620 Broadway Hous. Corp. v Rusabo 610 LLC
2007 NY Slip Op 31810(U)
June 20, 2007
Supreme Court, New York County
Docket Number: 0120942/2003
Judge: Carol R. Edmead
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SCANNED ON 6/25/2007

[* 1]

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

PRESENT: Hon. HON. CAROL EDMEAD PART 35
Justice

620 Broadway Housing

- v -

Rusabo 610 LLC

INDEX NO. 120942/03
MOTION DATE 4/30/07
MOTION SEQ. NO. 018
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	

FILED
JUN 25 2007
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers

Motion seq. #s 018-024 are consolidated and decided pursuant to the accompanying Memorandum Decision as follows:

ORDERED that as to motion sequence 018, the motion by Gramercy Wrecking & Environmental to dismiss and/or for summary judgment is denied; and it is further

ORDERED that as to motion sequence 019, the motion by IDI Construction Company, Inc. for summary judgment is granted only to the extent that IDI Construction Company, Inc. is entitled to indemnification from Island Foundation Corp. only to the extent that Island is found to have contributed to plaintiffs' damages, if any; and it is further

ORDERED that as to motion sequence 020, the motion by Vachris Engineering, P.C. for summary judgment is granted only to the extent that the third-party claims for contractual indemnification are dismissed, and the motion is otherwise denied; and it is further

ORDERED that as to motion sequence 021, the motion by Mueser Rutledge Consulting Engineers for summary judgment dismissing all claims against it is granted only as to the claims for contractual indemnification asserted by Rusabo 610 LLC and IDI Construction Company, Inc. and is otherwise denied; and it is further

ORDERED that as to motion sequence 022, the motion by Geo-Tech Industrial Corp. for summary judgment is granted only to the extent that IDI Construction Company, Inc.'s claim for contractual indemnification is dismissed; and it is further

ORDERED that as to motion sequence 023, the motion by Studios Architecture to dismiss and for summary judgment is granted, and the second third-party complaint as well as all cross claims are dismissed as to Studios Architecture; and it is further

ORDERED that as to motion sequence 024, the motion by Rusabo 610 LLC and Broadway Houston Mack Development, LLC for summary judgment is denied.

ORDERED that Studios Architecture serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated 6/20/07

ENTER: HON. CAROL EDMEAD, J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 35

---X

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

FILED
JUN 25 2007

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

Defendants.

---X

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.

---X

IDI CONSTRUCTION COMPANY,

Second Third-Party Action

Second Third-Party Plaintiff,

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.

---X

CAROL EDMEAD, J:

Motions numbered 120942/03-018 through 024 are consolidated for disposition. In motion sequence 018, second third-party defendant Gramercy Group Inc. s/h/a Gramercy Wrecking & Environmental (Gramercy) moves, pursuant to CPLR 3211 (a) (7) and CPLR 3212, to dismiss the second third- party complaint and all cross claims asserted against it. In motion sequence 019, second third-party plaintiff IDI Construction Company Inc. (IDI) moves, pursuant to CPLR 3212, for summary judgment against third-party defendant Island Foundation Corp. (Island). In motion sequence 020, third-party and second third-party defendant Vachris Engineering (Vachris) moves, pursuant to CPLR 3212, for summary judgment dismissing the second third-party complaint of IDI and the third-party complaint of Rusabo 610 LLC (Rusabo) and Broadway Houston Mack Development, LLC (BHMD), as well as all cross claims asserted against it. In motion sequence 021, third-party defendant Muesser Rutledge Consulting Engineeers (MRCE) moves, pursuant to CPLR 3211 (a) (7) and CPLR 3212, to dismiss all third-party claims and cross claims against it. In motion sequence 022, second third-party defendant

Geo-Tech Industrial Corp. (Geo-Tech) moves, pursuant to CPLR 3212, to dismiss the second third-party complaint and all cross claims asserted against it. In motion sequence 023, second third-party defendant Studios Architecture (Studios) moves, pursuant to CPLR 3212, for summary judgment dismissing the second third-party complaint and all cross claims against it. In motion sequence 024, defendants Rusabo and BHMD move, pursuant to CPLR 3212, for summary judgment against third-party defendants IDI, Island, and Vachris.

The plaintiffs in the main action are a co-op board and the residential owners of the premises located at 620 Broadway in Manhattan (hereinafter, plaintiffs or the 620 plaintiffs). The 620 plaintiffs bring their action to recover $20 million in property damages and related losses which they allege occurred as a result of defendants' demolition of an existing building and excavation of land on the adjoining lot at 610 Broadway.

610 Broadway is owned by defendant Rusabo. Rusabo entered into a long-term lease with defendant BHMD, the developer, to demolish a car-wash with an underground parking garage, which was on the property, and to build a new, six-story commercial building with three underground parking levels in its place. BMHD retained defendant Gilsanz Murray Steficek, LLP (GMS) as the structural engineering consultant. It then retained defendant IDI as the general contractor and/or construction manager.

IDI subcontracted the shoring, bracing and underpinning work for the northern area of the construction site, which was adjacent to 620 Broadway, to Mugler. It subcontracted the demolition work to Gramercy and the foundation work to Island.

Demolition work at 610 Broadway began over the summer of 2003. Deposition testimony indicates that during that summer, the 620 plaintiffs felt vibrations in their building

and began to notice cracks in the walls and that doors were not closing properly. 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 in the 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 the main action in March 2004. Thereafter, Rusabo and BHMD commenced a third-party action against MRCE and Vachris, two engineering firms, as well as Island. IDI instituted a second third-party action against MRCE and Vachris, as well as several architect firms and other subcontractors and the engineers, seeking indemnification and/or contribution. Discovery has been exchanged and depositions of all parties have been completed.

MOTION SEQUENCE 018

In motion sequence 018, second third-party defendant Gramercy moves, pursuant to CPLR 3211 (a) (7) and 3212, to dismiss the claims against it on the ground that it could not possibly have been responsible for plaintiffs' damages. Gramercy asserts that it performed only "selective demolition" at 610 Broadway, such as cutting beam pockets pursuant to drawings supplied to it by IDI, or removal of nonstructural concrete blocks that made up the stairwell, the elevator enclosure or utility room partitions. Gramercy asserts that its work did not involve the removal of the "slab on grade" or bottom-most level of the basement that sits immediately on top of the ground or soil. Finally, it asserts that its work at the premises was finished prior to October 2003, when the plaintiffs' damages occurred.

In opposition to Gramercy's motion, IDI asserts that Gramercy performed selective

demolition work at each level of the three-story underground parking garage. According to IDI, this included removing certain sections of the lowest basement slab to facilitate excavation for installation of new concrete piers, or footings, to support the new six-story building's structural steel columns. It also included demolishing portions of the concrete floor slabs at each level in order to make room for the installation of new structural steel columns, including columns along the north property line, which was abutting the plaintiffs' building at 620 Broadway. Finally, IDI points to deposition testimony of the individual plaintiffs, which indicates, without exception, that the plaintiffs began to notice damage, such as cracks in the walls, doors that wouldn't close, and separating tiles in July and August of 2003.

Although plaintiffs' complaint initially alleged that plaintiffs began to observe cracks and defects within their units "in or about October 24, 2003" (Amended Complaint, ¶ 23), their bill of particulars indicates that they claim that the defendants in the main action "improperly, negligently and unlawfully demolished, excavated, underpinned and shored in the vicinity of the southern foundation wall of 620 Broadway" (Bill of Particulars, ¶ 2).

Inasmuch as plaintiffs' deposition testimony indicates that they began to suffer damages during the time that Gramercy was performing demolition work at 610 Broadway, there is an issue of fact as to whether Gramercy was partially responsible for plaintiffs' damages.

MOTION SEQUENCE 019

In motion sequence 019, second third-party plaintiff IDI moves, pursuant to CPLR 3212, for summary judgment declaring that IDI is entitled to indemnification from second third-party defendant Island. In support of its motion, IDI asserts that Island, as the foundation

subcontractor, was the entity that performed the demolition, excavation and construction which plaintiffs claim caused their damages. According to IDI, Island began its work at the site in July 2003, well before the Stop Work Order of October 2003. Further, Island and its subcontractors were the only entities doing the foundation underpinning work along the northern line of the lot adjoining 620 Broadway prior to October 2003. Finally, IDI alleges that its role as to Island's work was limited to general supervisory functions, and that IDI did not direct Island's means, methods, techniques or sequences for their work on the project.

The Subcontract Agreement dated July 28, 2003, between IDI, as the general contractor, and Island, as subcontractor, provides, in relevant part, as follows:

> The subcontractor shall indemnify and hold harmless the Owner, Contractor, A/E/, A/E's Consultants, agents and employees or any of them from and against any and all claims, damages, losses and expenses, including, but not limited to, attorney's fees, arising out of or resulting from performance of the Subcontractor's work under this Subcontract, including such claim, damage, loss or expense which is attributable to bodily injury, sickness, disease or death, or injury to or destruction of tangible property (other than the work itself), including loss of use resulting therefrom, **but only to the extent caused in whole or in part by the negligent acts or omissions of the Subcontractor, its subcontractors or anyone directly or indirectly employed by them** or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

(Lawrence Aff, Ex. D, ¶ 12.2, emphasis added).

The provision continues:

> The obligations of the Subcontractor under this Article shall not extend to the liability of the A/E, the A/E's Consultants, and agents and employees of any of them arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications, or (2) the giving

> of or the failure to give directions or instructions by the A/E, the A/E's Consultants, and agents and employees or any of them, providing such giving or failure to give is the primary cause of the injury or damage"

(id., at ¶ 12.5).

Under the foregoing provisions, Island is responsible to indemnify IDI only where plaintiffs' damages are found to be the result of Island's negligence. As an initial matter, the degree to which Island was negligent, if at all, has not yet been determined by a trier of fact. Moreover, Island has presented evidence in the form of a report by Melvin Esrig, an independent engineer hired by IDI in November 2003, which tends to indicate that the cause of the damage to 620 Broadway was not Island's negligence, but rather, the prior, inadequate underpinning of the 620 foundation, which had been performed in 1967. Esrig's report states, *inter alia*, that:

> Inspection of the 1967 underpinning in the test pits revealed that only the southern half of the wall of 620 Broadway had been underpinned. Thus, the six story high south wall of 620 Broadway was applying an eccentric load to the foundation . . . .
>
> The unexpected presence of loose sand beneath 620 Broadway and unusual and unexpected eccentricity of the load on the underpinning are problems "inherited" by the owners of 610 Broadway. The acceptable performance of 620 Broadway since 1967 is likely the consequence of the fusing together of the walls of 610 and 620 Broadway by the mortar from the bricks

(Lawrence Aff, Ex. F, at 2).

Based upon the foregoing, IDI's motion for a declaration that IDI is entitled to indemnification from Island is granted only to the extent that Island is found to have contributed to plaintiffs' damages, if any.

MOTION SEQUENCE 020

In motion sequence 020, third-party and second third-party defendant Vachris, an engineering firm hired by Island, moves, pursuant to CPLR 3212, for summary judgment dismissing both the third-party complaint and second third-party complaint as against it.

Vachris was originally retained by Island pursuant to an oral agreement to design the underpinning of a portion of a wall in the southwest corner of 610 Broadway. Later it was again retained to design the underpinning for the north wall, which is the wall at issue in this action.

In the third-party complaint, Rusabo and BHMD assert claims against Vachris for common-law indemnification (first cause of action), contractual indemnification (second cause of action) and contribution (third cause of action). In the second third-party complaint, IDI alleges causes of action for contribution and common-law indemnity.

A third-party action for contractual indemnification can only be maintained where there is a written contract providing for indemnification (SSDW Co. v Feldman-Misthopoulos Assocs., 151 AD2d 293 [1st Dept 1989]). Inasmuch as the third-party defendants have failed to present any evidence indicating that Vachris was hired by Island pursuant to a written contract, those causes of action seeking contractual indemnification are dismissed.

As to the third-party claims for common-law indemnification, it is well settled that a party who has participated to some degree in the wrongdoing cannot receive the benefit of the doctrine of common-law or implied indemnity (Rockefeller Univ. v Tishman Constr. Corp. of N.Y., 232 AD2d 155 [1st Dept 1996]; Trustees of Columbia Univ. v Mitchell/Giurgola Assocs., 109 AD2d 449 [1st Dept 1985]). Vachris argues that, in order to succeed on their claims for common-law indemnification, Rusabo, BHMD, and IDI must demonstrate that they have not participated in the

wrongdoing alleged by the plaintiffs. Vachris further argues that since plaintiffs have charged these parties with negligence, they may not recover on a theory of common-law indemnification. Contrary to Vachris' position, it is plausible that the trier of fact in this dispute may find that Rusabo, BHMD, and IDI were only vicariously liable for the acts of Vachris, and committed no wrong. That part of the motion to dismiss those causes of action for common-law indemnity is therefore denied.

The right to contribution and apportionment of liability among alleged and multiple wrongdoers arises when they each owe a duty to plaintiff or to each other and, by breaching the respective duties, contribute to plaintiff's ultimate injuries (Trustees of Columbia Univ. City of N.Y. v Mitchell /Giurgola Assocs., 109 AD2d at 454.

Here, while Vachris had no direct contract with either Rusbo, BHMD or IDI, Vachris knew its work was ultimately performed for the developer/owner and construction manager of the project and it thus owed these entities a duty of care regarding any potential negligence in the design of the underpinning for which it was responsible (see Ossining Union Free School Dist. v Anderson La Rocca Anderson, 73 NY2d 417 [1989]).

Accordingly, Vachris's motion is granted only to the extent that the third-party claims for contractual indemnification are dismissed.

MOTION SEQUENCE 021

In motion sequence 021, third-party and second-third party defendant MRCE, an engineering firm hired by a representative of BHMD, moves, pursuant to CPLR 3212, to dismiss all claims against it. MRCE alleges that there is no evidence of negligence on the part of MRCE

which caused or contributed to plaintiffs' damages, and further, that MRCE had no responsibilities or involvement in supervising or directing the means and methods of construction at this project. MRCE also contends that since its contract was with McGraw Hudson Construction Corp (McGraw Hudson), it did not contract with any of the parties to this action and cannot be held liable for either indemnity or contribution.

MRCE acknowledges that it was retained on October 11, 2001 by McGraw Hudson to perform a geotechnical investigation for the project at 610 Broadway. Thereafter, on September 22, 2003, McGraw Hudson hired MRCE again, this time to assist McGraw Hudson and its consultants with regard to technical issues concerning underpinning.

IDI asserts that, contrary to MRCE's contention that it has no liability with respect to the damages suffered by the plaintiffs, MRCE played a major role in the events that occurred. According to IDI, the second agreement between BHMD and MRCE was entered into as the parties were dealing with the on-site problems encountered by the contractors at the north wall, which involved running sandy soil and faulty pre-existing underpinning. The pre-existing underpinning only supported part of the 610 foundation wall, leaving about one-half of it entirely unsupported, a condition that was misrepresented by the drawings which had been obtained prior to construction. Those inaccurate drawings had been obtained and provided by MRCE.

In response to the unexpected field conditions, the owners and the structural engineers decided to build new underpinning underneath the pre-existing underpinning, which would extend the entire width of the adjoined walls, instead of just the width of the new column footings. The new plan called for "conventional pit underpinning", which involves digging 4 x 4 foot pits and filling them with concrete.

In early September 2003, IDI started to implement this modified plan, but the contractors encountered problems during excavation, with sand running out from under the 620 building foundation, which was a level higher than the floor of the 610 Broadway foundation.

IDI immediately notified the owners and the structural engineers, who brought in David Good of MRCE, who recommended a grouting program to stabilize the soil and fill in the voids underneath the adjoining walls. Mr. Good made a site visit on September 12, 2003 to address the problems, and independently arranged for second third-party defendant Geo-Tech to meet him there to help devise a grouting plan.

According to IDI, the grouting plan recommended and directed by Mr. Good was implemented, but with mixed results. IDI alleges that it called Mr. Good at various times between September and October 2003, prior to the October 24, 2003 Stop Work Order, about the persistent difficulties the contractors were having with running sand in certain spots. Mr. Good's consistent recommendations were to grout and re-grout. A few weeks prior to the Stop Work Order, grouting was completed.

IDI presents the affidavit of Lawrence F. Johnsen, P.E., a geo-technical engineering consultant, who concludes that MCRE failed in its duty as a professional geo-technical engineer to calculate or even recognize the excessive soil-bearing condition caused by the pre-existing underpinning that was incomplete, improperly constructed, and unevenly and insufficiently supported the adjoining walls of 610 and 620 Broadway (Paone Aff, Ex. 11).

Mr. Johnsen also concludes that MCRE directed an ineffective grouting plan to stabilize the soil that directly led to the settlement of soil underneath the adjoining walls, which occurred both before and after the October 24, 2003 Stop Work Order (id.). He opines that had MCRE

directed a grouting plan that would encompass the soil underlying or at the bottom of the newly constructed underpinning, it could have avoided or at least decreased the overall amount of settlement during the underpinning.

As to the third-party claims for contractual indemnification, having contracted with the disclosed agent for BHMD, MRCE may be held liable for contractual indemnification to BHMD.

As to third-party and second third-party plaintiffs Rusabo and IDI, there was no contract between MRCE and either of these entities and therefore no grounds for contractual indemnification (SSDW Co. v Feldman-Misthopoulos Assocs., 151 AD2d 293, supra).

As to the third-party claims for common law indemnification, as previously noted, it is plausible that the trier of fact in this dispute may find that Rusabo, BHMD, and IDI committed no wrong, and were only vicariously liable for the acts of others, such as MRCE. On this basis, IDI would be entitled to indemnity from MRCE. Accordingly, that part of the motion to dismiss those causes of action for common law indemnity is denied.

As to the third-party claims for contribution, while MRCE had no direct contract with IDI, it knew its work was ultimately performed with, and on behalf of the owners and construction manager of the project and it owed these entities a duty of care regarding any potential negligence in its work (see Ossining Union Free School Dist. v Anderson LaRocca Anderson, 73 NY2d 417, supra).

Accordingly, that part of MRCE's motion to dismiss the third-party and second third-party claims against it is granted only as to the claims for contractual indemnification asserted by Rusabo and IDI, and is denied in all other respects.

MOTION SEQUENCE 022

In motion sequence 022, second third-party defendant Geo-Tech moves, pursuant to CPLR 3212, for summary judgment dismissing the second third-party complaint and all cross claims against it.

Geo-Tech was IDI's subcontractor for the soil grouting along the north property line of 610 Broadway. The grouting was implemented in conjunction with the effort to underpin the north wall of the underground garage at 610 Broadway and the adjoining south foundation wall of 620 Broadway.

IDI alleges that it filed its second third-party complaint against Geo-Tech based upon the plaintiffs' allegations in the main action, which included negligent soil stabilization. In its second third-party complaint against Geo-Tech, IDI seeks contractual indemnification, common-law indemnification, and/or contribution based upon Geo-Tech's negligence.

In support of its motion to dismiss, Geo-Tech asserts that the sub contract agreement upon which IDI relies for its contractual indemnification claim was not signed by the parties until November 17, 2003, which was well after the date of the damage to plaintiffs' building. IDI contends that the IDI purchase order for Geo-Tech's work was dated September 19, 2003, when Geo-Tech started its work, and that it states that it is "subject to the terms and conditions of Subcontract Agreement 2.04." However, a review of IDI's exhibits does not reveal that provision on any document dated prior to November 17, 2003. Accordingly, the claim for contractual indemnification is dismissed.

Geo-Tech also asserts that IDI is alleged to be an active wrongdoer and therefore is not entitled to indemnification. As already noted, the trier of fact may determine that IDI was not

negligent and is liable only vicariously, through the acts of others. Under these circumstances, IDI would be entitled to common-law indemnification.

Geo-Tech also alleges that IDI supervised and controlled its work and that it was not negligent. IDI responds that it controlled the work to the extent that it was responsible for coordination of the work of the various trades at the site. The only actual supervision it exercised was to direct where the grouting work should be done on any given day. IDI alleges that Geo-Tech worked with the geo-technical engineer for the project, MRCE. IDI states that Anthony De Pasquale, P.E. of Vachris, testified that there were problems with Geo-Tech's grouting work and that he later learned that the grout mixture developed by Geo-Tech was too "lean," meaning that it had too much water in it (Paone Aff., Ex. F at 235 - 236). There is therefore an issue of fact as to whether Geo-Tech was negligent and whether IDI is entitled to common law indemnification.

As to the issue of contribution, Geo-Tech performed work directly for IDI and therefore had a duty to IDI, making it liable in contribution for any potential negligence on its part (see Ossining Union Free School Dist. v Anderson LaRocca Anderson, 73 NY2d 417, supra).

Accordingly, the motion is granted only to the extent that IDI's claim for contractual indemnification is dismissed.

MOTION SEQUENCE 023

In motion sequence 023, Studios moves, pursuant to CPLR 3211 (a) (7) and 3212, for summary judgment dismissing all claims and cross claims against it.

Studios was hired by BHMD to design the building at 610 Broadway and was responsible for the preparation of the demolition plan for the existing structure at the site. In support of its

motion to dismiss, Studios asserts that the New York City Building Code requires that the owner of premises undergoing construction, with excavation to exceed 10 feet in depth below curb level, implement protective measures for the adjacent premises threatened by excavation (Administrative Code § 27-1031). The Building Code also requires that those protective measures be designed by a licensed professional engineer and that a licensed professional engineer conduct controlled inspections during the installation of said protective measures (id., § 27-1031 and § 27-157). Studios asserts that it did not undertake to design, install or perform controlled inspections of the excavation or of the installation of the underpinning at 610 Broadway. Rather, the excavation was performed by Island Foundation, which hired Vachris to design the underpinning and perform controlled inspections of the underpinning.

The sole opposition to this motion is by GMS, which asserts that, in plaintiffs' Bill of Particulars, the plaintiffs assert that the defendants negligently implemented plans for demolition of the structure of the premises. Despite this allegation, there is insufficient evidence to raise an issue of fact as to whether Studios' demolition plan was the cause of plaintiffs' damages. Accordingly, Studios' motion is granted and the second third-party complaint as well as all cross claims are dismissed as to Studios.

MOTION SEQUENCE 024

In motion sequence 024, the defendants and third-party plaintiffs Rusabo and BHMD (Owners) move, pursuant to CPLR 3212, for summary judgment on their cross claims for common-law indemnity, contribution and contractual indemnity as against IDI and on their third-party claims for contractual and common- law indemnity against third-party defendant Island,

and on their claim for common-law indemnity as against defendant Vachris.

As to defendant IDI, the Owners base their claims on a Construction Management Agreement with IDI, dated June 17, 2003, which provided, *inter alia*, that IDI would provide general contracting and construction management services, and specifically, pursuant to Article 30.11 (a) which provides, in part, as follows:

> To the fullest extent permitted by law, Construction Manager shall indemnify, defend and hold harmless Owner . . . from and against all losses, claims, causes of action, lawsuits . . . arising out of or in connection with: (I) any personal or bodily injury, sickness, disease or death, or damage or injury to or loss or destruction of, property . . . including the loss of use resulting therefrom sustained or purported to have been sustained as a result of performance of the Work . . . . Such obligations shall arise regardless of any claimed liability or [sic] the part of an indemnified party, provided however, **Construction Manager shall not be required to indemnify any Indemnitee to the extent attributable to such Indemnitees negligence.**

(Soommer Aff, Exhibit O) (emphasis added).

In opposition to the motion, IDI points out that the Owners took an active role in the construction project. Prior to the start of construction, the Owners retained GMS as the structural engineer to design and coordinate all structural elements of the project, as well as to serve as the engineer of record for the New York City Department of Buildings. GMS's design included new structural steel columns and related footings to support the pre-existing underground garage as modified. The Owners also retained MRCE as geo-technical engineer. MRCE reported on the bearing capacity of the soil at footing level, and later recommended the grouting procedure, which according to IDI's experts, presented significant problems. According to IDI, the Owners and their engineering consultants were on-site and were actively involved in the underpinning

construction at issue in this case. In addition, IDI alleges that the design changes for foundational support were rejected or accepted solely by the Owners and they pursued foundational designs that IDI opposed and that in fact, caused the damages to 620 Broadway.

New York law prohibits indemnity for another's wrongdoing. General Obligations Law § 5-322.1 provides that a construction agreement

> purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee . . . or indemnitee . . . is against public policy and is void and unenforceable . . . .

Inasmuch as the trier of fact may determine that the Owners engaged in independent acts and omissions which caused or contributed to the causation of the 620 Broadway damages, and that IDI was not at fault, the Owners' motion for summary judgment on their claims for indemnity and contribution are denied.

As to third-party defendant Island, the Owners seek summary judgment on their claims for contractual and common-law indemnification. As to the claim for contractual indemnification, Island's subcontract provides, in part, that:

> The subcontractor shall indemnify and hold harmless the Owner, Contractor, A/E, A/E's Consultants, agents and employees or any of them from and against any and all claims, damages, losses and expenses . . . arising out of or resulting from performance of the Subcontractor's work under this Subcontract . . . **but only to the extent caused in whole or in part by the negligent acts or omissions of the Subcontractor, its subcontractors or anyone directly or indirectly employed by them** or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

(Lawrence Aff, Ex. D, ¶ 12.2) (emphasis added).

Based upon this provision, Island is liable to the Owners based upon contractual indemnification only to the extent that Island is found to be liable for plaintiffs' damages. Since this issue has not yet been determined, the Owners' motion for summary judgment against Island is denied.

As to the Owners' claim for common-law indemnification against third-party defendants Island and Vachris, the Owners' motion for summary judgment is denied. As already noted, in order to prevail on a claim for common-law indemnity, the trier of fact must find that the Owners committed no negligence and are liable for damages only by reason of vicarious liability (Rockefeller Univ. v Tishman Constr. Corp. of N.Y., 232 AD2d 155, supra; Trustees of Columbia Univ. v Mitchell/Giurgola Assocs., 109 AD2d 449, supra). Having determined that there is an issue of fact as to the Owners negligence in determining the methods of underpinning, that part of the motion for summary judgment against Island and Vachris is denied.

Accordingly, based upon the foregoing, it is

ORDERED that as to motion sequence 018, the motion by Gramercy Wrecking & Environmental to dismiss and/or for summary judgment is denied; and it is further

ORDERED that as to motion sequence 019, the motion by IDI Construction Company, Inc. for summary judgment is granted only to the extent that IDI Construction Company, Inc. is entitled to indemnification from Island Foundation Corp. only to the extent that Island is found to have contributed to plaintiffs' damages, if any; and it is further

ORDERED that as to motion sequence 020, the motion by Vachris Engineering, P.C. for summary judgment is granted only to the extent that the third-party claims for contractual indemnification are dismissed, and the motion is otherwise denied; and it is further

ORDERED that as to motion sequence 021, the motion by Mueser Rutledge Consulting Engineers for summary judgment dismissing all claims against it is granted only as to the claims for contractual indemnification asserted by Rusabo 610 LLC and IDI Construction Company, Inc. and is otherwise denied; and it is further

ORDERED that as to motion sequence 022, the motion by Geo-Tech Industrial Corp. for summary judgment is granted only to the extent that IDI Construction Company, Inc.'s claim for contractual indemnification is dismissed; and it is further

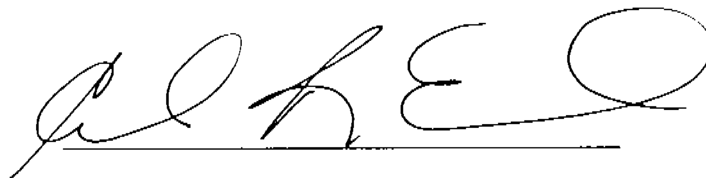
ORDERED that as to motion sequence 023, the motion by Studios Architecture to dismiss and for summary judgment is granted, and the second third-party complaint as well as all cross claims are dismissed as to Studios Architecture; and it is further

ORDERED that as to motion sequence 024, the motion by Rusabo 610 LLC and Broadway Houston Mack Development, LLC for summary judgment is denied.

FILED
JUN 25 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: June 20, 2007

ENTER:



Carol Robinson Edmead, J.S.C.