

**Manhattan Props., Inc. v 9 E. 30th Realty LLC**

2009 NY Slip Op 31939(U)

August 17, 2009

Supreme Court, New York County

Docket Number: 603535/06

Judge: Marcy S. Friedman

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

PRESENT: **MARCY S. FRIEDMAN, J.S.C.**

PART \_\_\_\_\_

Index Number : 603535/2006  
**MANHATTAN PROPERTIES, I**  
VS.  
**9 EAST 30TH REALTY, LLC**  
SEQUENCE NUMBER : 004  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

*- protect*  
in this motion to/for Summary judgment

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1  
2  
3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is decided as per*  
*decision/order dated 8-17-09*

**FILED**

AUG 27 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: August 17, 09

*MJF*

**MARCY S. FRIEDMAN, 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 57

PRESENT: Hon. Marcy S. Friedman, JSC

\_\_\_\_\_ x  
MANHATTAN PROPERTIES, INC.,

*Plaintiff,*

- against -

9 EAST 30<sup>TH</sup> REALTY LLC and ADRIATIC  
CONSTRUCTION, INC.,

*Defendants.*  
\_\_\_\_\_ x

Index No.: 603535/06

DECISION/ORDER

**FILED**  
AUG 27 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

In this action for property damage, second third-party defendant Protech Interiors, Inc. (“Protech”) moves for summary judgment dismissing the second third-party action brought by defendant/second third-party plaintiff 9 East 30<sup>th</sup> Realty, LLC (“9 East”) and the cross-claims of second third-party defendant Waldorf Holding Corp., sued as Waldorf Carting Corp. (“Waldorf”). Waldorf moves for summary judgment dismissing the second third-party action brought by defendant/second third-party plaintiff 9 East and the cross-claims of second third-party defendant Protech.

This action arises out of the collapse on December 7, 2004 of a party wall between the building owned by plaintiff Manhattan Properties, Inc. (“Manhattan Properties”) at 7 East 30<sup>th</sup> Street in Manhattan and the building owned by defendant 9 East at 9 East 30<sup>th</sup> Street. It is undisputed that Manhattan Properties hired Protech to assist with the renovation of the first floor and basement of its building, and that Protech subcontracted the work to Waldorf. At the time of the collapse, Waldorf was removing decorative wood paneling from the party wall.

[\* 3 ]

Protech and Waldorf contend that Waldorf's work was not structural and did not contribute to the collapse of the party wall. Rather, they contend that the collapse was caused by defective construction work performed at 9 East 30<sup>th</sup> Street for over one year prior to the collapse, that certain floors at 9 East 30<sup>th</sup> Street collapsed in September 2003, and that the September 2003 collapse caused damage to the party wall.

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

Here, Protech and Waldorf submit evidence that 9 East's construction was a cause of the party wall collapse. They thus cite the testimony of Anthony Cucich, an architect who was hired by the owner of 9 East after the September 2003 collapse at its premises to supervise the emergency work. Mr. Cucich testified that there was a buckle and a crack in the party wall after the September 2003 collapse (id. at 34), that the wall was "unprotected, because some of the joists were falling down," (id. at 128), and that the wall was "bubbling out" between the first and second floor. (Id.) However, he also testified that the building was braced (see id. at 122-123),

and that bricks were replaced. (Id. at 128-129.)<sup>1</sup> While third-party defendants rely on Mr. Cucich's testimony that the party wall was damaged by the 2003 collapse, Mr. Cucich also gave testimony that after the bracing and replacement of the bricks, the Building Department found that the building was safe. (Id. at 55, 132.) Third-party defendants also rely on the testimony of Andrew Osborn, a structural engineer who inspected 7 East 30<sup>th</sup> Street in December 2004 on behalf of 7 East's insurer. He testified that he observed that pockets of bricks had been removed from the party wall on the 9 East 30<sup>th</sup> Street side (Osborne Dep. at 44-48), and that conditions in that building were "very precarious" (id. at 54), with "intermittent flooring" (id. at 56.) However, he also testified that some brick work had been removed from the party wall on the 7 East side, that the removal of bricks adjacent to joists in the party wall would have some effect on the stability of the party wall (id. at 41-43), and that he observed bulging of the wall adjacent to the collapsed area. (Id. at 51.) Mr. Osborn's report of his inspection is not submitted until the reply (see Ex. A to Boury Reply Aff.) and is unsworn. Even if considered, it also does not eliminate triable issues of fact as to the cause of the party wall collapse. The report, more clearly than the deposition testimony, states that during the demolition work at 9 East, the contractor removed "significant portions of the first two wythes of the brick part[y] wall in the area of the collapse," and that the removal of these wythes "created a very unstable and hazardous condition." However, the report continues with the finding that "[w]hen the insured's contractor [at 7 East] pulled down interior finishes that were attached to the brick wall, only a single wythe of brick, in relatively poor condition, was available to resist the removal forces. The affected

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<sup>1</sup>There was some confusion in the testimony as to whether the bricks were replaced between the first and second floor or second and third floor. (See id. at 128-129.)

portion of the wall fell to the floor.” (Report at 3.) The report does not make any finding as to whether 7 East’s contractor was negligent in removing the paneling, given the condition of the wall. Nor is the cause of the party wall collapse conclusively demonstrated by the additional testimony cited by third-party defendants from Louis Lombardi of Manhattan Properties, Protech’s owner John Brandt, and Waldorf’s foreman Diego Tantillo.

Third-party defendants thus fail to demonstrate as a matter of law that the work at 9 East 30<sup>th</sup> Street was the sole cause of the party wall collapse. Nor do they demonstrate that the work at 7 East 30<sup>th</sup> Street was not a contributing cause of the collapse under these circumstances in which it is undisputed that the workers were using crowbars to remove the wood paneling at 7 East and that the party wall collapsed at the very time when they were performing this work. The court accordingly holds that Protech and Waldorf are not entitled to summary judgment dismissing the second third-party complaint.

As to the branch of Protech’s motion for dismissal of Waldorf’s cross-claims against it, Protech submits the contract between Waldorf and Protech requiring Waldorf to indemnify Protech for all claims arising out of the performance of Waldorf’s work to the extent caused in whole or in part by Waldorf. Waldorf does not oppose this branch of Protech’s motion, which will therefore be granted. The branch of Waldorf’s motion to dismiss Protech’s cross-claims against it for contribution and indemnification will be denied based on the existence of triable issues of fact as to Waldorf’s negligence.

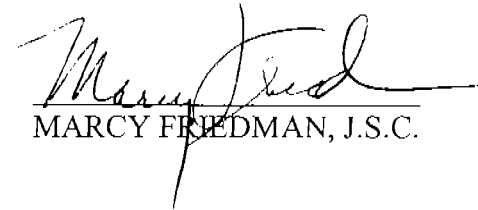
It is accordingly hereby ORDERED that the motion of second third-party defendant Protech Interiors, Inc. (“Protech”) for summary judgment is granted to the extent of dismissing the cross-claims of second third-party defendant Waldorf Holding Corp., sued as Waldorf

Carting Corp. ("Waldorf"), and is otherwise denied; and it is further

ORDERED that the motion of second third-party defendant Waldorf Holding Corp. for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

Dated: New York, New York  
August 17, 2009

  
MARCY FRIEDMAN, J.S.C.

**FILED**  
AUG 27 2009  
COUNTY CLERK'S OFFICE  
NEW YORK