

11 Essex St. Corp. v 7 Essex St., L.L.C .

2009 NY Slip Op 32255(U)

September 8, 2009

Supreme Court, New York County

Docket Number: 110019/04

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

11 ESSEX STREET CORP.

INDEX NO. 11 00 19/04

- v -

MOTION DATE _____

7 ESSEX STREET, L.L.C., ETAL

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

and cross motions are denied as attached

FILED
SEP 15 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/8/09

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

EMILY JANE GOODMAN

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X
11 ESSEX STREET CORP.,

Plaintiff,

-against-

7 ESSEX STREET, L.L.C., c/o VESTA
DEVELOPMENT GROUP, DeSIMONE CONSULTING
ENGINEERS, JEFFREY M. BROWN ASSOCIATES,
INC., BERZAK GOLD, P.C. and BIG APPLE
WRECKING AND CONSTRUCTION CORP.,

Defendants.

-----X
EMILY JANE GOODMAN, J.S.C.:

Index No. 110019/04

FILED
SEP 15 2009
COUNTY CLERK'S OFFICE
NEW YORK

This action arises out of a construction project that allegedly caused damage to a neighboring building. Plaintiff 11 Essex Street Corp. (11 Essex) moves, pursuant to CPLR 3025 (b), for an order granting it leave to amend its complaint to include a cause of action for gross negligence and to seek punitive damages. Defendant DeSimone Consulting Engineers (DeSimone) cross-moves, pursuant to CPLR 3212 (b), for summary judgment dismissing all claims and cross claims asserted as against it in this action and in the action which was joined for discovery and trial.

FACTS

Defendant 7 Essex Street L.L.C. (7 Essex) is the owner of the property located at 7 Essex Street, next to 11 Essex Street. 7 Essex retained Franke Gottsegen Cox (FGC) as architects, and defendant Jeffrey M. Brown Associates, Inc. (Brown Associates) as

construction manager, for a project that involved demolition of the existing building and construction of a new 10-story building. DeSimone was the structural engineer for the new building. FGC, Brown Associates, and DeSimone conducted a walk-through inspection of 11 Essex Street before commencing construction, and had the soil tested by a geotechnical engineer. The February 28, 2001 report revealed that the soil in the area was loose, and that the proposed structure was likely to cause adjacent structures to settle between three and five inches, "and could cause, at least, architectural distress." Geotechnical Report, at 3, Amended Notice of Motion, Ex. R. FGC, Brown Associates and DeSimone were also aware that the basement of 11 Essex's building had been lowered during renovations that 11 Essex had performed. FGC's diagram of the foundation of 11 Essex Street, drafted prior to the underpinning being designed, included this condition. DeSimone included various instructions in its plan regarding potential avoidance of underpinning the surrounding buildings.

Berzak Gold, P.C. (Berzak) is the engineer that designed the underpinnings for 11 Essex Street during the excavation and construction of the building at 7 Essex Street. Berzak was retained by Danna Construction (Danna), which was the concrete underpinning subcontractor. Berzak claims that it was not informed that part of the foundation wall did not have a footing,

or that the basement slab floor had been lowered below the foundation. According to plaintiff, Berzak did not attempt to get full information from the architect or engineer, nor did it conduct an inspection of the interior of the building prior to designing the underpinning. Berzak denies having seen the conditions of 11 Essex Street before designing the underpinning. Although DeSimone knew about the conditions, and provided that information to the contractors, apparently neither DeSimone nor other defendants provided that information to Berzak.

Allegedly, as a result of the installation of the underpinning without any lateral support, cracks formed in the walls of the building at 11 Essex Street, which caused the building to lean. This leaning occurred approximately one week after the placement of three sections of the underpinning.

When applying for permits from the Department of Buildings, DeSimone filed a Statement of Technical Responsibility (TR-1 form), stating that it was the engineer of record and would supervise the project. Berzak did not file a superceding TR-1 form until February 20, 2008, more than a week after the cracking of the walls at 11 Essex was discovered.

DISCUSSION

Motion to Amend Complaint

Plaintiff seeks leave to amend its complaint to assert claims for gross negligence, and to request punitive damages.

Defendants oppose the motion, contending that plaintiff has not presented sufficient allegations to support a request for punitive damages. Several defendants contend that there are no allegations that they harbored any malicious intent to support an award for punitive damages.

In moving for leave to amend a complaint, leave is freely granted (CPLR 3025 [b]), based upon some evidentiary showing that the proposed amendment has arguable merit. *Sabo v Allan B. Brill, P.C.*, 25 AD3d 420 (1st Dept 2006). Mere lateness alone is not a barrier to amendment, unless it is coupled with prejudice *Heller v Louis Provenzano, Inc.*, 303 AD2d 20 (1st Dept 2003).

Brown Associates

Brown Associates contends that plaintiff's claims as against it lack merit, and that plaintiff failed to submit an expert affidavit to support its claims that defendants were grossly negligent and reckless in their work. As the construction manager and not the general contractor, Brown Associates argues that it cannot be held liable, citing to Labor Law cases referencing the well known precedent that a construction manager's duty to supervise the work and ensure compliance with safety regulations does not amount to supervision and control over an injured plaintiff's methods and means of work. Brown Associates also cites to cases holding that a principal is not liable for the acts of independent contractors. It also

maintains that plaintiff failed to offer any evidence that the parties' actions were malicious, wanton or reckless, maintains that it was prejudiced by the delay, and maintains that any misconduct amounted to a private wrong, rather than a wrong aimed at the public.

These arguments are not compelling. In its opposition, Brown Associates carefully avoids explaining what its role as construction manager entailed. From the evidence submitted, it prepared daily progress reports and knew that underpinning was required, due to the discovery of a small section of foundation wall at Plaintiff's building, which had no footing. Brown Associates' contract required daily monitoring during excavation, but it is not clear that this role was fulfilled. Brown Associates' citation to Labor Law cases are to no avail as those cases are specific to the Labor Law statutes, which are not at issue here. Further, plaintiff seeks to hold Brown Associates liable for its own acts, and not for the acts of independent contractors. Moreover, at this stage, it would be premature to conclude that punitive damages could not be awarded because this was merely a private wrong, in view of the potential damage that could have affected members of the public in the vicinity of the undermined building (*see Fonda v 157 East 74th Co.,* 158 AD2d 297 [1st Dept 1990] [plaintiff was permitted to amend complaint to seek punitive damages where plaintiff sustained property damage

due to improper underpinning, in light of defendants' alleged reckless indifference to public safety]). Brown Associates' claims of prejudice are conclusory. Accordingly, the amendment has arguable merit.

DeSimone

DeSimone opposes the amendment, and cross-moves for summary judgment. Its position will be addressed *infra*.

7 Essex

In its opposition, 7 Essex contends that 11 Essex failed to assert any facts to support a conclusion that 7 Essex acted maliciously, wantonly or with any improper motive. It maintains that 11 Essex merely lumped 7 Essex together with the other defendants.

While it is true that 7 Essex was informed about the likelihood of movement during construction, and attended weekly project meetings, there are no allegations that 7 Essex was involved in planning the method of construction or the planning of the project in terms of engineering requirements. If the contractors that 7 Essex hired performed improperly, that does not mean that 7 Essex had the necessary wanton disregard that would support a claim for gross negligence or punitive damages. Here, 11 Essex has failed to allege any facts upon which gross negligence, as against 7 Essex, can be maintained. Therefore, to the extent that the amendment seeks punitive damages and to

assert gross negligence against 7 Essex, the motion is denied.

Berzak

Berzak contends that it will be prejudiced by an amendment, because 11 Essex caused the problem by dropping its cellar floor. However, that is not something that caused the parties' positions to be changed since the original complaint was filed. Berzak has not set forth any special right that it will lose, or asserted that it changed its position or that it will incur significant trouble or expense if the amendment is allowed. See *Smith v Industrial Leasing Corp.*, 124 AD2d 413 (3d Dept 1986); see also *Murray v City of New York*, 43 NY2d 400 (1977). Moreover, even if the Court were to assume that 11 Essex caused the problem by lowering its basement, that does not mean that Berzak was not grossly negligent in failing to discover that condition and design the underpinnings differently.

Berzak maintains that plaintiff has failed to offer any evidence that its actions were malicious, wanton or reckless toward 11 Essex. An act is wanton or reckless when it is constitutes "a conscious disregard of the rights of others" (*David XX v Saint Catherine's Ctr. for Children*, 267 AD2d 813, 816 [3d Dept 1999]) or is without regard for the safety of others. *Sharapata v Town of Islip*, 56 NY2d 332, 335 (1982); *Smith v Fitzsimmons*, 180 AD2d 177, 181 (4th Dept 1992). Here, 11 Essex has alleged that Berzak failed to ascertain the conditions

of 11 Essex before designing and allowing work on the underpinnings to commence, despite the fact that an improperly supported building could cause both property damage and personal damage if the building's stability were undermined. Thus, safety has been implicated, and 11 Essex has alleged facts to support its claim of gross negligence and for punitive damages sufficient to permit the amendment of the complaint as against Berzak.

Cross Motion for Summary Judgment

DeSimone cross-moves for summary judgment dismissing all claims and cross claims asserted against it. DeSimone contends that it had no responsibility or involvement in the underpinning work, that Berzak was the engineer responsible for ensuring the stability of the surrounding buildings, and that non party Delta Testing performed the controlled inspection. DeSimone claims that its engineering expertise was strictly for the purposes of the new building, and its plans specifically stated that a separate contractor would be solely responsible for protecting all adjacent buildings, and specified that the contractor must retain a separate engineer for that purpose.

There is no question that, in its plans, DeSimone stated that it was not responsible for protecting the surrounding buildings, and that a separate contractor would have to retain a separate engineer for that purpose. There is also no question that Brown Associates retained Berzak for that purpose.

However, DeSimone's motion for summary judgment is denied because the Court previously denied a similar motion, by Decision and Order, dated August 15, 2005, and no new facts or other sufficient cause has been demonstrated so as to entitle DeSimone to make a second motion (see *Forte v Weiner*, 214 AD2d 397 (1st Dept 1995)). The Court's prior decision was not reargued, or appealed.

DeSimone acknowledges that the Court previously held that DeSimone's filing of the TR-1 raised issues of fact regarding DeSimone's liability for trial.¹ However, DeSimone claims that "[s]ince that time, it has been revealed through discovery the DCE did not receive the requisite 72-hour notice under the Administrative Code." Further, it claims that after it filed the first motion, depositions confirmed that Berzak and non party Delta Testing were the engineers retained to perform the underpinning and controlled inspection.

DeSimone's attempt to characterize the above as new evidence is unpersuasive. When DeSimone first moved for summary

¹Although DeSimone argues that it filed the TR-1 as a "place-holder" for Berzak, the Court already found that the fact that DeSimone accepted responsibility as the engineer of record for the construction, by filing the TR-1, raised issues for trial. Notably, 1 RCNY §16-01 states that the Department of Buildings will not approve any plans or amendments where the work necessitates a controlled inspection unless a TR-1 is filed "whereby the controlled inspection architect or engineer assumes responsibility for the controlled inspection of the existing structure during construction operations to determine its stability and integrity."

judgment, it was already aware that it did not receive notice under Administrative Code §27-195, and therefore, it should have made that argument at that time.² Further, the roles of Berzak and non party Delta Testing were known when the earlier motion was made. In any event, those roles have nothing to do with DeSimone's filing of the TR-1. While other defendants may be found more actively liable at trial, DeSimone cannot avoid liability when it undertook the responsibility as engineer of record at the time that the cracks appeared (*see 27 Jefferson Ave., Inc. v Emergi*, 18 Misc 3d 336 [Sup Ct, Kings County 2007]), and where this issue has already been decided.

In view of the liberal policies allowing amendments of complaints, plaintiff's amendment has arguable merit. DeSimone assumed the duty for the controlled inspection, to determine stability and integrity of 11 Essex's building, by filing a TR-1, and knew about the soil conditions and the lowered basement at 11 Essex's building. DeSimone has failed to demonstrate that the amendment should be denied because it was not negligent or

²Assuming that DeSimone did not get the requisite 72-hour notice (presumably Delta Testing received that notice), DeSimone has not established that it did not know, or should not have known, that the work had commenced. Thus, this case is distinguishable from the case upon which DeSimone heavily relies (*see RCD Bldg., L.L.C. v Park Slope Condominiums, L.L.C.* (14 Misc 3d 1215[A], 2007 NY Slip Op 50035[u] [Sup Ct, Kings County 2007] [architect who filed the TR-1 was granted summary judgment because no controlled inspection was performed because it did not receive the requisite 72-hour notice before the work commenced, or otherwise know that the work had commenced])).

grossly negligent, or because it could not have proximately caused the damages.³

CONCLUSION

Accordingly, it is hereby

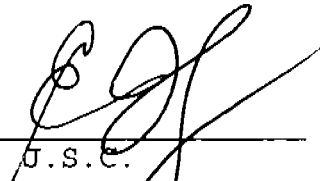
ORDERED that plaintiff's motion to amend its complaint is granted, except to the extent that the portion of the amendment that alleges gross negligence and seeks punitive damages as against 7 Essex Street LLC; and it is further

ORDERED that the cross motion of DeSimone Consulting Engineers is denied; and it is further

ORDERED that the amended complaint will be deemed served upon service of a copy of this order with notice of entry and defendants shall file their answers to the amended complaint within 10 days after receipt of said notice.

This Constitutes the Decision and Order of the Court.

Dated: September 8, 2009

ENTER: 
 U.S.C.
EMILY JANE GOODMAN

FILED
 SEP 15 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

³Even if the Court were to find that DeSimone was entitled to make a second summary judgment motion, it has not established that any negligence or gross negligence in connection with the controlled inspection could not have proximately caused the damages, because the damages were solely the result of Berzak's negligent design of the underpinnings.