[* 1]

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

PRESENT: HON. CAROL EDMEAD PART ____

Justice

Thomas McAdam Liquors et al.

- v -

Senior Living Options, Inc., et al.

INDEX NO. 113471/05

MOTION DATE 1/17/08

MOTION SEQ. NO. 002

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 09 2008
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the action is severed as to defendant David Mandl, and is continued as to the remaining defendants, and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that further prosecution of and proceedings in this action are stayed as to defendant David Mandl, except for an application to vacate or modify said stay, and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that the motion (sequence 002) of defendant Meltzer/Mandl Architects, P.C. for summary judgment is denied in all respects; and it is further

ORDERED that counsel for defendant Meltzer/Mandl Architects, P.C. shall serve a copy of this order with notice of entry within twenty days of entry.

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

Dated: 6/6/08

HON. CAROL EDMEAD J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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THOMAS J. McADAM LIQUORS, INC. and 398 THIRD AVENUE REALTY COMPANY,

Plaintiffs,

-against-

Index No. 113471/05

SENIOR LIVING OPTIONS, INC., ATLANTIC DEVELOPMENT GROUP "86" LLC, MELTZER/ MANDL ARCHITECTS, P.C., DAVID MANDL and JOY CONSTRUCTION CORPORATION,

Defendants.

----------X

JOY CONSTRUCTION CORPORATION,

Third-Party Plaintiff,

-against-

Third-Party Index No. 590921/06

DIAMOND POINT EXCAVATION and EXTREME CONCRETE CORP.,

Third-Party Defendants.

----------X

MELTZER/MANDL ARCHITECTS, P.C. and DAVID MANDL,

Fourth-Party Plaintiffs,

-against-

Fourth-Party Index No. 590205/07

400 THIRD AVENUE ASSOCIATES, L.P.,

Fourth-Party Defendant.

----------X

HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

This action arises out of property damage to the premises located at 398 Third Avenue in Manhattan. Plaintiffs, Thomas J. McAdam Liquors, Inc. and 398 Third Avenue Realty Company, a commercial tenant and owner of the premises, respectively, claim that the premises were extensively damaged during the construction of a high-rise senior-living residence on the adjoining premises, 400 Third Avenue (hereinafter, 400 Third Avenue or the adjoining premises). Plaintiffs commenced this negligence action against the owners of the adjoining premises, the project's architectural firm and its principal, and the project's general contractor.

Defendants Meltzer/Mandl Architects, P.C. (Meltzer/Mandl) and David Mandl, the architectural firm and its principal, now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against them.

BACKGROUND

According to the complaint, 398 Third Avenue consists of a retail liquor store and four floors of residential apartments. Plaintiff 398 Third Avenue Realty Company is the fee owner of the building and property. Plaintiff Thomas J. McAdam Liquors, Inc., a New York corporation and tenant of 398 Third Avenue, operates the retail liquor store.

Plaintiffs allege that Senior Living Options, Inc. (Senior Living) and/or Atlantic Development Group "86" LLC (Atlantic), both organized under the laws of New York, are the owners of the adjoining premises, and are also the developers of a 17-story high-rise building on that premises.

By agreement dated November 13, 2003, 400 Third Avenue Associates, L.P. c/o Atlantic Development Group LLC, identified therein as the owner, hired defendant Meltzer/Mandl to

provide certain architectural services in connection with the design and construction of 400 Third Avenue. The agreement provided the scope of Meltzer/Mandl's services to be the following:

> 2.2.4 [T]he Architect shall prepare, for approval by the Owner, Schematic Design Documents consisting of drawings and other documents illustrating the scale and relationship of Project components.

(Miletsky Affirm., Exh. 1). Meltzer/Mandl was also required to administer the construction contract (*id.*, § 2.6.2). However, the agreement limited Meltzer/Mandl's responsibilities as follows:

> 2.6.5 The Architect shall visit the site at intervals appropriate to the stage of construction or as otherwise agreed by the Owner and Architect in writing to become generally familiar with the progress and quality of the Work completed and to determine in general if the Work is being performed in a manner indicating that the Work when completed will be in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work.
>
> 2.6.6 The Architect shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions or programs in connection with the Work, since these are solely the Contractor's responsibility under the Contract for Construction. The Architect shall not be responsible for the Contractor's schedules or failure to carry out the Work in accordance with the Contract Documents. The Architect shall not have control over or charge of acts or omissions of the Contractor, Subcontractors, or their agents or employees, or of any other persons performing portions of the Work.
>
> ***
>
> 2.6.12 The Architect shall review and approve or take other appropriate action upon Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents . . . . The Architect's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of construction means, methods, techniques, sequences or procedures.

(*id.*).

400 Third Avenue Associates, L.P. entered into an agreement, dated February 15, 2004, with Joy Construction Corp. (Joy) to serve as the project's general contractor. The terms of that agreement stated:

> 3.3.1 The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless Contract Documents give other specific instructions concerning these matters.
>
> ***
>
> 4.2.3 The Architect will not have control over or charge of and will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's responsibility as provided in Paragraph 3.3.

(*id.*, Exh. 2).

The complaint contains one cause of action sounding in negligence against all defendants, seeking $1,000,000 in damages. Plaintiffs allege that, on or before April 9, 2004, portions of the adjoining premises were demolished and excavated in preparation for the construction work. They claim that their building and property were substantially damaged and nearly destroyed for their intended use as a result of defendants' negligent, improper, and unlawful design and construction of the project.

Specifically, the complaint alleges that the property damage resulted from: "(i) defendants' improper design, construction and maintenance of the excavation and failure to follow sound engineering and construction principles in connection therewith, particularly with respect to defendants' inadequate or non-existent underpinning, shoring, bracing, stabilizing,

reinforcing, sheeting and/or lateral support of plaintiffs' Building and Property before and during the Project; and (ii) defendants' failure to conform the Project to the seismic requirements of the New York City Building Code by building the Project too close to plaintiffs' Building and Property" (Complaint, ¶ 16).

According to plaintiffs, as a consequence of defendants' improper conduct, the building and property sustained significant cracks in its foundation and other damage, including visible vertical movement and floor subsidence, rendering the building and property unsafe. Plaintiffs allege that, therefore, the building required emergency repairs in order to prevent a total collapse.

Plaintiffs submit, in opposition to the motion, an affidavit from Robert Fink, the owner of plaintiffs, in which he recounts the facts in greater detail. Fink avers that, in April 2004, he noticed that the building began vibrating and experiencing severe structural damage (Fink Aff., ¶ 6). Fink states that he observed that the sidewalk in front of 398 Third Avenue had subsided, and that the front door of the building could not be opened because the ground had shifted (*id.*). He also observed bottles falling off shelves and cracks in the exterior, basement floor, interior north wall, and rear of the building (*id.*). In addition, Fink states that the basement door had to be cut in order to be opened, and that the basement stairs separated from the north wall (*id.*). According to Fink, at some point during the project, the City of New York stopped all operations because the north wall of the building was collapsing (*id.*, ¶ 7). When this occurred, Joy placed rods, which are still in place today, running from the north wall to the south wall to ensure that the building did not collapse (*id.*).

In their answer, Senior Living and Atlantic cross-claimed against Meltzer/Mandl and Mandl for contribution and indemnification. Joy also asserted a cross claim for contribution and

indemnification against Meltzer/Mandl.

By service of a third-party summons and complaint, Joy impleaded Diamond Point Excavation and Extreme Concrete Corp., which allegedly performed work at 400 Third Avenue. Joy's claims are for common-law and contractual indemnification, contribution, and breach of contract.

Meltzer/Mandl and Mandl then brought a fourth-party action against 400 Third Avenue Associates, L.P., seeking indemnification and contribution.

DISCUSSION

"A defendant moving for summary judgment has the initial burden of coming forward with admissible evidence, such as affidavits by persons having knowledge of the facts, reciting the material facts and showing that the cause of action has no merit" (*GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985]). Once this showing has been made, the burden shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The Effect of Defendant David Mandl's Death

In support of Meltzer/Mandl and Mandl's motion for summary judgment, counsel states in an affirmation that "[defendant] David Mandl was the president of [Meltzer/Mandl]. Unfortunately, he passed away on August 4, 2007" (Miletsky Affirm., ¶ 3). Counsel further

contends that Mandl was only named as a defendant because he signed certain items filed with the New York City Department of Buildings. In opposition, Joy argues that this summary judgment motion was improperly made, because the court is divested of jurisdiction until a substitution is made for Mandl. Plaintiffs contend that, although no substitution has been effected, this action should move forward because there will be no prejudice to Mandl's estate or any other party.

CPLR 1015, entitled "Substitution upon death," states as follows:

> (a) **Generally.** If a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties.
>
> (b) **Devolution of rights or liabilities on other parties.** Upon the death of one or more of the plaintiffs or defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or against the surviving defendants, the action does not abate. The death shall be noted on the record and the action shall proceed.

(emphasis in original). Causes of action for injury to property survive the death of a defendant (EPTL § 11-3.2 [a] [1]).

Even where a cause of action survives a party's death, such death divests the court of jurisdiction and stays the proceedings until a proper substitution has been made (*Matter of Einstoss*, 26 NY2d 181, 189-190 [1970]; *Griffin v Manning*, 36 AD3d 530, 532 [1st Dept 2007]; *Silvagnoli v Consolidated Edison Empls. Mut. Aid. Socy.*, 112 AD2d 819, 820 [1st Dept 1985]). "The basis of the substitution requirement is the principle of agency. Just as the death of a principal ordinarily revokes the authority of the agent, so the death of a party to an action revokes the power of the attorney" (*Wisdom v Wisdom*, 111 AD2d 13, 14-15 [1st Dept 1985]). Thus, generally speaking, any order rendered after the death of a party and before the substitution of a

legal representative is void (*Griffin*, 36 AD3d at 532; *Cueller v Betanes Food Corp.*, 24 AD3d 201 [1st Dept 2005], *lv denied* 6 NY3d 708 [2006]).

A motion for substitution pursuant to CPLR 1021 is the proper method by which the court acquires jurisdiction over a personal representative and those interested in the estate (*see Giroux v Dunlop Tire Corp.*, 16 AD3d 1068, 1069 [4th Dept 2005]), and "may be made by the successors or representatives of a party or by any party" (CPLR 1021).

While the court generally does not have jurisdiction to hear a motion upon a party's death, there are exceptions to this general rule. For instance,

> [i]n multi-party cases, there may be no need for substitution when one of the parties dies. Where, for example, the plaintiff is suing several tortfeasors, the death of one doesn't preclude the action from continuing against the others. In that instance the court need merely note the death on the record. Of course, if the plaintiff wants a judgment in the action to bind the decedent's estate, the plaintiff does have to assure a proper substitution is made for the decedent.

(Siegel, NY Prac § 184, at 313 [4th ed]). Thus, courts have stayed the action as to the decedent but not as to other defendants (*see e.g. Rocha v Figueiredo*, 50 AD3d 876, *2 [2d Dept 2008]).

Here, it is uncontested that Mandl died sometime in August 2007, prior to this motion but after the action was commenced against him and his co-defendants. Thus, counsel's authority to act on his behalf terminated upon his death. Additionally, the court has not been advised that any legal representative has been substituted for Mandl. Plaintiffs have also not moved for appointment of a representative for Mandl pursuant to CPLR 1021. Therefore, the action must be stayed as to Mandl. However, as to Meltzer/Mandl, the court finds that the action should proceed as it is an alleged joint tortfeasor.

In light of this determination, the court shall only consider the motion as it pertains to

Meltzer/Mandl, but not as to Mandl.

Summary Judgment as to Meltzer/Mandl

Melter/Mandl argues that it cannot be liable for plaintiffs' property damage, since it did not exercise any supervision or control over the construction work. It points to the provisions of the architectural agreement providing that it had no responsibility for site safety or the means, methods, and techniques of construction.

Melter/Mandl further contends that the owner and contractor, rather than the architect, were responsible for all foundation, excavation, and underpinning work, as evidenced by a report prepared by a geo-technical firm, Pillori Associates, P.A. (Pillori), which was hired by the owner to conduct a geo-technical investigation of the site. According to the report, the investigation consisted of drilling two borings and excavating three test pits (Miletsky Affirm., Exh. 8, at 1). The report states that "[b]ased on the test pit conditions and design basement depth, it does not appear that underpinning will be required" (*id.* at 3). Under the heading "Engineering Evaluation and Recommendations," the report states as follows:

> **Excavation and Bracing**
>
> The structural conditions of the neighboring buildings should be carefully documented. If any of the buildings are supported at shallow depths, similar to the existing two story building on the site, special care will be required in the design of underpinning to account for unbalanced lateral loads. In addition, if any of the neighboring buildings possess columns that bear on shallow footings near the property lines, very large, concentrated lateral loads must be accounted for in the excavation and underpinning design. It would also be prudent to excavate a series of test pits along the existing bearing walls after demolition of [*sic*] existing structure to verify the neighboring foundation conditions. Our office or the office of the structural engineer should review and approve the contractor's excavation plan outlining the sequence and methods for the excavation.

(*id.* at 4).

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Protection of Adjacent Structure

Existing Condition Survey

We strongly recommend that an existing survey be conducted for each of the neighboring buildings. The survey should be completed prior to construction. Each building should be inspected and photographed, inside and out, to record existing conditions.

Also, a survey-monitoring program should be implemented during excavation. At least three benchmark locations should be established on the exterior of each of the adjacent buildings. The benchmarks should be read on a daily basis throughout the duration of the excavation. Any observable movement, horizontal or vertical displacement, should be immediately brought to the attention of the construction manager and excavation should be suspended until an appropriate plan of action can be implemented.

(*id.*). Meltzer/Mandl's attorney's affirmation also states that the owner contracted with a testing firm to perform concrete testing of the underpinning of the project, and that the contractor hired its own structural engineer for the foundation and excavation work.

In addition, Meltzer/Mandl maintains that it owed no duty of care to the adjoining landowner, since there was no contractual privity between them.

Plaintiffs, Senior Living, Atlantic, and Joy contend that summary judgment should be denied, because they require additional discovery in order to adequately respond to the motion. They note that depositions of defendants and their representatives have not yet been held, and that Meltzer/Mandl have not provided notes or meeting minutes concerning their work on the project. In addition, defendants possess exclusive knowledge as to what occurred during the project. Plaintiffs speculate that Meltzer/Mandl could have instructed Joy or a subcontractor as to how to perform the work, and that an employee of Joy, Richard Sosa, likely spoke to

subcontractors and architects about problems with 398 Third Avenue. And, plaintiffs assert that there is a factual issue as to whether Meltzer/Mandl owed a duty to plaintiffs based on their actions on the project. Joy notes that it is unknown to date whether Meltzer/Mandl reviewed and approved drawings for the excavation and underpinning work. Meltzer/Mandl could be liable in negligence if it is determined that the drawings were improper.

In reply, Meltzer/Mandl argues that claims for "economic loss" against an architect do not lie, and that New York City Administrative Code §§ 27-1028 and 27-1031 imposed nondelegable duties on the owner and contractor for proper safety precautions on the worksite.

The court must first consider whether Meltzer/Mandl owed a duty to plaintiffs, an adjoining landowner and tenant.

The existence and scope of an alleged tortfeasor's duty is a legal issue for the court to resolve in the first instance (*Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 NY2d 220, 226 [1990]; *Waters v New York City Hous. Auth.*, 69 NY2d 225, 229 [1987]). "While moral and logical judgments are significant components of the analysis, we are also bound to consider the larger social consequences of our decisions and to tailor our notion of duty so that 'the legal consequences of wrongs [are limited] to a controllable degree'" (*Waters*, 69 NY2d at 229, quoting *Tobin v Grossman*, 24 NY2d 609, 619 [1969]). Under New York law, the existence of a duty of care does not turn merely on the foreseeability of injury (*Eiseman v State of New York*, 70 NY2d 175, 187 [1987]).

The Court of Appeals has summarized the task of determining a duty as to:

> fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public

> policies affecting the expansion or limitation of new channels of liability. At its foundation, the common law of torts is a means of apportioning risks and allocating the burden of loss. In drawing lines defining actionable duty, courts must therefore always be mindful of consequential, and precedential, effects of their decisions.

(*532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 288-289, *rearg denied* 96 NY2d 938 [2001] [internal quotation marks and citations omitted]).

An architect's duty of professional care arises out of the contractual relationship between the architect and its client (*Sears, Roebuck & Co. v Enco Assoc.*, 43 NY2d 389, 396 [1977]). Thus, an architect's duty of care extends to the client (*Major v Leary*, 241 App Div 606 [2d Dept 1934]; *Straus v Buchman*, 96 App Div 270 [1st Dept 1904], *affd* 184 NY 545 [1906]), and to members of a limited and foreseeable class who rely upon the architect's services being performed properly (*see Gordon v Holt*, 65 AD2d 344, 348-349 [4th Dept], *lv denied* 47 NY2d 710 [1979]; *see also White v Guarente*, 43 NY2d 356, 363 [1977]).

For example, in *Gordon*, *supra*, an architectural firm was retained by the mortgagee of an apartment building to make periodic inspections and to report on the progress and quality of the construction of the building (*Gordon*, 65 AD2d at 348). The Court, thus, held that the firm "owed no duty to an indeterminate class of persons such as future owners and tenants" (*id.* at 349).

In this case, it is not unreasonable to extend the architect's duty of care to an adjoining landowner, where the architect prepares plans that include excavation and foundation work. Considering that adjoining landowners are a fixed and definable class, there is no danger of unlimited or insurer-like liability. An adjoining landowner may reasonably expect that an architect will exercise reasonable care so as to avoid structural damage to its property. Therefore,

the court concludes that Meltzer/Mandl owed a duty of care to plaintiffs.

In its reply, Meltzer/Mandl improperly raised new arguments concerning claims for economic loss and the nondelegable duties imposed by the Administrative Code[1] (*see Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381 [1st Dept 2006] ["[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion"] [internal quotation marks omitted]). In any event, as discussed below, these arguments are without merit.

A cause of action for negligence or negligent misrepresentation which produces only economic injury, as distinguished from personal injuries or property damage, cannot be sustained unless there is privity between the parties (*Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 382 [1992], *rearg denied* 81 NY2d 955 [1993]; *Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 424 [1989]; *McNar Indus. v Fiebes & Schmitt, Architects*, 245 AD2d 993, 994 [3d Dept 1997], *lv denied* 91 NY2d 812 [1998]). Absent contractual privity, there must be the "functional equivalent of contractual privity" (*Ossining Union Free School Dist.*, 73 NY2d at 419). Here, in contrast, plaintiffs allege that they suffered property damage to their building, including cracks to the foundation, vertical movement, and floor subsidence (Complaint, ¶ 17). Thus, the court turns to Meltzer/Mandl's claim that it cannot be liable based upon its lack of supervision over the construction work.

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[1]Meltzer/Mandl also submits, for the first time in the reply, specifications that were purportedly part of the construction contract. This new evidence is also not entitled to consideration (*see Matter of Kennelly*, 33 AD3d at 381).

An architect or engineer may be liable for the negligent design or the negligent preparation or planning of design or engineering work (*see Reliance Ins. Co. v Morris Assoc.*, 200 AD2d 728, 729 [2d Dept 1994]; *Board of Educ. of City of N.Y. v Mars Assoc.*, 133 AD2d 800, 801 [2d Dept 1987]). In addition, an architect who has contracted to supervise construction may be liable for failure to properly supervise construction (*Reliance Ins. Co.*, 200 AD2d at 730). When an architect is responsible for supervising construction, he or she has a duty to make sure that the plans and specifications are followed, that the proper materials are used, that the construction is done in a good and workmanlike manner, and that the construction complies with applicable building code provisions (*see Clinton v Boehm*, 139 App Div 73, 75-76 [1st Dept 1910]).

The interpretation of clear, unambiguous terms of a contract is an issue of law for the court (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Here, the architectural services agreement provides that Meltzer/Mandl was required to prepare schematic design documents, including drawings, and to administer the construction contract (Miletsky Affirm., Exh. 1, §§ 2.2.4, 2.6.2), but was "not [] required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work" (*id.*, § 2.6.5). The agreement further states that Meltzer/Mandl did not "have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures" of construction (*id.*, § 2.6.6). The terms of the agreement are clear and unambiguous. While Meltzer/Mandl contracted to prepare design documents and to provide certain administrative services on the project, it did not

agree to supervise construction of the high-rise building on 400 Third Avenue[2] (*see Jewish Bd. of Guardians v Grumman Allied Indus.*, 96 AD2d 465, 467 [1st Dept 1983], *affd* 62 NY2d 684 [1984]).

Therefore, Meltzer/Mandl's only potential liability is for negligent design of the project. Nonetheless, Meltzer/Mandl has not submitted any evidence to demonstrate that it was not negligent in designing the project. In order to prove negligence or malpractice in the design of a structure, the plaintiff must provide expert testimony that the engineer or architect deviated from accepted industry standards (*Columbus v Smith & Mahoney*, 259 AD2d 857, 858 [3d Dept 1999]). Thus, to meet its summary judgment burden, Meltzer/Mandl was required to establish, through expert evidence, that it did not depart from accepted architectural standards, which it has failed to do. In addition, the Pillori report itself raises questions of fact as to whether the project was designed improperly (Miletsky Affirm., Exh. 8). That the owner and contractor may have had nondelegable duties to ensure safe excavation work, does not establish that Meltzer/Mandl was not negligent in designing the project. Accordingly, Meltzer/Mandl's motion must be denied[3] (*see GTF Mktg.*, 66 NY2d at 967).

The court also finds that the motion should be denied to allow additional discovery as to

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[2]Meltzer/Mandl's reliance on cases where injured plaintiffs seek recovery against architects is misplaced. In these cases, where the architect agrees to supervise construction, it is not liable to an injured plaintiff unless it commits an act of active malfeasance which causes or contributes to the plaintiff's accident (*see e.g. Walker v Metro-North Commuter R.R.*, 11 AD3d 339, 341 [1st Dept 2004]; *Davis v Lenox School*, 151 AD2d 230, 231 [1st Dept 1989]; *Jaroszewicz v Facilities Dev. Corp.*, 115 AD2d 159, 160 [3d Dept 1985]).

[3]Meltzer/Mandl's claims, made in its attorney's affirmation, that the adjoining landowner and Joy contracted with testing firms and a structural engineer, are without evidentiary value (*see Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]).

Meltzer/Mandl's role on the project. CPLR 3212 (f) provides that summary judgment may be denied where "facts essential to justify opposition may exist but cannot then be stated" (*see also Baldasano v Bank of N.Y.*, 199 AD2d 184, 185 [1st Dept 1993], citing *Terranova v Emil*, 20 NY2d 493, 497 [1967]). Where facts essential to justify opposition are exclusively within the knowledge and control of the movants, the court may deny summary judgment, especially where the non-movant has not had a reasonable opportunity for disclosure prior to the motion (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 103 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]). However, the "[m]ere hope that somehow the plaintiffs will uncover evidence that will prove their case, provides no basis . . . for postponing a decision on a summary judgment motion" (*Fulton v Allstate Ins. Co.*, 14 AD3d 380, 381 [1st Dept 2005] [internal quotation marks and citations omitted]).

Here, Melter/Mandl's motion was made before depositions of defendants and their representatives were conducted. Plaintiffs should be permitted to depose the architects in order to determine what role they played on the project, and if they approved drawings or plans that deviate from accepted industry standards.

Sanctions

Meltzer/Mandl's request for sanctions is denied, since it has failed to show that plaintiffs' naming of Meltzer/Mandl as a defendant was undertaken primarily "to harass or maliciously injure" Meltzer/Mandl (22 NYCRR § 130-1.1 [c] [2]). Nor has Meltzer/Mandl shown that plaintiffs' conduct was "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" (22 NYCRR §

130-1.1 [c] [1]).

CONCLUSION

Accordingly, for the foregoing reasons, it is

ORDERED that the action is severed as to defendant David Mandl, and is continued as to the remaining defendants, and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that further prosecution of and proceedings in this action are stayed as to defendant David Mandl, except for an application to vacate or modify said stay, and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that the motion (sequence 002) of defendant Meltzer/Mandl Architects, P.C. for summary judgment is denied in all respects; and it is further

ORDERED that counsel for defendant Meltzer/Mandl Architects, P.C. shall serve a copy of this order with notice of entry within twenty days of entry.

Dated: June 6, 2008

ENTER:

Hon. Carol Robinson Edmead, J.S.C.