

**Thomas J. McAdam Liqs., Inc. v Senior Living
Options, Inc.**

2009 NY Slip Op 33064(U)

November 13, 2009

Supreme Court, New York County

Docket Number: 113471/05

Judge: Carol R. Edmead

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

PRESENT: **HON. CAROL EDMEAD**

PART 35

Index Number : 113471/2005
THOMAS J. MCADAM LIQUORS
 vs.
SENIOR LIVING OPTIONS
 SEQUENCE NUMBER : 004
 SUMMARY JUDGMENT

INDEX NO. _____
 MOTION DATE 9/15/09
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

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

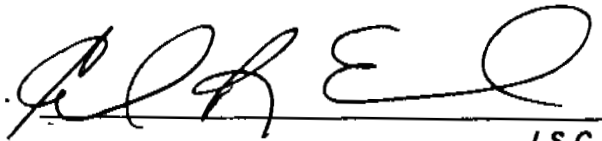
In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion by defendants Melzer/Mandl Architects, P.C. and David Mandl for summary judgment dismissing the complaint and all cross-claims against them pursuant CPLR 3212 is granted, and the Complaint and all cross-claims as asserted against them is hereby dismissed; and it is further

ORDERED that the branch of the motion by defendants Melzer/Mandl Architects, P.C. and David Mandl for dismissal of the complaint and all cross-claims against them pursuant CPLR 3211 (a)(7) is denied as moot; and it is further

ORDERED that defendants Melzer/Mandl Architects, P.C. and David Mandl serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 11/13/09 
 J.S.C.

PAPERS NUMBERED _____
FILED
 NOV 23 2009
 NEW YORK COUNTY CLERK'S OFFICE

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 REFERENCE

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

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

Plaintiffs,

-against-

Index No. 113471/05

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

Defendants.

-----X
JOY CONSTRUCTION CORPORATION,

Third-Party Plaintiff,

-against-

Third-Party Index No.
590921/06

DIAMOND POINT EXCAVATION and EXTREME
CONCRETE CORP.,

Third-Party Defendants.

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

Fourth-Party Plaintiffs,

-against-

Fourth-Party Index No.
590205/07

400 THIRD AVENUE ASSOCIATES, L.P.,

Fourth-Party Defendant.

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

FILED
NOV 23 2009
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

In this action alleging property damage, defendants Melzer/Mandl Architects, P.C. (“MMA”) and David Mandl (“Mandl”) (collectively, the “Mandl defendants”) move for dismissal of the complaint and all cross-claims against them, and for summary judgment in their favor pursuant to CPLR 3211 and 3212, respectively.

Factual Background

By agreement dated November 13, 2003, 400 Third Avenue Associates, L.P. c/o Atlantic Development Group LLC, identified therein as the owner (the ‘Owner’) hired MMA to provide certain architectural services (the “Architecture Contract”) in connection with the design and construction of a high-rise senior-living residence (the “project”) at 400 Third Avenue (the “adjoining premises”). MMA's architectural services included the structural design prepared by the firm of Selnick/Harwood Consulting Engineers, P.C. (“Selnick/Harwood”), a subcontracted consultant to MMA.

In 2004, the Owner and Joy Construction Corp. (“Joy”) entered into a contract for construction services (“the Construction Contract”).

Plaintiffs Thomas J. McAdam Liquors, Inc., and 398 Third Avenue Realty Company (collectively, “plaintiffs”), a commercial tenant (retail liquor store) and owner of the premises at 398 Third Avenue (the “subject premises”) respectively, commenced this action against Senior Living Options, Inc. (“Senior Living”) and/or Atlantic Development Group “86” LLC (“Atlantic”), as owners of the adjoining premises and developers of the project, MMA and its principal, Mandl, and the project’s general contractor, Joy, claiming that the subject premises were damaged from underpinning work during the construction project. Plaintiffs allege that, on

or before April 9, 2004, portions of the adjoining premises were demolished and excavated in preparation for the construction work. They claim that their building and property were substantially damaged and nearly destroyed for their intended use as a result of "(I) defendants' improper design, construction and maintenance of the excavation and failure to follow sound engineering and construction principles in connection therewith, particularly with respect to defendants' inadequate or non-existent underpinning, shoring, bracing, stabilizing, reinforcing, sheeting and/or lateral support of plaintiffs' Building and Property before and during the Project; and (ii) defendants' failure to conform the Project to the seismic requirements of the New York City Building Code (the "Building Code") by building the Project too close to plaintiffs' Building and Property."

Thereafter, Joy commenced a third party action against Diamond Point Excavation ("Diamond") and Extreme Concrete Corp. ("Extreme"), the entities which performed the underpinning work, for *inter alia*, indemnification and breach of contract.

The Mandl defendants then filed a fourth-party summons against 400 Third Avenue Associates, L.P. ("400 Third Avenue Assoc.") for indemnification and contribution.

The Mandl defendants moved for summary judgment, and by decision dated June 6, 2008, the Court dismissed all claims of negligent supervision and held that "Meltzer/Mandl's only potential liability is for negligent design of the project."

Motion by the Mandl Defendants

It is argued that plaintiffs cannot establish a negligence claim against MMA and Mandl.

First, MMA properly designed the project in accordance with the applicable New York City Building Code ("the Building Code") taking into account seismic movement. Plaintiffs' sole

allegation of improper design is that the Project was improperly designed due to an inadequate distance separating the buildings for seismic movement. MMA's contract documents and Selnick/Harwood's November 24, 2004 letter approved by the New York City Department of Buildings (the "DOB") contradict this allegation. Based on Selnick/Harwood's analysis, the one-inch distance indicated between the proposed building at 400 Third Avenue and 398 Third Avenue was adequate, and establishes that MMA properly designed this project in accordance with the Building Code and took into account seismic movement.

Furthermore, the Mandl defendants did not design the underpinning which is the basis for plaintiffs' claim. The Architectural Agreement demonstrates that MMA was responsible for preparing the design drawings for the new building and to perform certain construction administrative services during construction, and that the underpinning design was not within MMA's scope of services. MMA was not responsible for the means and methods of construction, for supervising construction or any contractors on the project, and had no responsibility for safety at the site. Furthermore the language in drawings prepared by MMA, which were incorporated in the construction contract between the Owner and Joy [the Contractor] ("Contractor's Contract"), establish that all foundation work, including underpinning and shoring, was the responsibility of the Joy and the Owner. In addition, the plans state that all underpinning work shall be supervised by the contractor's engineer and that the "Contractor is solely responsible for the safety of all existing property and persons during underpinning operations."

The Construction Contract between the Owner and Joy also demonstrates that the underpinning and shoring were the responsibility of the Contractor and Owner. Joy's corporate

designee Richard Sosa admitted at his deposition that neither MMA nor Selnick/Harwood was the underpinning engineer. Pursuant to its contract with the Owner and based upon the testimony of Mr. Sosa, Joy retained its own independent engineer to design the underpinning, sheeting and shoring, and the design of the underpinning clearly was not done by MMA.

The Mandl defendants also contend that although the stipulation annexed to the Note of Issue stated that depositions would continue, the deposition of MMA was not held, and was not mentioned in the stipulation. Since none of the parties were interested in a deposition from MMA, it is conceded that MMA was not involved in the underpinning process.

The Mandl defendants also point out that the Owner retained Pillori Associates, P.A., ("Pillori"), which performed a geotechnical review of the property and issued a report recommending a survey be conducted for the neighboring buildings and that each building should be inspected and photographed to record existing conditions ("Pillori report"). Pillori also recommended a survey-monitoring program be implemented during excavation. The Pillori report was commissioned by the Owner and not MMA and was ordered before the Owner entered into the Architectural Agreement with MMA. Yet, notwithstanding the Pillori report, there was no responsibility for the subsurface conditions on the site conditions placed on MMA in the Architectural Contract. In fact, all the responsibility for site work, including foundation work and sheeting and shoring was placed in the Contractor's hands.

The documents filed with the DOB further demonstrate that neither MMA nor Mandl was responsible for the underpinning work. Pillori signed the TR-1 Technical Report, Statement of Responsibility form ("TR-1) for underpinning, confirming that Pillori conducted controlled inspections of the underpinning work, and Versatile Consulting & Testing Inc. executed the TR-1

for the shoring and structural stability work.

Additionally, the notes of the meeting for the Project held in March 2004 states in Item No. 4.02 that "Joy is responsible for the design and underpinning, and shall submit shop drawings to Pillori for review and approve." Not only did MMA not design the underpinning, but also it was Pillori whose approval was required for the underpinning design.

Finally, Selnick/Harwood performed a field observation on or about June 10, 2004. In its report, Selnick/Harwood referenced the underpinning engineer and stated, "1. The underpinning engineer must review the site and make a determination on the procedure for investigating the existing column foundation prior to removals and lowering the sil for the mat and pit. 2. The underpinning engineer must advise the contractor how to proceed with the granite starter course removal and the corresponding underpinning if necessary."

The Mandl defendants also argue that plaintiff cannot recover against them as design professionals on a cause of action for negligence, since there is no special relationship, privity of contract or functional equivalent of privity of contract between the Mandl defendants and plaintiffs. Further, their relationship was not so entangled so as to approach that of privity.

Finally, the economic loss doctrine bars the damages alleged. Plaintiffs' Complaint alleges only negligence on the part of the defendants, and plaintiffs allege pecuniary loss as damages. Under New York law, a negligence claim seeking recovery solely for economic loss is invalid, and must be dismissed. Since the Complaint fails to state a cause of action in negligence, it must be dismissed.

Opposition by Senior Living, Atlantic Development, and Joy

Senior Living, Atlantic Development, and Joy (the "Owner/General Contractor") contend

that the Court previously determined that the Mandl defendants failed to submit any evidence to demonstrate that they were not negligent in designing the project and did not depart from accepted architectural standards. Further, the motion was denied, "to allow additional discovery as to Meltzer/Mandl's role on the project." After noting that the Mandl defendants' motion was made before their depositions, the parties were given an opportunity to depose them as to whether they approved drawings or plans that deviated from accepted industry standards. Since then, the Mandl defendants have failed to appear for depositions. This Court did not grant leave to renew the motion. After plaintiffs filed the Note of Issue, in May 2007 the Owner/General Contractor attempted to stipulate for outstanding depositions of third-party defendants and "any other party not yet disposed."

The Owner/General Contractor hired Rimkus Consulting Group, Inc. ("Rimkus") to defend this action, and according to the affidavit of Rimkus employee, Shawn Rothstein, a deposition of and discovery from MMA and Mandl is necessary in order to evaluate the adequacy of the underpinning work and the responsibility for any inadequacies in its design, inspection and construction. While the Mandl defendants may not have actually designed the underpinning, they and their design team had overall responsibility for the design of the project. The underpinning was a component that they delegated to other design professionals as part of the overall scope of the design work, and they still had statutory responsibilities related to the work.

Rothstein also notes that as part of the design documents provided under the direction of the Mandl defendants, drawing S-9, in its typical underpinning details states that, "the contractor shall retain the services of a Professional Engineer . . . to prepare, sign and seal design drawings and calculations for all required underpinning of adjacent structures . . ." Rothstein states that

the process by which the designer of record assigns work to a third-party engineer working for an intermediate entity not authorized to provide professional design services is defined as delegated design and the Mandl defendants would be considered the delegator of the work. Rothstein refers to the TR-1 that was filed with the DOB for the underpinning controlled inspections, which listed Mandl as the Registered Architect responsible for the plans, and signed and sealed by Mandl.

Rothstein also indicates that the Rules of the Board of Regents defines the specific requirements governing delegated designs and the actions of the delegator. It is not possible to fully evaluate whether the Mandl defendants and their design team fulfilled their responsibilities as a delegator of the work and if any deficiencies in their conduct as delegator contributed to any of the damage sustained by the plaintiffs without depositions and additional discovery. Since the Mandl defendants had significant responsibilities at this jobsite, and was responsible to inspect the site and endeavor to guard the owner against defects and deficiencies in the work, the motion should be denied.

The Mandl Defendants' Reply

The Mandl defendants note that plaintiff has not opposed this motion. Further, while MMA's prior motion for summary judgment was denied because MMA failed to submit evidence to demonstrate that it was not negligent in designing that project, that was remedied in this motion by the inclusion of the Affidavit of MMA's expert, Jeffrey Kusmick. Furthermore, the Owner/Contractor fails to cite one statute, case law or even legal theory which bars this motion.

Additionally, while MMA did make itself available for a deposition, no party sought to include MMA's deposition in the Compliance Conference Order dated January 21, 2009 or in the

Stipulation circulated after the Note of Issue was filed. Nor did the Owner/Contractor's motion to strike the Note of Issue and for outstanding discovery request the deposition of MMA. On July 21, 2009, at oral arguments on the Motion to strike the Note of Issue, this Court ordered that any request for the deposition of MMA must be done through a formal motion. Since no such motion has been filed by any party, the law of this case dictates MMA is not required to produce a witness for deposition.

Since the date the motion was filed, a deposition of Amnon Shalhov, the principal of Joy was held. Mr. Shalhov confirmed that Joy retained an underpinning engineer to design the underpinning process. Joy conceded in its Affirmation in Opposition that MMA did not actually design the underpinning.

Based on the language in the contracts and the language in the statutes, it was always Joy's responsibility to protect adjacent structures and design the underpinning or retain someone to do so, as Joy did by hiring Roman Sorokko. The Building Code expressly delegates the responsibility to protect all adjacent structures during construction to the contractors and the owners at the time that the underpinning work was being performed. The Building Code clearly designated the duty to protect adjacent structures to the property owner and/or contractor. Clearly, the Building Code placed a nondelegable duty on the contractor (Joy) and the Owner of the site safety precautions during earthwork. Thus, the underpinning work was never within MMA's scope of services.

In addition, the Mandl defendants mischaracterize Mandl's signature on the Statement of Technical Responsibility ("TR-1"). As stated on the TR-1, Mandl merely certified "that the Licensed Professional or Registered Architect engaged by the owner to supervise the work

specified above is acceptable." Mandl's signature is not an endorsement of the work itself, but merely certifies that the individual retained by the Owner, was acceptable.

Nor did MMA violate the Rules of Board of Regents by delegating its work. As the statutes and Joy's contract language clearly state, the underpinning design was clearly always within Joy's scope of services. Therefore, MMA did not delegate any of its duties. Even assuming that MMA did delegate underpinning duties, section 29.3 (b)(2) of the Rules of Board of Regents illustrates that MMA had no duty to oversee the design of Pillori Associates and Roman Sorokko since both Gregory Pillori and Roman Sorokko are licensed professional engineers. Thus, the Rules of the Board of Regents do not apply.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390 [U] [Sup Ct New York County 2003]). Thus, the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinde*r, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show

facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman, supra* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562).

In this Court's previous decision, the Court stated the following:

. . . Meltzer/Mandl's only potential liability is for negligent design of the project.¹ Nonetheless, Meltzer/Mandl has not submitted any evidence to demonstrate that it was not negligent in designing the project. . . [T]o meet its summary judgment burden, Meltzer/Mandl was required to establish, through expert evidence, that it did not depart from accepted architectural standards, which it has failed to do. In addition, the Pillori report itself raises questions of fact as to whether the project was designed improperly. . . . That the owner and contractor may have had nondelegable duties to ensure safe excavation work, does not establish that Meltzer/Mandl was not negligent in designing the project. Accordingly, Meltzer/Mandl's motion must be denied (see *GTF Mktg.*, 66 NY2d at 967).

The court also finds that the motion should be denied to allow additional discovery as to Meltzer/Mandl's role on the project.

* * * *

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

¹ In light of this Court's statement that the Mandl defendants' only potential liability is for negligent design, the Court does not reach the issue of whether the Complaint fails to state a cause of action for negligence.

The submissions by the Mandl defendants established that they were not negligent in designing the project as a whole. The Mandl defendants met their burden by submitting, *inter alia*, the expert affidavit of Jeffrey Kusmick, a registered, licensed architect, indicating that the Mandl defendants “did not deviate from accepted architectural standards in the Project’s design and the project’s seismic design regarding distance separations between buildings” and complied with the relevant statutes. In his affidavit, Mr. Kusmick opines that the consulting structural engineers for MMA (Selnick/Harwood) “properly concluded that the one (1) inch distance indicated between the proposed building at 400 Third Avenue and 398 Third Avenue was adequate and proper given that the calculated displacement of is 0.85 inches at a height of 160 feet and given that the building height to the top of the parapet is approximately 55 feet above the sidewalk elevation. Following this analysis and the Building Code, Selnick/Harwood accounted for seismic movement and designed 400 Third Avenue one inch away from 398 Third Avenue.” The Owner/Contractor does not contest any of these, or any of the remaining findings made by the Mandl defendants’ expert engineer. Kusmick also opines that the Mendl defendants and Selnick/Harwood properly applied the relevant statutes.

Specifically, it is also uncontested that the Mandl defendants did not design the underpinning which is the basis of plaintiffs’ negligence claim. It is uncontested that the notes from the March 2004 project meeting indicated that Joy was responsible for the design and underpinning. Further, the deposition of Joy’s representative confirmed that the design of the underpinning was performed by Versatile Consulting & Testing, Inc., an entity hired by Joy. Joy’s witness, Richard Sosa, admitted that the subject building had to be underpinned because “the bottom of our mat slab [*i.e.*, 400 Third Avenue’s foundation] was below the bottom of their

[398's] footing." Sosa explained the manner undertaken to underpin the subject building included retaining an engineer to design the underpinning process, who reviews the "geotech report" [in this case, prepared by Pillori] to determine the type of underpinning. The report is "signed off by the engineer first" and then Joy submits it "to the Buildings Department, [which] approve[s] it" Sosa also testified that the engineer determines where the underpinning was going to be placed by preparing a drawing, and that the engineer was hired by Joy. Versatile Consulting & Testing, Inc. was the engineer that designed the underpinning. Sosa's deposition establishes that Joy retained their own engineer to design and supervise the underpinning work.

Sosa's deposition is consistent with the drawings prepared by MMA, which state that:

All underpinning, sheeting, shoring or other constructions required for the support of existing building structures, adjacent properties . . . shall be subject to CONTROLLED inspections. The contactor shall retain a professional engineer acceptable to the Engineer of Record to perform such designs and inspections. This professional engineer shall prepare and submit signed and sealed calculations and plans plus the required forms for DOB filing to work commencing.

Where existing work is to be cut and/or underpinned, contractor shall provide all needling, shoring, bracing, wedging and dry-packaging and shall be responsible for the safety of the structure during this operation.

The Contractor shall be required to repair and patch any areas that are altered or damaged during the process of alteration. The Contractor is cautioned to make continuous observations of the existing structure during the performance of his work. Should he become aware of any situations that require further investigation or study (such as cracks in masonry and partitions, additional deflections, etc.) he shall notify the Engineer.

And, it is uncontested that Joy's contract with the Owner, it states in Paragraph 10.2 that:

The Contractor [Joy] shall take reasonable precautions for safely or. and shall provide reasonable protection to prevent damage, injury or loss to... (3) other property at the site or adjacent thereto, such as... structures ..."

"The Contractor shall erect and maintain as required by existing conditions and performance of the Contract reasonable safeguards for safety and protection..."

* * * * *

"Contractor [Joy] shall protect adjoining private and municipal property and shall provide barricades, temporary fences, and covered walkways..."

It is also undisputed that the Mandl defendants were not responsible for the methods of construction or for supervising construction, and that the Mandl defendants' Architectural Contract did not incorporate any of the recommendations made in the Pillori report regarding the surveys suggested to be done with the subject building.

And, the Mendl defendants also established that they had no supervisory authority over the design of the underpinning.

It is also uncontested that the economic loss doctrine bars the damages alleged. And, it is noted that plaintiffs do not oppose dismissal of their negligence claim against the Mandl defendants.

Therefore, the Mendl defendants established that any negligence in the underpinning design was not the result of any work performed by them on this project.

The Owner/General Contractor failed to raise an issue of material fact as to the Mandl defendants' liability for the damages plaintiffs sustained. The Owner/General Contractor's contention that discovery is needed to explore whether the Mandl defendants properly administered its "overall responsibility for the design of the project" and delegation of underpinning work to other design professionals is insufficient, and contrary to their own conduct.

It is uncontested that no party in this action sought to depose the Mandl defendants, and as such, the absence of deposition testimony from them at this juncture will not preclude summary relief. It is uncontested that no party included MMA's deposition in the Compliance

Conference Order or in the Stipulation circulated after the Note of Issue was filed, that the Owner/Contractor's own motion to strike the Note of Issue for outstanding discovery did not request the deposition of MMA, and that no party moved for the deposition of the MMA as required by the Court on July 21, 2009. Further, the stipulation the Owner/Contractor attempted to circulate to secure further depositions referencing the need for depositions of parties not yet deposed is dated May 7, 2009, prior to the Court's order directing a motion for MMA's deposition, and the Owner/Contractor never moved for such deposition. Therefore, the contention that further discovery is needed to determine "the adequacy of the underpinning work" and the "responsibility for any inadequacies in its design, inspection and construction" is insufficient to raise an issue as to the Mandl defendants' liability, especially since it is established that such underpinning work and its design, inspection and construction were performed by entities other than the Mandl defendants.

Further, the Owner/Contractors' contention (through its expert Rothstein) that issues exist as to whether the Mandl defendants "fulfilled their responsibilities as a delegator of the work" contributed to the damages sustained by plaintiffs, is insufficient. The record indicates that the Rules of the Board of Regents § 29.3 (b)(2), to which the Owner/Contractor cites for support, do not apply under these circumstances. The Rules of the Board of Regents § 29.3 (b)(2) only apply when the delegator, delegates its duties "through an intermediate entity *not authorized to provide professional design services. . .*" The record indicates that Gregory Pillori and Roman Sorokko are licensed professional engineers and MMA is not. Therefore, even if MMA delegated its duties, the Rules of the Board of Regents do not apply so as to impose the duty to comply with its requirements upon the Mandl defendants.

Therefore, the Owner/Contractor failed to raise an issue of fact as to the Mandl defendants' liability to plaintiffs for negligent design of the project and underpinning work.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the motion by defendants Melzer/Mandl Architects. P.C. and David Mandl for summary judgment dismissing the complaint and all cross-claims against them pursuant CPLR 3212 is granted, and the Complaint and all cross-claims as asserted against them is hereby dismissed; and it is further

ORDERED that the branch of the motion by defendants Melzer/Mandl Architects. P.C. and David Mandl for dismissal of the complaint and all cross-claims against them pursuant CPLR 3211 (a)(7) is denied as moot; and it is further

ORDERED that defendants Melzer/Mandl Architects. P.C. and David Mandl serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: November 13, 2009


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

HON. CAROL EDMEAD

FILED
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