they are indemnified by AJS on this Project.

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<sup>16</sup> *Brooks, supra*

<sup>17</sup> *Brooks, supra*

## Common Law Indemnification

MRP argues that it is entitled to summary judgment against AJS for common law indemnification because AJS created the hazardous condition and was a substantial factor in causing the accident.

In order to demonstrate a prima facie entitlement to judgment as a matter of law granting common law indemnification to MRP, MRP must demonstrate that it is merely vicariously liable for the acts of AJS and that MRP has committed no wrong. MRP must not have caused or created the conditions that gave rise to the accident. Furthermore, MRP must show that it did not know, and in the exercise of reasonable care could not have known, that the condition that caused the accident existed.<sup>18</sup>

MRP has set forth sufficient evidence to satisfy its initial burden under the law to show that it is entitled to common law indemnification from AJS. MRP offers substantial evidence indicating that AJS or one of its subcontractors was responsible for creating the debris that emanated beyond the barricaded work area, including that AJS and its subcontractors were the only parties tasked with demolition and renovation projects in the parking lot. MRP's alleged lack of involvement in deciding where to place fencing and orange cones also shows that MRP did not contribute to causing the accident. Any control of the parking lot, as MRP contends, was ceded to AJS and its subcontractors by Paragraph 3.15 of the Contract, the text of which can be found above.

This lack of control was further supported by MRP's orders to its cleaning crew that they were **not** to clean the parking lot, specifically the areas around the construction zones. In addition, the lack of any record indicating MRP was aware of a hazardous condition supports MRP's contention that it had no actual notice of the debris in the walkway.

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<sup>18</sup> *Rosado*, supra; *Buchwald*, supra

Finally, MRP indicates that there has been no assertion as to the amount of time the hazardous condition existed, which precludes a finding of constructive notice on the part of MRP. Indeed, “constructive notice requires a showing that the condition was visible, apparent, and existed for a sufficient period of time before the accident to permit defendants to discover it and take corrective action.”<sup>19</sup> Since there has been no evidence presented to show the amount of time the hazardous condition existed, MRP has satisfied its burden of showing that it did not have constructive notice of the hazard’s presence.<sup>20</sup>

Since MRP has satisfied its burden, the burden now shifts to AJS to raise the existence of a triable issue of fact.<sup>21</sup>

As a landowner, MRP was required to maintain the premises 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.<sup>22</sup> AJS argues that MRP is not entitled to common law indemnification from AJS because MRP failed to establish that it is free of negligence in its ownership, maintenance and control of the parking lot. AJS contends that MRP was a landowner in possession and that it was foreseeable that patrons would continue to use the parking lot in order to shop at the stores located in the shopping mall. As it was foreseeable that patrons would continue to use the parking lot even though portions were under construction, and construction debris was present in pedestrian walkways, there is a triable issue of fact as to whether MRP failed to use reasonable care in the maintenance of its property in view of all circumstances. AJS further argues that MRP was a

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<sup>19</sup> *Porcari, supra*

<sup>20</sup> *Moss v. JNK Capital Ltd.*, 85 N.Y.2d 1005, *Fasolino v Charming Stores*, 77 NY2d 847, 848; see also, *Cafiero v Inserra Supermarkets*, 195 AD2d 681, *affd* 82 NY2d 787; *Paolucci v First Natl. Supermarket Co.*, 178 AD2d 636).

<sup>21</sup> *Zuckerman, supra*

<sup>22</sup> *Peralta v. Henriquez*, 100 N.Y.2d 139 [2003]; *Basso v. Miller*, 40 N.Y.2d 233, 241 [1976];

substantial factor in causing the accident because it directed the placement of walkways and barricades.

Barricades, by their very nature, are reasonably calculated to control debris. In addition, the placement of walkways next to an active construction zone is commonplace in New York City and, if appropriately shielded, is not inherently negligent.<sup>23</sup> Since the placement of barricades next to the pedestrian walkways were reasonably calculated to contain the debris, the type of barricades used and placement of walkways cannot be said to have been unreasonable. MRP does have a duty to inspect the parking lot for open and obvious dangers as a landowner. However, the duty to maintain the parking lot free from construction debris was explicitly assumed by AJS in Paragraph 3.15 of the Contract. While MRP's instruction to its cleaning crews directing them to refrain from cleaning construction debris is troubling, MRP was nevertheless under no duty to inspect the premises for debris since it had assigned that duty to AJS through the Contract. As there is no triable issue of material fact, MRP's motion for summary judgment seeking common law indemnification against AJS must be granted.

### **MRP's Motion for Summary Judgment Against NY Construction**

MRP argues that it is entitled to summary judgment against NY Construction for common law indemnification because NY Construction allegedly created the hazardous condition when it allowed a piece of asphalt from the parking lot demolition to emanate beyond the barricaded work area.

In order to demonstrate a prima facie entitlement to judgment as a matter of law granting common law indemnification to MRP, it must demonstrate that it is merely vicariously liable for the acts of NY Construction and that it has committed no wrong. MRP must not have caused or created the conditions that gave rise to the accident. Furthermore, MRP must show that it did not know, and in the exercise of reasonable care could not have known, that the condition that caused the accident

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<sup>23</sup> *Waller v. Site Safety LLC*, 2006 NY Slip Op 2621 (1st Dept 2006)

existed.<sup>24</sup>

One who is legally liable solely by reason of his or her ownership of the property involved in the injury to a third person is generally entitled to indemnity by operation of law from the actual wrongdoer.<sup>25</sup> The failure of a landowner to discover and remedy a dangerous condition created by another is generally considered only passive negligence, entitling the landowner to common-law indemnity from the creator of the condition.<sup>26</sup>

MRP has set forth sufficient evidence to satisfy its initial burden under the law to show that it is entitled to common law indemnification from NY Construction. MRP contends that, since it did not have any involvement with the physical demolition of the parking lot, it could not have created the debris that resulted in Plaintiff's accident. NY Construction was the only party tasked with the parking lot demolition and renovation. NY Construction was excavating the parking lot directly adjacent to the walkway where the accident occurred. NY Construction was also responsible for the installation of barricades and fencing around the construction zone to prevent any debris from coming in contact with the public.

MRP had limited supervisory duties around the construction site, mostly consisting of monitoring the performance of subcontractors to ensure their actions conformed to the contract documents. MRP further argues that NY Construction had assumed at least some duty to inspect and maintain the public areas surrounding their barricaded construction zones. This is corroborated by NY Construction's own witness, Santo Maugeri, who stated that NY Construction was responsible

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<sup>24</sup> *Rosado*, supra; *Buchwald*, supra

<sup>25</sup> *Scott v. Curtis*, 195 N.Y. 424 (1909); *Mauro v. McCrindle*, 70 A.D.2d 77 (2d Dep't 1979), *aff'd*, 52 N.Y.2d 719 (1980); *D'Onofrio v. City of New York*, 284 A.D. 688 (1st Dep't 1954); *Tipaldi v. Riverside Memorial Chapel*, 273 A.D. 414 (1st Dep't 1948), *aff'd*, 298 N.Y. 686 (1948)

<sup>26</sup> *Jackson v. Associated Dry Goods Corp.*, 13 N.Y.2d 112 (1963) (overruled on other grounds by, *D'Ambrosio v. City of New York*, 55 N.Y.2d 454 (1982)).

for cleaning any debris that resulted from their work.<sup>27</sup> Ms. Bevacqua did not discover the debris on her morning inspection and MRP has no record of the debris prior to the accident. Therefore, MRP has sufficiently demonstrated that it did not have actual notice of the hazardous condition. As discussed in prior sections, MRP has also shown that it did not have constructive notice of the condition since there has been no assertion as to the amount of time the condition existed.<sup>28</sup>

Since MRP has satisfied its burden, the burden now shifts to NY Construction to raise the existence of a triable issue of fact.<sup>29</sup>

NY Construction alleges that MRP's decisions were a substantial factor in causing the accident. MRP allegedly played an active role in determining the type and placement of the barriers used to contain construction debris. NY Construction further alleges that MRP decided which areas of the parking lot to close, which areas would remain open, and where the pedestrian walkways would be located. MRP was also allegedly negligent in having failed to use reasonable inspection procedures to discover the hazard.

As was the case with MRP's motion for summary judgment seeking common law indemnification against AJS, the type and placement of barricades and walkways does not create a triable issue of material fact. NY Construction created the debris. Therefore, whatever MRP's inspection procedures, MRP's failure to discover the hazardous condition created by NY Construction is considered mere "passive negligence" and does not prevent MRP from seeking common law indemnification from NY Construction.<sup>30</sup>

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<sup>27</sup> Exhibit N, p. 52, AJS's Notice of Motion

<sup>28</sup> *Moss v. JNK Capital Ltd.*, 85 N.Y.2d 1005, *Fasolino v Charming Stores*, 77 NY2d 847, 848; see also, *Cafiero v Inserra Supermarkets*, 195 AD2d 681, affd 82 NY2d 787; *Paolucci v First Natl. Supermarket Co.*, 178 AD2d 636).

<sup>29</sup> *Zuckerman*, *supra*

<sup>30</sup> *Jackson*, *supra*

NY Construction relies on *Freeman v. National Audubon Society*, 243 A.D.2d 608 (2d Dept 1997) as preventing this court from granting MRP's motion because it is improper to grant summary judgment for common law indemnification against a party when more than one party might be responsible. However, nothing in *Freeman* prevents this court from granting summary judgment for common law indemnification against both parties who may have been responsible for the accident. *Freeman* and other similar cases<sup>31</sup> only preclude summary judgment when the degree of fault **of the party seeking summary judgment** remains in question, or when another party whose fault remains in question is not similarly obligated to indemnify. Since this court has already granted summary judgment for common law indemnification against AJS, the only other party who is potentially responsible for the accident, *Freeman* does not preclude this court from granting summary judgment for common law indemnification against NY Construction.

Since NY Construction has also failed to allege the existence of a triable issue of material fact, MRP's motion for summary judgment seeking common law indemnification against NY Construction must be granted.

Accordingly, it is hereby:

ORDERED, that AJS's motion for summary judgment against NY Construction seeking common law indemnification is denied; and it is further

ORDERED, that MRP's motion for summary judgment against AJS seeking contractual indemnification is granted; and it is further

ORDERED, that MRP's motion for summary judgment against AJS seeking common law

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<sup>31</sup> *La Lima v. Epstein*, 143 A.D.2d 886, 888 (2d Dept 1988); *Tama v. Gargiulo Bros.*, 2009 NY Slip Op 3506, 3 (2d Dept 2009)

indemnification is granted; and it is further

ORDERED, that MRP's motion for summary judgment against NY Construction seeking common law indemnification is granted.

ENTER,

DATED: March 19, 2010

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Joseph J. Maltese  
Justice of the Supreme Court

