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

PRESENT: KAREN S. SMITH Justice

PART 44

72 GRAND PARTNERS, LLC

Plaintiff,

- v -

ONE KEY LLC, SOHO EQUITIES INC., ROTHZEID KAISERMAN THOMSON & BREE, ROBERT SILLMAN ASSOCIATES, TINA NELSON, JOSHUA HOLMES, VERA MICHAELS, YEOU-JUI CHO, CAROLINE HUNT, and TREBIXOND ARTIFACTS, INC.

INDEX NO. 602069/2005

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to __ were read on this motion and cross-motion to/for

	PAPERS NUMBERED
Notice of Motion/Petition/Order to Show Cause - Affidavits - Exhibits	
Notice of Cross-Motion - Answering Affidavits — Exhibits ... Memorandum	
Reply Affidavits	

Cross-Motion: ☑ Yes ☐ No

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

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

Dated: 4/4/06

K S S.

Hon. Karen S. Smith, J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - IAS PART 44

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72 GRAND PARTNERS, LLC,

Index No. 602069/2005

Plaintiffs,

-against-

ONE KEY LLC, SOHO EQUITIES INC., ROTHZEID KAISERMAN THOMSON & BREE, ROBERT SILLMAN ASSOCIATES, TINA NELSON, JOSHUA HOLMES, VERA MICHAELS, YEOU-JUI CHO, CAROLINE HUNT, and TREBIXOND ARTIFACTS, INC.

Defendants.

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SOHO EQUITIES INC.

Third-party
Index No.:591184/2005

Third-Party Plaintiffs,

-against-

HERBERT WEINSTEIN, P.E. and REGENCY BUILDING ENTERPRISES, LTD.

Third-Party Defendants.

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SOHO EQUITIES INC., TINA NELSON, JOSHUA HOLMES, VERA MICHAELS, YEOU-JUI CHO, CAROLINE HUNT, AND TREBIXOND ARTIFACTS, INC.

Index No. 603137/2004

Plaintiffs,

-against-

72 GRAND PARTNERS, MENSHE OMARI, URI OMARI, EZRA OMRI, 72 GRAND PARTNERS LLC, ONE KEY LLC, NATHANSON CONSULTING CORP., ROTHZEID KAISERMAN THOMSON & BREE, ROBERT SILLMAN ASSOCIATES, LANGAN ENGINEERING AND ENVIRONMENTAL SERVICES P.C. and THE CITY

OF NEW YORK

Defendants.

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72 GRAND PARTNERS, MENSHE OMARI, URI OMARI, EZRA OMRI, and 72 GRAND PARTNERS LLC,

Third-party Index No.

Third-Party Plaintiffs,

-against-

HERBERT WEINSTEIN, P.E. and REGENCY BUILDING ENTERPRISES, LTD.

Third-Party Defendants.

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HON. KAREN S. SMITH

Third Party Defendants Hebert Weinstein, P.E. and Regency Building Enterprises, Ltd.'s motion, pursuant to CPLR § 3211 (a) (7) is denied.

In the first above-captioned action, ("the 72 Grand action") plaintiff 72 Grand Partners, LLC ("72 Grand") and its principals seek to recover for damages they sustained to their property from a number of defendants, including defendant/third party plaintiff Soho Equities Inc., ("Soho") the owner of the parcel of land adjacent to 72 Grand's property. Soho has commenced a third party action against Herbert Weinstein, P.E. and Regency Building Enterprises ("Weinstein defendants"). In the second above-captioned action ("the Soho Action"), Soho and its principals seek to recover for damages they sustained to their property from a number of defendants, including 72 Grand. 72 Grand has commenced a third party action against the Weinstein defendants[1]. The Weinstein defendants now move to dismiss the third party complaint as against them.

In the 72 Grand action, plaintiff 72 Grand alleges that it owns property located at 72 Grand Street, New York, New York. It further alleges that a building on an adjacent lot, located at 74 Grand Street and owned by Soho was leaning and/or shifting approximately 10 inches onto 72

[1]The Soho action and the 72 Grand action have been consolidated for the purposes of joint discovery and trial, by order of this court dated September 14, 2005.

Grand's plot of land. Consequently, 72 Grand alleges that it has not been able to construct upon its land and has sustained economic damages. It alleges causes of action against Onekey, LLC, Rothzeid Kaiserman Thomson & Bee, P.C., Robert Silman Associates, P.C., and Soho and Soho's principals. In its eighth cause of action, 72 Grand alleges that Soho and its principals had actual knowledge that the building located on its land was shifting, that Soho failed to take reasonable steps to prevent any further encroachment, and that 72 Grand sustained damages as a direct result of Soho's failure.

In its third party complaint in the 72 Grand action, Soho alleges that, prior to September 8, 2004, it retained the Weinstein defendants to perform engineering services at 74 Grand Street. Soho alleges that, pursuant to their agreement, the Weinstein defendants were obligated to indemnify and hold Soho harmless for any acts of carelessness, recklessness, or negligence that arose from the engineering services it performed at the 74 Grand Street. Accordingly, Soho seeks, indemnity or contribution from the Weinstein defendants in the event it is found liable in the underlying action.

The facts underlying the Soho action have been discussed at length in this court's previous decisions, dated May 24, 2005 and August 15, 2005, and will not be recounted here. 72 Grand has commenced a third party action against the Weinstein defendants, alleging that they performed their engineering services for Soho negligently, carelessly, and recklessly, and that their conduct was the cause of Soho's injuries. 72 Grand seeks indemnification or contribution from the Weinstein defendants for any damages 72 Grand may be found liable for to Soho.

The Weinstein defendants now move by order to show cause, pursuant to CPLR § 3211 (a) (7), to dismiss both third party complaints on the grounds that there does not exist a substantial basis in law to believe that their conduct was negligent or that it was a substantial factor in causing damage to Soho's or 72 Grand's property. The Weinstein defendants urge the court to treat the instant motion as one set forth under CPLR § 3211 (h) and to require the responding parties to demonstrate that a substantial basis in law exists to believe that the Weinstein's conduct was a proximate cause of the damage complained of in 72 Grand's complaint. They argue that they need such protection because of the potentially ruinous litigation costs they face. They allege that they are particularly ill suited to defend such a suit, because they do not have insurance that would cover their liability or their legal fees. Alternatively, they seek an order dismissing the complaint as against Herbert

Weinstein, individually, unless any party can demonstrate a factual basis for piercing the corporate veil. The Weinstein defendants also move to sanction Soho's attorneys in this action, Russo, Keane & Toner, LLP, for asserting a false material factual statement in their third-party complaint. Specifically, they contend that no contractual indemnity clause exists between themselves and Soho.

Soho cross moves for order granting sanctions against the Weinstein defendants and their attorney on the ground that the Weinstein defendant's motion constitutes frivolous conduct.

On a motion under CPLR § 3211 (a) (7), the court's role is to determine whether plaintiffs' pleadings set forth cause of action. (*511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]). The court must deny the motion if, from the four corners of the complaint, factual allegations can be discerned that would put forth any valid cause of action at law. (*Id.*) In making this determination, the court liberally construes in the complaint and accepts allegations contained therein, and in papers in opposition to the motion, as true. (*Id.*) Subsection (h) of CPLR § 3211 states as follows:

> A motion to dismiss based on paragraph seven of subdivision (a) of this rule, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action in which notice of claim must be served on a licensed architect, engineer, land surveyor or landscape architect pursuant to the provision of subdivision one of section two hundred fourteen of this chapter, shall be granted unless the party responding to the motion demonstrates that a substantial basis in law exists to believe that the preformance, conduct or omission complained of such licensed architect, engineer, land surveyor or landscape architect or such firm as set forth in the notice of claim was negligent and that such performance, conduct or omission was a proximate cause of personal injury, wrongful death or property damage complained of by the claimant or is supported by a substantial argument for an extension, modification or reversal of existing law.[2]

CPLR 214-d provides that, on a claim asserted against an architect, engineer, land surveyor, or landscape architect for personal injury or property damage, where the conduct alleged the architect, engineer, land surveyor or landscape architect, occurred more than ten years prior to the date of such

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[2]It appears that the reference to CPLR § 214 is a typographical error, as that section simply sets forth the causes of action for which a three year statute of limitations applies. CPLR § 214-d sets forth special notice requirements for causes of action against architects and engineers. Accordingly, the court will read CPLR § 3211 (h) to refer to CPLR § 214-d, instead of CPLR § 214.

claim, additional notice must be to that party at least ninety days before the commencement of an action. A cause of action for contribution may be maintained by a defendant against a third party when that third party owes a duty to the defendant and the third party's breach of said duty played a part in causing or augmenting the injury for which the contribution is sought. (*Raquet v. Braun*, 90 NY2d 177, 182-183 [1997].) A claim for indemnity may arise from an express contract or an implied obligation. (*Bellevue South Associates v. HRH Construction Corp.*, 78 NY2d 282, 296 [1991].) An implied indemnity obligation may arise when, between two parties, one party is considered actively negligent or the primary wrong doer. (*Id.*)

Both Soho's third party complaint and 72 Grand's third party complaint against the Weinstein defendants set forth causes of action for contribution and indemnification. Both allege that the Weinstein defendants were hired by Soho to perform engineering work. Soho's complaint further alleges that Soho is entitled to indemnification and contribution from the Weinstein defendants for any damage that result from the Weinstein defendant's negligence, carelessness, or recklessness. 72 Grand alleges that the Weinstein defendants were negligent in the performance of their engineering services and that they were the cause of any damage to the property at 74 Grand Street. Assuming that Soho or 72 Grand is found liable, and that either could establish that the injuries on which their liability was premised were caused, in whole or in part, by the Weinstein defendants, then they would be entitled to contribution or indemnification from the Weinstein defendants.

The court declines to hold the parties opposing the motion to the higher standard articulated under CPLR 3211 (h). In their moving papers, the Weinstein defendants acknowledge they became involved in the properties at 72 Grand Street and 74 Grand Street in March of 2003, and that they continued to be involved until the building located at 74 Grand Street settled on September 8, 2004. Accordingly, they cannot claim their involvement ended more than ten years prior to the claims at issue. The legislature has clearly limited that protection to architects and engineers whose conduct occurred at least ten years prior to the date of the claim. Had the legislature intended the exception to apply to all architects and engineers, it would no doubt have not included the ten year limitation. Indeed, the legislature has expressly extended similar protections to professionals accused of medical, dental, or podiatric malpractice, without time limitations. (*See* CPLR § 3012-a.) That the

legislature would make such an express limitation in CPLR 3211 (h), but decline to make one in other similar statutes indicates that the legislature clearly intended that limit to be firm. Thus, it is not for this court to extend that protection. That this litigation may pose significant financial hardship on the Weinstein defendants, especially if they are found liable, does not entitle them preferential treatment under the law.

The court similarly declines to treat this motion as one for summary judgment, as the Weinstein defendants request in their reply papers, since doing so would be patently unfair to the other parties in these actions. In their initial moving papers, the Weinstein defendants only submitted the affidavit of Herb Weinstein, who set forth his involvement in the project. It was not until their reply papers that they set forth much of the evidence that they believe entitles them to judgment as a matter of law. Accordingly, it would be patently unfair to grant summary judgment in their favor without giving the parties an opportunity to respond.

The court similarly declines to dismiss the two third party complaints in issue as against Herb Weinstein individually. Both complaints allege that both Regency Building Enterprises, Limited, and Herbert Weinstein, P.E. were retained by Soho to provide engineering services. Only a professional corporation, a partnership, or a joint enterprise is authorized to enter into contracts to provide professional engineering services. (Education Law § 7209(4), *Charlebois v. J.M Weller Associates*, 72 NY2d 587, 592 [1988].) None of these entities limits the liability of its principals for their negligence. There is no evidence before the court that indicates what type of business organization Regency Building Enterprises is. However, there is no dispute in the record that Soho contracted with Regency for professional engineering services. Moreover, many of the documents that the Weinstein defendants submit in their reply papers are letters signed by Herb Weinstein in which he acknowledges attending meetings, files complaints with the New York City Department of Buildings, and requests plans and documents from 72 Grand. Thus, for the purposes of this motion, the court will assume that Regency Enterprises, Ltd. is organized as one of the business entities authorized to provide professional engineering services. Therefore, Herbert Weinstein would be responsible for any professional engineering services he provided in a negligent manner. Accordingly, dismissal of the complaint as against Weinstein is inappropriate at this time.

Finally, the court denies both Soho the Weinstein defendants' request for sanctions, pursuant

to 22 NYCRR § 130-1.1. Contrary to the contention of the Weinstein defendants, Soho's third party complaint does not specifically allege the existence of an express, contractual indemnification agreement between the Weinstein defendants and Soho. Rather, in its wherefore clause, it seeks indemnification under contract, as well as indemnification and contribution under common law. While the Weinstein defendants did not prevail on the instant motion, it cannot be said that it was so palpably lacking in merit as to be frivolous. Accordingly, it is hereby

ORDERED that Regency Building Enterprises, Ltd. and Herbert Weinstein's motion, and Soho Equities, Inc's cross-motion, are denied.

The parties are reminded of the conference before the court on May 5, 2006 at 9:30 a.m. at 111 Centre Street, Room 581, New York, New York.

Dated: April 3, 2006
New York, New York

ENTER:

Karen S. Smith, J.S.C.