SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : **HON. LAWRENCE V. CULLEN** **IAS PART 12**
Justice

- x

EILEEN OKOWSKY,

Plaintiff,

- against -

CORD MEYER DEVELOPMENT, LLC and
COMMERCE BANK CORP., INC.,

Defendants.

- x

Index No.: 25372/05

Motion Date: 10/29/08

Motion No.: 16

Motion Seq. No. 2

COMMERCE BANCORP, INC.,

Third-Party Plaintiff,

- against -

ACC CONSTRUCTION CORPORATION,

Third-Party Defendant.

- - -- - - - - - - - - - - - - - - - - x

Index No. 35046/06

The following papers numbered 1 to 20 on these motions:

	Papers Numbered
Third-Party Defendant ACC Construction Corp.'s Notice of Motion-Affirmation-Affidavit(s)-Exhibits-Service	1-4
Defendant, Third-Party Plaintiff Commerce Bancorp, Inc.'s Notice of Cross-Motion & Affirmation in Opposition-Exhibits-Service	5-10
Plaintiff's Affirmation in Opposition to Cross-Motion-Exhibits-Service	11-13
Defendant Cord Meyer's Affirmation in Opposition-Exhibits-Service	14-17
ACC Construction Corp.'s Affirmation in Opposition to Cross-Motion and Reply Affirmation	17-20

By notice of motion, third-party defendant, ACC Construction Corporation (ACC), seeks an order of the Court, pursuant to CPLR § 3212, granting them summary judgment and dismissal of the third-party complaint and any and all cross-claims against them.

Defendant, third-party plaintiff, Commerce Bancorp, Inc., (Commerce), files an affirmation in partial opposition and cross-moves for summary judgment and dismissal of plaintiff's complaint as against them, summary judgment on its cross-claim against Cord Meyer Development, LLC (Cord Meyer), and summary judgment on their third-party complaint against ACC. Plaintiff files an opposition to the cross-motion.

ACC files an affirmation in partial opposition to the Commerce cross-motion and a reply to the opposition to their motion. Cord Meyer files an affirmation in opposition to the Commerce cross-motion, and ACC files a reply to their motion.

The underlying cause of action is a claim by plaintiff for personal injuries alleged to have been sustained in a trip and fall on February 13, 2004 on the public sidewalk of 71st Road, Forest Hills, NY.

Focusing on different portions of plaintiff's deposition testimony, defendants maintain that plaintiff was not able to say where she fell, while plaintiff maintains that she pointed out exactly where she fell, and what caused her to fall.

Based on plaintiff's testimony as follows, defendants argue plaintiff was unable to identify where she fell:

> Q. On Defendant's Exhibit G, can you tell me if this picture - - if anywhere on this picture represents where you fell?
>
> A. I am going to have to assume somewhere here (indicating). I didn't look to see where my foot got stuck [sic]. I am not understanding the question. (Deposition, p. 35, lines 18-24).

and

> Q. On the intersection of Queens Blvd. once you stepped on to 71st Road do you know how many feet into the road you fell?
>
> A. Probably the middle of the block getting closer to Queens Blvd., not close to Austin St. I was probably midpoint in the middle of the block.

Q. Does defendant's Exhibit G represent where you fell?

A. It looks like it, yes.

Q. Can you circle for me on Defendant's G, can you indicate where exactly you fell or if you don't know please state you don't know. Don't guess.

A. I am assuming here (indicating). (p. 37, lines 8-25).

In response, plaintiff draws the Court's attention to the following:

Q. Can you describe for me in your own words the incident that occurred on February 13, 2004?

A. As I was walking down the street, as I said, I was just walking normally and the next thing I knew my right toe stopped me short. It hit something which stopped me short and had me fly and then I landed and my left foot some how landed under my body. I landed on my left foot. (Deposition, p. 33 lines 10-19).

and

Q. Did you make any determination as to what your right foot came in contact with just before your fall?

A. Well it stopped me short so it had to be some type of piece of concrete or something on the ground.

Q. When you say it must have been, what I want to know is do you know as we sit here today, what it was?

A. Yes, it was a piece of concrete in the ground that stopped my right foot short, my right toe.

Q. Was that a piece of raised concrete in the sidewalk?

A. I don't know if it was raised or more lower, but my foot got caught in it, my right foot.

Q. Was it part of the sidewalk?

A. Yes. (P. 70, line 25, p. 71, lines 2-19).

and

Q. Do you have any understanding of what it is that caused you to fall?

A. Yes.

Q. What is it that caused you to fall?

A. A crack or indentation in the sidewalk. (P. 73, lines 8-13).

and finally,

Q. I am going to show you now what has been marked Defendant's G which I believe you marked earlier. The area that is marked by the circle, is it your testimony that is the area your toe caught at the time of this incident?

A. Yes.

While the Court can see that plaintiff's testimony may serve to provide fodder for cross-examination at trial, it is hardly dispositive on the issue of whether plaintiff knew where she fell, or what caused her to fall.

Defendant's reliance on the cases cited wherein the plaintiff was unable to identify the place where the trip and fall accident occurred at the time of the deposition and subsequently submitted a "feigned" affidavit to overcome a summary judgment is misapplied. (See defendant's ACC paragraphs 32 and 33 in affirmation in support).

Accordingly, viewing the evidence in a light most favorable to the plaintiff, as the Court is required to do, the overall deposition testimony of plaintiff, at the very least, raises questions of fact in response to defendant's prima facie case for summary judgment regarding the proximate cause of her accident. (See Louniakov v. MROD Realty Corp., 282 AD2d 657, 724 NYS2d 70 (2001); Farrar v. Teicholz, 173 AD2d 674, 570 NYS2d 329 (1991); Diana v. RB-3 Assoc., 12 AD3d 1108, 785 NYS2d 235 (2004)).

Defendant ACC also argues that they neither created the "condition" of the sidewalk causing plaintiff to fall, nor did they have actual or constructive notice of such a condition.

In support of this contention, third-party defendant ACC, cites to the testimony of Joseph Garcia Briceno, the maintenance supervisor for co-defendant, Cord Meyer. Mr. Briceno testified that the building eventually housing Commerce Bank was leased to Commerce Bank by Cord Meyer. By the terms of the lease, Cord Meyer was responsible for structural maintenance, but sidewalks were the responsibility of the tenant, Commerce. He also

testified that he never saw the sidewalk condition pictured in the photos shown at the deposition before the day of plaintiff's accident.

Gary Kaganowich, an officer and project manager for Commerce Bank stated that ACC was hired as the general contractor for the Commerce Bank project at that location. He stated that ACC was not charged with repairing cracked sidewalks or patching holes, although ACC replaced the sidewalks after the accident.

However, when asked specifically about a provision of the contract between Commerce Bank and ACC, which was entered into prior to plaintiff's accident, Mr. Kaganowich explained that "sidewalk or waterproofing" referred to "...removal and replacement of the concrete sidewalk around the perimeter of the building." (See defendant's Exhibit M, deposition of Gary Kaganowich, p. 43, lines 16-23). When shown a copy of the photograph of the sidewalk, Mr. Kaganowich acknowledged the crack, but claimed that he'd never noticed it, or had complaints regarding it.

John Ahearn, the ground superintendent for ACC, testified that the project at this site started in the Fall of 2003 and was completed sometime in the Spring of 2004. He acknowledged walking in the area one to two times a week, but said he had never noticed this crack in the sidewalk.

However, when shown the photos of the sidewalk, Mr. Ahearn acknowledged that there was a missing piece of concrete, and that it constituted a tripping hazzard. Finally, Mr. Ahearn said, yes, that ACC did have responsibility with respect to the maintenance of the sidewalk around the construction site. (Defendant's Exhibit O, deposition testimony of John Ahearn, p. 40, lines 4-8).

In support of their contention that the defect in the sidewalk was sufficiently noticeable so that the defendant must be charged with at least constructive notice of the condition, plaintiff relies in part on the photographs used at the deposition wherein the defendant's witnesses acknowledged the crack or condition depicted in the photos. It is uncontroverted that the photos relied on at the deposition were taken by plaintiff's brother-in-law approximately two hours after the accident. The plaintiff, seated in her brother-in-law's car, pointed to the place where she fell and he took the photos. Plaintiff submits the affidavit of her brother-in-law, Roy Arroyo, in support of her affirmation in opposition. While defendant complains that this witness was never deposed, it is clear from plaintiff's deposition testimony that the identifying photographs were taken by Arroyo. Defendant makes no claim that his deposition was sought and refused.

Plaintiff also submits the affidavit of an expert witness, Nicholas Bellizzi, a civil engineer whose expert opinion is that the condition depicted in the photographs had existed at least two years prior to plaintiff's accident.

Accordingly, "[o]n this record, the defendant's motion papers left unresolved triable issues of fact as to whether they created the alleged dangerous condition, or alternatively, whether they had actual or constructive notice of its existence. (See Lafrancesca v. Wal-Mart Stores, Inc., 23 AD3d 351 (2005))." Chetcuti v. Wal-Mart Stores, Inc., 42 AD3d 419, 839 NYS2d 551 (2007).

Finally, this Court finds that to the extent defendant maintains that the alleged defective condition that plaintiff complains of as causing her to trip and fall is trivial, upon examination of the testimony and evidence before the Court "...it can not be concluded, as a matter of law, that the alleged defect upon which plaintiff...tripped and fell was of such a trivial nature that it could not give rise to legal liability on the part of defendants (see Corrado v. City of New York, 6 AD3d 380 (2004); Lobsenzer v. Mintz, 283 AD2d 556 (2001); Reeves v. New York City Tr. Auth., 276 AD2d 543 (2000))." Friedman v. Beth David Cemetery, 19 AD3d 365, 796 NYS2d 167 (2004)).

Third-Party Complaint and Cross-Claims
as Between Defendants

Cord Meyer is the owner of the property where the alleged accident took place. At the time of the accident, Cord Meyer had leased the property to Commerce. In turn, Commerce contracted with ACC to act as general contractor in the project to build a retail bank branch on the premises. In fact, the project was underway at the time of plaintiff's accident.

In the third-party complaint in this action, Commerce alleges a cause of action against ACC based on claims of an entitlement to defense and indemnification on theories of common law and contractual indemnification and damages based on an alleged breach of contract. In it's cross-claim, Cord Meyer seeks the same relief.

At the outset the Court notes that Commerce agrees to discontinue it's claim that ACC breached the contract between them.

Third-party defendant, ACC argues that they can not be held to owe a duty of defense and indemnification to Commerce under a theory of common law indemnification as there is no evidence presented that Commerce was not "actively" negligent, nor any evidence that ACC was contributorily negligent. Defendant ACC argues that none of the witnesses from ACC, Commerce, or Cord

Meyer testified to having seen the alleged sidewalk defect prior to plaintiff's accident original - your page 20).

Because the alleged defective condition was on a public sidewalk, defendant ACC argues it could have been created in any number of ways. As noted above, however the court has already determined that there are material issues of fact concerning constructive notice precluding summary judgment for defendants.

The claim for relief based on a theory of contractual indemnification must also fail, defendant ACC argues, as it is based on a contractual provision, namely, the "ATA 1987" version of "general conditions" referenced in the parties' contract which inures to the benefit of an owner of property. Commerce, in this instance is not an owner, moreover, ACC argues the accident was not caused by negligent acts or omissions of third-party defendant, ACC.

In the cross-motion, Commerce maintains they are entitled to defense and indemnification from ACC. In support of this contention, Commerce points to Section 7.3.1. of their contract with ACC which states:

> "7.3.1 Contractor is responsible for security of building, supplies, workers and entire site until occupancy is accepted by the Owner."

Thus, Commerce argues third-party defendant ACC was responsible for the "entire site," including where plaintiff alleges she fell. Moreover, defendant Commerce points to the testimony of John Ahearn, the general superintendent for ACC who stated that ACC was responsible for maintaining the sidewalk around the construction site. (Ahearn deposition testimony, p. 40, lines 4-8).

Commerce also alleges that the lease between them and Cord Meyer states that Cord Meyer is responsible for maintaining and repairing sidewalks and that Cord Meyer shall indemnify and hold Commerce harmless for any breach of said lease. In support of this contention Commerce points to the following portions of the lease.

> "Repairs: 4. Owner shall maintain in good condition and repair in conformance with similarly situated office buildings in Queens (i)the structural portions of the building and the demised premises, both exterior and interior (including the roof, foundation and curtain walls), and (ii) the building systems which service the demised premises and are located outside of the demised premises. Owner shall also maintain in good condition and repair the public portions of the building and the sidewalks, both exterior and

interior.... Tenant shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements, fire or other casualty, excepted."

and

"17. Owner shall indemnify and save harmless Tenant against and from all liabilities, obligations, damages (specifically excluding consequential damages), penalties, claims, costs and expenses for which Tenant shall not be reimbursed by insurance, including reasonable attorneys' fees, paid suffered or incurred as a result of any breach by Owner or Owner's agents or employees of any covenant of this lease."

Moreover, Commerce maintains that by the terms of the lease, and the Administrative Code of the City of New York, Cord Meyer, as owner of the property where the alleged accident took place is responsible for maintaining the sidewalk in a reasonably safe condition. (See NYC Code §§ 7-210, 19-152).

In response, defendant Cord Meyer maintains that it is their tenant, Commerce, who owes a duty to Cord Meyer to defend and indemnify Cord Meyer. In support of this claim, defendant Cord Meyer points to various portions of the lease between Cord Meyer and Commerce, as well as the testimony of Joseph Briceno, the Cord Meyer building maintenance superintendent.

Those portions of the lease upon which defendant Cord Meyer relies are:

Paragraph "50" of said lease reads as follows:

"a) Tenant shall, at its own expense, procure and keep effective during the term of this demise, combined comprehensive General Liability Insurance insuring against claims for property damage and bodily injury with minimum amounts of $3,000,000.00 per occurrence, and $3,000,000.00 aggregate insuring the Landlord, its agents and employees and the Tenant against claims arising out of the Tenant's business or anything done or omitted, or claimed to have been done or omitted by the Tenant or by the Landlord, or anything occurring or claimed to have occurred upon or adjacent to the demised premises or sidewalks or street in front thereof."

"b) Tenant shall also require general contractor or contractors engaged by it to do work in or about demised premises to procure and keep in effect Workers' Compensation Insurance and to procure and keep in full force and effect Commercial General Liability policies with occurrence clauses as will fully protect and indemnify Landlord and Tenant against any and all damages and claims, suits or action for damages as the result of any injury or alleged injury to any person whomsoever in any property whatsoever arising out of any demolition or construction upon the demised premises, in minimum amounts of $2,000,000.00 per person and $3,000,000.00 per person and $3,000,000.00 aggregate."

Paragraph "4" of said lease reads as follows:

"Tenant shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto..."

Paragraph "8" of said lease reads as follows:

"Tenant agrees, at Tenant's sole cost and expense to maintain general public liability insurance in standard form in favor of owner and Tenant against claims for bodily injury or death or property damage occurring in or upon the demised premises effective from the date Tenant enters into possession of the demised premises and during the term of this lease.... Tenant shall indemnify and save harmless owner against and form all liabilities, obligations, damages, penalties, claims, costs and expenses for which owners shall not be reimbursed by insurance.... In case any action or proceeding is brought against either party by reason of any such claim, the other party upon written notice from the first party will at the second party's expense resist or defend such action or proceeding by counsel approved by the first party in writing, such approval not to be reasonably withheld."

Cord Meyer maintains that a request for defense and indemnification was tendered on or about September 9, 2005. As of the submission of this motion Cord Meyer maintains that both Commerce and their insurance carrier have declined to provide a defense, in violation of the lease agreement.

Moreover, Cord Meyer maintains that as owners of the property they are also entitled to defense and indemnification from the general contractor on the site, ACC.

At the outset, the Court notes that both third-party defendant ACC and defendant Cord Meyer maintain that this Court should disregard the Commerce cross-motion for summary judgment as untimely. "However, an untimely motion or cross-motion for summary judgment may be considered by the Court where, as here, a timely motion for summary judgment was made on nearly identical grounds (see Bressingham v. Jamaica Hosp. Med. Ctr., 17 AD3d 496, 497 (2005); Boehme v. APPLE, A Program Planned Life Enrichment, 298 AD2d 540 (2002); Miranda v. Devlin, 260 AD2d 451 (1999)). In such circumstances, the issues raised by the untimely motion or cross-motion are already properly before the court and thus, the nearly identical nature of the grounds may provide the requisite good cause (see CPLR § 3212[a]) to review the untimely motion or cross-motion on the merits. Notably, the court, in the course of deciding the timely motion, is, in any event, empowered to search the record and award summary judgment to a non-moving party (see CPLR § 3212[b])." Grande v. Peteroy, 39 AD3d 590, 591, 592, 833 NYS2d 615 (2007). Admittedly, the parties are arguing different positions on these summary judgment motions and the cross-motion. Nevertheless, the motions involve the same issues. Accordingly, defendants ACC's and Cord Meyer's motions to disregard the Commerce cross-motion for summary judgment as untimely are denied.

Both Commerce and Cord Meyer cite paragraph four (4) of the lease in support of their contention that the other party is obligated to maintain the sidewalks adjacent to the building in a reasonably safe condition.

In citing paragraph four (4) Commerce refers to that portion of the lease which lists numbered "inserts" as part of the lease which are to be included as part of paragraph four (4). Those inserts namely, 6,7, 8 and especially 9, are clearly intended to be part of the lease, but are, for some reason omitted from the quoted portion of the lease argued by defendant Cord Meyer. When read as a whole, however, it is clear the parties' intent was for the owner, Cord Meyer to repair and maintain the sidewalk. Hoffman v. NJR Associates, 48 Diva Nails & Paul, WL 3243548, 2008 NY Slip Op.

Defendant Cord Meyer also relies on paragraph eight (8) of the lease which they quote, once again, sans additional language as marked by number and listed at the end of the standard boilerplate part of the lease. That additional language includes number seventeen (17) of a paragraph requiring the owner (Cord Meyer) to indemnify and hold the tenant, Commerce, harmless, for enumerated damages not covered as a result of the owner's breach. (See Exhibit 7, Commerce Bank Cross-Motion, lease, Inserts to Printed Portion of Lease, para. 17).

Finally, Cord Meyer relies on paragraphs, fifty (50(a) and (b)) contained in the parties' rider to the lease. These provisions require the tenant, Commerce, to obtain and maintain Comprehensive Liability Insurance in favor of the landlord, Cord Meyer, for among other things, Cord Meyer's own alleged negligence (paragraph 50[a]). The tenant is also obligated to require any contractor they engage, in this instance, ACC Construction, to obtain Comprehensive General Liability coverage which includes the tenant (Commerce) and the landlord (Cord Meyer). As noted previously, ACC fulfilled this obligation, and Commerce agreed to withdraw that portion of its claim against ACC based on breach of contract.

Turning next to the tenant's (Commerce's) obligation to the landlord (Cord Meyer). Under the lease where it is determined that the claim is based on the landlord's negligence it has been held "[w]here, as here...in a commercial lease negotiated by two sophisticated parties...a lessor and lessee freely enter into an indemnification agreement whereby they use insurance to allocate the risk of liability to third parties between themselves, General Obligations Law § 5-321 dos not prohibit indemnity." Great N. Ins. Co. v. Interior Const. Corp., 7 NY3d 412, 419, 823 NYS2d 765 (2006). Thus, the Court's have allowed such agreements to withstand scrutiny in light of a strong policy to "...afford protection to the public." Id. at 419. Accordingly, if it is ultimately determined that defendant Cord Meyer was negligent in failing to maintain the sidewalk perimeter in a reasonably safe condition, then under the lease between the parties, Commerce through the insurance procured on their own and Cord Meyer's behalf is obligated to indemnify Cord Meyer.

Paragraph seventeen (17) on which Commerce relies obligates Cord Meyer, as owner, for essentially any obligations or expenses incurred by Commerce "...for which Tenant (Commerce) shall not be reimbursed by insurance..." Thus, if the costs (excluding consequential damages) exceed the coverage secured by Commerce on each party's behalf, then Cord Meyer is obligated to meet that expense.

Finally, as to Cord Meyer's reliance on the same paragraph eight (8) in support of their contention, that Commerce has breached their obligation to Cord Meyer to provide a defense, such reliance is misplaced.

Paragraph eight (8) of the lease between the parties when taken as a whole contains a reciprocal provision as follows:

> In case any action or proceeding is brought against either party by reason of any such claim the other party upon written notice from the first party will at the second party's expense resist or defend such action or proceeding by counsel approved by the

first party in writing, such approval not to be unreasonably withheld and such consent to be deemed given to counsel appointed by the second party's insurance company.

Such provision presupposed only one of the parties being sued as a result of some claim, with the result that the second party makes a demand to be defended. In this instance plaintiff named both parties from the outset. Therefore, each defendant under the lease is demanding the other should defend and indemnify them, rendering this provision meaningless.

Defendant ACC maintains that they can not be held liable to Commerce or Cord Meyer, as the owner of the premises, under a theory of common law indemnification or contractual indemnification.

"In order to establish their claim for common-law indemnification, the owners were required to prove not only that they were not negligent, but also that the proposed indemnitor [ACC Construction] was responsible for negligence that contributed to the accident..." Benedetto v. Carrera Realty Corp., 32 AD3d 874, 875, 822 NYS2d 542 (2006). "[T]he key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is a separate duty owed the indemnitee by the indemnitor. (Raquet v. Brown, 90 NY2d 177, 183 (1997), quoting Mas v. Two Bridges Assoc., 75 NY2d 680, 690 (1990)." Vetland v. FX Enters. I, Ltd., 49 AD3d 632, 634, 854 NYS2d 415 (2008).

Under the circumstances presented here neither Commerce nor Cord Meyer has established that third-party defendant, ACC owes them a duty pursuant to a theory of common-law indemnification.

Defendants Commerce and Cord Meyer rely on the contract between Commerce and third-party defendant ACC in support of their claim for contractual indemnification. As noted previously, the provisions on which they rely are § 7.3.1, and § 9.1.2 which notes that the "General Conditions" provision of the AIA Document A201 1987 Version applies to this contract.

The provisions on which defendants Cord Meyer and Commerce rely, particularly defendant Commerce within the 1987 Version of AIA "General Conditions" are § 3.3.2 and § 3.18.1, which provide as follows:

"3.3.2 the Contractor [i.e., ACC] shall be responsible to the Owner [designated as Commerce] for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons performing portions of the Work under a contract with the Contractor.

3.18.1 To the fullest extent permitted by law, **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 attorneys' 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 Work itself) including loss of use resulting therefrom, but only **to the extent caused in whole or in part by anyone directly or indirectly employed by them or anyone for whose acts they may be liable, 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 Paragraph 3.18.

(See **Exhibit 10** at Art. 3 § 3.3.2, § 3.18.1 (emphasis added)."

Third-party defendant, ACC argues that there is no evidence, however, that the condition of the sidewalk where plaintiff maintains she fell was a condition "....arising out of or resulting from performance of the work..."

There is no dispute that defendant ACC Construction was on the site and performing some construction work at the time of the plaintiff's accident.

There is no dispute that third-party defendant ACC made regular inspections of the site in the period preceding plaintiff's accident. And finally, third-party defendant ACC's own witness, John Ahearn, the general superintendent, testified that ACC and not Commerce was responsible for the maintenance of the perimeter sidewalk during the pendency of the construction.

However, third-party defendant ACC emphasizes that the witness for Commerce Bank testified that third-party defendant ACC's duties did not extend to repairing or patching any holes or cracks in the sidewalk. Nor, Kaganowich explained, did he interpret "security" (see § 7.3.1) to mean that ACC was in fact the insurer for the entire site.

"Pursuant to General Obligations Law § 5-322.1 any construction contract purporting to indemnify a party for its own negligence is void and unenforceable, although contracts requiring parties to procure insurance are not similarly void

(see Kinney v. GW Lisk Co., 76 NY2d 215 (1990))." Mathius v. Platimum Estates, 2007 WL 2814510.

In the instant case, there exists triable issues of fact on the question of [constructive knowledge and] negligence, if any, of the respective parties. Thus, movants have failed to establish their freedom from fault so as to entitle them to summary judgment on their cross-claims for contractual indemnification. (See Daniels v. Bohnfiore, Inc., 300 AD2d 341 (2002); Reynolds v. County of Westchester, 270 AD2d 473 (2d Dep't 2000).

Accordingly, upon all of the foregoing, all motions seeking summary judgment and dismissal of plaintiff's complaint are denied. Third-party defendant, ACC's motion for summary judgment and dismissal of the third-party complaint and any and all cross-claims is denied.

Defendant, third-party plaintiff, Commerce Bancorp. Inc.'s motion for summary judgment on their cross-claim against defendant Cord Meyer Development, LLC is denied. Commerce Bancorp. Inc.'s motion for summary judgment on their third-party complaint against ACC is denied.

Dated: Jamaica, New York
January 21, 2009

HON. LAWRENCE V. CULLEN, J.S.C.