

**Tower Ins. Co. of N.Y. v Centre Ct. Holdings, LLC**

2010 NY Slip Op 30283(U)

February 3, 2010

Supreme Court, New York County

Docket Number: 602549/08

Judge: Joan A. Madden

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

PRESENT: HON. JOAN A. MADDEN  
J.S.C.

PART 11

Index Number : 602549/2008  
**TOWER INS. CO. OF NEW YORK**  
VS.  
**CENTRE COURT HOLDING, LLC**  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

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 \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion *is determined in accordance with the annexed decision and order.*

**FILED**

FEB 08 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: February 3, 2010

[Signature]  
HON. JOAN A. MADDEN <sup>c.</sup>

Check one: FINAL DISPOSITION   NON-FINAL DISPOSITION <sup>J.S.C.</sup>

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  
NEW YORK COUNTY: PART 11

TOWER INSURANCE COMPANY OF NEW YORK,  
a/s/o WING TAT REALTY, INC.,

Index No.: 602549/08

Plaintiff,

- against -

DECISION/ORDER

CENTRE COURT HOLDINGS, LLC, CENTRE  
COURT, LLC, CENTRE COURT, INC.,  
ORION DEVELOPMENT, INC., ORION  
DEVELOPMENT LLC, KOSTOW GREENWOOD  
ARCHITECTS, PC, GOLDSTEIN ASSOCIATES  
CONSULTING ENGINEERS, OC, STRUCTURAL  
PRESERVATION SYSTEMS, LLC,  
S.I. GENERAL CONSTRUCTION CORP. and  
RED HOOK CONSTRUCTION GROUP-I, LLC,

Defendants.

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**MADDEN, JOAN, J.:**

In this action, plaintiff Tower Insurance Company of New York (Tower) a/s/o Wing Tat Realty, Inc., sues to recover for property damage sustained by its subrogor as a result of construction activities on adjacent property owned by defendants Centre Court Holdings, LLC, Centre Court, LLC, and Centre Court, Inc. (collectively Centre Court). Defendant Kostow Greenwood Architects, PC (Kostow Greenwood) moves, pursuant to CPLR 3211 (a) (1) and (7), 3211 (c), and 3212, to dismiss, and/or for summary judgment dismissing, the complaint and all cross claims against it.

The complaint alleges that a building owned by Tower's subrogor, located at 118-122 Baxter Street, New York, New York

[\* 3]

(subrogor's building), was damaged during excavation and construction of a building (subject building) on Centre Court's property, located at 233-235 Canal Street, New York, New York (subject property), adjacent to the subrogor's property. More particularly, plaintiff claims that substantial structural damage was caused to the subrogor's building as a result of defendants' failure to properly underpin, shore and brace the subrogor's building, and defendants' failure to ensure that proper underpinning, shoring and bracing of the subrogor's building was performed during construction of the subject building. See Plaintiff's Response to Demand for Bill of Particulars, Ex. B to Aff. in Opp. of Red Hook Construction Group-I, Inc. (Red Hook).

Kostow Greenwood moves for dismissal on the basis that it had no responsibilities with respect to underpinning, shoring or bracing of the subrogor's building, and, therefore, it had no duty to plaintiff. In support of its motion, Kostow Greenwood submits an affidavit from its principal, Michael Kostow (Kostow), and documentary evidence, including a letter agreement between Kostow Greenwood and Centre Court, and two drawings prepared by Kostow Greenwood in connection with the construction of the subject building. See Kostow Aff. in Support, Exs. A, C, D. According to Kostow, Kostow Greenwood was retained by Centre Court to provide architectural services for the construction project, and had "no responsibility with respect to the design of

[\* 4]

the underpinning plan, no involvement in the actual excavation and foundation work, and was not retained to perform Controlled Inspections and Certifications." Kostow Aff. in Support, ¶ 4. Mr. Kostow also asserts that the two drawings demonstrate that the contractor performing the actual underpinning work was required to retain a licensed professional engineer to design and inspect the underpinning. *Id.*, ¶¶ 5, 8.

In opposition to the motion, plaintiff and defendants Centre Court, Orion Development, Inc. (Orion), the general contractor for the construction project, and Red Hook, a subcontractor hired by Orion to perform construction and excavation activities, argue that the motion is premature, as little discovery has been conducted, and is necessary to determine the scope of Kostow Greenwood's work and responsibilities with respect to the construction project.<sup>1</sup>

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." CPLR 3212 (b); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York*

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<sup>1</sup>Defendants Goldstein Associates Consulting Engineers, PC, Structural Preservation Systems, LLC, and S.I. General Construction Corp. submit no opposition to the instant motion.

[\* 5]

*Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once such showing has been made, to defeat summary judgment, the opposing party must "establish the existence of material issues of fact which require a trial of the action." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986), citing *Zuckerman*, 49 NY2d at 562. The evidence must be viewed in a light most favorable to the nonmoving party (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and the motion must be denied if there is any doubt as to the existence of a triable issue of fact. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). Similarly, on a motion to dismiss pursuant to CPLR 3211, when documentary evidence is considered, "such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N. Y.*, 98 NY2d 314, 326 (2002); see *Leon v Martinez*, 84 NY2d 83, 88 (1994).

Here, contrary to Kostow Greenwood's contentions, the documents submitted by Kostow Greenwood in support of the motion do not establish its prima facie entitlement to summary judgment, or otherwise entitle it to dismissal under CPLR 3211 (a) (1), (a) (7), or (c). Neither the letter agreement nor the project plan drawings demonstrate, as a matter of law, that the scope of Kostow Greenwood's responsibilities excluded any work related to

[\* 6]

the design or review of the underpinning plans. Notably, the letter agreement, submitted as an unsigned proposal, is not evidentiary proof in admissible form sufficient to support summary judgment (see CPLR 3212 [b]; *Speirs v Not Fade Away Tie Dye Co.*, 236 AD2d 531 [2d Dept 1997]); it also incorporates by reference other terms pursuant to the AIA standard form agreement, which is not attached to the moving papers. Although Kostow, in reply, claims that an AIA agreement was not executed in connection with its work (see *Kostow Reply Aff.*, ¶ 2), his affidavit raises issues of fact as to the terms of the agreement, and the actual work performed by his company. The project drawings, identified as S0001 and A0.2, also are not conclusive as to the scope of Kostow Greenwood's responsibilities. Rather, as plaintiff and defendants correctly note in their opposition, they raise an issue of fact by expressly identifying Kostow Greenwood's responsibilities as including review and approval of underpinning drawings and work.

In any event, in view of the substantial amount of discovery outstanding at this early stage of the proceedings in the case, summary judgment should be denied as premature. At the time that the instant motion was made, no preliminary conference had been held and little or no discovery had been conducted in this matter; document demands were outstanding, and no depositions had been held, or even scheduled. See *Aff. in Opp. of Centre Court*,

¶ 6; Plaintiff Aff. in Opp., ¶ 7.

Pursuant to CPLR 3212 (f), when it appears "that facts essential to justify opposition may exist but cannot then be stated," the court may deny a motion for summary judgment. "This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion." *Baron v Incorporated Vil. of Freeport*, 143 AD2d 792, 793 (2d Dept 1988); see *Valdivia v Consolidated Resistance Co. of Am., Inc.*, 54 AD3d 753, 755 (2d Dept 2008); *Colicchio v Port Auth. of N. Y. & N. J.*, 246 AD2d 464, 465 (1<sup>st</sup> Dept 1998). Plaintiff and defendants assert that discovery is necessary to determine, among other things, what work was performed by Kostow Greenwood, and what responsibilities it had with respect to the underpinning of the subrogor's building, and plaintiff and defendants have offered some "evidentiary basis" "to suggest" that discovery may lead to relevant evidence. See *Harris v Alcan Aluminum Corp.*, 91 AD2d 830 (4<sup>th</sup> Dept 1982), *affd for reasons stated below* 58 NY2d 1036 (1983). Under these circumstances, plaintiff and defendants are entitled to discovery prior to a determination of the motion. See *Harvey v Nealis*, 61 AD3d 935 (2d Dept 2009); *Rengifo v City of New York*, 7 AD3d 773 (2d Dept 2004); *McGlynn v Palace Co.*, 262 AD2d 116 (1<sup>st</sup> Dept 1999); *Ponce v St. John's Cemetery*, 222 AD2d 361 (1<sup>st</sup> Dept 1995).

The court notes that, as plaintiff correctly points out,

Kostow Greenwood failed to include a complete set of all the pleadings with its motion, as required by CPLR 3212 (b), which can provide a separate basis for denial of the motion. See *Wider v Heller*, 24 AD3d 433 (2d Dept 2005); *Deer Park Assoc. v Robbins Store, Inc.*, 243 AD2d 443 (2d Dept 1997). While that technical defect may be overlooked where, as here, copies of the defendants' answers are annexed to the reply papers (see *Pandian v New York Health & Hosps. Corp.*, 54 AD3d 590, 591 [1<sup>st</sup> Dept 2008]; *Welch v Hauck*, 18 AD3d 1096, 1098 [3d Dept 2005]), Kostow Greenwood fails to address, or even identify, any of the cross-claims against it. The branch of the motion which seeks dismissal of all cross claims, therefore, also is denied.

Accordingly, it is

ORDERED that the motion of Kostow Greenwood Architects, PC, is denied, without prejudice to renewal after completion of discovery.

Dated: February 3, 2010

**FILED**  
 HON. JOAN MADDEN, J.S.C.  
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