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

JUDGE SHIRLEY WERNER KORNREICH

HON. SHIRLEY WERNER KORNREICH

Index Number : 401397/2006

PART 54

WILLIAMS, JAMES

VS

GOTHAM CONSTRUCTION

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 1/31/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 2 were read on this motion to/for Summary Judgment

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

+ all papers in motion sequences 0029 003, as well as cs 0099 010, & related motion action

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
AUG 22 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

Dated: 8/20/08

HON. SHIRLEY WERNER KORNREICH J.S.C.

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

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: PART 54

----------X

JAMES WILLIAMS and MARY WILLIAMS,

Plaintiffs,

-against-

GOTHAM CONSTRUCTION COMPANY, LLC, GOTHAM CONSTRUCTION, INC., J.E. LEVINE BUILDERS, INC., 502 WEST 42ND STREET ASSOCIATES, LLC, SFA WEST 42ND STREET ASSOCIATES, LLC, SFA HOLDINGS, LLC, SIDNEY FETNER ASSOCIATES, INC., SPRING SCAFFOLDING, INC., J & A CONCRETE CORP., JRC ELECTRICAL CONTRACTOR and INTERSTATE MASONRY CORP.,

Defendants.

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J.E. LEVINE BUILDERS, INC.,

Third-Party Plaintiff,

-against-

ROBERT SILMAN ASSOCIATES, P.C. and RICHARD C. MUGLER CO., INC.,

Third-Party Defendants.

----------X

ROBERT SILMAN ASSOCIATES, P.C.,

Second Third-Party Plaintiff,

-against-

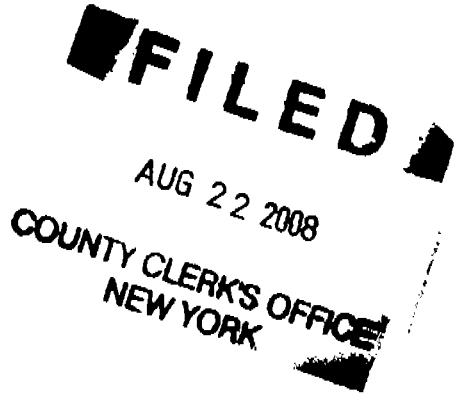
DELTA TESTING LABORATORIES, INC.,

Second Third-Party Defendant.

----------X

Index No.: 108447/02

DECISION & ORDER



Index No. 590964/04

Index No. 108494/03

----------X

CHRISTOPHER MORICI,

Index No. 108447/02

Plaintiff,

-against-

SYDNEY FEDNER ASSOCIATES, INC.,

Defendant.

----------X

SYDNEY FEDNER ASSOCIATES, INC.,

Index No. 591066/02

Third-Party Plaintiff,

-against-

J.E. LEVINE BUILDERS, INC.,

Third-Party Defendant.

----------X

J.E. LEVINE BUILDERS, INC.,

Index No. 590140/03

Second Third-Party Plaintiff,

-against-

DELTA TESTING LABORATORIES, INC., and
A. RUSSO WRECKING, INC.,

Second Third-Party Defendants.

----------X

J.E. LEVINE BUILDERS, INC.,

Index No. 591434/03

Third Third-Party Plaintiff,

-against-

ROBERT SILMAN ASSOCIATES, P.C., and
RICHARD C. MUGLER CO., INC.,

Third Third-Party Defendants.

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SHIRLEY WERNER KORNREICH, J.

Motion Sequences 001, 002 and 003 in the Williams action and Motion Sequences 009 and 010 in the Morici action are hereby consolidated for disposition. In these construction accident cases, two actions arising from the same events were joined for joint trial.

Motions Before the Court

A. Williams Action Motions

Defendants Gotham Construction Company, LLC, and Gotham Construction, Inc. (collectively, Gotham), move for summary judgment dismissing the complaint and all cross-claims against them (Mot. Seq. 001 and 002).

Third-party defendant Richard C. Mugler Co., Inc. (Mugler), moves for summary judgment dismissing the third-party action and all cross-claims and counterclaims against it (Mot. Seq. 003). Defendant/third-party plaintiff, JE. Levine Builders, Inc. (Levine), is the only party opposing Mugler's motion.

Plaintiffs cross-move: 1) to amend the complaint to add two new parties, the owner of the premises where the action occurred, 501 West 41st Street Associates, LLC (501 LLC), and its managing member, 41st Street Realty Associates, LLC (41 LLC), and to delete from the caption 502 West 42nd Street Associates, LLC, and SFA West 42nd Street Associates, LLC, incorrectly named, respectively, as owner and managing member; 2) to amend the caption to name J.E. Levine Builders, Inc., in place of J. E. Levine Builder; 3) to extend their time to move for summary judgment against the newly named owner and managing member; and 4) for partial summary judgment on liability pursuant to Labor Law 240(1) against Levine. Plaintiffs' cross-

motion does not seek summary judgment against Levine on any other cause of action in the complaint.

Defendants 502 West 42nd Street Associates, LLC, SFA West 42nd Street Associates, LLC, SFA Holdings, LLC and Sydney Fetner Associates, LLC, collectively, cross-move for summary judgment dismissing the complaint and all cross-claims against them.

Levine cross-moves for summary judgment dismissing the complaint and all cross-claims against it.

Third-party defendant Robert Silman Associates, PC (Silman), cross-moves to dismiss Levine's third-party complaint and all cross-claims and counterclaims against it.

Second third-party defendant, Delta Testing Laboratories, Inc. (Delta), cross-moves to dismiss Silman's second third-party complaint and all cross-claims against it.

Defendant Interstate Masonry Corp. (Interstate Masonry) cross-moves for summary judgment dismissing the complaint and all cross-claims against it. Only Levine opposes this motion.

Defendant J&A Concrete Corp. (JA Concrete) cross-moves for summary judgment dismissing the complaint and all cross-claims against it. There is no opposition to this motion.

B. Morici Action Motions

Third third-party defendant Silman moves (Mot. Seq. 009) for summary judgment dismissing the third third-party action and all cross-claims and counterclaims against it.

Third third-party defendant Mugler moves for summary judgment dismissing the third third-party action and all cross-claims and counterclaims against it. (Mot. Seq. 010).

Second third-party defendant Delta cross-moves for summary judgment dismissing the

second third-party action and all cross-claims and counterclaims against it.*Parties and Procedural History*

Plaintiffs, James Williams (Williams) and Christopher Morici (Morici), were laborers employed by SMEG Corporation (SMEG), a non-party, to work on a gut renovation project at premises located at 500 West 42nd St., New York, NY (500 West). Levine was the general contractor or construction manager for the project during which plaintiffs were injured. Levine was hired by the owner of the site, 501 LLC, on July 24, 2001, after a preconstruction phase of the project was completed. Mugler was a shoring contractor hired by Levine. Silman was an engineering firm engaged to do structural engineering work by the architect, Wormser & Wormser (Wormser) in August 1999 and then engaged directly by 501 LLC in June 2001. Delta was an engineering firm hired by 501 LLC in November 2001, upon the recommendation of Levine, to do controlled inspections. Gotham was hired by SFA to supervise preliminary foundation work at the site in 2000. JA Concrete was a subcontractor hired by Levine to do concrete work. Levine also contracted with Interstate Masonry in November 2001 to do masonry work.

The Williams action was commenced in the Supreme Court, Bronx County, on December 8, 2004, and assigned Index No. 26012/04. It was transferred to this court by the June 3, 2005 order of Justice Barry Salman. The same order joined the Williams and Morici actions for trial. The Morici action was filed in this court on or about April 23, 2002 and initially was pending before Justice Rosalyn Richter.

In July 2004, Justice Richter granted a motion to sever Levine's third third-party claims against Silman and Mugler in the Morici action. In 2005, after the note of issue was filed in the

Morici action, Justice Richter dismissed the complaint against Sydney Fedner Associates, Inc., A. Russo Wrecking and Delta, but denied motions to dismiss the cross-claims between them. In the 2005 decision, Justice Richter denied Morici's motion to amend the caption to add 501 LLC. However, in 2005, Morici brought a new action against 501 LLC under Index No. 102919/05. In May 2006, Justice Richter consolidated all of the Morici cases under Index Nos. 108447/02. The caption on the papers submitted by the parties in connection with these motions does not reflect the action by Morici against 501 LLC.

The note of issue in the Williams action was filed on November 16, 2007.[1] In 2007, after summary judgment motions were made in Williams, the Morici action was reassigned to Justice Ling-Cohan and the Williams action was reassigned to Justice Acosta. The Morici action was then transferred to Justice Acosta. The instant motions and cross-motions for summary judgment were originally submitted to Justice Acosta. The motions in both actions were randomly reassigned to this court in or around January 2008. The parties do not dispute that the deadline for moving for summary judgment was 60 days after filing the note of issue in the Williams case.

The Williams plaintiffs oppose Levine's cross-motion as untimely. Levine does not dispute the tardiness of its motion, which was served on February 21, 2007, but urges that the court may consider it in opposition to plaintiffs' timely cross-motion in the Williams case. The court will consider the Levine cross-motion insofar as it is directed to the Williams complaint with respect to his claim under Labor Law 240(1), as that was the subject of plaintiffs' motion. An untimely cross-motion for summary judgment cannot be considered if it seeks relief different than that sought by the timely motion to which it responds. *Filannino v. Triborough Bridge &*

[1] In 2005, the Williams plaintiffs discontinued the action against Spring Scaffolding, Inc.

Tunnel Auth., 34 A.D.3d 280 (1st Dept. 2006). For the same reason, Levine's cross-motion in Williams will be considered to the extent that it is responsive to motions by other parties to dismiss claims against them by Levine.

Background

Plaintiff s Williams and Morici, were injured on March 27, 2002, when they fell through the partially demolished second floor of 500 West and landed in the basement. The Williams complaint contains causes of action for: negligence (1st cause of action); violations of Labor Law §§ 200, 240, 241(1), 241(2), 241(3), 241(4), and 241(6) (2nd cause of action); violation of Labor Law §241(6) (3rd cause of action); and loss of consortium on behalf of plaintiff's wife, Mary Williams (4th cause of action). The Morici complaint was brought against Sydney Fedner Associates, Inc., a party dismissed from the action in 2005. The complaint brought by Morici against 501 LLC is not included in the papers submitted to the court.

At the time of the accident, 500 West was undergoing a gut rehabilitation. It is described in the record, variously, as a four, five or six-story building, with a cellar, constructed at the turn of the twentieth century. The u-shaped structure originally had a central courtyard, which was supported by two stair towers in the north and south corners. As part of the renovation, the beams supporting the slab floors were temporarily shored up near and outside the stair towers before they were removed. Following removal of the stair towers, new cement slab floors were constructed on top of corrugated decking over steel and masonry bearing walls. However, new cement slabs were not constructed in all parts of each floor. Original slabs in parts of each floor were to remain with plans to cover them with a new finish layer of flooring.

It is undisputed that on the day of the accident, the original slab flooring, which had 3 or 4

inches of slab covered by cinder fill and a cosmetic finish layer, had been partially demolished leaving only the bottom layer of cement slab. The finish layer had been a gravelly, cinder fill and tile, wood or cement flooring. The bottom layer was supported by steel I beams and steel bars, referred to as "rebar," that ran between the I-beams and rested in the web of steel beams.

Williams testified that SMEG, his employer, was the general contractor on the job, although that statement is not supported by the record. He testified that there was a "super," employed by SMEG, whose first name was, "Tim," who "was the boss there," and told him "what to do and things like that." Williams' EBT, p. 31-32. Williams' other supervisor was the SMEG foreman, whose name he could not remember. *Id.* Williams said, "I always had to speak to the super or the foreman and find out what's on the agenda for that day." *Id.* at 41. On the morning of the accident, Williams said that he spoke to "both of them," referring to the foreman and the superintendent, whom he called "the boss," who instructed the laborers to remove debris from the basement. *Id.* at 42-43. After a coffee break, at around 9:30 a.m., the super changed their assignment by telling the foreman to move them to the second floor. *Id.* at 46-47. Williams heard the super give the order. *Id.* at 47. It is not clear from Williams' testimony whether the "super" was Tim Corola, Levine's site superintendent, or a SMEG superintendent.

Williams testified that to reach the second floor on the day of the accident, he ascended a temporary scissor scaffold stairway on the outside of 500 West and entered the second floor through a hole in the wall. He described the second floor as littered with concrete, scaffolding and scaffolding planks. He further testified that there were holes in the second floor that had been chopped out, through which he could see to the floor below. In the front of the building, where he was working, there was only one hole in the floor that had been made for the new

elevator shaft. As he was working, he testified that a section of concrete, approximately 4 by 8 feet, gave way and he landed in the basement. He described the location of the section that collapsed as an area on the wall, near the elevator shaft, in the front of the building to the left of the hole from which he entered the second floor.

Morici testified that he took all instructions on the site exclusively from the SMEG foreman, not from Levine. Morici EBT, pp. 20-21. On the day of the accident, he was instructed by his foreman to go to work on the second floor. *Id.* at 25-26. To get to the second floor, Morici climbed a ladder from the basement to a sidewalk bridge, and then took a scaffold scissor staircase on the exterior of the building to the second floor. *Id.* at 32-35. The second floor was divided by a wall with an interior door. *Id.* at 35-38. One side of the second floor had old concrete and the other had new concrete that had just been poured by JAConcrete. *Id.*. The accident happened on the side with the old concrete. *Id.* at 35-38 and 101. The new and old concrete areas each were 100 by 100 feet. *Id.* at 39. In describing the floor where the accident happened, Morici said that the concrete was not one continuous piece; rather it was separated by steel beams imbedded in the floor with the cement slabs in channels between the beams. *Id.* at 102-103. He did not see any floor openings on the second floor. *Id.* at 102. The old concrete area had window openings, none of which were covered. *Id.* at 101. Morici worked on the second floor for about an hour before the accident, cleaning up wood debris, old metal I-beams that had been taken out, and pieces of the new Q-decking. *Id.* at 111-112. The items removed were sent down on a rope through an opening on the old side of the building. *Id.* at 118-120. Although Morici said that I-beams had been replaced on the second floor prior to the accident, he stated that none had been replaced in the area where he fell. *Id.* at 109.

Damon Pazzaglini, a witness produced by SFA, testified that Silman, the structural engineering firm, made the decision to keep the original cement slabs in place in the area where the accident occurred. 2003 Pazzaglini EBT, pp. 35-36. Silman was hired by Wormser, the architect, to provide structural engineering services for the project on August 26, 1999. Silman Motion, Exh. B, and Silman EBT, pp. 13-16. The 1999 Silman contract stated that Silman would "assess the current structural condition" and produce a "pre-schematic set of structural documents" noting the "scope of work and structural strategies for renovation work at 500, 502 and 506 West 42nd St." Silman Motion, Exh. B. The 1999 Silman contract excluded controlled inspections, labor for making or patching probes, and the design of temporary shoring or bracing. *Id.* In 1999, 501 LLC did not own the building and no construction was going on at 500 West. Silman EBT, pp. 18-19. Non-party Lexington Realty Group (Lexington) owned the building in 1999.

On September 21, 1999, Silman wrote a letter marked as a draft to Wormser concerning "assessing the structural feasability of the proposed alteration/renovation" of the three buildings, which reflects that Silman had visited the site and reviewed various engineering reports, including a letter from LZA Technologies, an engineering firm, to Lexington, dated January 13, 1997 (LZA Report). The 1999 Silman draft letter stated that during the site visit, Silman did not perform any tests or probes. Some of the conclusions Silman reached were as follows:

> The general condition is ... consistent with a building of this type and age which has been allowed to deteriorate through lack of maintenance and care. Localized structural failures are evident throughout the structures but none, in our opinion, pose any immediate danger or indicate overall instability.

Silman Motion, Exh. X. After discussing how to deal with "some foundation deterioration,"

which Silman thought could be repaired, Silman continued:

> For this reason, your proposal of rebuilding the six-story buildings behind a remnant facade may be the best answer to address both budgetary and scheduling concerns brought about by foundation stabilization. The structure from the street facades back to the face of each core would be preserved (the floor structure to remain would provide an excellent work platform and temporary brace for the facades during construction) while a new, six-story conventional concrete block and hollow-core concrete plank structure would be constructed in the rear lots.

Id.

On March 14, 2001, a meeting for the job site was memorialized in minutes. Levine Affirmation in Opposition to Gotham Motion in Williams, Exh. C. The meeting was attended by Hal Fetner and Damon Pazzaglini of SFA, two representatives of Gotham, two representatives of Silman, and two representatives of Wormser. The minutes stated that Pete Salvato would be the job-site super for Gotham, that the foundation plan would be revised, that Gotham would meet with contractors (not parties to these actions) to establish the sequence and strategy for the foundation work, that Silman would provide completed foundation drawings, that controlled inspections would be performed by independent inspectors hired by SFA, that demolition of existing stair towers "must be coordinated with the new steel framing" and that Gotham would have the steel contractor submit calculations for shoring. *Id.* With respect to making openings in the existing slabs, the minutes stated that because of their existing condition, the concrete had to be in place before making openings in them and that "chopping out of the concrete prior to pouring new topping is not acceptable." *Id.*

On April 18, 2001, Silman prepared a drawing for the site. Silman Motion, Exh. U. Notes on the drawing relating to "Controlled Inspection," state that the owner would provide a testing agency to perform controlled inspections required by the New York City Building Code

(Code) for, among other things, reinforcement of concrete and "stability of building construction." *Id.*

On June 1, 2001, 501 LLC entered into a direct contract with Silman, in which Silman agreed to "perform structural calculation and produce construction documents for the redesign of the courtyard addition at 500 West." Silman Motion, Exh. B. The agreement also included "earlier changes made at the owner's directive, including stair relocation and pile design" as discussed at the May 24, 2001 site meeting. *Id.* The 2001 Silman contract excluded "material inspections, laboratory testing, the labor for making or patching probes, the design of shoring and bracing (all temporary structures), and cost estimates." *Id.*

In a report to the New York City Department of Buildings (DOB), dated March 28, 2002, the day after the accident, Silman gave its first opinion as to the cause of the collapse:

> [I]t is our professional opinion that the area of slab that collapsed was an isolated condition unrelated to the overall stability of the structure to the North of the demising wall. We do believe that the collapse may be related to the fact that much of this portion of the building has been open for the past 15 months during a slow construction schedule. This is not meant to place blame on anyone involved in the project but, rather, to point out that the existing cinder slabs have experienced certain types of unseen construction "trauma" over the past 15 months that they have not had to endure during the first ninety years of their serviceable life (construction vibration, water, etc.)

Plaintiff's Cross-Motion, Exh. C. In a letter to Wormser, dated April 1, 2002, Silman gave a second opinion, stating that it had examined the site on March 30 and found that a "deviant" reinforcing bar was 4 inches too short to support the slab. Mugler Motion, Exh. J.

According to Silman's testimony and expert affidavits, as well as the affidavit of Levine's expert, the accident was not foreseeable because there was no way of knowing that there was a short, deviant steel rod in the slab. Silman's deposition witness said that the rusted steel bar that

fell was not scraped down and, therefore, most of it could have been intact under the rust. Silman EBT, p. 163. Silman had not ordered sounding, ultra-sound or x-ray testing because prior to the accident, the spalling observed was not significant and such tests are rarely performed. *Id.* at 181-191.

In response, plaintiff offers a report, dated January 13, 1997, by David B. Peraza, P.E., an associate of LZA Technology (LZA Report). Plaintiffs' cross-motion, Exhibit B. The LZA Report was sent to Lexington, the owner who conveyed 500 West to 501 LLC, the owner on the date of the accident. Silman's witness testified that he had received the LZA report from Wormser in 1999. The LZA Report contains a stamp noting that it was received by the New York City Department of Buildings (DOB) on May 4, 1997. The conclusion of the LZA Report was that 500 West would have to be demolished to repair it without creating unacceptable risk. The LZA Report also refers to a letter, dated March 21, 1996, from Cornelius Dennis, P.E., to the DOB stating that a "sudden collapse is possible, with little or no further warning." The Dennis opinion related to three buildings: 500 West, 502 West 42nd Street and 506 West 42nd Street.

Silman's witness testified that he had discounted the LZA Report as biased because it was sought in connection with an effort to evict tenants. Silman EBT, pp. 131-141 and Plaintiff's Cross-Motion, Exh. B. He also said that the LZA Report contradicted another report concerning all three buildings, written by Don Friedman, P.E., also in 1997, which stated that actual conditions had to be examined before the building could be declared unstable. *Id.* Silman's witness was also questioned about a 2000 report concerning probes and core testing of the concrete in 500 West that was performed by C.E. Boss, which found that the concrete core composition was "low density cinder concrete (crumbling)." Silman EBT, pp. 75-78. There is

no showing on this record that Levine ever saw the LZA Report, the Dennis report or the C.E. Boss report. Nor is there an expert report in evidentiary form submitted by plaintiffs as to the cause of the collapse.

Silman's witness testified that Levine was responsible for loads during construction and the means and methods of building, whereas Silman's responsibility was to insure that the finished building could withstand the loads required by the DOB in the finished product. *Id.* at 84. Silman placed responsibility for designing the shoring on Mugler. *Id.* at 87. Silman's witness testified that the slab that fell was being used as a work platform in place of a scaffold. *Id.* at 152. In addition, Silman placed responsibility on Delta for "ongoing stability...during construction." *Id.* at 29-30.

On this motion, Silman presents an expert affidavit stating that the core probes and structural calculations done by Silman to determine the structural adequacy of the existing floor system complied with the standard of care for engineers and that absent prevalent rust or spalling in the area where the deviant rebar was located, more expensive sounding, x-ray or similar non-destructive tests were not within the prevailing standard of care and need not have been conducted.

The contract between Levine, 501 LLC and Wormser delegated the responsibility for hiring subcontractors to Levine, with 501 LLC's advice, which could not unreasonably be withheld. Motion by 502 West 42nd St. Assoc, LLC, et al., Exh. A, Levine Contract, §§ 2.3.2.1 and 13.2. The contract contains an agreement by the owner not to communicate directly with the subcontractors. *Id.* at §13.4.22. The contract states that Levine is familiar with the scope of the project, has had access to the site and is familiar with the general condition of the existing

buildings. *Id.*, Article 11, §11.1. Levine was responsible for site protection, weather protection, vibration isolation, and "any bracing or protection that is not performed by Subcontractors." *Id.* at §13.4.29. Levine was responsible for performance of the work in compliance with all laws and regulations. *Id.* at §13.4.30. Levine's contract made it responsible for arranging construction inspections and tests it deemed necessary, with 501, LLC's consent. *Id.* at §13.4.18. Levine was required to have a project manager with overall responsibility for the project. *Id.* at §14.1.

In addition, the general conditions contained in the American Institute of Architects Document A201 of 1997 (General Conditions) were made a part of the contract. *Id.* at §1.2. The General Conditions required Levine to supervise and direct the work and evaluate the safety of the site. *Id.*, General Conditions §3.3.1. They required Levine to give written notice to the owner and architect if Levine determined that any work procedures "may not be safe" and to stop all work until further written instructions were received from the architect. *Id.* The General Conditions made Levine responsible for initiating, maintaining and supervising all safety precautions and programs, providing protection, complying with applicable laws and preventing accidents. *Id.*, General Conditions, Article 10, §§ 10.1.1 et seq.

The Levine contract provides that Levine "shall not be required to provide professional services which constitute the practice of ... engineering." *Id.* at §§ 2.4 and 11.3. The contract says that 501 LLC shall furnish and Levine "shall be entitled to rely upon the accuracy of" reports, surveys, drawings and tests concerning conditions of the site which are required by law; structural and mechanical tests; and other laboratory tests, inspections and reports that are required by law; and "the services of other consultants when such services are reasonably

required by the scope of the Project and are requested by the Construction Manager." *Id.* at §§ 3.1.4 through 3.1.4.5. The contract absolves Levine from liability for damages "resulting from errors inconsistencies of omissions in Architect's or other consultants' Construction Documents. *Id.* at §11.3.

The record contains the deposition of Levine's project manager, Andrew Weissman. He stated that the Levine construction supervisor, who was on the site on a daily basis, was Antimo Corola, whose nickname was Tim. Mr. Weissman typically was there once a week. Silman visually inspected the work, but Mr. Weissman could not say when. When Levine arrived on site, there were cement slab floor plates between the steel framing on every level, except the ground floor, but Mr. Weissman was not sure whether the cement slab on the second floor was complete, i.e. without openings. He admitted that Gotham was not working at 500 West after around July or August 2001 through the date of the accident. Levine EBT, p. 74. Mr. Weissman said that an existing courtyard was eliminated by demolishing the stair towers and constructing new cement slab floors on top of corrugated decking over steel and masonry bearing walls.[2] Weissman said that the purpose of the shoring was to support the structure while the stair towers were removed and, after the removal, the structural elements were to carry the additional floors. He admitted that at the time of the accident, 500 West had no windows or doors and if it rained, it could rain into the building. *Id.* at 82-85. He stated that the area that fell was not one of the areas in which Mugler was supposed to place shoring. Tr. 155. Mr. Weissman opined that when the shoring was removed, the structure was stable. He said that after the shoring was completed,

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[2] Earlier in the transcript, Mr. Weissman said that a courtyard was being created, not demolished. He later corrected himself.

the demolition contractor removed concrete and steel with hand tools, pneumatic tools and a burning torch, beginning with the roof and working down to the second floor. He also said that the architect, the engineer and the control inspection engineers were on the job on a weekly basis and approved the removal of the shoring. Mr. Weissman placed responsibility on Delta for carrying out stability and integrity inspections required by the DOB. *Id.* at 44. Tim Corola, at Weissman's instruction, would call Silman if they were needed on the site, but usually the architect would call Silman.

Mr. Weissman was on the site on the day of the accident. After the accident he observed on the second floor that the cement slab in one bay or framed area had fallen away from all sides of the framing. There was no shoring in that area. Although Mr. Weissman testified that the plaintiffs fell approximately 20 feet from the north stair tower, later in the transcript he testified that the stair tower had been removed prior to the accident. On the day of the accident, Mr. Weissman observed that there was "a little bit of rust" ... "in spots here and there"on top of the steel beam where the slab fell. *Id.* at 105.

Delta's bid proposal was approved by Levine and 501 LLC in November 2001. It contains a section entitled "Structural Steel (Based upon Local Fabrication)." The last item in that section contains the following description of services to be provided: "Professional Engineer to inspect structural stability during steel erection, and complete Building Department forms..." Delta wrote a report on the date of the accident that states that the shoring between the second floor and the cellar was still intact at the time of the occurrence. Silman Motion, Exh. DD.

Delta's witness, Bernard Lucchese, gave two depositions. Delta came on the job in

November 2001. Mr. Lucchese was in charge of the job site for Delta. 2003 Delta EBT, p. 46. He denied that Delta was responsible for testing the original concrete slab floors. *Id.* at 13. If Mr. Lucchese saw an unsafe condition on the site, he couldn't stop the work, but he was supposed to tell Tim Corolla of Levine. *Id.* at 74.[3] Mr. Lucchese testified that his first meeting on the site, on November 7, 2001, was attended by Mugler and Tim Corolla. At that meeting, Mr. Lucchese said he "wasn't comfortable with the look of the [old] slab" and said that the structural engineer should be contacted. *Id.* at 14-15. The second floor was not in bad condition. *Id.* at 54. What made him uncomfortable was that the slab was thin and there was rust on the steel I-beams and spalling around the rebar work on the sixth floor, which was in the worst condition, although his concern was with all the floors, not just the sixth. *Id.* at 16-17. Mr. Lucchese was concerned about the safety of the slabs because he had to work on them every day. *Id.* at 55. Mr. Corolla had the same concern. *Id.* at 18. Later, Tim Corolla told Mr. Lucchese that he had contacted the engineer, Silman, about the slabs, and that Silman had looked at them and found them acceptable. *Id.* at 19 and 31. After Lucchese had asked Corolla several times to have Silman look at the slabs, Lucchese wrote a report, dated November 16, 2001, that requested a written report from Silman about the integrity of the slabs. *Id.* at 20-21 and 24. Mr. Lucchese never received a written report from Silman. *Id.* Mr. Lucchese called Nat Oppenheimer of Silman around the time of his November 16, 2001 report. *Id.* at 26-27. During the phone call, Mr. Oppenheimer said that he already had sent someone to check the slabs and would send someone again. *Id.* at 27-28 and 32. Mr. Lucchese said that Mugler's shoring was the only thing

[3] The record contains two different spellings of the last name of the Levine site supervisor.

that was used to reinforce the existing building. *Id.* at 36.

At his second deposition, Mr. Lucchese said that at his first meeting on the site, Delta's role for the project was to inspect the shoring that Mugler would install according to Mugler's drawings. 2006 Delta EBT, p. 19. Delta also was to inspect and test the new structural steel and was responsible for the "inspection of structural steel integrity." *Id.* at 22-23 and 33-34. Upon his arrival at the site, Mr. Lucchese observed that: "the [old] slabs were already torn up. The top layer of concrete and wood was already removed..." and he told Tim and Mugler that he "didn't know if it was stable or not." *Id.* at 43-44. This was based upon his visual inspection and he did not test the slabs. *Id.* at 46. He was not sure if the structural components of the slabs remained or if the reinforcing steel was adequate. *Id.* at 48-49. No reinforcements were placed at the existing slabs before the new concrete was poured. *Id.* at 55-56. Delta's inspection of the shoring included verification that the placement of shoring was adequate. *Id.* at 57. Mr. Lucchese found that it was. *Id.* When Mr. Lucchese asked Silman to look at the slabs, he was concerned about all of them. *Id.* at 66. The shoring from the second floor to the upper floor was removed without Delta seeing it. *Id.* at 69. Before he got to the site to look at it, Mr. Lucchese received a call about plaintiff's accident. Mr. Lucchese said that the existing slabs were being used as work platforms. *Id.* at 80. His concern about the slabs was that he saw spalling and rust that could expand, causing the concrete to pop out. *Id.* at 80-82. If there is visible rust there may be rust you cannot see within the same slabs that could cause the supporting beams to separate from the concrete, which would affect the integrity of the slab. *Id.* He was concerned that what was left of the slab was inadequate to support the construction loads and everything that would be placed on that level and that the rusting and spalling further deteriorated the structural

integrity of the system. *Id.* at 90-91.

Mugler's contract was limited to shoring the areas around the two stair towers. Silman Motion, Exh. C. Mugler's witness testified that its shoring of the beams "inadvertently shored the slabs." Mugler EBT, pp. 30 and 182. According to Mugler, the shoring went from the cellar to the second floor, by-passing the first floor, which had been removed at an earlier stage of the construction. The north stair tower was shored after the south stair tower was removed and the new slab construction was completed near the former south tower. After completion of the new flooring, the shoring was removed from each floor starting from the roof down. According to Mugler's witness, the shoring around the north tower was removed a few days before the accident. Mugler EBT, pp. 22-23. The last shoring to be removed was the shoring between the cellar and the second floor on the north side of the building. *Id.* Mugler prepared calculations for the shoring, including the second floor, which were approved by Henlia Chen, an engineer hired by Mugler, and then submitted to Levine, who sent them to Silman, who also approved them. Mugler EBT, pp. 60-69 and 142-144. Wormser also reviewed Mugler's drawings. *Id.* at 156. The needed shoring was determined in a "combined effort" of Levine and Mugler. *Id.* at 160-161. Levine signed change orders that called for cabling the north and east facades of 500 West because of concerns relating to the stability of the bearing walls. *Id.* at 35-43. Mr. Mugler testified that six months before the accident, he noticed that the bearing walls were brittle, which resulted in the change order after discussions with Levine and Silman. *Id.* Mugler's last day on the job was April 4, 2002. *Id.* at 109. The shoring had been removed from the second floor on

the day of the accident. *Id.* at 112. There was no bracing near or on the north tower.[4] *Id.* at 118.

Gotham's Vice-President, Steven Grodsky, testified that in 2000, Gotham supervised the foundation work for a renovation project at 500 West. Gotham did the foundation supervision at 500 West without a written contract because the job was too small. Gotham did work at 500 West in 2000 and was off the site when Levine arrived in 2001. Gotham EBT, pp. 28-29 and 36. Gotham did no work at the site in 2001 or 2002. *Id.* Gotham's supervisory role at 500 West was to assist Sydney Fether Associates, Inc., by scheduling the job and the testing inspections of the strength of concrete in the foundations and possibly the soil. The foundation work involved digging out footings in the basement and pilings. Mini-piles were put into holes drilled around the foundation, instead of driving piles in, in order to lessen the vibrations.

Interstate Masonry's witness testified that the only work it did on the site was to construct an elevator shaft in the courtyard that was outside of 500 West and to fill in some open windows with cinder blocks, including some on the second floor.

With respect to the ownership of 500 West, it is undisputed that 501 LLC owns the building, which it acquired by deed, dated December 31, 2000, from Lexington. On the same date, Lexington conveyed the parcels of land located at 502-506 West 42nd Street to 502 West 42nd Street Associates, LLC. However, the deed for the parcels located at 502-506 West 42nd Street has a handwritten notation stating that it is a conveyance of 500-506 West 42nd Street, which is at odds with the meets and bounds description in the deed. Hence, it is clear that the owner of 500 West on the date of the accident was 501 LLC.

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[4] No party has submitted any evidence indicating that the accident was caused by the brittleness of the bearing walls.

The following facts are also undisputed and are derived from the testimony of Damon Pazzaglini, a senior vice-president of defendant Sydney Fetner Associates, Inc. (SFA). 501 LLC is managed by an entity known as 41st Street Realty Associates, LLC (41 LLC), which also is the managing agent of the property 500 West. At the time of the accident, the members of 501 LLC were 41 LLC and Sun America Affordable Housing Partners. The members of 41 LLC are Harold (a/k/a Hal) Fetner, Mr. Pazzaglini, SFA Holdings, LLC (SFA Holdings) and a Brickman related entity. SFA Holdings is a limited liability company that holds non-managing membership interests in other limited liability companies that own real estate in the United States. The members of SFA Holdings are Sondra Fetner, Harold Fetner, Randi Fetner and Shelly Lipman. Harold Fetner is the son of Sydney Fetner, who died many years ago.

There is a common address for 502 West 42nd Street Associates, LLC, SFA West 42nd Street Associates, LLC, 41 LLC, SFA Holdings, 501 LLC and SFA, which is 245 East 87th St., New York, NY. The mailing address of the vendee on the deeds previously described is 245 East 87th St., Attn: Mr. Harold Fetner, New York, NY. The record contains a recorded easement, executed on May 7, 2002, which states that Harold Fetner is the manager of 41 LLC, which is the managing member of both 502 West 42nd Street Associates, LLC, and 501 LLC. Plaintiff's Cross-Motion, Exh. M and Pazzaglini 2003 EBT, p. 30.

Discussion

A. Williams' Motion to Amend the Complaint

Williams' motion to amend the complaint is granted, and the Williams plaintiffs are granted leave to serve an amended pleading naming as defendants 501 West 41st Street Associates, LLC and 41st Street Realty Associates, LLC in place of 502 West 42nd Street

Associates, LLC, and SFA West 42nd Street Associates, LLC, and naming J.E. Levine Builders, Inc., in place of J. E. Levine Builder. There is no opposition to the minor change in Levine's name in the caption. A motion to amend should be freely granted in the absence of prejudice or surprise, even after trial. *Murray v. New York*, 43 N.Y.2d 400, 406 (1977)(workers' compensation defense permitted to conform pleadings to proof after trial). Where a new party is added, the new pleading relates back to the earlier pleading if:

> (1) both claims arose out of same conduct, transaction or occurrence, (2) the new party is 'united in interest' with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for a mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well.

Buran v. Coupal, 87 N.Y.2d 173, 178 (1995). An excusable mistake in naming the party is not an absolute requirement. *Id.* at 179. The linchpin of the inquiry is whether the newly added parties had actual notice of the claim or reasonably believed that the plaintiff did not intend to sue them. *Id.* at 180-181.

Here, it is clear that notice of the Williams suit was given at the same address and to principals of 501 LLC and 41 LLC, i.e., Harold Fetner was involved in 41 LLC, the managing member of 501 LLC, and SFA Holdings, all of whom have the same address c/o Harold Fetner. The easement demonstrates that Harold Fetner is the manager of 41 LLC, which is the managing member of 502 West 42nd Street Associates, LLC, one of the entities named originally. It is clear that through Harold Fetner, 501 LLC and 41 LLC had notice of the suit and knew that but for an error caused by a handwritten note on a deed, they would have been named.

As 501 LLC and 41 LLC had no opportunity to move for summary judgment, the court

will grant them leave to do so in order to avoid any prejudice to them as a result of the amendment. However, Williams may not move for summary judgment against the newly added parties, as Williams could have added these parties earlier and moved for summary judgment against them in the time set by the court, but chose not to. Williams was on notice that he had served the wrong party from the time the Morici action was joined with this one.

B. Williams' Motion against Levine for Summary Judgment pursuant to Labor Law 240(1)

Plaintiffs' motion against Levine is denied because there are issues of fact as to whether it was foreseeable that the partially demolished floor, upon which plaintiff was working, would collapse without proper support. The collapse of a floor can result in liability under section 240(1), whether or not the floor is permanent, if there is a foreseeable need for safety devices. *Balladares v. Southgate Owners Corp.*, 40 A.D.3d 667, 670 (2nd Dept. 2007); *Richardson v. Matarese*, 206 A.D.2d 353 (2nd Dept. 1994)(collapse of permanent floor when beams separated from header while 800 pound radiator being moved across it prima facie violation of 204(1)); *Centeno v. 80 Pine, Inc.*, 294 A.D.2d 326 (2nd Dept. 2002)(fall during removal of permanent concrete floor could give rise to 240(1) liability).

However, there clearly are issues of fact as to whether the collapse was foreseeable. The concerns of Delta's engineer, Mr. Lucchese, the availability of other means to test the slabs that were not utilized, the evidence that the collapse occurred days after shoring that "inadvertently" secured the slabs was removed, the evidence that the plan was to use the slab as a work platform in place of a scaffold, the evidence that the first floor had been removed exposing plaintiffs to a gravity-related risk, the rusting and spalling of the slab supports, and Silman's opinion that

exposure to the elements and vibration for 15 months contributed to the collapse, raise issues of fact as to whether the accident was foreseeable and the concrete slab should have been supported. The jury could find that Levine was on notice of a dangerous condition due to the concerns expressed by Mr. Lucchese in November 2001, with which Mr. Corola concurred. The jury could infer that Levine should have requested tests or supplied bracing if it was unsure that the area was safe, obligations that Levine assumed under its contract with 501 LLC.

However, Silman's opinion that an undetectable short steel beam caused the accident and its expert affidavit concerning the lack of conditions warranting more expensive testing raise issues of fact as to whether the inadequate support should have been discovered through further testing and whether it was prudent to rely on the integrity of the unsupported existing slab given its condition and its exposure to construction vibration and the elements. The court notes that the opinion of Silman's expert that more expensive testing is outside the standard of care without significant rust and spalling conflicts with the testimony of Mr. Lucchese, another engineer, to whom the amount of spalling and rust signaled potential danger and with the LZA Report.

The court rejects Levine's argument that it cannot be held liable under §240(1) because it was nominally a construction manager, pursuant to its contract with 501 LLC. The nomenclature of the contract is not determinative of liability under §240(1). *Walls v. Turner Constr. Co.*, 4 N.Y.3d 861, 864 (2005). A construction manager "may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury." *Id.* at 863-864. Where the owner delegates to the construction manager the work giving rise to the duty to conform to the requirements of section 240(1), the construction manager has the concomitant authority to

supervise and control that work and becomes a statutory agent of the owner. *Id.* at 864. The Court of Appeals has found a construction manager liable under 240(1) where: (1) there were specific contractual terms creating an agency, (2) there was no general contractor, (3) the construction manager had a duty to oversee the construction site and the trade contractors, and (4) the construction manager had authority to control activities at the work site and to stop any unsafe work practices. *Id.*

In this case, the Levine contract clearly obligated it to be the eyes and ears of the owner, with the ability to oversee construction, supervise site safety and stop unsafe practices. There was no general contractor on the site. The contract contains language creating not just an agency relationship between Levine and 501 LLC, but a fiduciary relationship of trust and confidence. In sum, Levine was the agent of the owner on the site and, therefore, it had the obligation to furnish protection in accordance with Labor Law §240(1).

The Williams plaintiffs' cross-motion for summary judgment on their claim pursuant to Labor Law §240(1) is denied due to the factual issues previously mentioned.

C. Cross-Motion for Summary Judgment by 502 West 42nd Street Associates, LLC, SFA West 42nd Street Associates, LLC, SFA Holdings, Inc., and Sidney Fetner Associates, Inc.

The defendants 502 West 42nd Street Associates, LLC, SFA West 42nd Street Associates, LLC, SFA Holdings, Inc., and Sidney Fetner Associates, Inc., are entitled to summary judgment dismissing the complaint and all cross-claims against them, as they clearly did not own or manage 500 West at the time of the accident.

D. Motions for Summary Judgment by Interstate Masonry Corp., Gotham Construction Co., LLC, Gotham Construction, Inc., and JA *Concrete*

Gotham is entitled to dismissal of the complaint and all cross-claims against it. There is

no evidence in the record that a Gotham entity did work that contributed to the slab collapse or that it worked as a general contractor at the time of the accident or that its conduct caused the accident. Levine's contention that the foundation work done by Gotham may have caused vibrations that led to the collapse is unsupported by any evidence. Levine's position is pure speculation. The testimony of Gotham's witness, Mr. Grodsky, that SFA hired contractors that Gotham supervised, is insufficient to demonstrate that SFA owned 500 West in the face of documentary proof that it did not.

With respect to Interstate Masonry, there is no evidence that it did anything before the accident that had a relationship to the slab that collapsed, and its cross-motion is granted in its entirety. Interstate's testimony that it only constructed an elevator shaft outside 500 West and filled in windows with cinder block is uncontradicted.

JA Concrete's motion is granted in the absence of opposition and in the absence of evidence that it did anything that contributed to the accident.

E. The Claims against Mugler

There is no evidence that Mugler was responsible for more than shoring areas near the stair towers, over 20 feet from where the slab fell. The fact that Mugler's shoring inadvertently shored the slabs does not make it responsible for continuing that unintended result. Accordingly, Levine's third party complaint against Mugler in the *Williams* action, Levine's third third-party complaint against Mugler in the *Morici* action, and all cross-claims and counterclaims against Mugler in both actions are dismissed.

F. Silman's Motions for Summary Judgment

The court agrees that Silman is entitled to dismissal of Levine's third-party claims in both

actions for contractual indemnification and failure to procure insurance. Silman's two contracts do not contain provisions requiring Silman to procure insurance or indemnify Levine. Accordingly, that branch of Silman's motions is granted in both actions. In addition, Silman's cross-motion is granted to the extent that all claims against Silman by 502 West 42nd Street Associates, LLC, SFA West 42nd Street Associates, LLC, SFA Holdings, Inc., Sidney Fetner Associates, Inc., Richard C. Mugler Co., Inc., Interstate Masonry Corp., Gotham Construction Co., LLC, Gotham Construction, Inc., and J&A Concrete Corporation are dismissed.

However, Silman is not entitled to dismissal of Levine's or Delta's claims for common law indemnification and contribution in either action. Silman urges that it cannot be held liable to indemnify Levine for violations of Labor Law §§ 240(1) and 241 because Silman was not an owner, a general contractor, or their agent, and, therefore, Silman owed no statutory duty to plaintiffs. Silman argues that because it did not direct or control plaintiffs' work and have the ability to stop unsafe practices, it cannot be held liable for common law indemnification and contribution for plaintiffs' Labor Law §200 claims. Lastly, Silman contends that it provided only engineering planning and design services, which insulates it from liability under Labor Law §§ 240(1) and 241(6).[5]

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[5] Labor Law §240(1) provides that "[a]ll contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

No liability pursuant to this subdivision for the failure to provide protection to a person so employed shall be imposed on professional engineers ... who do not direct or control the work for activities other than planning and design. This exception shall not diminish or extinguish any liability of professional engineers or architects or landscape architects arising under the common law or any other provision of law.

Labor Law § 241 provides that "[a]ll contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements: ...

6. All areas in which construction, excavation or demolition work is being performed shall be so

However, Silman could be held liable for common law indemnification or contribution if the jury were to find that the accident was foreseeable and believed that Silman rendered incorrect professional advice that solely caused or contributed to the accident. "Professionals ... may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties." *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 551 (1992). Contribution may be based upon a duty owed to a defendant, if an independent obligation can be found on the part of a concurrent wrongdoer to prevent foreseeable harm, despite the fact that the duty violated was not one owing directly to the injured plaintiff. *Id.* at 559. The critical requirement is that the contributing party must have had a part in causing or augmenting the injury for which contribution is sought and contribution is available whether the culpable parties are liable on the same or different theories, against concurrent, successive, independent, alternative and even intentional tortfeasors. *Raquet v. Braun*, 90 N.Y.2d 177, 182-183 (1997). The exception in Labor Law §§ 240 and 241 for engineering design and planning services specifically preserves the liability of engineers under the common law and statutes.

Here, there is evidence in the record that Silman gave professional opinions about the stability of the slab, its use as a work platform, the tests that were appropriate, and the shoring plan, upon which Levine and Delta relied. As a professional, Silman owed a duty to render competent advice. Whether or not Silman was required under its contracts to give such an

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constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, ... shall comply therewith....

9. No liability for the non-compliance with any of the provisions of this section shall be imposed on professional engineers ... who do not direct or control the work for activities other than planning and design. This exception shall not diminish or extinguish any liability of professional engineers, architects or landscape architects arising under the common law or any other provision of law.

opinion is of no moment. "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all" *Marks v. Nambil Realty Co.*, 245 N.Y. 256, 258 (1927). There also is evidence that Silman knew of the LZA Report and that Delta's Mr. Lucchese and Levine's Mr. Corola brought their concerns about the slabs to Silman's attention prior to the accident, after which Silman made the decision that the slabs were safe. There is evidence that Silman did more than merely provide design and planning services. While Silman claims that it was Delta that was required to perform inspections of the structural integrity during construction of both the old and new parts of the building, Delta denies it and some evidence supports that denial. An issue of fact as to which engineering firm was responsible exists.

G. Delta's Motions for Summary Judgment

Delta's cross-motion is granted to the extent that all claims against Delta by 502 West 42nd Street Associates, LLC, SFA West 42nd Street Associates, LLC, SFA Holdings, Inc., Sidney Fetner Associates, Inc., Richard C. Mugler Co., Inc., Interstate Masonry Corp., Gotham Construction Co., LLC, Gotham Construction, Inc., and J&A Concrete Corporation are dismissed. However, Delta is not entitled to summary judgment dismissing the claims against it by Levine and Silman for common law indemnification and contribution.

Delta's contract to "inspect structural stability during steel erection, and complete Building Department forms" is ambiguous as to whether its obligation was limited to stability of the new steel. The testimony and affidavits submitted by Silman and the Levine deposition raise an issue of fact as to whether Delta's obligation extended to the whole structure. In addition, there is evidence that Delta was involved in the decision to remove the shoring, which may have

contributed to the accident. Delta, like Silman, had a duty to render competent professional services and can be held liable for indemnification or contribution if it contributed to the accident.

The court notes that although Delta seeks dismissal of the claims against it by Levine in the Williams action for contractual indemnification and failure to procure insurance, Levine's pleading does not assert those claims against Delta. Delta Motion, Exh. N.

Accordingly, it is

ORDERED that in the Williams action:

1) The following motions and cross-motions are granted: a) the motions by Gotham Construction Company, LLC, and Gotham Construction, Inc., for summary judgment dismissing the complaint all cross-claims against them (Mot. Seq. 001 and 002); b) the motion by third-party defendant Richard C. Mugler Co., Inc., for summary judgment dismissing the third-party action and all cross-claims and counterclaims against it (Mot. Seq. 003); c) the cross-motion by 502 West 42nd Street Associates, LLC, SFA West 42nd Street Associates, LLC, SFA Holdings, LLC and Sydney Fetner Associates, Inc., for summary judgment dismissing the complaint and all cross-claims against them; d) the cross-motion by Interstate Masonry Corp. for summary judgment dismissing the complaint and all cross-claims against it; and e) the cross-motion by J&A Concrete Corp. for summary judgment dismissing the complaint and all cross-claims against it;

2) the branch of plaintiffs' cross-motion to amend the complaint to add 501 West 41st Street Associates, LLC and 41st Street Realty Associates, LLC, and to delete from the caption 502 West 42nd Street Associates, LLC, and SFA West 42nd Street Associates, LLC, and to amend the caption to name J.E. Levine Builders, Inc., in place of J. E. Levine Builder; is granted, but the branches of plaintiffs' cross-motion to extend their time to move for summary judgment against

the newly added parties and for partial summary judgment on liability pursuant to Labor Law §240(1) against Levine, are denied;

3) the cross-motion by J.E. Levine Builders, Inc., for summary judgment dismissing the complaint and all cross-claims against it, is denied as untimely;

4) the cross-motion by Robert Silman Associates, PC, to dismiss Levine's third-party complaint and all cross-claims and counterclaims against Robert Silman Associates, PC, is granted solely to the extent that the third-party claims of J.E. Levine Builders, Inc., for contractual indemnification and failure to procure insurance are dismissed as against Robert Silman Associates, PC, and all claims against Robert Silman Associates, PC, by 502 West 42nd Street Associates, LLC, SFA West 42nd Street Associates, LLC, SFA Holdings, Inc., Sidney Fetner Associates, Inc., Richard C. Mugler Co., Inc., Interstate Masonry Corp., Gotham Construction Co., LLC, Gotham Construction, Inc., and J&A Concrete Corporation are dismissed; and in all other respects the cross-motion is denied;

5) the cross-motion by Delta Testing Laboratories, Inc., to dismiss the third-party complaint of Robert Silman Associates, PC, and all cross-claims against Delta Testing Laboratories, Inc., is granted solely to the extent that all claims against Delta Testing Laboratories, Inc., by 502 West 42nd Street Associates, LLC, SFA West 42nd Street Associates, LLC, SFA Holdings, Inc., Sidney Fetner Associates, Inc., Richard C. Mugler Co., Inc., Interstate Masonry Corp., Gotham Construction Co., LLC, Gotham Construction, Inc., and J&A Concrete Corporation are dismissed; and in all other respects the cross-motion is denied;

6) plaintiffs may serve a supplemental summons and amended complaint upon 501 West 41st Street Associates, LLC and 41st Street Realty Associates, LLC, which reflects the dismissals

effectuated by this decision and order, within twenty days of service upon plaintiffs of a copy of this order with notice of entry; the newly added parties shall answer the complaint within the time limited by the CPLR and may move for summary judgment no later than 60 days after service by them of their answer to the supplemental summons and amended complaint;

7) the Clerk is directed to enter judgment accordingly and sever the remainder of the action, which shall continue;

8) the caption, hereafter shall read:

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JAMES WILLIAMS and MARY WILLIAMS, Index No. 108447/02
Plaintiffs,
-against-

J.E. LEVINE BUILDERS, INC., 501 WEST 41st STREET ASSOCIATES, LLC, 41st STREET REALTY ASSOCIATES, LLC, and JRC ELECTRICAL CONTRACTOR,
Defendants.
----------X
J.E. LEVINE BUILDERS, INC.,
Third-Party Plaintiff,
Index No. 590964/04
-against-

ROBERT SILMAN ASSOCIATES, P.C., and DELTA TESTING LABORATORIES, INC.,
Third-Party Defendants.
----------X

and the third-party claims of Robert A. Silman Associates, PC, against Delta Testing Laboratory, Inc., are hereby converted to cross-claims and, and the cross-claims of J.E. Levine Builders, Inc., against Delta Testing Laboratories, Inc., are converted to third-party claims; and

9) plaintiffs are directed to serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the Trial Support Office, Room 158M, who shall amend their records

to reflect the change in the caption of the *Williams* action; and it is further

ORDERED that in the *Morici* action:

1) the motion by Robert Silman Associates, PC (Mot. Seq. 009), for summary judgment dismissing the third-party action by J.E. Levine Builders, Inc., and all cross-claims and counterclaims against Robert Silman Associates, PC, is granted solely to the extent that the claims by J.E. Levine Builders, Inc., for contractual indemnification and failure to procure insurance are dismissed; and all claims against Robert Silman Associates, Inc., by Richard C. Mugler Co., Inc., are dismissed; and in all other respects the cross-motion is denied;

2) the motion by Richard C. Mugler Co., Inc., for summary judgment dismissing the third-party action and all cross-claims and counterclaims against it (Mot. Seq. 010) is granted;

3) the cross-motion by Delta Testing Laboratories, Inc., for summary judgment dismissing the third-party actions and all cross-claims and counterclaims against it is granted solely to the extent that all claims against Delta Testing Labortories, Inc., by Richard C. Mugler Co., Inc., are dismissed and in all other respects the cross-motion is denied; and

4) the Clerk is directed to enter judgment accordingly and sever the remainder of the action, which shall continue; and it is further

ORDERED that the parties shall appear for a pre-trial conference in Part 54, Room 1227, on October 16, 2008 at 12:00 p.m., at the courthouse located at 111 Centre Street, New York, NY; and it is further

ORDERED that prior to the pre-trial conference, the parties are directed to confer in order to agree upon a stipulation, to be so ordered at the conference, amending the caption in the *Morici* action to conform to the decisions of this court and all prior Justices of this court.

Dated: August 20, 2008

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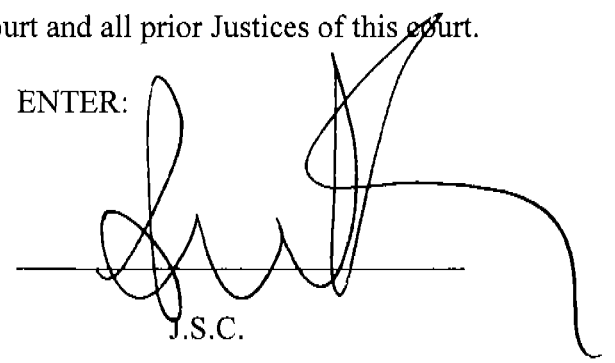

J.S.C.