400 East 51st Street v Fifty First Beekman Corp.
2005 NY Slip Op 30286(U)
December 20, 2005
Supreme Court, New York County
Docket Number: 0115311/2001
Judge: Shirley Werner Kornreich
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[* 1] SCANNED ON 1/6/2006

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

PRESENT: **Kornreich, Shirley Werner, J.**
Justice

PART 54

400 East 51st Street, LLC,

Plaintiff

-against-

Fifty First Beekman Corp., et al.,

Defendants.

INDEX NO. 115311/01

MOTION DATE 7/14/05

MOTION SEQ. NO. 6

MOTION CAL. NO. ______

The following papers, numbered 1 to 12 were read on this motion for Summary Judgment

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

Cross-Motion: [x] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision and order.

FILED JAN -6 2006 COUNTY CLERK'S OFFICE NEW YORK

Dated: December 20, 2005

SHIRLEY WERNER KORNREICH J.S.C.

Check one: [ ] FINAL DISPOSITION [x] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

---X

400 EAST 51ST STREET LLC,

Plaintiff,

Index No.: 115311/01

DECISION AND ORDER

-against-

FIFTY FIRST BEEKMAN CORP., ROSE ASSOCIATES, INC., PAUL J. HERMAN, MIDTOWN PRESERVATION, INC., BREEZE NATIONAL, INC. (s/h/a BREEZE CONTRACTING CORP.), KATHLEEN NEEDHAM INOCCO, and JOHN DOES #1-10,

Defendants.

---X

FIFTY FIRST BEEKMAN CORP. and MIDTOWN PRESERVATION, INC.,

Index No.: 591082/01

Third-Party Plaintiffs,

-against-

ALEXICO MANAGEMENT GROUP, INC., NISO BAHAR, IZAK SENBAHAR, RESAT ARBAS, GAMA HOLDINGS, INC., SIMON ELIAS, HRH CONSTRUCTION CORPORATION, PETER PALAZZO, ROBERT CONROY, FRANK ROSS, JR., HARRY WEIDMYER, BREEZE CONTRACTING CORP., and JOHN DOES #1-10,

Third-Party Defendants,

---X

BREEZE CONTRACTING CORP., ALEXICO MANAGEMENT GROUP, INC., NISO BAHAR, IZAK SENBAHAR, RESAT ARBAS, and SIMON ELIAS,

Index No.: 590808/02

Second Third-Party Plaintiffs,

-against-

[* 3]

FLEET TRUCKING INC.,

Second Third-Party Defendant.

---X

BREEZE CONTRACTING CORP., ALEXICO MANAGEMENT GROUP, INC., NISO BAHAR, IZAK SENBAHAR, RESAT ARBAS, and SIMON ELIAS,

Index No.: 591109/02

Third Third-Party Plaintiffs,

-against-

CIVETTA COUSINS, JV.,

Third Third-Party Defendant,

---X

HRH CONSTRUCTION CORPORATION, PETER PALAZZO, ROBERT CONROY, FRANK ROSS, JR., and HARRY WEIDMYER,

Index No.: 591149/02

Fourth Third-Party Plaintiffs,

-against-

CIVETTA COUSINS, JV.,

Fourth Third-Party Defendant.

---X

KORNREICH, SHIRLEY WERNER, J.:

This is an action to recover for alleged "unlawful interference with the use and enjoyment" of property at 400 East 51st Street, in New York City, the site at which plaintiff has constructed a new residential high rise building ("The Grand Beekman"). In its Verified Complaint, dated August 10, 2001, plaintiff alleges that its construction project was delayed due to a New York City Department of Buildings ("DOB") stop-work order caused by defendants' failure to remedy a dangerous condition that existed in the facade of a building adjacent to plaintiff's property (the "Co-op Building"). Plaintiff's complaint asserts causes of action for private nuisance, violation of

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building codes and negligence against defendants: the owner, managing agent and engineering consultant of the neighboring property, and two of their employee/agents. Defendants counterclaimed that plaintiff's negligent demolition work caused the dangerous condition.

On October 5, 2001, defendants Fifty First Beekman Corp. (the "Co-op"), the owner of the Co-op Building, and its engineering consultant, Midtown Preservation, Inc. ("Midtown"), commenced a third-party action against several of plaintiff's principals: Alexico Management Group, Inc. ("Alexico"), Niso Bahar, Izak Senbahar, Resat Arbas, Gama Holdings, Inc., and Simon Elias (together, "Plaintiff's Principals"); plaintiff's construction manager HRH Construction Corporation ("HRH"), and certain of its principals, Peter Palazzo, Robert Conroy, Frank Ross, Jr. and Harry Weidmyer (together, the "HRH Principals"); and Breeze Contracting Corp. ("Breeze"), a demolition contractor hired for plaintiff's project.[1] The theory of the third-party plaintiffs was that the third-party defendants had caused the western wall of the Co-op Building to become unstable through improper demolition of a pre-existing building directly adjacent to the Co-op Building (the "Adjacent Building"), as well as through their failure to brace, stabilize and weatherproof the wall.

In July 2002, Breeze and other third-party defendants commenced a second third-party action against Fleet Trucking Inc. ("Fleet"), the demolition subcontractor, for contractual indemnification, and/or for Fleet's alleged breach of the defense-and-indemnification provisions of its purchase order agreement with Breeze. On January 29, 2004, plaintiff moved to amend its complaint to assert claims directly against Breeze and Fleet for breach of contract and contractual indemnification. The motion was granted, by order dated July 21, 2004. Plaintiff's claims against

[1]At oral argument, defendants indicated that the third-party action would be discontinued as against Plaintiffs' Principals and the HRH Principals.

Breeze for breach of contract and delay damages have been settled and discontinued. Santorno Aff., para. 10.

In addition, a third third-party action was commenced against Civetta Cousins, JV ("Civetta") by Breeze and Plaintiff's Principals; and a fourth third-party action was commenced against Civetta by HRH and its principals. The theory of these actions is that Civetta, the excavation subcontractor hired by HRH, owes indemnification to the third- and fourth-party plaintiffs pursuant to Civetta's contract with HRH.

I. Summary Judgment Motions

Two motion sequences are now before the Court, No. 6 and No. 7.

In Motion Sequence No. 6, defendants move for summary judgment dismissing plaintiff's complaint.

Plaintiff, together with its Principals, and third-party defendant Breeze, cross-move for summary judgment dismissing defendants' counterclaims and third-party claims against them.

HRH and its Principals cross-move for summary judgment dismissing all claims, counterclaims and cross-claims against them.

Second third-party defendant Fleet cross-moves for summary judgement dismissing all claims and cross-claims against it by plaintiff, its Principals, and Breeze.

In Motion Sequence No. 7, Civetta moves for summary judgment dismissing the third- and fourth-party complaints.

II. Factual Background

In July 2000, plaintiff contracted with Breeze to demolish two pre-existing buildings on the property where The Grand Beekman now stands. Affirmation of F. Santoro, para. 14. By contract dated June 7, 2000, Breeze agreed to "furnish all labor, supervision, materials, scaffolding, ladders,

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tools, equipment, supplies, and incidental materials, etc., necessary for the prosecution and completion of all asbestos abatement and demolition of the existing building(s)..." Affirmation of G. Sachs, Exhibit A. Breeze agreed to indemnify "the Architect, the Owner," and several entities listed on an additional insured rider, including plaintiff, HRH and Alexico. *Id.*

By purchase order agreement dated August 10, 2000, Breeze subcontracted with Fleet to demolish the pre-existing buildings on plaintiff's property, one of which partially adjoined the Co-op Building. *Id.* The scope of Fleet's work included, *inter alia,* "demolition of all buildings to sidewalk grade." Pursuant to the agreement, Fleet agreed to:

> save [Breeze], its agents, employees and parent and affiliate companies as well as the owner ... of the project where the work is to be performed or materials used, harmless against any and all (i) claims and liability for injury to or death of any person and for damage to or loss of any property occurring an any manner whatsoever by reason of the work hereunder.

Affirmation of G. Sachs, Exhibit B.

Fleet's demolition work began in late August 2000, and ended in or about December 2000. Breeze's president, Toby Romano, testified that decisions regarding Fleet's demolition work were made by and between himself, Peter Salvato (of Breeze) and John Colucci (of Fleet). During the course of the demolition work, portions of the western wall of the Co-op Building were exposed. Affirmation of K. Inocco, para. 5. According to plaintiff, "voids in the Western Wall of the Co-op Building that were exposed by the demolition were filled in with mortar (parged) [by Fleet], and a temporary waterproofing measure, a polyurethene shield, i.e., blue tarps were installed in the areas where the 404 East 51st Street and the Co-op Building were previously adjoined." Santoro Aff., para. 16. On the other hand, defendants contend that the "blue tarps" were placed in a "haphazard and incomplete manner" so that they "did not cover all exposed areas, large holes were left open to

the elements, and the tarpaulins were not watertight." Inocco Aff., para. 5.

Mr. Romano testified that it is standard practice for the demolition contractor to "patch cavities on the adjoining building." EBT of T. Romano, p. 69. Mr. Romano testified that Fleet performed patching, as necessary to fill in cavities, on the western wall of the Co-op Building. He further testified that one or two weeks after the commencement of demolition, he met with the superintendent for the Co-op Building, who reported "getting water in his basement." *Id.* at 82. Mr. Romano told the superintendent that the water was "existing water" caused by a "crack in [the building's] foundation." *Id.* at 83. Mr. Romano formed his opinion based on his observation of a "hairline crack in the existing foundation" of the Co-op Building. *Id.* at 85. Mr. Romano further testified that Breeze provided Fleet with blue plastic tarps to be installed on the west wall of the Co-op Building "as a precaution to keep any rain out" pending "a whole new waterproofing system" that HRH was planning to install.

In April 2001, the Co-op requested that Midtown investigate reported "water infiltration" into apartment LH and the basement Storage Room of the Co-op building. Inocco Aff., Ex. B. By letter dated April 24, 2001, Midtown confirmed the leak reports, and concluded that

> [b]oth leaks are attributed to the demolition of the neighboring building. While temporary tarps have been installed at the upper floors, immediate protection is required at the base of the building. A long-term solution also needs to be addressed, which is contingent on the proposed new construction work. In order to abate the leak in the Storage Room, waterproofing of the foundation wall may also be required.

Inocco Aff., Ex. B.

Previously, in 1999, Midtown had been retained by the Co-op to perform an inspection of the Co-op Building, pursuant to Rule 32-03 of the Administrative Code (commonly referred to as "Local Law 11"). In February 2001 (after plaintiff's demolition work), the Co-op hired Midtown

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to prepare plans for repair of the facade. On June 12, 2001, Midtown sent out a Bid Package for the facade restoration work. Inocco Aff., Ex. C. The job was awarded to VHS Building Corp. ("VHS") in July 2001, and an agreement between VHS and the Co-op was executed, providing that VHS would begin work on July 30, 2001. *Id.,* Ex. E. On July 16, 2001, VHS submitted an application for work approval to the DOB. Inocco Aff. at 10.

On July 24, 2001, an employee of Midtown, using a scaffold drop, inspected the western wall of the Co-op Building "by removing portions of the blue plastic tarpaulins... ." *Id.* at 11. According to Kathleen Inocco, a "licensed professional engineer" and a principal of Midtown, the employee's inspection of the wall "revealed that certain concrete block portions of the western wall ... were unstable and that loose block could be removed by hand." *Id.* at 12. Ms. Inocco notes that "[e]xcavation of the [Adjacent Building] by the Developer or its agents had begun on or about July 23, 2001, directly at the base of the western wall of the Co-op's Building. That excavation was causing considerable vibration to the western wall... ." *Id.* at 13.

By letter dated July 24, 2001, Ms. Inocco notified the DOB that Midtown had "observed unsafe conditions on the facade of the [Co-op] building." Inocco Aff., Ex. G. Ms. Inocco's letter noted that "the neighboring property is being excavated, causing a great deal of vibration." *Id.* The letter requested that "the excavation project at the corner of East 51st Street and First Avenue be immediately shut down until the west wall of #420 is stabilized." *Id.* Also on July 24, 2001, counsel for the Co-op wrote to HRH, directing that it "immediately cease and desist all construction activities until the [western wall] conditions are stabilized and remedied." *Id.*, Ex. H. According to Ms. Inocco, excavation continued on July 24, and July 25, 2001. *Id.* at 15.

Ms. Inocco further states that "Midtown learned that on July 25, 2001, representatives of the DOB's Building Enforcement Safety Team Squad visited the Property and directed that all

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excavation activities stay 30 feet away from the east property line of the Property due to the condition of the western wall of the Co-op's Building." Inocco Aff. at 16. By letter dated July 26, 2001, Ms. Inocco again wrote to DOB, requesting a stop-work order. *Id.*, Ex. F. Ms. Inocco's July 26 letter noted that "the demolition of the [Adjacent] building exposed concrete block, containing many voids, on the western facade of [the Co-op Building]." *Id.* The letter stated that Midtown was "extremely concerned since the neighboring property had just commenced excavation, causing significant vibration to this already unstable wall. ... Vibrations from the excavation can likely cause sections of this wall to fall on workmen below." *Id.*

Ms. Inocco further states that "[o]n or about July 27, 2001, inspectors from the DOB visited the Property and directed the Developer and HRH to suspend all excavation at the work site pending stabilization of the western wall of the Co-op's Building." Inocco Aff. at 18. Thereafter, the DOB issued a work permit for the renovation work on the facade of the Co-op, and VHS commenced the renovation on Monday July 30, 2001. *Id.* at 20; Ex. I. On August 3, 2001, Midtown and/or VHS "observed that the wall ties between the brick facade and the back-up block of the wall had sheared, rendering the brick facade unstable and subject to collapse." *Id.* at 21. On the same day, Ms. Inocco wrote to the DOB, stating that "in addition to loose concrete block, the wall ties between the outer wythe of brick and backup block have sheared. The contractor cannot leave the work site until the brickwork is secured. Therefore, please issue a permit for such weekend work, which may be required on a 24 hour basis." *Id.*, Ex. K. Also on August 3, 2001, Ms. Inocco advised HRH that "the wall ties between the outer brick facade and block backup have sheared and the facade has moved significantly. The brick facade is very unstable and is in the process of being removed. Please be advised that NO ONE should be permitted on your site until this wall is stabilized." *Id.* (emphasis in original).

DOB issued an "After Hours Work Permit" dated August 3, 2001, to VHS. *Id.*, Ex. L. VHS then modified its plans, and worked to stabilize the "upper portions of the western wall before it could complete the repairs to the portions of the lower western wall ... ." By letter dated August 17, 2001, HRH requested from the DOB "permission to erect a safety platform to catch loose debris from the west wall ... and to continue to excavate 20 ft. west of the adjacent property, 420 E. 51st Street." *Id.*, Ex. M. HRH constructed the safety platform, which was completed on or about August 30, 2001. *Id.* at 25.

Apparently, the DOB put "a lot of pressure" on Midtown to provide "frequent updates on what was transpiring at the site... ." EBT of K. Inocco, p. 387. On August 23, 2001, Ms. Inocco's partner at Midtown, Dennis Mele, wrote to the DOB to submit a "condition report" on the subject wall. Freudenberg Aff., Ex. A. In the letter, Mr. Mele made the following observations about the wall:

> <u>Lower Floors (north and south sections)</u>
>
> Areas where the old neighboring structure was removed are constructed of concrete block rather than brick. This block is laid up in a haphazard manner, with numerous voids and hollows and with an inadequate number of wall ties and in some cases no wall ties whatsoever. Although relieving angles are present at most areas of the wall there is one section of wall near the southeast corner that does not bear on any relieving angle. At this location the angles do not extend fully to the southeast building corner. The area in question is approximately four stories in height with dimensions of approximately 10 feet wide by 40 feet high. This area is self supporting and not properly tied back to the building frame. At other locations each floor is an independent panel of masonry free to move horizontally under certain conditions as may be created by the excavation.
>
> The remaining areas of block work have numerous conditions of loose mortar, loose in fill block and brick and although bearing on

angles, they are not properly tied back. In fact manner [sic] pieces of loose masonry were removed by hand and by light hammer testing during the inspection on August 22nd. There are similar conditions still concealed behind the tarps.

Lower Floors (central portion)

At the building's original brick veneer (located within the area of the old building's courtyard) the brick masonry exhibits signs of shifting off of the relieving angles. There are also conditions of step cracking in the brick. As with all other areas of the west facade we believe that there are inadequate wall ties in this area. The contractor is instructed to install structural pins through the veneer and directly into the building's concrete frame.

Corner Repairs

Both corners of the building are no[t][2] exposed to [sic] to the demolition of the neighbor. At this area the original withe glazed brick of 420 East 51st has been disturbed. In some instances the removal of the building has left cracked brick exposed. Some of these conditions include cracks in the bisque of the brick directly behind the white, glazed face of the brick, creating numerous opportunities for spalling.

Freudenberg Aff., Ex. A.

At his deposition, Mr. Mele did not recall whether he had personally inspected the wall prior to writing the August 23 letter. EBT of D. Mele, p. 107. However, Mr. Mele stated that the letter accurately reflected the condition of the wall as he had observed it at some point in August 2001. *Id.* at 109.

At her deposition, Ms. Inocco testified that she was "on vacation" during the week when Mr. Mele wrote the August 23 letter to the DOB. EBT of K. Inocco, p. 387. She testified that the word "haphazard" in connection with the concrete block referred to a "messier type of

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[2] On the copy provided to the Court, the letter "t" appears to have been interlineated by hand.

construction," but did not indicate that the block was laid in an improper manner. *Id.* at 388. She further testified that she did not recall that the wall had inadequate wall ties. *Id.* at 389. She surmised that Mr. Mele may have "observed areas" in which there were no wall ties. *Id.* Ms. Inocco stated that she was not familiar with the "numerous conditions of loose mortar, loose in-fill block and brick" to which Mr. Mele's letter made reference. *Id.* She further testified that she had not concluded that there were inadequate wall ties on the western wall of the Co-op. *Id.* at 391. Ms. Inocco opined that "some of the voids [in the wall] were likely part of the original construction, but many of them and most almost [sic] all of the big holes that were left in the wall ... were as a result of the demolition." *Id.* at 393.

Jean Miele, a "licensed professional architect," avers that he has read the letter dated August 23, 2001, written by Mr. Mele of Midtown. Affidavit of J. Miele, para. 5. Mr. Miele opines that the "haphazard construction, absence and inadequate number of wall ties, and absence of complete relieving angles of the western wall ... can in no way be attributed to the demolition or construction activity on the adjoining property to the East. Stated differently, the demolition of 404 East 51st Street in the Fall of 2000 did not lay the blocks of the Western Wall down in a haphazard manner, without the appropriate number of wall ties and complete relieving angles; these defects are defects in original construction." *Id.* at 7.

On August 15, 2001, plaintiff commenced a separate proceeding, Index No. 604066/01, pursuant to RPAPL § 881 (the "Section 881 Proceeding"). Plaintiff's petition alleged that defendant Beekman, the owner of the Co-op Building, refused to "erect appropriate safety measures" on its property, after the issuance of the DOB stop-work order, unless plaintiff waived all claims against the Co-op. The petition sought an order granting plaintiff access to the Co-op Building to erect safety measures in order to comply with the DOB order. At a hearing on August

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24, 2001, Justice William Wetzel found as follows:

> ...having read the petition, the order to show cause, the opposition papers which include the affidavit of the president of the co-op, and particularly the affidavit of Deny [sic] Mele, the registered architect on behalf of co-op, this Court determines that the basic issue in this case, that the Court makes the critical finding of fact in, is that the respondent co-op has addressed the issue of the wall by entering into a contract with VHS Building Corporation to do the necessary work under local law Eleven, has obtained a work permit and commenced the work.
>
> And while the petitioner asserts that it has an effective plan that would accomplish the work in less time, this Court finds no basis in law or in equity to require that the building owner respondent defer to the developer to perform the necessary work.

Affirmation of E. Weintraub, Ex. J.

There is controversy over the nature of HRH's involvement in the demolition of the Adjacent Building. Plaintiff asserts that HRH supervised the demolition work, and "expressly informed Breeze that the blue tarps were sufficient temporary waterproofing," and that "permanent waterproofing of the Co-op Building's Western Wall would be properly performed by or at the direction of HRH Construction during the actual construction of the Grand Beekman." Santoro Aff., para. 17. Plaintiff points to testimony of Breeze by Toby Romano, who stated that HRH was "overseeing the project," including the demolition. EBT of T. Romano, p. 190.

On the other hand, Peter Palazzo testified on behalf of HRH, that Breeze, not HRH, supervised the demolition. EBT of P. Palazzo. The "Construction Management Agreement" between plaintiff and HRH was executed as of November 30, 2001, but provides that it "shall be effective as of the date of commencement of pre-construction activities on or about June 8, 1999." Affirmation of M. Freudenberg, Ex. E. The agreement provided that HRH would perform "Work," defined as "construction and services as required by the Contract Documents (as hereinafter defined), whether completed or partially completed... . The Work may constitute the

whole or part of the Project." *Id.* Neither the agreement, nor any associated "contract documents" specify any demolition work. HRH states that its involvement during the demolition phase was limited to "completing the pre-construction services ... as a courtesy." EBT of P. Palazzo, p. 553.

HRH also points to the fact that plaintiff contracted directly with Breeze for the demolition work. The contract provides that Breeze would "furnish all labor, supervision, materials, scaffolding, ladders, tools, equipment, supplies, and incidental materials, etc., necessary for the prosecution and completion of all asbestos abatement and demolition of the existing buildings... ." Freudenberg Aff., Ex. G, Art. 2. Mr. Romano testified that Breeze supervised the demolition work performed by Fleet, though it did not perform any of this work. EBT of T. Romano, p. 189.

HRH, as "construction manager," entered into an agreement dated July 9, 2001, with Civetta Cousins, JV ("Civetta"). The agreement provided that Civetta would "furnish all labor, supervision, materials, scaffolding, ladders, tools, equipment, supplies and incidental materials, etc., necessary for the prosecution and completion of: Excavation, Backfill, Grading & Concrete Foundation." Freudenberg Aff., Ex. H., Art. 2. Mr. Palazzo testified that Civetta "had responsibility for means and methods and made a determination as to where to commence the foundation work." EBT of P. Palazzo, p. 341. Nicholas Roselli, who was the General Supervisor for Civetta at the time of the project, avers that Civetta's work commenced on or about July 23, 2001. Affidavit of N. Roselli, para. 5. Mr. Roselli further avers that "at all times during this project, we worked within the plans and permits provided by HRH and within any directives given by HRH." *Id.* at 12.

II. Conclusions of Law

In order to prevail on a motion for summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its

favor, and do so by tender of evidentiary proof in admissible form. *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557 (1980). It has long been clear that "issue-finding, rather than issue determination" is the proper judicial role in summary judgment proceedings. *See Esteve v. Abad,* 271 A.D.2d 725 (1st Dept. 1947); *cf.* Morris v. Lenox Hill Hospital, 232 A.D.2d 184 (1st Dept. 1996) (summary judgment inappropriate where facts permit conflicting inferences). Similarly, here, the central issue of what caused the Co-op building's western wall to become damaged, is a factual issue to be resolved at trial. However, as set forth below, certain causes of action alleged herein, must be dismissed as a matter of law.

A. Negligence

The Court of Appeals has made clear that a cause of action for negligence will not lie where there has been no physical harm to person or property. *See 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 290 (2001). Put another way, a landowner does not owe a duty to an adjoining landowner to protect it "against purely economic losses." *See id; Roundabout Theatre Co. v. Tishman Realty & Constr. Co.,* 302 A.D.2d 272, 273 (1st Dept. 2003). Defendants argue that plaintiff's negligence claim must fail because it seeks compensation for purely economic losses. The Court agrees. Plaintiff alleges no physical damage to its property or any person.

Moreover, as the Court of Appeals in *532 Madison* held, restriction of the realm of potential negligence claimants "is necessary to avoid exposing defendants to unlimited liability to an indeterminate class of persons conceivably injured by any negligence in a defendant's act." *532 Madison,* 96 N.Y.2d at 289. "Landowners, for example, have a duty to protect tenants, patrons and invitees from foreseeable harm caused by the criminal conduct of others while they are

on the premises, because the special relationship puts them in the best position to protect against the risk." *Id.* Here, defendants had no special relationship with plaintiff, a developer of adjacent property. Thus, plaintiff's negligence claim must be dismissed.

On the other hand, a question of fact is raised as to whether the demolition and/or excavation work was negligently performed and caused damage to the Co-op's western wall. Therefore, defendants' counterclaim against plaintiff for negligence shall remain. Similarly, the cross-motions by HRH, Breeze, Fleet and Civetta, to dismiss the claims and cross-claims against them for negligence and/or indemnification, must be denied.

B. Private Nuisance

To make out a case of private nuisance, plaintiff must show that defendants' conduct caused a substantial interference with plaintiff's right to the use and enjoyment of its property. *See Copart Industries, Inc. v. Consolidated Edison Co.,* 41 N.Y.2d 564, 569 (1977). Moreover, plaintiff must show that defendants' conduct was either "(1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities." *Id.* Plaintiff argues that defendants "knew about the pre-existing problems on the west wall dating back to 1999, yet blamed the next door demolition and excavation at Plaintiff's Property for the needed repairs because they wanted Plaintiff's work stopped." Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Partial Summary Judgment, p. 20. Plaintiff contends that defendants acted intentionally, by "deliberately writing to the DOB and falsely blaming Plaintiff for causing damage... ." *Id.* at 20. Alternatively, plaintiff contends that defendants were negligent in failing to take action sooner to remedy the problems with the west wall.

The Court finds no evidence to support plaintiff's theory that defendants acted either intentionally or negligently to delay repairs to the west wall of the Co-op Building. Plaintiff has produced no evidence that Midtown's investigation in 1999 revealed any defective or dangerous conditions in the portions of the wall that were exposed as a result of the demolition work. Nor is there any evidence that defendants acted unreasonably after the conditions were revealed. Indeed, in the Section 881 Proceeding, Justice Wetzel made the "critical finding of fact" that the Co-op "addressed the issue of the wall by entering into a contract with VHS Building Corporation to do the necessary work under local law Eleven, has obtained a work permit and commenced the work. And while the petitioner asserts that it has an effective plan that would accomplish the work in less time, this Court finds no basis in law or in equity to require that the building owner respondent defer to the developer to perform the necessary work." Nor is there any evidence that defendants were engaged in any "abnormally dangerous" activities. *See Doundoulakis v. Hempstead,* 42 N.Y.2d 440, 448 (1977).

The Court of Appeals has held that "[n]uisance is based upon the maxim that a man shall not use his property so as to harm another. It traditionally required that, after a balancing of risk-utility considerations, the gravity of the harm to a plaintiff be found to outweigh the social usefulness of a defendant's activity." *See Little Joseph Realty, Inc. v. Babylon,* 41 N.Y.2d 738, 744-745 (1977) (citations, internal quotation marks omitted). Here, there is no evidence that defendants used their property to harm plaintiff. Even if a trier of fact were to find–and the Court does not so find–that the western wall of the Co-op building was constructed in a defective or dangerous manner, defendants appear to have taken reasonable action to remedy any discovered defects. To hold defendants liable in tort for the risk to an adjacent developer that the DOB may impose work stoppages to ensure safe work conditions, would effect an improper balancing of the

"risk-utility considerations" inherent in setting forth the legal parameters of adjoining landowners in New York City. The Court finds it more appropriate that, in the absence of evidence of intentional wrongdoing, the developer of commercial property bear such risks. Thus, plaintiff's cause of action for private nuisance is dismissed.

C. Administrative Code Violations

Violation of a provision of the Administrative Code may provide proof of negligence, but does not carry tort liability *per se*. *See Elliott v. City of New York*, 95 N.Y.2d 730, 734 (2001). As discussed above, plaintiff's causes of action for negligence and private nuisance must be dismissed. Thus, plaintiff's cause of action for violation of Sections 27-127, 27-128 and 27-129 of the Building Code of the City of New York, must also be dismissed. Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing plaintiff's complaint is granted, and plaintiff's complaint is dismissed; and it is further

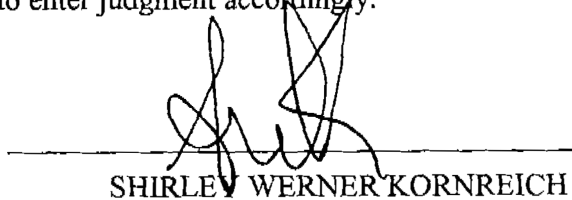
ORDERED that the cross-motion of plaintiff, Alexico Management Group, Inc., Niso Bahar, Izak Senbahar, Resat Arbas, Gama Holdings, Inc., and Simon Elias, and Breeze National, Inc., for summary judgment dismissing defendants' counterclaims and third-party claims against them, is denied; and it is further

ORDERED that the cross-motion of HRH Construction Corporation for summary judgment dismissing all claims, counterclaims and cross-claims against it is denied; and it is further

ORDERED that the cross-motion of second third-party defendant Fleet Trucking Inc. for summary judgement dismissing all claims and cross-claims against it is denied; and it is further

ORDERED that the motion of Civetta Cousins, JV for summary judgment dismissing the third- and fourth-party complaints is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.



Date: December 20, 2005
New York, New York

SHIRLEY WERNER KORNREICH

FILED
JAN - 6 2006
COUNTY CLERK'S OFFICE
NEW YORK