

## **Appellate Court Affirms that General Obligations Law §5-321 Voids Entire Indemnification Clause for Dangerous Work Area Accident**

The team of Jim Duggan, Melissa Burke and Joshua Henry won a motion for summary judgment at the trial level and successfully defended its appeal at the Appellate Division, Fourth Department, in a significant case involving the reach of indemnification in this landlord-tenant-third party suit.

The defendant, a Buffalo-area restaurant, employed the waitress plaintiff who was beginning her shift on a busy Friday night. The Building that housed the restaurant had been a bar since Prohibition days. The owner of the building put in a trap door many years ago so that beer, stored in the basement coolers, could be lifted up to the bar room area from below. The lid fit into a base in the floor and was not attached by a hinge. A co-employee set the lid aside, the plaintiff did not notice the opening, stepped right into the open hole, and sustained a serious injury.

When the owner of the building retired from the family bar business, he leased the entire bar/restaurant space to a new proprietor. The owner purchased a lease for a few dollars from a stationary store. The lease was so out of date that its indemnification clause pre-dated the enactment of GOL §5-321, which makes indemnification agreements that require tenants to indemnify for the landlord's sole negligence unenforceable. The indemnification provisions in the lease were identified by KSLN as overboard because the tenant was required to indemnify the landlord for any recent accident or incident that could have arisen during the tenancy that could cause the landlord to be responsible for damages to a third party.

On June 10, 2011, the Appellate Division, Fourth Department affirmed Justice Russell Buscaglia's order granting our client's summary judgment dismissing the commercial landlord's third party action for contractual indemnity, common law indemnity and contribution.

The motion for summary judgment dismissing the landlord's "pass through" claim against the employer was granted because:

- The plaintiff did not sustain a "grave injury" under the definitions which allow third party actions against employers under the Workers' Compensation Law §11.
- The indemnification clause in the lease between the property owner and the employer/tenant was found to be unenforceable as violate of GOL §5-321.

The outcome of this case is particularly notable since there are few reported cases that apply GOL §5-321 so decisively as most indemnification agreements have some "savings" language that allow landlords to pursue tenants for some portion of any given claim.