

**Public Serv. Mut. Ins. Co. v Slope
W., LLC**

2009 NY Slip Op 30732(U)

March 27, 2009

Supreme Court, New York County

Docket Number: 590786/06

Judge: Doris Ling-Cohan

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

PRESENT: **JUSTICE DORIS LING-COHAN**
Justice

PART 36

Public Service Mutual

INDEX NO. 118045/03

- v -

Storwest et al.

MOTION DATE _____

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

PAPERS NUMBERED

1, 2

Answering Affidavits -- Exhibits _____

3

Replying Affidavits _____

4

interim order

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by third-party defendant
Bricolage Designs Co for summary judgment is granted
in accordance with the attached memorandum
decision

(The within motion is consolidated for disposition
with motion Sequence 006)

FILED

APR 02 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/27/09

JUSTICE DORIS LING-COHAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36**

-----X
PUBLIC SERVICE MUTUAL INSURANCE
COMPANY a/s/o FIFTH AVENUE COMMITTEE, INC.,

Index No.: 118045/03

Plaintiff,

Motion Seq. No.:
005 & 006

-against-

SLOPE WEST, LLC, UNITED HOMES OF NEW YORK, INC.
and WT CONSTRUCTION, INC.,

Defendants.

-----X
SLOPE WEST, LLC,

Index No.: 590786/06

Third-Party Plaintiff,

-against-

BRICOLAGE DESIGNS CO., LEONID KRUPNIK and
BENEDETTO & SON EXCAVATING, INC.,

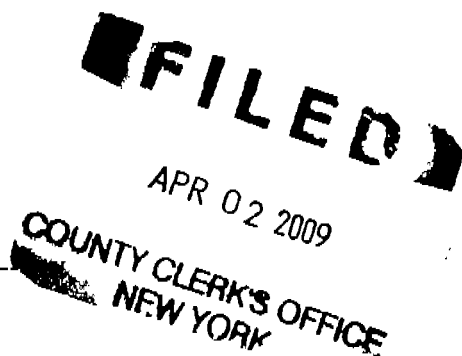
Third-Party Defendants.

-----X
Ling-Cohan, J.:

Motion sequence numbers 005 and 006 are hereby consolidated for disposition.

This is an action to recover for damage to property located at 332 Bergen Street, Brooklyn, New York, due to the improper shoring and underpinning of the adjacent premises located at 326-330 Bergen Street.

In motion sequence number 005, third-party defendant Bricolage Designs Co. (Bricolage) moves, pursuant CPLR 3212, for summary judgment dismissing third-party plaintiff Slope West, LLC's (Slope West) third-party complaint, as well as all cross claims, as against it. In motion sequence number 006, third-party defendant Leonid Krupnik (Krupnik) moves, pursuant to



CPLR 3212, for summary judgment dismissing Slope West's third-party complaint, as well as all cross claims, as against it.

BACKGROUND

This action involves the design and construction of two new five-story 10-unit buildings (the project) located at 326-330 Bergen Street, Brooklyn, New York (the premises). Defendant and third-party plaintiff Slope West owns the premises. Defendant WT Construction (WT) served as general contractor on the project. Third-party defendant Bricolage served as architect on the project, and third-party defendant Krupnik served as design engineer on the project.

Plaintiff Public Service Mutual Insurance Company (PSM) a/s/o Fifth Avenue Committee is the insurer of Fifth Avenue Committee (FAC), the owner of the adjacent property located at 332 Bergen Street (the adjacent property). Plaintiff filed a complaint against Slope West, United Homes of New York, Inc. (United) and WT (together, defendants), dated October 13, 2003, alleging that, as the insurer and subrogee of FAC, it paid approximately \$175,000 to FAC for damage caused to the adjacent property, including but not limited to, cracks in the interior and exterior of the building, as a result of negligent underpinning and shoring work conducted at the premises.

On or about August 11, 2006, Slope West filed a third-party action against Bricolage, Krupnik and Benedetto & Son Excavating, Inc. (Benedetto), in which Slope West seeks contractual and common-law indemnification and/or contribution for any damages for which Slope West is found liable to plaintiff.

BRICOLAGE'S MOTION FOR SUMMARY JUDGMENT DISMISSING SLOPE WEST'S
THIRD-PARTY COMPLAINT AS AGAINST IT (motion sequence number 005)

Third-party defendant Bricolage moves for summary judgment dismissing Slope West's third-party claims for contractual and common-law indemnification and/or contribution as against it, on the ground that, as architect for the premises, it was not responsible, nor did it have any involvement in the underpinning, shoring or construction means and methods which caused damage to the adjacent property.

A. SLOPE WEST'S CONTRACTUAL INDEMNIFICATION CLAIM AGAINST
BRICOLAGE

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; see *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 402 [1st Dept 2005]). It is well settled that with respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its statutory liability and that "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" [citation omitted]" (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003]; *Keena v Gucci Shops, Inc.*, 300 AD2d 82, 82 [1st Dept 2002]).

Here, Bricolage is entitled to summary judgment dismissing Slope West's claim for contractual indemnification against it, as the testimonial and documentary evidence in this case indicates that Bricolage did not have a contractual duty to perform any professional services in connection with the planning and supervision of the excavation, underpinning, shoring or

construction means and methods at the premises; nor did Bricolage perform any such services in a way that proximately caused the damage to the adjacent property.

In his affidavit dated September 10, 2007, Henry Radusky, AIA, a principal of Bricolage, stated that Bricolage was retained by Slope West to prepare architectural plans and specifications, as well as sewer applications and approvals in connection with the project, pursuant to a written agreement dated April 19, 2002 (the Bricolage/Slope West contract).

Importantly, the terms of the Brocolage/Slope West contract state, in pertinent part:

The architect will not be responsible for work in the following areas in addition to the exclusions contained with the context of the contract as part of contract fee specified;

* * *

(b) Preparation of structural framing plans and engineering including underpinning, piles, shoring &/or sheetpiling (if required)

* * *

(d) Structural engineering services including underpinning, piles, shoring &/or sheetpiling only (if required)

(Bricolage's Notice of Motion, Exhibit D, Brocolage/Slope West Contract, at 1). In addition, the

Brocolage/Slope West contract states:

Bricolage shall not be responsible, have control or be in charge of construction and shall have no responsibility for construction means and methods, techniques or sequences of procedures for safety of precautions and programs in connection with the work, for the acts or omissions of the contractor, sub-contractor, or any other person performing any of the work, or for failure of any of them to carry out the work in strict accordance with the drawings

(*id.* at 2).

Further, the Bricolage/Slope West contract sets forth that Bricolage's work on the project includes "[p]reparation and submittal of all controlled inspection items required (other than underpinning and/or piles, shoring, and/or sheetpiling if necessary" (*id.* at 1). In Article 2 of the

AIA form contract, which was signed by Slope West and Bricolage, “filing, coordinating or expediting any underpinning, piles and/or [shoring]/sheetpiling” was specifically excluded from the definition of the architect’s basic services (Bricolage’s Notice of Motion, Exhibit D, Brocolage/Slope West Contract, AIA Document B151-1997, at 2). Moreover, the following notice is stated on the coversheet of Bricolage’s plans, which were submitted to the New York City Buildings Department:

THE ARCHITECT shall not have control or charge of and shall not be responsible for construction means, methods, deviations, techniques, sequences, or procedures, or for safety precautions and programs in connection with the work, for the acts or omissions of the contractor, subcontractors or any other persons performing any of the work, for the failure of any of them to carry out the work in accordance with the contract documents

(Bricolage’s Notice of Motion, Exhibit E, Bricolage Design Plans Coversheet).

In fact, a review of the record reveals that defendant WT contracted with Slope West to perform the excavation and foundation work on the premises, including the underpinning and shoring work which was necessary in order to protect the adjoining property. In addition, Krupnick, the design engineer on the project, was retained to prepare and provide the plans for said underpinning and shoring, as well as to conduct various inspections.

In opposition to Bricolage’s motion for summary judgment dismissing Slope West’s claim for contractual indemnification against it, Slope West puts forth only the testimony of Joseph Tyrnauer (Tyrnauer), owner of WT Construction, to support its contention that, in addition to the plans supplied by Krupnik, Bricolage’s architectural plans were utilized by WT during the excavation and underpinning portions of the project. However, a review of the record indicates that this testimonial evidence is vague and uncertain on this issue, and thus, it fails to

sufficiently refute Bricolage's strong documentary evidence which clearly demonstrates that Bricolage did not have a duty to perform any professional services relating to the excavation, underpinning, shoring or construction means and methods; nor did it breach any duty that proximately caused damage to the adjacent property.

When asked to describe what documents would have guided the necessary deepness of the excavation at the premises, Tyrnauer noted only that this information would "probably" be on the architectural plan (Slope West's Affirmation in Opposition to Bricolage's Notice of Motion, Exhibit 2, Tyrnauer Deposition, at 300). In addition, Tyrnauer stated only that the architectural plans might be relevant to the type of underpinning to be performed.

Moreover, Slope West does not present any evidence that there was anything wrong with Bricolage's architectural plans or that WI's use of said plans proximately caused the damage to the adjacent property. Thus, Bricolage is entitled to summary judgment dismissing Slope West's claim for contractual indemnification as against it.

B. SLOPE WEST'S COMMON-LAW INDEMNIFICATION AND CONTRIBUTION CLAIMS AGAINST BRICOLAGE

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *Priestly v Montefiore Medical Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]). In the absence of any negligence, a claim for common-law indemnity may be established upon a

showing that the proposed indemnitor “had the authority to direct, supervise, and control the work giving rise to the injury” (*Hernandez v Two E. End Ave. Apt. Corp.*, 303 AD2d 556, 557 [2d Dept 2003]).

“Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person [internal quotation marks and citations omitted]” (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61-62 [2d Dept 2003]). A third-party action for contribution requires that the third-party defendant owed a duty to the plaintiff in the main action, that there was a breach of this duty and that the third party’s breach contributed to plaintiff’s injuries (*Crow-Crimmins-Wolff & Munier v County of Westchester*, 90 AD2d 785, 786 [2d Dept 1982]).

It is well settled that, in order to set forth a prima facie case of negligence, “a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries” (*Engelhart v County of Orange*, 16 AD3d 369, 371 [2d Dept 2005]; *Marasco v C.D.R. Electronics Sec. & Surveillance Sys. Co.*, 1 AD3d 578, 580 [2d Dept 2003]). “A claim of professional negligence requires proof that there was a departure from the accepted standards of practice and that the departure was a proximate cause of the injury” (*Estate of Burke v Repetti & Co.*, 255 AD2d 483, 483 [2d Dept 1998], quoting *Georgetti v United Hosp. Med. Ctr.*, 204 AD2d 271, 272 [2d Dept 1994]).

Here, as discussed prior, the testimonial and documentary evidence in this case indicates that Bricolage did not owe or breach any duty of care which proximately caused the damage to the adjacent property. “Absent a duty of care, there is no breach and no liability” (*Engelhart v County of Orange*, 16 AD3d at 371). Thus, Bricolage is entitled to summary judgment

dismissing Slope West's claim for common-law indemnification and/or contribution as against it.

KRUPNIK'S MOTION FOR SUMMARY JUDGMENT DISMISSING SLOPE WEST'S
THIRD-PARTY COMPLAINT AS AGAINST IT (mot. seq. 006)

A. SLOPE WEST'S COMMON-LAW INDEMNIFICATION AND/OR CONTRIBUTION
CLAIMS AGAINST KRUPNIK

Krupnik argues that he is entitled to summary judgment dismissing Slope West's common-law indemnification and/or contribution claims against him, on the ground that he never breached any duty that proximately caused damage to the adjacent property. In support of his motion, Krupnik submitted an affidavit indicating that, as a professional engineer licensed to practice in the State of New York, he fulfilled his duty to Slope West by preparing structural designs and specifications in accordance with general engineering standards and practices.

In his affidavit, Krupnik explained that his structural drawing, S-3, outlined the proper procedure to be followed by WT with regard to the underpinning, shoring and bracing of the premises. To that effect, helical piles were to be installed, followed by the concrete strap beams and then the underpinning.

Although Slope West argues that Krupnik's affidavit, which asserts that his plans were prepared in accordance with generally accepted engineering standards and practices, is "unsupported," said affidavit was sufficient to meet Krupnik's initial burden of demonstrating entitlement to judgment as a matter of law on this issue (*see 470 Owners Corporation v Richard L. Heimer, P.E., P.C.*, 258 AD2d 558, 558 [2d Dept 1999]).

Krupnik argues that based upon his observations, the damage to the adjacent property was actually caused by WT's failure to comply with the procedures set forth in Krupnik's plans and specifications, comply with the New York City Building Code (building code) and adhere to the

terms of its contract. As such, Krupnik argues that WT's failures constitute an intervening cause that eliminates any possible nexus between Krupnik's structural designs and plaintiff's alleged damages.

To establish a prima facie case of negligence, "plaintiff must show that 'defendant's negligence was a substantial cause of the events which produced the injury'" (*Kush v City of Buffalo*, 59 NY2d 26, 32-33 [1983], quoting *Derdiarian v Felix Contr. Co.*, 51 NY2d 308, 315 [1980]). "An intervening act will be deemed a superseding cause and will serve to relieve defendant of liability when the act is of such an extraordinary nature or so attenuates defendant's negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant" (*id.* at 33; *Emanuel v Sheridan Transp. Corp.*, 10 AD3d 46, 57 [1st Dept 2004]).

In his affidavit, Krupnik stated that, on October 9, 2002, he visited the premises in response to a claim that damage had been incurred by the adjacent property. At that time, Krupnik observed cracks in the adjacent property's brick masonry walls. In addition, Krupnik noticed that some of the underpinning along the east and west walls of the adjacent property was installed before the installation of the concrete strap beams, whereas Krupnik's plans required that the strap beams be installed before any underpinning. Krupnik also observed piles which were not galvanized, as required by the Helical pile notes on drawing S-1 of his structural designs.

In opposition, Slope West puts forth only the deposition testimony of Tyrnauer, who admitted that he had no training in reading architectural plans. Although Tyrnauer testified that WT had an employee at the site during the underpinning work to make sure that the work was

done in accordance with Krupnik's drawings, Tyrnauer's responses to questions concerning the details and sequences of the work performed by WT and various subcontractors, as well as the extent to which Krupnik's plans were followed by these workers, were vague and uncertain in nature.

Here, the speculative nature of Tyrnauer's lay testimony does not raise an issue of fact as to whether Krupnik's work deviated from industry standards. It has been "repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*id.*; *Shaw v Time-Life Records*, 38 NY2d 201, 207 [1975] ["Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion"]).

Moreover, Slope West's failure to offer its own expert affidavit was fatal to its claim that Krupnik was negligent in this case (*Sheehan v Pantelidis*, 6 AD3d 251, 251 [1st Dept 2004] [defendant's failure to offer an expert affidavit was fatal to his malpractice claim against the architect]; *470 Owners Corporation v Richard L. Heimer, P.E., P.C.*, 258 AD2d at 559 [plaintiff failed to raise a genuine issue of material fact when it failed to submit an expert affidavit in opposition to defendant's motion for summary judgment dismissing plaintiff's engineering malpractice complaint]).

Finally, as noted by Krupnik, the record is devoid of any evidence that Krupnik ever received 72 hours' written notice, as required by the building code, notifying him that a

controlled inspection was needed. Accordingly, as Krupnik was unaware that the underpinning work had even been performed by WT, it cannot be held responsible for any alleged failure to visit the site.

Thus, Krupnik is entitled to summary judgment dismissing Slope West's claims for common-law indemnification and/or contribution as against it.

B. SLOPE WEST'S CONTRACTUAL INDEMNIFICATION CLAIM AGAINST KRUPNIK

Krupnik argues that he is entitled to summary judgment dismissing Slope West's third-party claims for contractual indemnification against him, on the ground that he fulfilled his contractual duties to provide inspections, structural engineering services, including the plans and specifications for the structural elements of the premises, pursuant to his agreement with Cross State, dated June 6, 2002 (the Cross State contract). In addition, Krupnik's asserts that, pursuant to the Cross State contract, he was not responsible for determining the contractor's means, methods, techniques, sequences and procedures. Rather, all of these responsibilities, including the underpinning and excavation work, were delegated to WT.

In response to Krupnik's argument, Slope West only offers the vague testimony of Tyrnauer, wherein he states that WT, as well as various subcontractors, were obligated to perform in accordance with Krupnik's drawings. As a result, Slope West asserts that there remain genuine material issues of fact with regard to whether Krupnik breached its duty and whether his breach was a proximate cause of plaintiff's claimed damages.

Thus, as Slope West has failed to present sufficient evidence to rebut Krupnik's contentions in support of his motion, Krupnik is entitled to summary judgment dismissing Slope West's claim for contractual indemnification as against it.

CROSS-CLAIMS OF BRICOLAGE AND KRUPNIK

Bricolage and Krupnik both move to dismiss all cross claims as against them. To this effect, Bricolage cross-claimed against Krupnik for common-law indemnification and contribution, and Bricolage cross-claimed against Krupnik for common-law and contractual indemnification and contribution. As neither Bricolage or Krupnik have been shown to have breached any duty that proximately caused the damage to the adjacent building, Slope West's third-party complaint has been dismissed as against these parties. Accordingly, as said cross claims are now moot, Bricolage and Krupnik are entitled to summary judgment dismissing their cross claims against each other.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that third-party defendant Bricolage Designs Co.'s motion (motion sequence number 005), pursuant to CPLR 3212, for summary judgment dismissing third-party plaintiff Slope West, LLC's (Slope West) third-party complaint, as well as all cross claims against it, is granted, and the third-party complaint is severed and dismissed as to this third-party defendant, and the Clerk is directed to enter judgment in favor of this third-party defendant, with costs and disbursements as taxed by the Clerk; and it is further


ORDERED that third-party defendant Leonid Krupnik's motion (motion sequence number 006), pursuant to CPLR 3212, for summary judgment dismissing Slope West's third-party complaint, as well as all cross claims against him, is granted, and the complaint is severed and dismissed as to this third-party defendant, and the Clerk is directed to enter judgment in favor of this third-party defendant, with costs and disbursements as taxed by the Clerk; and it is

further

ORDERED that the remainder of the action shall continue; it is further

ORDERED that within 30 days of entry of this order, Bricolage shall serve a copy upon all parties, with notice of entry.

DATED: March 27, 2009


Hon. Doris Ling-Cohan

J:\Summary Judgment\Public Service v Slope West.wpd

FILED
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COUNTY CLERK'S OFFICE
NEW YORK