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

PRESENT: CAROL EDMEAD J.S.C. PART 35

Justice

620 Broadway

- v -

Rosado

INDEX NO. 120942/03

MOTION DATE 1/17/07

MOTION SEQ. NO. 017

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

The with motions (motion sequence 017) is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion by defendant Gilsanz Murray Steficek, LLP for summary judgment is denied in its entirety.



Dated: 5/30/07

CAROL EDMEAD J.S.C.

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

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: I.A.S. PART 35

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THE 620 BROADWAY HOUSING CORPORATION, SUSAN FLANAGAN, WILLIAM FLANAGAN, JAMES PUGH, DONNA BERGIN, NANCY NEY, DAVID ROCKWELL, GLORIA KISCH, JOHN PAULSON, JENNIE PAULSON, SCOTT KNOLL, TAMI ISHIDA, SEMONE WAGNER, BOB BOLAND, JAMES LIU, MARC BALET, PETER DAVIES, SAMUEL AND ILANA VICHNESS, and DAVID Z, INC.,

**DECISION AND ORDER**

Plaintiffs,

-against-

Index No. 120942/03

RUSABO 610 LLC, BROADWAY HOUSTON MACK DEVELOPMENT, LLC, IDI CONSTRUCTION COMPANY, INC., and GILSANZ MURRAY STEFICEK,



Defendants.

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RUSABO 610 LLC and BROADWAY HOUSTON MACK DEVELOPMENT, LLC,

Third-Party Plaintiffs,

First Third-Party Action

-against-

Index No. 590805/04

MUESER RUTLEDGE CONSULTING ENGINEERS, ISLAND FOUNDATION CORP. and VACHRIS ENGINEERING, P.C.,

Third-Party Defendants.

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IDI CONSTRUCTION COMPANY,

Second Third-Party Plaintiff,

Second Third-Party Action

Index No. 590806/04

-against-

ISLAND FOUNDATION CORP., CHARLES F. VACHRIS ENGINEERING, P.C., MUESER RUTLEDGE CONSULTING ENGINEERS, GEO-TECH INDUSTRIAL CORP., RICHARD C. MUGLER COMPANY, INC., GRAMERCY WRECKING & ENVIRONMENTAL STUDIOS ARCHITECTURE, MOED DE ARMAS SHANNON ARCHITECTS, IRWIN G. CANTOR, P.E., individually and d/b/a/ ABRAHAMS HERTZBERG & CANTOR, HIGHRISE HOISTING & SCAFFOLDING, INC., and DELTA TESTING LABORATORIES, INC.,

Second Third-Party Defendants.
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**CAROL EDMEAD, J:**

Defendant Gilsanz Murray Steficek, LLP (GMS) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint and all cross-claims against it, and granting summary judgment as to GMS's cross claims for indemnification.

Plaintiffs in the main action seek to recover approximately $20 million in property damage and associated losses, sustained as a result of defendants' excavation of the property on an adjoining lot, which caused the southern foundation wall of plaintiffs' building to shift. The plaintiffs are The 620 Housing Corporation, a co-op board, and the residential owners of the building located at 620 Broadway, in Manhattan (hereinafter plaintiffs, or the 620 plaintiffs). Plaintiffs' building is located on the corner of Houston Street and Broadway. It is a landmark, six-story building with two below-grade basements, and was constructed in 1858. In 1980, the building was completely gutted and renovated as part of a plan to convert the building to cooperative ownership. The building now contains 11 residential units and one commercial unit.

The lot adjacent to 620 Broadway on the south is 610 Broadway. The property is owned

by defendant Rusabo 610 LLC (Rusabo). Rusabo entered into a long-term lease with defendant Broadway Houston Mack Development LLC (BHMD), the developer, to demolish an above-ground carwash and below-ground parking garage, and to build a new, six-story commercial building with three underground parking levels in its place. BHMD retained defendant Gilsanz Murray Steficek, LLP (GMS) as the structural engineering consultant. It then retained defendant IDI Construction Company, Inc. as the general contractor and/or construction manager. Before demolition and construction began, McGraw Hudson Construction Corporation, BHMD's representative, hired Mueser Rutledge Consulting Engineers (MRCE) to conduct a geo-technical analysis of the soil conditions at 610 Broadway.

IDI subcontracted the shoring, bracing and underpinning work for the north area of the construction site adjacent to the 620 building to Richard C. Mugler Co. Inc. (Mugler). It subcontracted the demolition work to Gramercy Group, Inc. (Gramercy), and the foundation work to Island Foundation Corp. (Island).

Demolition work at 610 Broadway began over the summer of 2003. During that summer, the 620 plaintiffs felt vibrations in their building. In October 2003, the residents of 620 Broadway began to observe cracks and defects in the ceilings, walls, and door frames in both the individual residential units, as well as common areas of their building. On October 24th , the New York City Department of Buildings issued a Stop Work Order at the site.

The 620 plaintiffs commenced this action on March 22, 2004, by filing a summons and complaint. Thereafter, both BHMD and IDI instituted third-party actions against MRCE, Island, Vachris Engineering, P.C. (Vachris), Geo-Tech Industrial Corp. (Geo-Tech), Mugler, Gramercy, Studios Architecture (Studios), and Delta Testing Laboratories, Inc. (Delta). Subsequently, the

third-party defendants interposed cross claims against one another. At this point, discovery has been exchanged and depositions of all parties have been completed.

In their bill of particulars, the 620 plaintiffs allege that defendants, including GMS, compromised the integrity of the southern foundation wall of 620 Broadway by, inter alia, negligently preparing plans and drawings for demolition, excavation, underpinning and shoring of 610 Broadway, failing to analyze, test, inspect and research the interdependence between the foundations of the 620 and 610 Broadway lots, negligently demolishing and excavating a sub-cellar concrete slab adjacent to the southern foundation wall of 620 Broadway, negligently supervising, and negligently excavating the southern foundation wall of 620 Broadway (Plf's Bill of Particulars, Hechler Aff., Ex. C). The 620 plaintiffs point to a soil analysis report, by third-party defendant MRCE which stated as follows:

> **New Footings Adjacent to Existing Foundations** It is essential that excavations for the new footings do not disturb existing foundations (footings, foundation walls or underpinning) of the building itself and of adjacent structures. Removal of soils around existing foundations should be minimized. Where possible, no excavations adjacent to existing foundations should extend below an influence line shown on Sheet No. 2. Where excavation next to the existing foundations extends below the influence line but not below subgrade of the existing foundations, it should be performed carefully by hand and under continuous inspection of the Resident Engineer designated for the controlled inspection. Where excavation next to the existing foundations extends below their subgrade, concrete underpinning of the foundations will be required consisting of carefully constructed sheeted pits filled with concrete

(Lester Aff., Ex. F).

The 620 plaintiffs allege that rather than excavate in "sheeted pits," as recommended by MRCE, defendant GMS prepared drawings utilized by defendant IDI to excavate the full length

of the southern foundation wall of 620 Broadway. According to the plaintiffs, this wholesale excavation removed all lateral support for the southern foundation wall of 620 Broadway and exposed the southern foundation wall. Plaintiffs allege that GMS performed controlled inspections that permitted the fine, sandy soil to seep-out from under and behind the southern foundation wall of 620 Broadway and permitted incremental movement and shifting of the southern foundation at the time of GMS's involvement in the project. Moreover, from September 2003 to December 2003, despite encountering substantial seepage of sandy soil, IDI and GMS failed to abort the excavation around plaintiffs' foundation wall, which would have prevented further loss of soil support.

GMS, by its attorney, asserts that it was specifically retained by BHMD, the developer, to provide certain limited structural engineering services in connection with the construction of the new building, and that it was not hired to provide any engineering services with respect to the demolition, excavation, shoring or underpinning aspects of the construction project. GMS states that, in order to obtain a work permit for the project, the New York City Department of Buildings (DOB) required that a registered architect or professional engineer be responsible for performing the controlled inspections for the project. GMS asserts that while it was originally identified as the engineer responsible for the controlled inspections, pursuant to the filings with the DOB, for subgrade, welding, high strength bolts, structural stability, etc., it never assumed responsibility for controlled inspections or designs of any demolition, excavation, shoring or underpinning work that was performed at the project. In addition, GMS asserts that it owes no duty to the 620 plaintiffs for any claimed property damage, since it was not in privity of contract with these plaintiffs.

There is no dispute that GMS filed a "Technical Report: Statement of Responsibility" (TR) with the Department of Buildings, dated August 19, 2002 (Lester Aff., Ex. A), and that Philip Murray, of GMS indicated thereon that he was responsible for, inter alia, "subgrade." As the engineer of record with the DOB, GMS was obligated to make the controlled inspections (Equitable Life Assur. Socy. of U. S. v NICO Constr. Co., 245 AD2d 194 [1st Dept 1997]). On this basis alone, there is an issue of fact as to whether GMS' failure to make controlled inspections of the excavation was a proximate cause of the damage done to 620 Broadway (id. at 196). In addition, included with the TR, plaintiffs have submitted a BHMD "Change Order" which was sent to IDI indicating under the heading "Description of Change" the following:

> Furnish all labor and materials to underpin the north wall as directed and as shown on underpinning drawings prepared by Vachris Engineering, Dated 10/14/03 and **approved by Gilsanz, Murray, Stefocek,(sic) LLP on 10/16/03.** Also included is pressure injection grouting of the existing soils along and under the north wall to stabilize the soil before underpinning (emphasis added)

(Lester Aff., Ex. A). These documents create an issue of fact as to GMS's possible negligence regarding the undermining of the 620 plaintiffs' southern foundation wall.

GMS also contends that it did not owe a duty of care to the 620 plaintiffs, since it was hired by BHMD and had no relationship, and therefore no contractual privity, with the plaintiffs. GMS also asserts that, even if plaintiffs can demonstrate that GMS owed them a duty independent of its contractual relationship with BHMD, plaintiffs' negligence claims are nevertheless without merit, since they seek recovery for economic damages, and under New York law, absent privity between the parties, there can be no recovery for purely economic loss under a negligence theory of liability.

As a initial matter, the "economic loss" doctrine cited by GMS in Suffolk Laundry Servs. v Redux Corp. (238 AD2d 577 [2d Dept 1977]), has no application here. That doctrine provides that, where a product fails to perform as promised due to negligence in either the manufacturing or installation process, a plaintiff is precluded from recovering tort damages for its economic loss. The Court of Appeals has already noted that the economic loss doctrine has no application to construction disasters (532 Madison Ave. Gourmet Foods v Finlandia Ctr. Inc., 96 NY2d 280, 288 n1 [2001]). In addition, here the plaintiffs suffered property damage, not merely economic loss.

As to the issue of a duty of care, the Court in 532 Madison Avenue stated that:

> "[t]he existence and scope of a torfeasor's duty is, of course, a legal question for the courts, which 'fix the duty point by balancing factors, including the reasonable expectations of parties and society generally . . . disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability' "

(id. at 288, quoting Hamilton v Beretta U.S.A. Corp., 96 NY2d 222, 232 [2001]). In 532 Madison Avenue, the Court dealt with the liability of a landowner after a section of a wall of a 39-story office tower partially collapsed in midtown. The collapse occurred following a construction project which had aggravated existing structural defects. New York City officials directed the closure of 15 heavily trafficked blocks on Madison Avenue for two weeks, causing many businesses to suffer substantial economic losses. In determining a landowner's scope of duty to his neighbors with regard to construction disasters, the Court limited recovery to those who had suffered personal injury or property damage, but excluded those who suffered only economic loss (532 Madison Ave. Gourmet Foods v Finlandia Ctr., 96 NY2d at 291-292 [2001]). Based upon this case, the First Department later held that a property owner's and its construction

contractor's duty of care extended only to those who, as a result of a construction disaster, suffered personal injury or property damage, and not to adjacent property owners who, as a result of street closures, suffered only economic loss (Roundabout Theatre Co. v Tishman Realty & Constr., 302 AD2d 272 [1st Dept 2003]). The within case is similar to above construction disasters and the scope of liability of the landowner and contractor is determined by these principles.

In arguing that its duty of care should be more limited, GMS relies primarily on two Court of Appeals decisions which are readily distinguishable from the within case. Ossining Union Free School Dist. v Anderson LaRocca Anderson (73 NY2d 417 [1989]) involved a case of negligent misrepresentation, where an engineering consulting firm mistakenly reported that a school district's building was unsound. The school district relocated activities that were using the building. The engineering firm had not been hired by the school district, but rather, by an architectural firm that had been hired by the school district. The Court determined that, in order for a third party to sue claiming negligent misrepresentation, the underlying relationship of the parties must be one of contract or so close as to be the functional equivalent of contractual privity. The Court's reasoning was that "[i]n negligent misrepresentation cases especially, what is objectively foreseeable injury may be vast and unbounded, wholly disproportionate to a defendant's undertaking or wrongdoing" (Ossining Union Free School Dist. v Anderson LaRocca Anderson, 73 NY2d at 421).

In Eaves Brooks Costume Co. v Y.B.H. Realty Corp. (76 NY2d 220 [1990]) the plaintiff was a commercial tenant who sought to recover for property damage after a fire sprinkler system malfunctioned and flooded the leased premises. The tenant sought to sue two companies who

had contracted with the building's owners to inspect the sprinkler system and to maintain the alarm system. In determining that the maintenance companies did not owe the tenant a duty of care, the Court of Appeals stated "the limited scope of defendants' undertaking is nonetheless relevant in determining whether a tort duty to others should arise from their performance of the contractual obligations" (id. at 227).

In this case, it is not unreasonable to place the burden of a duty of care on the structural engineer. Given the close proximity of the adjacent building to the construction site, there was a substantial likelihood that negligence in the excavation of 610 Broadway would undermine the building at 620 Broadway. The job of the structural engineer on this job site is hardly a limited undertaking as in Eaves Brooks Costume Co. For these reasons, GMS's motion to dismiss plaintiffs' complaint is denied.

GMS also seeks dismissal of all cross claims asserted against it. As to those cross claims asserted by Rusabo and BHMD, the contract between these parties provides that GMS will indemnify and hold harmless the owners/developers of the project for any damages caused by the negligence of GMS, up to $100,000.00 (Hechler Aff., Ex. H).

IDI and various third-party defendants have also asserted cross claims against GMS, based upon common-law indemnity. Common-law or "implied" indemnity arises by operation of law and is available from the party at fault to another party whose liability is solely vicarious and without any negligence. Where a party's liability is vicarious, and such party is held liable solely because of the negligence of another, that party is entitled to indemnity from the wrongdoer who, actually committed fault (see e.g. Kelly v Diesel Constr. Div. of Carl A. Morse, Inc., 35 NY2d 1 [1974]; Trustees of Columbia Univ. v Mitchell/Giurgola Assoc., 109 AD2d 449, 452 [1st Dept

1985]). Since this curt has not yet determined issues of negligence, the GMS's motion to dismiss the cross claims asserted against it is premature, and is therefore denied.

Similarly, that part of GMS's motion to grant its cross claims against the other defendants is denied since no determination has been made as to culpability or non-culpability of any defendant.

Accordingly, for the foregoing reasons, it is

ORDERED that the motion by defendant Gilsanz Murray Steficek, LLP for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.



Dated: May 30, 2007

Carol Robinson Edmead, J.S.C.