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

PRESENT: MARCY S. FRIEDMAN PART 57

Index Number : 120547/2001

HIXON, VERINA

VS

CONGREGATION BEIT YAAKOV

Sequence Number : 010

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3, 4

Cross-Motion: | | Yes |✓| No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER

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

Dated: 7-18-07

MARCY S. FRIEDMAN J.S.C.

Check one: | | FINAL DISPOSITION |X| NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK -- PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

VERINA HIXON,

Plaintiff(s),

Index No.: 120547/2001

- against -

DECISION/ORDER

CONGREGATION BEIT YAAKOV, a New York Non-Profit Religious Corporation, et al.

Defendant(s).

In this action, plaintiff sues to recover for property damage to her apartment located at 14 East 64th Street in Manhattan, allegedly resulting from demolition and construction work performed by or on behalf of defendants at an adjacent premises owned by defendant Congregation Beit Yaakov ("Congregation"). Defendant Congregation moves for summary judgment dismissing the complaint as against defendants Congregation, Goodman Management Co., Inc., 12-14 East 64th Owners Corp., Watershed Partners, Inc. ("Watershed"), J.T. Magen & Company, Inc. ("Magen"), MRC II Contracting, Inc., Macroyce Demolition, Ltd., and Urban Foundation Engineering, LLC ("Urban"). By separate motions, defendant Urban and defendants Goodman Management Co., Inc. and 12-14 East 64th Owners Corp. (collectively "defendant Owners") move for summary judgment dismissing the complaint as against them. Defendant Watershed also moves separately for summary judgment dismissing the complaint and all cross-claims against it and for summary judgment on its cross-claims for indemnification. For purposes of their disposition, the motions are consolidated.

The standards for summary judgment are well settled. The movant must tender evidence,

by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

While plaintiff will bear the ultimate burden of proof of defendants' negligence at trial, as the proponent of the summary judgment motion, defendants have the initial burden on this motion of coming forward with sufficient evidence to shift the burden to plaintiff. (See Massey v New York City Hous. Auth., 230 AD2d 601 [1st Dept 1996]; Pirrelli v Long Is. R. R., 226 AD2d 166 [1st Dept 1996].) Thus, defendants have the burden on this motion to show that they were not negligent in the performance of their work and that their work did not cause damage to plaintiff's apartment. "This burden cannot be satisfied by merely pointing out gaps in the plaintiff's case." (Valdez v Aramark Servs., Inc., 23 AD3d 639 [2d Dept 2005].)

Congregation argues that plaintiff has failed to establish the elements of her negligence cause of action because she has failed to provide any admissible evidence that her alleged damages were directly caused by the defendants. (Aff. of David Persky in Support of Motion, ¶ 15.)[1] In support of this argument, Congregation relies on plaintiff's bill of particulars and prior preclusion orders of this court. By prior orders of this court dated March 10, 2005, and April 28,

[1]In its motion for summary judgment, defendant Urban incorporates by reference the affirmation of defendant Congregation's attorney, and makes essentially the same argument as Congregation. Defendant Owners expressly adopt the motion of Congregation.

2005, plaintiff Hixon was "precluded from testifying as to damages" because she failed to appear for an examination before trial. Based chiefly on the preclusion orders, Congregation contends that plaintiff will be unable to prove her negligence claim or offer proof of damages at trial.

While summary judgment may be granted solely on the basis of a preclusion order (see Le Frois Foods Corp. v Policy Advancing Corp., 59 AD2d 1013 [4th Dept 1977]), in the First Department, summary judgment based on an order of preclusion is not automatic. (See Crump v City of New York, 67 AD2d 634 [1st Dept 1979]; Jawitz v British Leyland Motor Inc., 42 AD2d 536 [1st Dept 1973]; Israel v Drei Corp., 5 AD2d 987 [1st Dept 1958], rearg denied 6 AD2d 1005.) Here, the preclusion order at issue does not preclude plaintiff from introducing any evidence at trial, but only precludes her from offering her own testimony as to damages. Defendants have made no showing on their motions that plaintiff will not be able to introduce competent evidence of negligence, or that no basis exists for a finding of negligence. Nor have defendants shown that plaintiff will be unable to present admissible evidence as to damages, such as insurance company reports.

To the extent that Congregation argues, based on the deposition testimony of one of its trustees, Les Bohm, that the complaint against it should be dismissed because Congregation had no active role in the direction, supervision, control or performance of the demolition or construction work at its premises, this testimony is also insufficient to warrant summary judgment. According to Mr. Bohm, Congregation's role in the construction project was to review bills, pay invoices, prepare and review cost analysis, and verify that contracts awarded agreed with the requisition. Even assuming that Congregation played no role in the actual supervision of the work, Congregation fails to demonstrate that it cannot be held liable for the

negligent acts of its independent contractors on the ground that the work of the contractors was "inherently dangerous." (See Rosenberg v Equitable Life Assur. Socy. of U.S., 79 NY2d 663, 668 [1992]; Ortiz v Nunez, 32 AD3d 759, 760 [1st Dept 2006].)

Finally, defendants fail to submit any evidence, expert or other, to show that defendants' work at the Congregation's premises was not negligent, or that it did not cause damage to plaintiff's residence. Thus, notwithstanding the preclusion orders, defendants have not discharged their initial burden of coming forward and their motion for summary judgment dismissing the complaint must be denied.

With respect to the motion of Watershed, the court reaches a different conclusion. In support of its motion for summary judgment dismissing the complaint, Watershed contends that it provided only administrative services on the construction project and had no oversight of the construction work. Watershed's president submits an affidavit in which he attests that Watershed is a project management consulting firm that assisted the owner in contractual matters with general contractors, scheduling matters and payment processes. (Nulsen Aff. in Support, ¶ 3.) Watershed's claim is supported by the testimony of Mr. Bohm and is not disputed by plaintiff. As Watershed thereby has demonstrated its entitlement to summary judgment, this branch of its motion will be granted. The branch of its motion which seeks dismissal of any cross-claims against it is also granted in the absence of any opposition.

The branch of Watershed's motion which seeks summary judgment on its cross-claims for contractual indemnification against Magen and Skanska should be denied. The indemnification agreement between Congregation and Magen provides for indemnity only "to the extent caused in whole or in part by the negligent acts or omissions of the Contractor [Magen]."

(See Nulsen Aff., Ex. 2 [Section 3.18.1 of Congregation's agreement with Magen.)[2] Thus, a showing of the general contractor's negligence is required to trigger the indemnification provision. In view of the issues of fact as to whether Magen's or Skanska's work at the site was negligent, the branch of Watershed's motion for contractual indemnification is denied. For the same reasons, the branch of the motion seeking summary judgment on its cross-claims for common-law indemnification or contribution is also denied. The branch of Watershed's motion seeking dismissal of its cross-claim against Magen for failure to procure insurance coverage is denied for failure to make any factual showing that Magen did not procure the required coverage.

It is accordingly ORDERED that the motions of defendants Congregation Beit Yaakov, Urban Foundation Engineering, LLC , Goodman Management Co., Inc. and 12-14 East 64th Owners Corp. are denied; and it is further

ORDERED that the motion of defendant Watershed Partners, Inc. is granted only to the extent of dismissing the complaint and all cross-claims against it.

This constitutes the decision and order of the court.

Dated: New York, New York
July 18, 2007

MARCY FRIEDMAN, J.S.C.

[2] The parties do not dispute that Skanska's agreement with Congregation contains an identical indemnification provision.