Morris v Home Depot USA
2014 NY Slip Op 32169(U)
August 8, 2014
Supreme Court, Suffolk County
Docket Number: 06-5201
Judge: Thomas F. Whelan

SHORT FORM ORDER

INDEX No. 06-5201
CAL. No. 13-01140OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 12-9-13 (#011)
MOTION DATE 12-18-13 (#010)
MOTION DATE 4-18-14 (#012)
ADJ. DATE 4-21-14
Mot. Seq. # 010 - MG
011 - MD
012 - MotD

JOHN MORRIS and TERESA MORRIS,

Plaintiffs,

- against -

HOME DEPOT USA,

Defendant.

HOME DEPOT U.S.A., INC.,

Third-Party Plaintiff,

- against -

J & J BUILDING MAINTENANCE, INC.,

Third-Party Defendant.

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Upon the following papers numbered 1 to 68 read on these motions for summary judgment/security for costs; Notice of Motion/ Order to Show Cause and supporting papers 1-20, 21-37, 38-45; Notice of Cross Motion and supporting papers__; Answering Affidavits and supporting papers 46-51,51-59, 60-61; Replying Affidavits and supporting papers 62-63, 64-66, 67-68; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for purposes of this determination, and it is further

ORDERED that the motion by third-party defendant J & J Building Maintenance ("J & J") for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross-claims insofar as asserted against it, is granted; and it is further

ORDERED that the motion by defendant/third party plaintiff Home Depot USA, Inc. ("Home Depot") for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and granting it summary judgment on its third-party complaint, is denied; and it is further

ORDERED that the motion by defendant/third party plaintiff Home Depot for an order pursuant to CPLR 8501 requiring the plaintiffs to provide security for costs is granted to the extent that the plaintiffs are required to give an undertaking in the amount of two hundred and fifty ($250.00) as security for costs; and it is further

ORDERED that pursuant to CPLR 8502 to all proceedings in this matter, other than to review or vacate this order, are stayed until such security for costs is given.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff, John Morris, on January 19, 2004 when he slipped and fell on what he described as an accumulation of ice, snow and water in the parking lot of the Home Depot store located in Shirley, in the Town of Brookhaven, New York. Plaintiffs allege that the defendants created the dangerous condition that led to his accident. Plaintiff Teresa Morris seeks damages for loss of services.

Defendant J & J now moves for summary judgment dismissing the complaint and all cross claims. In support of the motion, it submits its attorney's affirmation and reply/opposition affirmations; the pleadings; the depositions of the plaintiffs, Joseph Clark as a non-party witness, Marlene Mejias, for Home Depot, Paula Cerney, for Home Depot, and Joseph Belmont, for J & J; a copy of a maintenance contractor agreement between the defendants Home Depot and J & J dated February 14, 2003; and a copy of Home Depot, USA Snow Plowing and Removal Specifications for contractors. Defendant Home Depot opposes defendant J & J's motion and also moves for summary judgment dismissing the complaint and granting summary judgment against J & J on Home Depot's claims for indemnification. In opposition to J & J's motion and in support of its motion, it submits, *inter alia*, its attorney's affirmation and reply affirmations; a copy of the pleadings; the depositions of the plaintiff John Morris, Joseph Belmont, for defendant J & J, Paula Cerney, for Home Depot, and Marlene Mejias, for Home Depot; a copy of a maintenance contractor agreement between the defendants Home Depot and J & J dated February 14, 2003; a copy of Home Depot, USA Snow Plowing and Removal Specifications for contractors; certified weather data from the National Climatic Data Center for January 2004; a copy of a J & J proposal for Home Depot Store #1282 dated January 6, 2004; and the affidavit of Ernesto Perez, sworn to on March 13, 2014.

Plaintiffs do not oppose the motion for summary judgment submitted by the defendant J & J. In opposition to the Home Depot motion for summary judgment, they submit, *inter alia*, their attorney's

affirmation and reply affirmation; the affidavit of John Morris, sworn to on December 4, 2013; two invoices issued by defendant J & J to Home Depot, dated January 18, 2004 and January 19, 2004; and certified weather data from the National Climatic Data Center for January 2004.

In support of its motion for an order requiring the plaintiffs to provide security for costs, defendant Home Depot submits, *inter alia*, its order to show cause and supporting affidavit; reply affidavit; and a copy of the pleadings. In opposition, plaintiffs submit their attorney's affirmation and a copy of their attorney's affirmation in opposition, with attached exhibits, to Home Depot's motion for summary judgment

Plaintiff John Morris testified that on January 19, 2004, he was employed by ASR Electric, one of the contractors engaged in the construction of a Home Depot store in Shirley, New York. He had been working at the site since August of 2003. On January 19, 2004, he drove to work and arrived at the Home Depot at 6:50 a m. It was still dark. He did not recall if there were any lights on in the parking lot. There were approximately 12 cars already parked there. He testified that the parking lot was covered with snow, ice. The snow had turned to ice overnight, and it was all rutted. Apparently a lot of vehicles had driven through there over the weekend or through the snow. He parked his truck in the parking lot. He could not see the painted lines on the ground designating a parking spot, as they were covered with the snow ice mix. It was below freezing, and it was not raining or snowing. He got out of his truck and headed toward the entrance to the store, carrying his lunch pail. A couple of seconds after getting out of his truck, he was about six feet from his truck and 50 to 60 feet from the store, and he slipped and fell. His right ankle went towards his left foot, and he went down. He pulled himself up and went into the building. He saw his foreman and told him that he slipped and twisted his ankle on the ice outside and that he hurt his right wrist. At approximately 10 a.m., he saw someone plowing, salting and sanding the parking lot. He finished work and went home. He worked the next day and afterwards went to the Massapequa Orthopedic Group. He did not file any report of his accident with Home Depot. He did file a claim for workers' compensation as a result of his injury.

Joseph Clark testified as a non-party witness. He was formerly employed by Home Depot for 13 years. He was assigned to the Shirley store prior to its opening to the public. His duties included staffing the store with employees. He had no responsibility with regard to snow plowing at the store. He believed that it was handled by Home Depot's District Corporate Office. Based upon his experience working for Home Depot, it was their policy that store managers or assistant managers dealt with outside contractors performing work on the property. He agreed that at the end of an outside contractors's work, someone from Home Depot would look at or approve that the work was done to Home Depot's satisfaction. He was not aware of any accidents in the store's parking lot or of anyone slipping and falling on ice. Clark did not witness the plaintiff's alleged fall.

Paula D. Cerney testified as a witness for Home Depot. She has been employed by the company for 17 years. Her current title is divisional building services manager. In August or September of 2001 she was maintenance manager for the northeast, including New York stores. She held that title until the end of 2003. However, she still dealt with the northeast for a short time thereafter. Her role involved negotiating, reviewing and signing maintenance contracts, including those with snow plowing vendors. There was a master maintenance contract which covered snow removal for Home Depot stores

in the New York metropolitan area. Defendant J & J performed snow removal services at several Home Depot locations on Long Island. The Shirley Home Depot opened on February 5, 2004. The Home Depot snow removal policy for snow removal from parking lots in January of 2004 required the contractor to plow if the snow was over two inches, salt in unsafe conditions, icy conditions and plow parking spots, perimeter sidewalks and fire exit doors. Snow plowing contractors were responsible for knowing the amount of snowfall at each location. J & J first began performing snow removal services at the Shirley store in January 2004 pursuant to a verbal contract. That contract was handled by Ernesto Perez, who was an assistant maintenance manager for Home Depot. If a store is not open, Home Depot enters into a snow plowing agreement, or if it is mid-season, verbal contracts are awarded. The contractor is required to follow snow removal specifications, as with the agreement that Ernesto Perez entered into with J & J. Cerney testified that the customary arrangement that Home Depot had with its snow plowing contractors was that salting and sanding was available at management's request, for an additional fee. She further stated that in 2004 a snowplowing contractor normally had the discretion to determine when to plow or apply salt and sand without first contacting Home Depot. When asked if a contractor had discretion pursuant to the Home Depot standards as to when to apply salt or sand, she also stated that she did not recall.

Joseph Belmonte testified as a witness for the defendant J & J. His examination took place almost 9 full years after the accident which is the subject of this action. He is the president and only officer of J & J. His company first started providing snow plowing service to the Shirley Home Depot store in January of 2004. He performed the snow plowing on January 18, 2004. He received a telephone call from the area manager, Ernesto Perez, who asked him to provide pricing for that location and to start servicing it right away. He did not specifically recall visiting the store but it was his practice to measure the size of the parking lot before working up a price for the bid. He sent a written proposal to Mr. Perez, who verbally acknowledged it in a phone call and told him to go ahead with the work. He was not formally awarded the contract for the store until the following season. He recalled plowing snow and salting and sanding at the Shirley store prior to its opening. On January 18, 2004, he plowed three inches of snow at the site, but could not recall the details. The next day he performed services there was January 19, 2004, which he recalled based upon the invoice that was prepared. On that date he performed a salt and sand application on the parking lot. He felt that an application was warranted, but there was no contact person from management to give approval, as was normally required. He applied salt and sand and hoped that he would get paid, and he eventually was paid. If he had a manager's name to authorize it, he would have put it on the invoice to assure payment. It was Home Depot's policy that he would need a manager's name in order to get paid. It was not up to his discretion, he could not provide salting and sanding without management approval. There were times when the management at other Home Depot store would not give approval for salting and sanding. His custom and practice was that plowing would begin once there was one to two inches of snow. Salting and sanding was generally done immediately upon the completion of plowing, although he could not specifically recall what occurred on these dates.

It is noted at the outset that the affidavit of John Morris, sworn to on December 4, 2013 has been considered by the Court. Although the affidavit was signed and notarized in Florida, and was not accompanied by a certification in accordance with CPLR 2309 (c), this is not a fatal, as defendant Home Depot has not shown that it is prejudiced thereby (*see* ***Ali v Verizon New York, Inc.***, 116 AD3d 722, 982

NYS2d 903 [2d Dept 2014]; ***Fredette v Town of Southampton***, 95 AD3d 940, 944 NYS2d 206 [2d Dept 2012]. Likewise, the affidavit of Ernesto Perez, sworn to, in Florida, on March 13, 2014, submitted by the defendant Home Depot, is considered even though it suffers from the same infirmity.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

A defendant will be held liable for a slip and fall involving snow and ice on its property only when it created the dangerous condition that caused the accident or had actual or constructive notice thereof (***Gushin v Whispering Hills Condominium I***, 96 AD3d 721, 946 NYS2d 202 [2d Dept 2012]; ***Baines v G & D Ventures, Inc.***, 64 AD3d 528, 883 NYS2d 256 [2d Dept 2009]); ***Taylor v Rochdale Vil., Inc.***, 60 AD3d 930, 875 NYS2d 561 [2d Dept 2009]). To constitute constructive notice, the dangerous condition must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it (***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Baines v G & D Ventures, Inc.***, *supra*). Although plaintiffs will bear the burden at trial of establishing that defendant Home Depot had actual or constructive notice of the dangerous condition, on a motion for summary judgement, the defendant bears the burden of establishing lack of notice as a matter of law (***Carillo v PM Realty Group***, 16 AD3d 611, 793 NYS2d 69 [2d Dept 2005]; ***Totten v Cumberland Farms***, 57 AD3d 653, 871 NYS2d 179 [2d Dept 2008]). To meet its initial burden to show lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when plaintiff fell (***Braudy v Best Buy Co., Inc.***, 63 AD3d 1092, 883 NYS2d 90 [2d Dept 2009]; ***Pryzywalny v New York City Transit Authority***, 69 AD3d 598, 892 NYS2d 181 [2d Dept 2010]). Furthermore, a plaintiff seeking to hold a snow removal contractor liable must show that by virtue of a defendant's snow removal contract, defendant displaced the duty of the landowner to safely maintain the premises (***Espinal v Melville Snow Contractors, Inc.***, 98 NY2d 136, 746 NYS2d 120 [2002]) and assumed a duty to plaintiff to exercise reasonable care to prevent all foreseeable harm to the plaintiff such that the plaintiff detrimentally relied on the defendant's performance of the defendant's duties under the snow removal contract (*see* ***Palka v Servicemaster Management Services***, 83 NY2d 579, 611 NYS2d 817 [1994]; ***Pavlovich v Wade Associates, Inc.***, 274 AD2d 383, 710 NYS2d 615 [2d Dept 2000]), or that the defendant's actions "advanced to such a point as to have launched a force or instrument of harm" (***Pavlovich v Wade Associates, Inc.***, *supra*). Defendant J & J has established it's entitlement to summary judgment dismissing the complaint. The plaintiff has not opposed J & J's motion.

Exhibit A to Home Depot's maintenance contractor agreement with J & J entitled "Scope of Services" states that it is "an addendum to your existing store list/pricing and services" and consists of a

pricing form sheet for snow plowing (pricing for 2 to 4 inches etc). Said form also contains a column which states "[s]alt/sanding is available upon management request" and leaves a space for the proposed price per application.

Also attached to the agreement was a memorandum issued to J & J by Home Depot entitled "Maintenance Policies revision #6 dated May 1, 1997". Paragraph 1 states:

> No work will be performed without a workorder number issued by the Home Depot Maintenance Department. The only exceptions will be snowplowing contractors who will obtain a workorder after the snow removal project is completed... .

Home Depot also submitted its "Snow Plowing and Removal Specifications" for contractors, which is dated January 2, 1977. Paragraph 1.B states:

> Snow will be plowed so that parking lot, all entry and exit drives, loading dock and service drive are accessible to customer and delivery traffic throughout store operating hours.

Paragraph J states:

> Salt and sand applications may be asked for by store management when the need arises. Contractor is to contact the store manager or assistant store manager whenever conditions warrant the possible need to salt and sanding operations. If store refuses salt sanding then manager's name and time of conversation must be noted by contractor for future reference.

Paragraph N states, in relevant part: "[c]ontractor will obtain approval from store management that all operations performed are acceptable before leaving the site."

Paragraphs P and Q of the document state:

> Contractor will not be paid for any additional services authorized by store Management [sic] unless the name of the Store manager authorizing work can be provided. When store management requests additional work have them sign your work ticket, make sure your employees ask for Store Managers name and print it on your work ticket. Responsibility for proof of authorization will be contractors in all cases.

It is concluded from the provisions of the agreement that defendant J & J did not displace the duty of the landowner to safely maintain the premises and did not assume a duty to plaintiff to exercise reasonable care to prevent all foreseeable harm such that the plaintiff detrimentally relied on the defendant's performance of the defendant's duties under the snow removal contract (*see* ***Espinal v Melville Snow Contractors, Inc.***, *supra*).

The terms of the agreement, the Home Depot' snow plowing specifications and the testimony of Joseph Belmonte establish that J& J was required to obtain authorization from Home Depot before putting down sand and salt during its snow plowing operations. The testimony of Home Depot Paula D. Cerney with regard to whether authorization was required is contradictory and fails to raise an issue of fact in this regard. The actual facts in the record are unclear as to what occurred on January 18th and 19th, 2004. Due to the passage of almost 9 years between the accident and Belmonte's deposition, his recollection of the snow plowing carried out on those dates is limited and depended on the documentation (invoices, the snow plowing specifications, etc.) The meteorological evidence submitted by the parties establishes that approximately three inches of snow fell on January 18th and that the snow stopped falling at approximately 6 p.m. on that date. The temperature was at or above freezing until approximately 10 p.m. and thereafter fell until it was 21 degrees at the time of the alleged accident. The testimony of the plaintiff establishes that he observed salt and sand being applied to the parking lot during the morning of January 19th. The testimony of Joseph Belmonte was that it was his practice to begin plowing as soon as the snow reached or exceeded two inches. He further testified that he could not obtain authorization to apply salt and sand because he had no one that he could contact at Home Depot. He put down salt and sand anyway, hoping that he would eventually be paid, which he was.

Based upon the foregoing, Home Depot failed to establish that J & J launched a force or instrument of harm. Indeed, by merely plowing the snow in accordance with the contract and leaving some residual snow or ice on the plowed area, J &J cannot be said to have created a dangerous condition thereby launching a force or instrument of harm (***Foster v Herbert Slepoy Corp.***, 76 AD3d 210, 905 NYS2d 226 [2d Dept 2010]; *see also* ***Fung v Japan Airlines Co., Ltd.***, 9 NY3d 351, 361, 850 NYS2d 359 [2007]; ***Espinal v Melville Snow Contrs.***, *supra*). Moreover, a claim that a contractor exacerbated an existing condition requires some showing that the contractor left the premises in a more dangerous condition than he or she found it (*see,* e.g., ***Figueroa v Lazarus Bergman Assoc.***, 269 AD2d 215, 217, 703 NYS2d 113 [1st Dept 2000]). Therefore, even if J&J had the obligation to apply salt or sand to the parking lot area after plowing, Home Depot has offered nothing more than speculation that the failure to perform that duty rendered the property less safe than it was before J & J started its work (*see* ***Church v Callanan Indus.***, 99 NY2d at 112, 752 NYS2d 254 [2002]; ***Crosthwaite v Acadia Realty Trust***, 62 AD3d at 825, 879 NYS2d 554 [2d Dept 2009]). In addition to this J &J was paid for both the snow plowing and the salt and sand application, without any complaint from Home Depot.

In light of the foregoing, defendant J & J is entitled to summary judgement dismissing the complaint.

Contrary to the defendant Home Depot's contention, it failed to demonstrate its prima facie entitlement to judgment as a matter of law, with regard to either the complaint or the third-party complaint. Home Depot has put forth a "storm in progress" defense. "Under the so-called 'storm in progress' rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm" (***Weller v Paul***, 91 AD3d 945, 947, 938 NYS2d 152 [2d Dept 2012]; ***Marchese v Skenderi***, 51 AD3d 642, 642, 856 NYS2d 680 [2d Dept 2008]; *see* ***Solazzo v New York City Tr. Auth.***, 6 NY3d 734, 810 NYS2d 121, 843 NE2d 748 [2d Dept 2005]). However, even if a storm is ongoing, once a property owner elects to remove snow, it is required to act with reasonable care so as to avoid creating a

hazardous condition or exacerbating a natural hazard created by the storm (***Yassa v Awad***, 117 AD3d 1037, 986 NYS2d 525[2d Dept 2014]; ***Kantor v Leisure Glen Homeowners Assn., Inc.***, 95 AD3d 1177, 944 NYS2d 640 [2d Dept 2012]; ***Salvanti v Sunset Indus. Park Assoc.***, 27 AD3d 546, 813 NYS2d 110 [2d Dept 2006]; ***Chaudhry v East Buffet & Rest.***, 24 AD3d 493, 808 NYS2d 239 [2d Dept 2005]). Furthermore, as already noted, Home Depot must meet its initial burden to show lack of constructive notice by offering some evidence as to when the area in question was last cleaned or inspected relative to the time when plaintiff fell (*see* ***Braudy v Best Buy Co., Inc.***; *supra*, ***Pryzywalny v New York City Transit Authority***, *supra*). Joseph Clark, a former Home Depot employee testified that it was Home Depot's practice that upon completion of an outside contractors's work, someone from Home Depot would look at or approve that the work was done to Home Depot's satisfaction. This policy was confirmed by the testimony of Home Depot employee Marlene Meijas. In addition, Paragraph "N" of the Home Depot's snow plowing specifications states, in relevant part: "[c]ontractor will obtain approval from store management that all operations performed are acceptable before leaving the site." J & J, however, as with the salt/sand authorization, could not obtain an inspection of its work in this matter, because Home Depot failed to provide him with the necessary contact information. Thus, not only did Home Depot fail to offer some evidence as to when the area in question was last cleaned or inspected relative to the time when plaintiff fell, the record establishes that it failed to follow its own inspection requirements with regard to this incident, creating an issue of fact which precludes summary judgment.

In view of the foregoing, Home Depot's motion for summary judgment is denied.

Turning to the third-party complaint, the principle of common-law, or implied, indemnification permits a party who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages the party paid to the injured party (*see* ***Arrendal v Trizechahn Corp.***, 98 AD3d 699, 950 NYS2d 185 [2d Dept 2012]; ***Bellefleur v Newark Beth Israel Med. Ctr.***, 66 AD3d 807, 888 NYS2d 81[2d Dept 2009]). An award of summary judgment on a claim for common-law indemnification is appropriate only where there are no triable issues of fact concerning the degree of fault attributable to the parties (*see* ***Aragundi v Tishman Realty & Constr. Co., Inc.***, 68 AD3d 1027, 891 NYS2d 462 [2d Dept 2009]; ***Coque v Wildflower Estates Developers, Inc.***, 31 AD3d 484, 818 NYS2d 546 [2d Dept 2006]).

The right to contractual indemnification depends upon the specific language of the contract; the promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement (***Sovereign Bank v Biagioni***, 115 AD3d 847, 982 NYS2d 322 [2d Dept 2014]; ***George v Marshalls of MA, Inc.***, 61 AD3d 925, 878 NYS2d 143 [2d Dept 2009].

The testimony of Home Depot's witnesses and Joseph Belmonte, president of defendant J &J, as well as the one page proposal (signed by J &J, never signed by Home Depot) and the affidavit of Ernesto Perez, establish that there was a verbal contract between the parties that J & J undertake snow plowing activities at the Shirley store in January of 2004, pursuant to Home Depot's snow plowing specifications. The unrefuted testimony of Mr. Belmonte establishes that the Shirley store was not added to the maintenance contractor agreement between the parties until the following winter season. Home Depot, however, attempts to argue that J & J's snow plowing activities at the Shirley store were governed by the maintenance contractor agreement. This claim is defeated by paragraph 13 of the agreement itself which states that "[t]he terms and conditions of this agreement may not be amended, waived or modified, except in a writing signed by both parties." The verbal agreement of the parties with regard to the

Shirley store obviously fails to meet this contractual requirement. Moreover, paragraph 24.0 of the agreement provides that "this Agreement, including all exhibits and any other documents referenced therein, constitutes the entire agreement between the parties with regard to the subject matter hereof.... ." Thus, Home Depot's claim for indemnification, pursuant to the agreement, fails as a matter of law.

Home Depot's claim for common law indemnification from J & J is also unavailing. The principle of common-law, or implied, indemnification permits a party who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages the party paid to the injured party (*see* ***Arrendal v Trizechahn Corp.***, 98 AD3d 699, 950 NYS2d 185 [2d Dept 2012]; ***Bellefleur v Newark Beth Israel Med. Ctr.***, 66 AD3d 807, 888 NYS2d 81[2d Dept 2009]). Home Depot failed to establish the plaintiff's accident resulted from any negligence on the part of defendant J & J, thus negating any claim for common law indemnification.

J & J's motion for summary judgment dismissing the third-party complaint is granted; that branch of defendant Home Depots' motion seeking summary judgment against J & J with respect to the issue of indemnification is denied.

Home Depot's motion for an order pursuant to CPLR 8501 requiring the plaintiffs to provide security for costs is granted to the extent that the plaintiffs are required to give an undertaking in the amount of two hundred and fifty ($250.00) as security for costs. The affidavit submitted in support does not set forth any costs actually incurred and its claims with regard to future costs are speculative at best. Pursuant to CPLR 8502 all proceedings in this matter, other than to review or vacate this order, will be stayed until such security for costs is given.

Dated: 8/8/14

THOMAS F. WHELAN, J.S.C.