

**Hon v Prince Dev. Co. LLC**

2007 NY Slip Op 31519(U)

May 22, 2007

Supreme Court, New York County

Docket Number: 0602236/2004

Judge: Marylin G. Diamond

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
PRESENT: HON. MARYLIN G. DIAMOND PART 48

Justice

JOHN HON et al.,

Plaintiffs,

INDEX NO. 602236/04

-against-

PRINCE DEVELOPMENT COMPANY LLC et al.,

Defendants.

MOTION SEQ. NO. 002

**FILED**

MAY 30 2007

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

**Upon the foregoing papers, it is ordered that:** Motion sequences numbers 002-007 are consolidated herein for decision. This action involves claims arising from physical damage to a mixed-use building allegedly caused by the demolition of an adjoining building with which it shared a party wall and the failure to provide adequate underpinning for the allegedly damaged building. Plaintiffs seek monetary compensation for structural damage to the building, business interruption and emotional distress, as well as punitive damages and attorney's fees.

**Background**

Plaintiffs Dr. John Hon and his wife Julie Hon own the damaged building, which is located on 41<sup>st</sup> Rd in Flushing, New York (the "Hon building"). Between October, 2003 and February, 2004, Dr. Hon maintained an office for the practice of medicine after allegedly spending a significant amount of money to refurbish the building and set up medical offices and an apartment.

Defendant Prince Development Company LLC owns the property on which the demolished building stood (the "Prince building"). Defendant Chien-Tsang Lin is a 50% owner of Prince. On August 15, 2003, Prince and defendant Generation Building Co. entered into a contract in which Generation was retained as the general contractor on a construction project involving the Prince building. Although the contract covered demolition and excavation work, Prince subsequently withdrew this responsibility from Generation and contracted directly with defendant Always Fast, Inc. to perform this work. In turn, Always Fast subcontracted the foundation work, including construction of the underpinning for the Hon building, to defendant S&S Concrete, Inc. Defendant 888 Imperial Realty, Inc., a shell corporation created by Lin, contracted with defendant Anflo Industries, Inc. to perform the demolition work. Defendant Anflo Contracting Corp. handled the removal of the demolition debris.

On February 17, 2004, the New York City Department of Buildings ("DOB") issued a stop-work order pursuant to New York City Building Code § 27-1031 due to defendants' "failure to protect adjacent structures during construction operations" and ordered the evacuation of the Hon building. The notice of violation stated that Prince "undermined underpinning of adjacent foundation causing structural cracks to [the] foundation wall and exterior wall ... structural cracks in cellar floor, boiler room floor, north wall in boiler room, cracks in cellar stairway and second floor stairway [and] undermining of rear yard."

On November 16, 2004, at an administrative hearing, Prince admitted the factual allegations of these charges, as well as three other violations, and agreed to pay a \$1,000 fine and to perform all necessary work to bring the project into compliance with DOB requirements. However, because Prince and the plaintiffs were thereafter unable to agree on plans for the remediation and underpinning of the Hon building, Prince did not bring the project into such compliance. The stop-work and evacuation order thus

remains in effect.

The amended verified complaint alleges that all defendants "performed the project in a manner that caused structural damage and instability" to the premises and were negligent in relying on "patently defective plans, specifications and/or drawings for the project." Specifically, the complaint charges that the shoring plan did not accurately reflect the configuration of the exterior wall of the premises. Moreover, it appears that the party wall either lacked any footing or had only a partial footing, and was built on disturbed earth and "garbage." The first cause of action asserts a claim of negligence *per se* against all defendants for having violated a statutory duty under the New York City Building Code in failing to provide the required underpinning and shoring to protect the premises. The second cause of action sounds in common law negligence. The third cause of action asserts a claim for private nuisance in creating an unsafe condition by not providing proper underpinning and shoring during the project. The fourth cause of action, sounding in trespass, alleges that defendants have wrongfully entered upon the Hon premises.

In motion sequence number 002, Always Fast has moved for summary judgment dismissing the complaint in its entirety as against it. In motion sequence number 003, S&S Concrete moves to sever the action against it, hold all motions in abeyance and permit it to conduct discovery. In motion sequence number 004, the architects on the project, defendant Michael Kang and his professional corporation, defendant Michael Kang Architect PLLC (collectively the "Kang defendants"), move for partial summary judgment dismissing all cross-claims against them for common law and contractual indemnification. In motion sequence number 005, counsel for Always Fast has moved to withdraw. In motion sequence number 006, Anflo Industries and Anflo Contracting have moved for summary judgment dismissing the complaint in its entirety as against them. In motion sequence number 007, the plaintiffs move for partial summary judgment on the first and third causes of action as against Prince and Lin, and for restraining notices pursuant to CPLR 5229. Generation has cross-moved for summary judgment dismissing the complaint as against it. Finally, the defendants seek the dismissal of the plaintiffs' demands for punitive damages, attorney's fees and compensatory monetary relief for emotional distress.

## Discussion

**1. Motion Sequence Number 007** - As already noted, plaintiffs have moved for partial summary judgment on liability on the first and third causes of action as against Prince and Lin, and to restrain assets pursuant to CPLR 5229. The first cause of action against these two defendants alleges negligence *per se* for violation of New York City Administrative Code § 27-1031. The third alleges nuisance for failure to provide adequate shoring and underpinning. As to party walls, section 27-1031(2)(c) provides that "[W]here a party wall will be affected by excavation, regardless of the depth, the person who causes the excavation to be made shall preserve such party wall at his or her own expense so that it shall be, and shall remain, in a safe condition." Section 27-1031 imposes strict liability on both the owner and the contractor who perform the excavation. *See Coronet Properties Co. v I/M Second Avenue, Inc.*, 166 AD2d 242 (1<sup>st</sup> Dept 1990).

Here, plaintiffs have established that Prince, as the owner, through its agents and sub-agent, failed to "preserve such party wall ... so that it shall be, and shall remain, in a safe condition." Even without Prince's admissions of fault at the DOB hearing, the evidence is overwhelming that the party wall has not been maintained in a safe condition. Prince has not disputed this fact and has not produced any evidence that it satisfied its duty to maintain the wall. Indeed, the photographic evidence clearly shows significant cracks in the party wall. Although there may be factual issues as to the cause of the failure to maintain the party wall in a safe condition, these issues are irrelevant to Prince's absolute duty under section 27-1031.

In any event, in view of Prince's admissions to the charges before the DOB, it is collaterally estopped from denying that it is in violation of section 27-1031. It is well settled that findings in administrative proceedings may be given collateral estoppel effect in subsequent judicial proceedings. *See Jeffreys v Griffen*, 1 NY3d 34 (2003); *Ryan v New York Tel. Co.*, 62 NY2d 494 (1984). Although this

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action was already pending, Prince nevertheless elected to forego its opportunity to litigate the issue of whether it violated section 27-1031 and admitted not only the violation, but also the factual charge of undermining the underpinning.

Prince argues that since the fine before the DOB was only \$1,000, its admission should not be given collateral estoppel effect in a case implicating a far larger sum of money. The Court of Appeals has stated that "Whether a party had a full and fair opportunity to litigate a prior determination involves a practical inquiry into the realities of litigation. A comprehensive list of the various factors which should enter into a determination whether a party has had his day in court would include such considerations as the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law and foreseeability of future litigation." *Gilberg v Barbieri*, 53 NY2d 285, 292 (1985). The transcript of the DOB proceedings shows that Prince appeared with a professional engineer and admitted to the factual allegations of all three of the cited hazardous violations. Among the admissions was that Prince failed to protect the adjoining structure by undermining the underpinning during construction of the new foundation, causing structural cracks in various parts of the Hon building, including the foundation wall.

Prince has failed to demonstrate that it was not afforded a full and fair opportunity to litigate the issues presented by the DOB violations or that the forum offered by the DOB was not quasi-judicial. *See Jeffreys v Griffen*, 1 NY3d at 41. Nor has Prince submitted any evidence that it complied with the section 27-1031(c) mandate to maintain the party wall in a safe condition. The plaintiffs are therefore entitled to summary judgment as against Prince on the first cause of action.

As to the third cause of action, Prince's admission that it failed to maintain the party wall in a safe condition is also an admission that it has created a private nuisance. A private nuisance involves the interference with the use or enjoyment of land and may be based on negligence or nonfeasance. *See Copart Industries, Inc. v Cons. Edison Co. of New York, Inc.*, 41 NY2d 564, 569 (1977). Since Prince has admitted to at least non-feasance at the DOB hearing, plaintiffs are also entitled to summary judgment against this defendant on their third cause of action.

As to defendant Lin, plaintiffs claim that he is individually liable either because he participated in the commission of a tort or because Prince's corporate veil should be pierced. *See Limited Liability Company Law § 609; Retropolis, Inc. v 14<sup>th</sup> St. Development, LLC*, 17 AD3d 209 (1<sup>st</sup> Dept 2005). The plaintiffs, however, have failed to submit adequate evidence in support of either theory and their motion for summary judgment as against Lin must therefore be denied. Their application to restrain assets must also be denied.

**2. Motion Sequence Number 004** - The Kang defendants were the architects who prepared the plans for shoring and underpinning the Hon building. They settled with defendants Lin and Prince for an undisclosed sum and received a release dated March 6, 2005. They now move, in motion sequence number 004, to dismiss all cross claims for common law and contractual indemnification as against them. As to contractual indemnification, the Kang defendants are entitled to dismissal because it is undisputed that there is no indemnity provision in any of the contracts they signed. As to common law indemnification, their motion must be denied since it is entirely possible that the liability of the other defendants will only be vicarious and that the sole cause of plaintiffs' damages will be found to have been attributable to the negligence of the Kang defendants.

**3. Motion Sequence Number 006** - In motion sequence number 006, Anflo Industries and Anflo Contracting move for summary judgment dismissing the complaint in its entirety as against them. As already noted, Anflo Industries demolished the existing Prince building pursuant to a contract with 888 Imperial, and Anflo Contracting removed the resulting debris. As to the first cause of action for negligence

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*per se*, section 27-1031 of the Administrative Code governs demolition operations and is captioned "protection of adjacent structures." It provides, in relevant part, that:

(1) All beams in party walls shall be cut off close to the walls, stub ends removed without weakening existing masonry, and beam pockets cleaned of loose mortar. The owner of the demolished structure shall, at his or her own expense, bend over all wall anchors at the beam ends in the standing wall and shall brick-up all open beam holes with sound brick and cement mortar.

(2) The stability and condition of the remaining walls shall be investigated and all necessary steps taken to protect same. Where the floor beams of the adjacent building bear on the party wall, the person causing the demolition to be made shall ascertain that such beams are anchored into the wall and, where such anchorage is lacking, shall provide anchorage or otherwise brace the standing wall.

At his deposition, Frank Malatesta conceded that Anflo Industries took no steps to determine whether the floor joists of the Hon building were properly anchored to the party wall after the demolition was completed. Thus, there is a factual issue as to whether Anflo Industries complied with Administrative Code § 27-1037. Its motion must therefore be denied with respect to the first cause of action. Similarly, the motion is denied with respect to the second and third causes of action for, respectively, common law negligence and private nuisance. In view of the factual issues which exist with respect to its compliance with the Administrative Code, Anflo Industries has failed to show that it is entitled to the dismissal of these two claims. However, the motion is granted with respect to the fourth cause of action for trespass since plaintiffs have not adequately pled the presence of any non-permissive invasion of the Hon property. Finally, as to Anflo Contracting, there is no evidence that, in merely removing the debris, it caused any damage to the Hon building. The motion for summary judgment must therefore be granted with respect to all claims asserted against it.

**4. Motion Sequence Number 002** - In motion sequence number 002, Always Fast moves for summary judgment dismissing the complaint as against it. Always Fast contracted with Prince to perform excavation and foundation work. At his deposition, Malatesta testified that Always Fast performed only excavation work and subcontracted the foundation work to S&S Concrete, including the removal of the old footings, the pouring of the new footing and the installation of the underpinning. Kang testified that his inspection of the work site after the issuance of the stop-work order showed that the newly installed footing for the proposed Prince building was undermining the underpinning of the Hon building. This deposition testimony that the work performed by S&S Concrete at Always Fast's behest undermined the underpinning is sufficient to present issues of fact with respect to the plaintiffs' claims against Always Fast for negligence *per se* and common law negligence, as well as for private nuisance. Always Fast's motion must therefore be denied with respect to these causes of action. However, in light of the express permission granted by Hon, there is no basis in the record before the court for the plaintiffs' trespass claim against Always Fast and this portion of its motion for summary judgment must therefore be granted.

**5. Motion Sequence Number 005** - In motion sequence number 005, Always Fast's counsel, Wagner, Domain & Leto, has moved to withdraw, pursuant to 22 NYCRR 1200.15(c)(1)(vi), on the ground that Always Fast has breached its retainer agreement with counsel to maintain in escrow an amount equal to ten times the agreed upon hourly fee of \$160. The motion is granted. Always Fast shall have 30 days after service upon it of a copy of this order with notice of entry to retain new counsel and have such counsel file a notice of appearance with the clerk of Part 48. All proceedings in this action shall be stayed until that date.

**6. Motion Sequence Number 003** - After being in default for more than two years and not offering any excuse or explanation for the delay, S&S Concrete now moves, in motion sequence number 003, to sever the action against it, to permit it to conduct discovery, to hold all other motions in abeyance, and to allow it to file a late summary judgment motion. The motion is denied in its entirety. The parties shall provide S&S Concrete with such discovery materials as it may request, at reasonable duplication costs. In the event that S&S Concrete or any other party wishes to obtain additional discovery as a result of its late appearance, the matter should be raised at the status conference before the court scheduled herein.

**7. Generation's Cross-Motion** - Generation, the general contractor on the project, has cross-moved for summary judgment dismissing the complaint as against it. In its capacity as general contractor, Generation was contractually obligated to act as the "superintendent of construction." Although its responsibility for excavation and foundation work was withdrawn by Prince, it nevertheless remained responsible for the demolition work. The fact that it was 888 Imperial rather than Generation which hired Anflo Industries to perform this work is not dispositive since the demolition remained Generation's responsibility. Moreover, there is a factual issue regarding Generation's relationship to 888 Imperial, which appears to have been a mere nominee. Generation cannot avoid its vicarious liability as general contractor by having an apparent nominee execute its subcontracts. Since the relationship between Generation and Imperial has not been adequately explained in the submissions, Generation has failed to establish its entitlement to summary judgment. The cross-motion must therefore be denied.

**8. The Dismissal of Various Forms of Relief Demanded by the Plaintiffs** - In addition to asserting four causes of action, the complaint seeks, *inter alia*, punitive damages, attorney's fees and compensatory monetary relief for emotional distress caused by the defendants' conduct. In their motions, the defendants have also asked that these forms of relief be dismissed.

As to punitive damages, the plaintiffs have failed to provide any basis for the issuance of such relief. Indeed, the complaint does not even allege, as required, high moral turpitude and wanton dishonesty. *See Giblin v Murphy*, 73 NY2d 769, 772 (1988); *Heller v Provenzano*, 303 AD2d 20 (1<sup>st</sup> Dept 2003).

As to attorney's fees, the plaintiffs have not suggested that there is any applicable statutory or contractual provision entitling them to this relief. *See Salvato v St. David's School*, 307 AD2d 812 (1<sup>st</sup> Dept 2003).

As to emotional distress, the complaint does not even assert this claim, as it should, as a separate cause of action. Moreover, no such cause of action lies where, as here, the distress and ensuing physical injury were caused only by observation or awareness of unintended damage to one's property. *See Stahl v McGlynn*, 47 AD2d 238, 240 (2<sup>nd</sup> Dept 1975). The defendants' request that these three forms of relief be dismissed must therefore be granted.

**Conclusion**

Accordingly, in motion sequence number 002, the motion of Always Fast for summary judgment is granted to the extent that the fourth cause of action as against this defendant is hereby dismissed. The motion is otherwise denied.

In motion sequence number 003, the motion of S&S Concrete is denied in its entirety.

In motion sequence number 004, the Kang defendants' motion for partial summary judgment is denied.

In motion sequence number 005, the motion of counsel for Always Fast to withdraw is granted, and all proceedings shall be stayed for 30 days from the date of service upon Always Fast of a copy of this order with notice of entry.

In motion sequence number 006, the motion for summary judgment by Anflo Industries and Anflo

Contracting is granted to the extent that the complaint is hereby dismissed in its entirety as against Anflo Contracting and the fourth cause of action is hereby dismissed as against Anflo Industries. The motion is otherwise denied.

In motion sequence number 007, the plaintiffs' motion is granted to the extent that they are hereby awarded partial summary judgment on the first and third causes of action as against Prince and Lin. The motion is otherwise denied.

Generation's cross-motion for summary judgment is hereby denied.

Upon the defendants' motions, the plaintiffs' demands for punitive damages, attorney's fees and compensation for emotional distress are hereby dismissed.

The remaining parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on July 18, 2007 at 10:00 a.m. for a status conference.

ENTER ORDER

Dated: 5/22/07



MARYLIN G. DIAMOND, J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

**FILED**  
MAY 30 2007  
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