Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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F & S DISTRIBUTORS, INC.,

Plaintiffs,

- against -

SLATTERY SKANSKA, INC. and THE CITY OF NEW YORK,

Defendants.

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Index Number: 00545/05

Motion Date: OCT. 16, 2007

Motion Cal. Number: 12
Motion Seq. No. 1

The following papers numbered 1 to 10 read on this motion by defendants for summary judgment or, in the alternative, to preclude testimony.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition to Motion-Exhibits.....	5-7
Reply Affirmation.....	8-10

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by defendants for summary judgment or, in the alternative, to preclude testimony, is granted to the extent that summary judgment is awarded in favor of defendants.

Plaintiff allegedly sustained damage to its property located at 26-10 BQE West in Queens County on February 6, 2004 as a result of construction and demolition work performed by defendants to the Brooklyn-Queens Expressway adjacent to the subject property.

Plaintiff did not repair the damage, but rather sold the premises. The measure of damages which plaintiff is seeking is the diminution in the market value of the property as measured by the difference between the what the fair market value of the premises would have been had there been no damage and the actual sale price. Irving Bork, sole officer and shareholder of plaintiff, testified

in his deposition that the fair market value of the premises was $5.3 million but that because of the damage he felt that he had to reduce his asking price to $4.75 million, which he considered was a fair price. The property was sold for $4.75 million. Therefore, plaintiff contends that it was damaged in the sum of $550,000.00.

Plaintiff has failed to proffer any competent evidence in admissible form to show that the construction work performed by defendants caused the alleged damage to the premises.

Plaintiff's counsel, in his affirmation in opposition, states that "no argument is made that there has been a failure of proof as to defendant's liability." On the contrary, the motion, besides arguing that plaintiff will be unable to prove damages, also argues that plaintiff is unable to establish that defendants caused the alleged damage to the premises. Indeed, plaintiff's counsel, in his affirmation in opposition, addresses the issue of causation. Since proximate cause is a component of liability, this Court is at a loss in understanding why counsel is of the notion that the issue of liability is not raised in the instant motion.

There is no affidavit or any testimony from an expert linking the construction work to the cracks and other alleged damage to the premises. There is no report or testimony from an engineer or other expert stating that there was, in fact, structural damage to the premises.

It is undisputed that the only potential witnesses in this action on behalf of plaintiff are Bork, his property manager, Thomas Hulk, and the real estate broker who sold the property, Joseph Eliasoph. None of these witnesses is established to be an expert qualified to render an opinion as to the cause of structural damage.

Bork's testimony that the construction work caused the alleged damage to the subject premises is entirely speculative. Bork testified that prior to his purchase of the premises in 1993, he had performed a walk-through of the premises and did not notice the damage of which he is now complaining. He testified that the construction work began in 1995 or 1996. He had occupied the premises on a daily basis prior to July 2003. In July 2003 he moved out of the premises and was looking to sell the property. He did not notice the alleged damage to his building until February 2004 when he was in the process of selling the building. The closing of title took place on December 8, 2004. He also testified that the construction work produced heavy pounding. Bork merely speculates that the heavy pounding of the construction work caused the damage to his property.

Hulk has no qualifications as an expert to determine the cause of structural damage. In fact, from the date he first saw the

premises in 1998 and walked around the building to inspect it, he never observed any damage to the premises(see Exhibit "G", transcript p.60). He only learned of the alleged damage from Bork, Eliasoph and from an engineering report that the first prospective purchaser of the premises allegedly had hired an engineer to make (pp.88-89). Moreover, he did not recall whether the engineering report cited a cause of the damage (pp. 90-91). Therefore, Hulk's opinion as to the existence of damage to the premises and the cause thereof is of no probative value.

Annexed to the moving papers is a letter from Eliasoph to Bork stating that the first buyer found structural defects in the premises and that the engineer for that first buyer informed him that the problems were most likely caused by the BQE construction. Since this letter is not in admissible form and constitutes hearsay with respect to what an unidentified engineer purportedly said, it is inadmissible, lacks probative value and has not been considered.

Since plaintiff also fails to establish that Eliosoph qualifies as an expert to render an opinion concerning the cause of the alleged damage, Eliosoph would be precluded from offering his opinion as to causation. Even were Eliosoph an expert qualified to render his opinion as to the cause of the alleged damage, it is neither alleged nor shown that Eliosoph actually inspected the damage and rendered an opinion.

The only demonstrative evidence of damage to the premises consists of photographs depicting cracks in a wall of the premises and cracked, broken and depressed sidewalk flags abutting the premises. However, there is no competent, admissible proof proffered to link this damage to any construction work.

Peter Franco, project manager of Slattery Skanska, Inc. for the BQE construction project, testified in his deposition that no complaints were made by plaintiff other than the lawsuit (see Exhibit "B" to affirmation in opposition, transcript p. 42). He examined the exterior of the premises and observed that there was damage. However, he did not know what caused the damage (p. 46).

The record on this motion, therefore, fails to raise an issue of fact as to whether the alleged damage to plaintiff's premises was caused by the construction work performed by defendants. Since the only potential witnesses on behalf of plaintiff are either incompetent to testify as to causation or their opinion as to causation is speculative, and, thus, inadmissible, plaintiff will be unable to establish a prima facie case of liability.

Accordingly, defendants are entitled to summary judgment.

Since defendants are entitled to summary judgment on the issue of liability, the Court need not reach the issue of whether the

record on this motion raises an issue of fact as to damages.

Accordingly, the motion is granted and the complaint is dismissed.

Dated: November 14, 2007

KEVIN J. KERRIGAN, J.S.C.