

11 Essex Street Corp. v 7 Essex Street, LLC
2006 NY Slip Op 30066(U)
January 13, 2006
Supreme Court, New York County
Docket Number: 0600176/1762
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: THOMAS J. LINE
Index Number : 600176/2004

PART 17

11 ESSEX STREET CORP.

vs
TOWER INS. CO. OF NY

Sequence Number : 004

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided
in accordance with the attached

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

FILED
JAN 24 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/13/06

[Signature]
J.S.C.
THOMAS J. LINE

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X
11 ESSEX STREET CORP.,

Plaintiff,

-against-

Index No. 110019/2004

7 ESSEX STREET, LLC, c/o VESTA DEVELOPMENT
GROUP, DeSIMONE CONSULTING ENGINEERS,
JEFFREY M. BROWN ASSOCIATES, INC.,
BERZAK GOLD, P.C., and BIG APPLE WRECKING
AND CONSTRUCTION CORP.,

Defendants.

-----X
EMILY JANE GOODMAN, J.S.C.:

In this action for property damage and lost rental income, plaintiff alleges that negligent construction at an adjacent property caused plaintiff's building to collapse partially. Plaintiff alleges that large amounts of earth and bedrock were removed from the adjacent property without taking sufficient precautionary measures to prevent damage to neighboring land and structures. Plaintiff commenced this action against the owner of the adjacent property, and several entities that the owner hired for the construction project: a general contractor/construction manager, two professional engineering firms, and a contractor who performed demolition work.

Pursuant to CPLR 3212, defendant Big Apple Wrecking and Construction Corp. (Big Apple Wrecking), the demolition subcontractor, moves for summary judgment dismissing the complaint. Plaintiff and defendants 7 Essex Street LLC and DeSimone Consulting Engineers oppose the motion, arguing that summary judgment is premature.

As an initial matter, Big Apple Wrecking's motion is brought improperly as Motion Seq. No. 004 in a related case, *11 Essex St. Corp. v Tower Ins. Co. of New York*, Index No. 600176/2004. Big Apple Wrecking is not a party to that action, and the two cases were only joined for trial and

discovery, not consolidated. However, the court excuses this defect and deems this as a motion made in this action, because Big Apple Wrecking's motion was brought when a decision on the motion to consolidate was still outstanding. The parties in this action are advised to bring all further motions properly under Index No. 110019/2004, and the movant must pay the appropriate fees, including purchase of the Request for Judicial Intervention.

Turning to the merits, Big Apple Wrecking argues that it was not responsible for the damage to plaintiff's building, because it did not perform, manage or supervise the work which plaintiff believes caused the accident. A report from plaintiff's insurance carrier concluded that the damage was due to the failure of underpinning installed to allow excavation of the adjacent property (*see Showers Affirm., Exs L-M*). The Department of Buildings similarly observed that exterior cracks developed in the southwest wall of plaintiff's building due to excavation at the adjacent property (*id.*, Ex O). However, Big Apple Wrecking submits documentary evidence that it was hired to perform demolition, and not excavation or underpinning (*id.*, Ex C). Big Apple Wrecking contends that Danna Construction Company (Danna), which is not a party to this action, had the responsibility for "all earthwork," pursuant to Danna's contract with the construction manager (*id.*, Ex F). Last, Big Apple Wrecking also submits evidence that it completed its work on January 10, 2002, over one month after plaintiff's building allegedly sustained damage (Chasin Aff. ¶ 9; Showers Affirm., Ex H).

Big Apple Wrecking's motion is denied. It has not met its prima facie case for summary judgment, and granting summary judgment would otherwise be premature. The documentary evidence of the scope of Big Apple Wrecking's work does not establish, as a matter of law, what work it actually did at the site. As its co-defendants point out, depositions have not been taken in this case, and initial written discovery demands are outstanding (*see Groves v Land's End Hous.*

Co., 80 NY2d 978, 980 [1992]). The fact that Danna had responsibility for "all earthwork" at the site does not conclusively rule out whether Big Apple Wrecking's activities could have played a substantial factor in causing damage to plaintiff's building. Big Apple Wrecking only assumes that, given the passage of time, there is no connection to its activities. However, lack of causation in fact cannot be determined as a matter of law until Big Apple Wrecking's activities at the site become known through discovery.

Finally, Big Apple Wrecking mentions in reply that plaintiff and defendant Berzak Gold P.C. have signed a stipulation of discontinuance of the action as against Big Apple Wrecking. If plaintiff discontinues its claims against Big Apple Wrecking, it appears that many of the cross claims of the co-defendants would be dismissed as well, for those cross claims are based on common-law indemnification. However, this stipulation is not effective because not all the attorneys of record for the parties to this action have executed the stipulation (CPLR 3217 [a] [2]; *C. W. Brown, Inc. v HCE, Inc.*, 8 AD3d 520, 521 [2d Dept 2004]). Thus, if plaintiff wishes to withdraw its claims against Big Apple Wrecking, it must seek a court order (CPLR 3217 [b]).

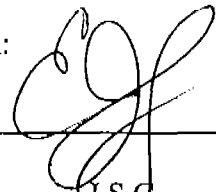
Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant Big Apple Wrecking and Construction Corp. is denied, with leave to renew after completion of all discovery; and it is further

ORDERED that copies of this decision and order shall be filed with the County Clerk under *11 Essex St. Corp. v 7 Essex St, LCC et al.*, Index No. 110019/2004.

Dated: January 13, 2006

ENTER:



U.S.C.
EMILY JANE GOODMAN

FILED
JAN 24 2006
COUNTY CLERK'S OFFICE
NEW YORK