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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 603387/2006
KENNY, PATRICIA
VS.
TURNER CONSTRUCTION
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

FILED
JUL 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Based on the foregoing, it is hereby

ORDERED that the motion by Richard Meier & Partners LLP pursuant to CPLR 3211 to dismiss the complaint is denied; and it is further

ORDERED that the branch of the cross-motion by Nelson & Pope, LLP for summary judgment dismissing the complaint and all cross-claims asserted against it is granted as to plaintiff and defendants, Richard Meier & Partners, Michael Harris Spector, AIA, P.C. a/k/a and d/b/a the Spector Group and Spector Group Home, LLC and Spector Associates, LLP, Ysrael A. Seinuk, P.C., Syska & Hennessy, Inc., Nelson & Pope LLP, Kings County Waterproofing Inc., L. Martone & Sons Inc., Macedos Construction Co. Inc., Francis Brothers Sewer and Drainage, Inc. and Coken Company Inc.; and it is further

ORDERED that the branch of the cross-motion by Nelson & Pope, LLP for summary judgment dismissing all cross-claims asserted against is denied as to defendants Turner Construction Company and The Corporate Source, Inc., without prejudice; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 7/28/09

J.S.C.
HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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 35

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PATRICIA KENNY,

Index No. 603387/06

Plaintiff,

-against-

DECISION/ORDER

TURNER CONSTRUCTION COMPANY, RICHARD MEIER & PARTNERS, MICHAEL HARRIS SPECTOR, AIA, P.C. a/k/a and d/b/a THE SPECTOR GROUP and SPECTOR GROUP HOME, LLC and SPECTOR ASSOCIATES, LLP, THE CORPORATE SOURCE INC., YSRAEL A. SEINUK, P.C., SYSKA & HENNESSY, INC., NELSON & POPE LLP, KINGS COUNTY WATERPROOFING INC., L . MARTONE & SONS INC., MACEDOS CONSTRUCTION CO. INC., FRANCIS BROTHERS SEWER and DRAINAGE, INC. and COKEN COMPANY INC.,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiff Patricia Kenney ("plaintiff"), a building manager for the General Services Administration ("GSA"), commenced this negligence action against various engineers, architects, and contractors for injuries she sustained when she slipped and fell on black ice at a parking garage located at the Central Islip Courthouse located at 170 Federal Plaza, Central Islip, New York (the "Courthouse").

Pursuant to a 1992 contract with GSA (the "Contract"), The Spector Group ("Spector"), "In Association with [defendant] Richard Meier & Partners" LLP ("RMP"), provided architectural services and design work for the construction of the Courthouse. Spector engaged defendant Nelson & Pope, LLP ("Nelson") to provide civil and site engineering services for the

project.

RMP now moves for pre-answer dismissal of the complaint for failure to state a cause of action. Nelson cross moves for summary judgment dismissing the complaint and all cross-claims asserted against it.

Factual Background

According to plaintiff's deposition, from 2000 through 2005, plaintiff observed water accumulation in the expansion joints in the upper level of the garage, which dripped down to the lower level of the garage and formed ice. Plaintiff complained to Orhan Akyuruk, a supervisor at defendant Corporate Source Inc. ("Corporate Source"), who advised her that the

> expansion joints were not sealed, so any time there was precipitation, it was coming down. And the drains in the parking garage were not hooked up to anything so there was no place for the water to go. And part of the garage [the lower level] was pitched wrong, so had the drains been functioning, the water would not have to run to it anyway. . . . [Expansion joints are where two slabs of concrete meet] where the walls were not sealed. . . [no] more than an inch [wide]
> (Plaintiff EBT, pp. 35-36).

In her Complaint, plaintiff claims RMP, as architect, and Nelson, as the engineer, were to supervise "the construction, reconstruction, repair and renovation work" at the parking garage. It is alleged that RMP and Nelson negligently performed their architectural and engineering management and supervision duties, and that each departed from good and accepted architectural and engineering practice, respectively. The alleged negligence of these defendants caused leaking and an accumulation of ice, which later caused plaintiff to slip and fall.

In March 2008, defendant Syska & Hennessy, Inc. ("Syska"), another engineer, moved for pre-answer dismissal of the complaint. By order, dated November 10, 2008, the Court (James, J.) dismissed the action against Syska, on the ground that the Complaint failed to state

what "was done [by Syska] under Syska's contract . . . that resulted in defects that caused or was a substantial factor in causing [plaintiff's] injuries." (Court Transcript, pp. 10, 19).

RMP's Motion

RMP argues that the Complaint fails to state a cause of action against RMP. RMP contends that it performed certain design services more than sixteen years ago at the Courthouse pursuant to its "Association Agreement" with Spector. RMP was only responsible for the aesthetic aspects of the architectural and interior design of the Courthouse. The allegations against RMP are the same as those alleged against Syska, and as with Syska, there is no allegation of what, if anything, RMP did that specifically caused plaintiff's injury. Plaintiff's conclusory allegations are insufficient to provide notice of the nature of the occurrence and prevents RMP from defending itself against the allegations. Similarly, no duty exists on the part of a design professional to any third party absent a clear contractual undertaking to control and supervise the construction site, and here, RMP had no contractual authority to control and supervise the construction site at the parking garage and the Complaint fails to allege any facts giving rise to any duty on behalf of RMP to plaintiff as person outside of RMP's contracts. Finally, the order of Justice James is "law of the case" and precludes re-litigation of issues already determined therein.

Opposition

Defendant Turner Construction Company ("Turner") argues that issues of fact exist as to whether RMP, the principal architect of the construction project, negligently designed the expansion joints, pitch, grating, and drain which caused water to leak on the lower level garage floor and form black ice where plaintiff allegedly slipped and fell.

Pursuant to the Contract, "Section I - Scope of Architect-Engineer Services," RMP was to provide professional services necessary for the planning and design of the new Federal Building and Courthouse and related site work for the project. Under section 4, entitled "Project Description," the project property included "345 secure parking spaces" and an "indoor parking area." Under Section I, (A) Project Description, #6, RMP was to perform an investigative study for Courthouse and to report and make program recommendations on site orientation, site services, site access, site amenities and site restrictions. Under section II (Design Phase Services) (A)(3), RMP was responsible for developing the final design program with the GSA for "support spaces such as parking." Under (A)(3)(I), RMP was to provide a written description of the aspects and systems for the project, including "pedestrian and vehicular access" and site development provisions for "parking." Further, the Contract required RMP to correct or revise any errors of deficiencies in its designs or drawings, maintain an acceptable inspection system, and perform value engineering services by analyzing the functions of systems, equipment, facilities, services and supplies in a cost-effective, safe, and reliable manner.

By correspondence dated December 6, 1994, RMP advised Spector of its concerns about the expansion joints regarding, for example, the rubber being able to compress enough. On February 25, 1997, GSA wrote Spector, directing Spector and RMP to "redesign the storm drainage system for the garage" since the "design exposes the government to flooding of the lower parking level in the event of a hurricane or severe storm resulting in a power failure that would disable the pumps." Further, the "grating [located over the pedestrian access way] will permit rain and snow to accumulate and freeze on the access way creating a hazardous condition for pedestrians and unnecessary liability for the government." Therefore, GSA directed Spector

and RMP to "replace the grating, as well as the gratings on column line P1 and P17, with precast plank." It is argued that such evidence raises a question of fact as to whether RMP negligently performed its architectural design services in the garage. And, RMP has been sufficiently apprised of the negligent design allegations in this matter. Further, RMP's claim that it owed no duty to the plaintiff has been rejected by the Courts; Courts have rejected the notion that privity is required for architects to owe a duty to third-parties for injuries resulting from the architect's design work. And, this Court need not follow J. James's order. Such order was issued prior to a First Department's decision holding that a design professional may be subject to tort liability for failure to exercise reasonable care, irrespective of its contractual duties; and unlike Syska, RMP was provided with notice (from GSA) as to how its work was defective under its contract with GSA.

Turner also argues that RMP's motion is unsupported by proof in admissible form, but instead, relies on an attorney affirmation, which lacks evidentiary value.

And, Turner argues, the motion is premature as the parties have not had a reasonable opportunity to conduct discovery as to RMP. RMP is clearly a necessary party to this action and should participate fully in discovery, including appearing for a deposition and providing responses to the parties' discovery demands.

Plaintiff adds that RMP's reliance on Justice James' order is misplaced, in that Justice James noted that Syska and Hennesey alleged that they did not perform work in the parking garage, and RMP was directly responsible for work in the parking garage. RMP was aware of the anticipated problems with the expansion joints and storm drainage system for the parking garage and did not correct the design flaw. Although caselaw was not provided to Justice James,

caselaw before this Court indicates that RMP's duty to the plaintiff emanates from the Complaint which alleges that RMP did not properly supervise, repair, and install flooring membranes, plumbing and drains. Furthermore, RMP's motion is a nullity for failure to submit an affidavit of an interested party with knowledge and information of the facts.

Defendant Macedos Construction Co. Inc. ("Macedos") asserts, in addition to the above, that a jury should decide whether RMP exercised reasonable care to ensure that the site was reasonably safe for pedestrians.

Corporate Source adopts the position of Turner, adding that Turner's exhibits raise a question of fact as to whether RMP's negligence launched a force or instrument of harm, thereby establishing a duty to pedestrians, such as plaintiff.

Defendant Kings County Waterproofing Corp. adopts the positions of Turner, Macedos, and Corporate Source.

Finally, defendant Coken & Company adopts the position of Turner.

RMP's Reply

In reply, RMP adds that Turner's cross-claims for contribution and common-law indemnity (alleged after RMP's motion was made), and existing Complaint are still subject to the law of case issued by J. James. Further, the documents submitted in opposition fail to identify facts to state a claim against RMP. According to the affidavit of RMP's partner in charge of the project, Reynolds Logan ("Logan"), such documents had no bearing on plaintiff's accident. The February 2007 letter refers to a pump drainage system designed to address hurricane conditions that would have served no purpose in preventing the leaks that plaintiff alleges caused her accident. And, the grating is approximately 90 feet away from where plaintiff's accident

occurred; the water from the grating would have had to have traveled uphill and over a span of 90 feet to have reached the location of plaintiff's accident. Thus, the grating mentioned therein could not have been a factor in plaintiff's accident. Also, the February 1994 correspondence referred to expansion joints in the Courthouse building itself, and had nothing to do with the garage where plaintiff fell. Nor does plaintiff allege that the joints were a design issue, but rather, testified that the leaks through the joints resulted from construction issues with Turner failing to seal the joints, and sealing the joints was part of the design. The only design issue was with respect to the grating, which could not have caused plaintiff's accident. Also, the February 1996 letter mentions the garage in connection with eliminating a separate garage for judges and eliminating a tunnel for staff leading to the garage.

RMP also argues that a purported need for discovery does not excuse a failure to state a claim, especially since the parties had an opportunity to conduct discovery for more than two years.

And, nothing in RMP's agreements obligated RMP to indemnify or procure insurance for Turner. Thus, such cross-claims must also be dismissed.

Any attempt to distinguish RMP from Syska on the ground that Syska did not perform services in the garage is clearly contradicted by the extraneous documents. Notwithstanding, it was the vague allegations set forth in the pleadings against Syska, that are exactly the same as the allegations against RMP, that Justice James found were insufficient. The law of the case applies here as no law has changed since Justice James's decision. The First Department's determination reinforced the fundamental requirement, stating that in that case, the "complaint allege[d] with specificity and in detail that [the engineer] departed from the professional standard

of care and that its conduct was a proximate cause of [plaintiff s] injury." The First Department also found that the claim was sufficiently plead against the engineer based on an expert affidavit submitted in opposition to the engineer's motion to dismiss stating specifically how the engineer was negligent and how such negligence caused the plaintiff's damages. No such affidavit was submitted here, even though plaintiff had more than three years to retain an expert to opine on the potential liability of the Project's architects and engineers.

Further, the law plaintiff requests this Court to apply existed as of 2002, over five years prior to Justice James's decision. Plaintiff s failure to raise this argument when she first litigated this issue in her opposition to Syska's motion does not permit plaintiff to raise the argument now. In any case, while plaintiff argues that a design professional may have duties beyond its contract, plaintiff fails to allege how a breach of any duty, regardless of what that duty is, caused plaintiff's accident; without causation, there can be no liability.

RMP also notes that plaintiff is submitting documents prepared by Syska that it did not submit in its previous opposition to Syska's motion. Also, while plaintiff relies on a Nelson drawing as a basis for its claim against RMP, plaintiff does not even oppose Nelson's cross-motion.

Furthermore, unlike a motion for summary judgment, a pre-answer motion to dismiss can be supported by an attorney affirmation. And, after Turner submitted documentary evidence, RMP submitted an affidavit of RMP's partner in charge of the project.

Turner's Sur-Reply[1]

Logan's affidavit and accident report submitted with RMP's reply raises new arguments and introduces new evidences, and thus, should be disregarded. Only the plaintiff's deposition has been completed, and no entity in this action has received any written discovery exchange from RMP.

Nelson's Cross-Motion

Nelson argues that it did not provide any engineering services regarding the construction or reconstruction of the garage, did not have anything to do with the ownership, maintenance, supervision or control of the garage, had no duty to inspect the garage, or remove ice therefrom.

The plans Nelson prepared for the Courthouse project delineate the parking garage on the upper right corner, and there are no grading or drainage calculations within this section of these plans. The plans also state "Concrete Parking Deck (See Architect Plans)." Nelson was not the architect on the project, and had no duty toward the design of same. Nelson was not the engineer "supervising" or "in charge of" the design, construction or repair of the parking garage, as plaintiff alleges. To date, no party has produced any contracts with Nelson. As such, Nelson owed no duty to plaintiff. Even if Nelson designed the parking lot, plaintiff's lack of privity with Nelson deprives her of standing to pursue a claim.

Turner's Opposition

According to its contract with Spector, Nelson was to provide civil and site engineering services for the Courthouse project. Pursuant to Article 7.1 (b)(7), Nelson was responsible for

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[1] RMP objects to the Court's consideration of Turner's sur-reply, arguing that the Court only granted *plaintiff* the opportunity to submit papers, RMP did not raise any new arguments in its reply. RMP's reply merely rebutted Turner's opposition. In the alternative, RMP argues that it should be permitted to submit a sur-sur reply.

the preparation of preliminary site planes indicating "grading, parking, utilities, retaining walls, site lighting, etc. as they relate to at least 3 design schemes." Pursuant to Article 7.1(d)(1) (Working Drawing Phase), Nelson was to "[p]rovide complete site and alignment plans indicating sanitary and storm drainage calculations, land use data, parking tabulations, grading, including cut and fill balancing, retaining walls and handrails."

Pursuant to its contract with GSA, Nelson prepared various drawings of the sewer, site drainage, grates, grading and storm water pumping station, trench drains, and parking area. The February 25, 1997 letter from GSA apprised the architects that there were numerous problems with the design of the storm drainage system which included the leaching pools, water pumps, storage tanks, and grating, elements that were incorporated into Nelson design drawings. Thus, issues of fact exist regarding Nelson's design of the storm drainage system, leaching pools, water pumps, storage tanks, and grating and whether the negligent design of these elements was a substantial factor in causing plaintiff s incident. Although Robert G. Nelson claims that his design work was not directed to the parking garage, he concedes that the parking garage appears in the design drawings, and notes that Nelson performed work relating to the design of the sanitary sewer and water distribution, including the design of the collection piping and leaching pools. In addition, under the contract between Nelson and Spector, Nelson was responsible for design work in connection with the parking areas, grading, and storm water, sanitary system, disposal schemes, and drainage calculations. As evidenced by the February 25, 1997 GSA letter, the design of the site and storm drainage system was deemed an "architect/engineer" deficiency and the Spector/RMP team was directed to redesign the storm drainage system for the garage. Nelson should not be granted summary judgment solely on the basis of the self-serving testimony

of its principal where significant triable issues of fact exist.

Corporate Source's Opposition

There are facts unavailable at this time which may raise an issue of fact as to Nelson's negligence. Corporate Source requests that the Court deny the instant cross-motion and allow discovery to continue. The only admissible evidence submitted in support of this cross-motion is the affidavit of Robert Nelson and certain selected design drawings. Nelson's contract with the general contractor for the project, Turner, is relevant to the scope of Nelson's work on the project, and is absent from Nelson's cross-motion. Further, the design drawings submitted admittedly depict the parking garage. As these documents are not self-explanatory and require engineering expertise to understand, it is not possible for either Corporate Source or the Court to determine conclusively that they exculpate Nelson.

Nelson's Reply

The testimony of the plaintiff, who did not oppose the cross-motion, related to expansion joints, storm drainage system, grating and pitch inside the parking garage, and Mr. Nelson's Affidavit avers that Nelson "did not design this parking garage nor did they provide any engineering services with respect to this parking garage." There are no notations of grading or drainage within the subject garage in any of Nelson Pope's plans. Turner submitted no proof that Nelson was involved with the design of the parking garage where plaintiff allegedly tripped and fell. Further, the various provisions of the contract cited by Turner do not relate to the placing of expansion joints, storm drainage or grating within the parking garage's structure where plaintiff purports to have fallen. In any event, the plans submitted by this defendant accurately depict the scope of work performed by Nelson with regard to this project, and clearly indicate that they did

not lave anything to do with the design of the parking garage and did not provide any services relative to expansion joints, storm drainage system, grating and/or pitch inside the garage.[2]

Nelson also points out that Corporate Source, has not come forth with any evidentiary proof that Nelson was involved with the parking garage where plaintiff allegedly tripped and fell. And, since Nelson's work on this project took place between 1995 and 1999, more than 10 years ago, after a diligent search, the contract cannot be located. To date, none of the parties to this action have produced any contracts with Nelson with regard to the Courthouse in response to Nelson's October 2008 Notice for Discovery & Inspection for such contracts. Therefore, at the least in the alternative, the plaintiff's complaint and cross-claims of defendants who have not opposed the motion should be dismissed in their entirety.

Analysis

CPLR 3211(a)(7): Failure to State a Cause of Action

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept

[2] Nelson also asks this Court to disregard Turner's opposition as untimely filed.

factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR § 3026), and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]).

As against RMP, the Complaint alleges, in pertinent, the following:

> 86. That . . . prior to January 19, 2005, and at the time of the construction and at all times herein mentioned, defendant, RICHARD MEIER & PARTNERS, was the architect supervising and in charge of the construction, reconstruction, repair and renovation work . . . at the parking garage . . . .
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> * * * * *
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> 91. That the aforementioned occurrence [and] . . . the injuries sustained by the plaintiff, were caused by and due to the negligence of the defendants . . . in the negligent . . . design, architecture, engineering and repair of the aforementioned premises at the aforesaid location; in failing to properly design the parking lot to be free of leaks; in failing to properly construct the parking lot; . . . in failing to properly install, flooring membranes and/or plumbing and/or drains; in the negligent . . . supervision of construction, reconstruction, renovation and repair of the aforementioned premises at the premises at the aforesaid location; in negligently and carelessly providing architect services and consultation; . . . in failing to take the necessary steps and measurements to protect the life of the plaintiff; in causing the plaintiff to be exposed to a hazardous place under dangerous circumstances without the benefit of a adequate and appropriate protection for her safety and welfare; in failing to construct, shore, equip, place, guard, arrange and maintain the aforesaid so as to give proper protection to the plaintiff . . . .
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> * * * * *
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> 102. That . . . defendant RICHARD MEIER & PARTNERS, held himself out to the public as possessing and utilizing the proper degree of learning and skill necessary to render architectural services in accordance with good and accepted architectural practices, and undertook and agreed to use reasonable care and diligence in the architecture, design and management and supervision of the construction, reconstruction renovation and repair of the afore-mentioned premises.

103. That . . . RICHARD MEIER & PARTNERS . . . negligently, recklessly, improperly and carelessly performed their architectural management and supervision duties and departed from good and accepted architectural practice then and there prevailing and constituted professional malpractice.

104. That . . . RICHARD MEIER & PARTNERS were negligent in the architectural design, supervision, plan drawing, lay out of the expansion joints, drainage within the parking lot, design of the pitch within the parking lot and the placement of the electrical fixtures.

105. That . . . RICHARD MEIER & PARTNERS negligence, recklessness and professional malpractice caused the personal injuries to the plaintiff as heretofore described herein.

Plaintiff alleges that she slipped and fell on black ice that formed as a result of, *inter alia*, water leaking from expansion joints in the garage. The Complaint essentially alleges that RMP was the architect in charge of supervising and designing the subject parking lot, and failed to carry out its duty to so supervise and design the parking lot to be free from leaks. It is further alleged that RMP was negligent in the architectural design, supervision, plan drawing, lay out of the expansion joints, drainage within the parking lot, design of the pitch within the parking lot and the placement of the electrical fixtures. Such allegations are sufficient to state a claim against RMP.

Shalmoni v Shalmoni (141 AD2d 628, 529 NYS2d 538 [2d Dept 1988] [fraud allegation dismissed where representations were not forth with particularity]) and *Roberts v Pollack*, 92 AD2d 440, 461 NYS2d 272 [1st Dept 1983] ["allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration"]) cited by RMP, do not warrant a different result. Both cases stand for the long established principle that bare "legal" conclusions and factual assertions

either inherently incredible or "flatly contradicted" by documentary evidence, are insufficient to support a claim, and that "essential material facts supporting the cause of action must still appear on the face of the complaint or a plausible explanation provided for the failure to do so when the pleadings are challenged."

None of the allegations in the Complaint are inherently incredible. Further, none of the documents submitted by RMP flatly contradict the allegations. The "Architect-Engineer Contract" indicates that the scope of RMP's work included, but was "not limited to" *architectural*, *structural*, mechanical, electrical, *plumbing*, civil, cost estimating, value engineering and specialty consultant services. The Project Description included the construction of 345 "indoor parking spaces." RMP was to also provide a written description of "pedestrian and vehicular access" and site development provisions for "parking" (see I (A)(3)(I)). And, as indicated above, the Complaint contains essential material facts to support a negligence claim against RMP. Instead, the allegations in the Complaint are supported by the Architect-Engineer Contract, which indicates that RMP "shall provide professional services necessary for the planning and design of the new Federal Building & Courthouse and related site work . . . "and that the Project will provide 345 indoor parking spaces . . . ."

Furthermore, this Court is not bound by the decision of Justice James. The determination on the record by Justice James was made on November 10, 2008, as to Syska, the *engineer,* without the benefit of the First Department's later decision relied upon by opponents to the instant motion, *Castle Village Owners Corp.* (*supra*), issued on December 2, 2008. Syska argued that as engineer "it does not take on any obligation for construction means, methods, safety precautions and programs and did not take any control over or charge of the acts of the

contractor, subcontractors, et cetera; in brief, has no liability for the safety at the construction site and therefore, no liability for any" of plaintiff's injuries. The second basis for Syska's motion was that the complaint was unclear as to how the accident occurred and that it could have "been caused by any structural or design services" by "any" engineer. During oral argument, when asked what Syska allegedly did under its contract that resulted in plaintiff's injury, plaintiff responded that Syska failed to properly "give the architectural designs", Syska's services included mechanical, electrical, plumbing and fire protection engineering design services, " and departed from good and accepted engineering practices." The Court noted that such duty ran to the entity with which Syska contracted, but not to plaintiff (pp. 12-13). Then, the issue of Syska's duty arose, at which point the plaintiff argued that Syska's duty emanated from the fact that "they are designing it for the general public and their contract goes toward the ultimate design of the parking garage and they know [plaintiff] is going to ultimately utilize the parking garage." The Court then responded, "Where is the case law to support that position?" to which plaintiff replied, "I have no case law for that, your Honor." Consequently, the Court proceeded to apply *Espinal v Melville Snow Contractor, Inc.* (98 NY2d 136 [2002]) involving the liability of a snow removal contractor to a plaintiff, not a party to such contract. Justice James likened the claim against Syska to *Espinal*, and stated the three situations in which a party who enters into a contract to render services may be said to be liable in tort to third persons. Justice James then cited *Caldwell v Two Columbus Ave. Condominium* (38 AD3d 474, 834 NYS2d 42 [1st Dept 2007]), where a third-party claim against "structural design engineers" was dismissed because both the third-party complaint and the third-party plaintiff's engineer's report contained "no detail of any type that the water infiltration was caused by structural defects attributable to the

design of the building." Therefore, since the Complaint offers no notice as to exactly what was done under Syska's contract that resulted in defects that caused plaintiff's injuries, Syska's motion to dismiss was granted.

Notably, the opponents herein put forth a case, *Hughes v City of New York* (5 Misc 3d 1024, 799 NYS2d 161 [Sup Ct New York County 2002]), to establish that RMP, as architect of a structure servicing the public, owed a duty to the foreseeable plaintiff herein. In *Hughes,* plaintiff Marion Hughes tripped and fell on the public sidewalk adjacent to a pedestrian path at Rockefeller Center. Defendant Beyer Blinder Belle Architects and Planners LLP ("BBB") had designed the subject sidewalk and path pursuant to a Consulting Agreement to provide services to a non-party, Tishman Speyer Properties, L.P. Plaintiffs alleged that BBB negligently designed the sidewalk by combining paving materials in multiple colors, rendering the curb visually indistinguishable from sidewalk and the path by causing them to appear to be on the same horizontal plane. BBB moved to dismiss, or, in the alternative, for summary judgment, arguing that it did not owe any duty to plaintiff relating to its design of the sidewalk.

The Court stated that under New York law, architects or builders, like manufacturers of consumer products, may be held accountable in negligence to ultimate users injured by a defective product. Citing *Inman v Binghamton Housing Authority* (3 NY2d 137, 145 (1957), *Cubito v Kreisberg*, (69 AD2d 738 [2d Dept 1979] *affd* 51 NY2d 900 [1980]), and *Schilling v Warwick Constr., Inc.*, 193 AD2d 594 (2d Dept 1993]) the Court held that an architect who prepares plans and specifications is under a duty to use that degree of care that would have been exercised by a reasonably prudent architect to make the envisioned site or structure reasonably safe for intended users. The plans must provide for a design that prevents an unreasonable risk

of foreseeable harm. The architect who designs a sidewalk owes that duty of care not only to the client who commissioned the design, but to those pedestrians who foreseeably use the sidewalk for its expected, intended purpose. Simply put, BBB owed a duty of care to plaintiff Marion Hughes, because she was a foreseeable user of the sidewalk. Further, the proof submitted on this motion raised an issue as to whether the concept or execution of this polychrome designer sidewalk caused a deceptive visual pattern that concealed the curb so as to constitute a hidden hazard or trap. Based on *Hughes v City of New York*, it cannot be said that RMP owed no duty to plaintiff, RMP claims.

Further, the *Caldwell* decision, relied upon by Justice James, does not state the allegations of the third-party complaint with which this Court can compare the Complaint herein, which does allege that "in failing to properly design the parking lot to be free of leaks; in failing to properly construct the parking lot; . . . in failing to properly install, flooring membranes and/or plumbing and/or drains."

The Court is also persuaded by the case, *Castle Village Owners Corp. v Greater New York Mut. Ins. Co.* (58 AD3d 178, 868 NYS2d 189 [1st Dept 2008]), in which a portion of a retaining wall bordering the Castle Village co-op complex collapsed onto the Henry Hudson Parkway, causing property damage to vehicles nearby. Plaintiff Castle Village sued Langan Engineering and Environmental Services, Inc. and Langan Engineering and Environmental Services, P.C., which had provided engineering services for Castle Village, including monitoring and maintaining the retaining wall. Langan, in turn, brought a third-party action for contribution against Mueser Rutledge Consulting Engineers ("MRCE"), the engineers who had designed and implemented certain corrective measures for the stability of the retaining wall in 1985 when

Castle Village was in the process of converting from a rental building to a co-op. MRCE moved to dismiss under CPLR 3211*(h)*.

In applying the "substantial basis" standard set forth in CPLR 3211(h), which is a "departure from the standard ordinarily applicable to the review of CPLR 3211 motions" the Court noted that in reviewing the sufficiency of a complaint under CPLR 3211(h), it must look "beyond the face of the pleadings to determine whether the claim alleged is supported by 'such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.'" CPLR 3211(h) was intended to heighten the court's scrutiny of the complaint and thereby make it easier to dismiss a CPLR 214-d action than other types of negligence actions."

The Court held that the "*complaint alleges with specificity and in detail that MRCE departed from the professional standard of care and that its conduct was a proximate cause of Castle Village's injury. It alleges that MRCE failed to properly design the structural repairs, failed to properly inspect and supervise the contractor's repair work, and then failed to test the rock anchors once they were installed. More specifically, Langan asserts that the rock anchors were too short for their designed purpose and did not provide stabilization for the wall.*" (Emphasis added). The Court next found that the allegations in the complaint were amply supported by an affidavit of Langan's expert, Francis D. Leathers, P.E., a registered professional engineer. Thus, the allegations of the complaint and the expert affidavit were held to provide a "substantial basis" to believe that MRCE was negligent in the performance of its professional design duties and that the negligence was a proximate cause of the damage. Denial of the motion was held proper. Although the Court in *Castle Village*, applied a higher standard, which was met through the use of an expert's affidavit not required herein, the First Department initially stated

that the Complaint's allegations were sufficiently specific, in that it alleged that "MRCE failed to properly design the structural repairs, failed to properly inspect and supervise the contractor's repair work, and then failed to test the rock anchors once they were installed. More specifically, Langan asserts that the rock anchors were too short for their designed purpose and did not provide stabilization for the wall." By also alleging that RMP failed "to properly install, flooring membranes and/or plumbing and/or drains," the Complaint herein is likewise sufficient.

The Court also notes that Turner submits the Architect-Engineer Contract and various correspondence, to raise issues as to RMP's work concerning the subject garage, and notice of leaks therein, and RMP, in reply, interprets these documents through its attorney and affidavit of RMP's principal. The positions taken in reply make pre-answer dismissal of the Complaint even more inappropriate. Thus, not only does the Complaint state a cause of action against RMP, but the parties should be permitted to pursue discovery to fully explore the merits of the parties' positions. Therefore, RMP's motion for pre-answer dismissal of the complaint as asserted against it is denied.

Nelson's Cross-Motion for Summary Judgment

3212: Summary Judgment

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, Oct. 21, 2003]). This standard requires that defendant 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.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

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 v City of New York, supra*, 49 NY2d 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). Opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

At the outset, the Court notes that plaintiff and all defendants except Turner and Corporate Source, have not opposed Nelson's cross-motion to dismiss the Complaint. Therefore, the Complaint and all cross-claims by defendants, except Turner and Corporate Source as against RMP, are dismissed.

However, as to the cross-claims by Turner and Corporate Source, summary dismissal of these claims is unwarranted, at this juncture. The affidavit of its principal, Robert G. Nelson, Jr., in the absence of any further discovery, *i.e.*, depositions of the principals of the defendants, renders the cross-motion premature. The record indicates that Nelson performed engineering services at the Courthouse, and performed work relating to the sanitary sewer and water distribution. The documents before this Court also indicate that Nelson was responsible for design work related to the parking areas, grading, and storm water, and drainage calculations. Further, although this Court is not qualified to analyze them, the submitted design drawings depict the garage. The parties should be permitted to fully explore the statements contained in Mr. Nelson's affidavit and the documents before the Court at a deposition.

Therefore, the cross-motion by Nelson for summary judgment is denied as to Turner and Corporate Source, without prejudice, at this juncture, and granted as to the plaintiff and remaining co-defendants.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by Richard Meier & Partners LLP pursuant to CPLR 3211 to dismiss the complaint is denied; and it is further

ORDERED that the branch of the cross-motion by Nelson & Pope, LLP for summary

judgment dismissing the complaint and all cross-claims asserted against it is granted as to plaintiff and defendants, Richard Meier & Partners, Michael Harris Spector, AIA, P.C. a/k/a and d/b/a the Spector Group and Spector Group Home, LLC and Spector Associates, LLP, Ysrael A. Seinuk, P.C., Syska & Hennessy, Inc., Nelson & Pope LLP, Kings County Waterproofing Inc., L. Martone & Sons Inc., Macedos Construction Co. Inc., Francis Brothers Sewer and Drainage, Inc. and Coken Company Inc.; and it is further

ORDERED that the branch of the cross-motion by Nelson & Pope, LLP for summary judgment dismissing all cross-claims asserted against is denied as to defendants Turner Construction Company and The Corporate Source, Inc., without prejudice; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: July 28, 2009

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

HON. CAROL EDMEAD

FILED

JUL 29 2009

COUNTY CLERK'S OFFICE
NEW YORK