

Orchard Mgt., Inc. v Insurance Co. of Greater N.Y.

2010 NY Slip Op 30908(U)

April 5, 2010

Supreme Court, New York County

Docket Number: 602476/05

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 602476/2005

ORCHARD MANAGEMENT

vs.

INS. CO. GREATER NEW YORK

SEQUENCE NUMBER : 004

STRIKE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n 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

Motion and cross-motion are decided as per attached decision

FILED

APR 13 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/5/10

[Signature]
EMILY JANE GOODMAN

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NON-FINAL DISPOSITION

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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 17

-----x

ORCHARD MANAGEMENT, INC. and
234-240 EAST 25th STREET ASSOCIATES, L.P.,

Plaintiffs,

-against-

Index No. 602476/05

INSURANCE COMPANY OF GREATER NEW YORK,
242 EAST 25th STREET ASSOCIATES, L.L.C.,
C. GERSHON COMPANY, INC.,
J.E. LEVINE BUILDERS, INC.,
STEPHEN B. JACOBS GROUP, P.C.,
ROBERT DERECTOR ASSOCIATES, INC.,
THE CANTOR SEINUK GROUP, INC.,
SOIL MECHANICAL DRILLING AND TESTING CORP.,
and 242 EAST 25th STREET CORPORATION,

Defendants.

-----x

J.E. LEVINE BUILDERS, INC.,

Third-Party Plaintiff,

-against-

Third-Party
Index No. 591266/05

GOLDEN VALE CONSTRUCTION CORP.,

Third-Party Defendant.

-----x

INSURANCE COMPANY OF GREATER NEW YORK,

Second Third-Party Plaintiff,

-against-

Second Third-Party
Index No. 590318/06

242 EAST 25th STREET CORPORATION and
242 EAST 25th STREET ASSOCIATES, L.L.C.,

Second Third-Party Defendants.

-----x

INSURANCE COMPANY OF GREATER NEW YORK,

Third Third-Party Plaintiff,

Third Third-Party
Index No. 590388/07

-against-

C. GERSHON COMPANY, INC.,
J.E. LEVINE BUILDER, INC,
STEPHEN B. JACOBS GROUP, P.C.,
ROBERT DERECTOR ASSOCIATES, INC.,
THE CANTOR SEINUK GROUP, INC., and
SOIL MECHANICAL DRILLING AND TESTING CORP.,

Third Third-Party Defendants.
-----x

EMILY JANE GOODMAN, J.S.C.:

This matter involves multi-party litigations arising from damages to a six-story residential building allegedly caused by excavation and construction activities that took place at an adjoining property. Orchard Management, Inc. and 234-240 East 25th Street Associates, L.P. (together, Plaintiffs) are the respective manager and owner of a condominium building located at 232-240 East 25th Street, New York City (Plaintiff's Building).

Plaintiffs seek recovery for property damages from their insurer, Insurance Company of Greater New York (GNY); the owner/developer of the adjoining property, 242 East 25th Street Associates, LLC, 242 East 25th Street Corporation and C. Gershon Company, Inc. (collectively, 242/Gershon); the general manager retained by 242/Gershon for the construction project, J.E. Levine Builders, Inc. (Levine); the architect retained by 242/Gershon for the project, Stephen B. Jacobs Group, P.C. (SJG); the structural engineer retained by 242/Gershon for the project, The Cantor Seinuk Group, Inc. (Cantor); and the subcontractor retained by Levine for excavation and foundation work for the

project, Golden Vale Construction Corp. (Golden Vale).¹ In turn, GNY seeks to assert indemnification claims against 242/Gershon and Levine, as well as other entities involved in the project, including Cantor and Golden Vale.

The above-captioned actions, which encompass the principal action and various third-party actions, including the third-party action by Levine against Golden Vale, have been consolidated for all purposes, including discovery and trial, pursuant to an order of this court dated September 27, 2007. This decision and order addresses motion sequence numbers 004, 005, 006 and 007, as well as many cross motions by the various parties, all of which are consolidated herein for disposition.

Background

As owner/developer of the land at 242-246 East 25th Street, New York City (the Site), 242/Gershon entered into a construction management agreement with Levine, as project general manager, to build a 13-story residential building at the Site, which is adjacent to Plaintiffs' building. Separately, 242/Gershon entered into contracts for architectural services with SJG, and for structural engineering services with Cantor. Thereafter, Levine, as agent of 242/Gershon, subcontracted with Golden Vale to perform excavation and foundation work for the project. In

¹ Based on the court records, the actions filed against defendants Robert Director Associates, Inc. and Soil Mechanical Drilling and Testing Corp. have been dismissed or discontinued.

turn, Golden Vale retained Bronzino Engineering (Bronzino) to design underpinning and shoring work for the Site.² Golden Vale also hired Metric Consulting and Inspection (Metric) to perform field inspections, including underpinning inspection, as well as concrete and soil testing, among other things.

In June 2004, excavation activities began at the Site, which adjoins and is located to the east of Plaintiffs' Building. Due to excavation and construction activities at the Site, Plaintiffs allege that their building sustained extensive damages, and seek insurance coverage from their insurance carrier, GNY, under an "all risk" policy. After GNY denied coverage, Plaintiffs started this action (index number 602476/05) against GNY in July 2005. While opposing Plaintiffs' motion for summary judgment (motion sequence number 006), GNY cross-moves for permission to file cross claims against 242/Gershon, Levine, Cantor and Golden Vale.

Separately, 242/Gershon moves (motion sequence number 004) for summary judgment against Levine based on common law or contractual indemnification, as well as for an order striking Golden Vale's answer and precluding Golden Vale from testifying at trial. In turn, SJG moves (motion sequence number 005) for summary judgment in its favor, arguing, inter alia, that damages to Plaintiffs' Building were not caused by SJG, because SJG was

² Underpinning and shoring are methods by which a building adjacent to a construction site is stabilized when excavation at the site is done at a depth greater than the building's footing.

not responsible for structural engineering, underpinning or excavation work, pursuant to its contract with 242/Gershon. Plaintiffs also move (motion sequence number 007) for partial summary judgment against the defendants, asserting that under the applicable building code, the defendants are strictly liable for damages to Plaintiffs' Building where, as here, the depth of excavation was greater than 10 feet.

The above motions (motion sequence numbers 004, 005, 006 and 007) engendered many oppositions and cross motions, all of which are consolidated herein for disposition, as discussed below.³

Applicable Legal Standards

In stating the standards for granting or denying a summary judgment motion pursuant to CPLR 3212, the Court of Appeals noted in *Alvarez v Prospect Hospital* (68 NY2d 320, 324 [1986]):

As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such ... showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to

³ It is noteworthy that Golden Vale commenced a third-party action against Bronzino in July 2009. Bronzino moved (motion sequence number 008) for an order dismissing the third-party complaint against it, or severing the third-party action from the principal action and other third-party actions. By order of this court, dated November 4, 2009, Bronzino's motion was granted as to severance, but denied as to dismissal, without prejudice to its raising dismissal arguments in the severed action.

produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [internal citations omitted].

Adhering to the above guidance, the courts uniformly scrutinize motions for summary judgment, as well as the facts and circumstances of each case, to determine whether relief may be granted. *See e.g. Andre v Pomeroy*, 35 NY2d 361, 364 (1974) (because entry of summary judgment "deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues"); *People v Grasso*, 50 AD3d 535, 544 (1st Dept 2008) (in considering a motion for summary judgment, "all of the evidence must be viewed in the light most favorable to the opponent of the motion"). However, conclusory allegations unsupported by competent evidence are insufficient to defeat a summary judgment motion. *Alvarez*, 68 NY2d at 324-25. Notably, "[t]he court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues." *Sheehan v Gong*, 2 AD3d 166, 168 (1st Dept 2003).

Also, it has been held generally that documentary evidence must establish conclusively a defense to a claim as a matter of law, before a court may dismiss the claim pursuant to CPLR 3211 (a) (1). *See e.g. Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267 (1st Dept 2004).

Discussions

I. 242/Gershon's Motion (Motion Sequence Number 004)

242/Gershon's motion requests various reliefs. First, 242/Gershon requests the court to vacate the Statement of Readiness and the Note of Issue filed by Plaintiffs. 242/Gershon argues that the relief is proper because Golden Vale, a necessary party to these proceedings who was responsible for excavation and underpinning work at the Site, had repeatedly failed to appear for an examination before trial, despite the fact that it had been ordered by this court to do so on at least three occasions. 242/Gershon contends that it will be substantially prejudiced if a trial proceeds without discovery of Golden Vale.

Vacating the Statement of Readiness and the Note of Issue at this juncture is unwarranted, particularly in light of the fact that these proceedings have been pending since 2005, and all parties (as well as non-parties), except for Golden Vale, have produced witnesses and documents for examination and discovery. According to counsel for Golden Vale, who is apparently retained by Golden Vale's insurer, the reason for Golden Vale's failure to appear for examination before trial is that Golden Vale went out of business soon after these proceedings were commenced, and its principals left this country for Europe and never returned. In this regard, it is proper to grant 242/Gershon's alternative request for relief, which is to preclude Golden Vale from

introducing evidence at trial, due to its non-compliance with prior discovery orders of this court.¹ CPLR 3126 empowers this court to enter penalty orders against a party, such as Golden Vale, when it failed or refused to comply with disclosure orders.

242/Gershon's motion also seeks summary judgment against Levine, the general manager hired for the construction project, based on common-law and/or contractual indemnification. Pursuant to Article 10 of the Construction Management Agreement, Levine was required to obtain insurance policies or certificates naming 242/Gershon as an additional insured. The record reflects that Levine procured insurance coverage in favor of 242/Gershon. Further, pursuant to the same Agreement, Levine was required to defend, indemnify and hold harmless 242/Gershon from all claims, losses or damages caused by Levine's negligence or omissions. Because of this contractual clause, 242/Gershon requests entry of summary judgment against Levine with respect to its contractual obligation to defend, indemnify and reimburse all legal fees and expenses incurred by 242/Gershon in these proceedings.

Levine does not dispute its contractual obligations to 242/Gershon. Instead, it argues that a reciprocal clause in the same Agreement also required 242/Gershon to defend and indemnify Levine. Levine contends that "it is not clear from the contract

¹ The same relief against Golden Vale is requested by other co-defendants in these cases.

as to who shall defend and indemnify who." See Michael Seltzer Affirmation in Support of Levine's Cross Motion And in Opposition to 242/Gershon's Motion (Seltzer Affirmation), ¶ 15.

Levine's argument is without merit. Levine has not alleged any claim against 242/Gershon arising from any act or omission of 242/Gershon that may be attributable to the damages sustained by Plaintiffs' Building. In fact, Levine has not asserted an indemnity claim against 242/Gershon. Thus, 242/Gershon's motion seeking summary judgment against Levine as to its contractual obligation to defend and indemnify 242/Gershon is granted.

A. Levine's Cross Motion

In its cross motion, Levine asserts that, if this court were to grant 242/Gershon's request for defense and indemnification against Levine, it should likewise grant Levine's request for defense and indemnification against Golden Vale, which contracted with Levine to perform excavation and underpinning work. Seltzer Affirmation, ¶ 16. Pursuant to Article 20 of the subcontract, Golden Vale was to indemnify Levine and 242/Gershon from claims or losses arising out of any act or omission of Golden Vale in the performance of work at the Site. The record reflects that Golden Vale procured insurance coverage in favor of Levine, and pursuant to an endorsement, 242/Gershon was named as additional insured. Thus, Levine contends that it is entitled to summary judgment against Golden Vale, as a matter of law, for contractual

defense and indemnity, where, as here, Plaintiffs allege that improper excavation and underpinning work at the Site caused damages to Plaintiffs' Building. *Id.*, ¶¶ 22-38.

Golden Vale opposes Levine's cross claim and summary judgment motion. Golden Vale argues that (1) pursuant to the subcontract, Golden Vale was to complete its work under the direction and supervision of Levine; (2) Levine's superintendent for the project, Joseph Edwards, directed and supervised Golden Vale's excavation and underpinning work, as evidenced by drawings and calculations of Edwards in respect of the depth of excavation and the amount of concrete for the underpinning; (3) General Obligations Law (GOL) § 5-322.1 voids any indemnity clause that seeks to exempt the indemnitee from liability for its own negligence; and (4) an issue of fact as to the apportionment of comparative fault precludes the entry of summary judgment.

Golden Vale's argument that it relied on the drawings and calculations of Edwards in its performance of excavation and underpinning work is specious. The record reflects that Golden Vale retained Bronzino, a licensed engineer, to perform, *inter alia*, underpinning design. Further, Edwards' unopposed testimony reflects that the drawings were only hand sketches (as opposed to plans or specifications) prepared by him *after* the underpinning was finished, and that the calculations were simply a "takeoff" as to the amount of poured concrete (measured in yards) used for

the underpinning. Deposition of Edwards, at 305-309.

Thus, the record shows that the excavation and underpinning work was done by Golden Vale and/or its subcontractor Bronzino, and Levine does not dispute that section 2.2 of the subcontract states that Golden Vale "shall undertake and complete the Work under the direction and supervision of the Construction Manager [i.e., Levine.]" Yet, Levine argues that, despite its duty to direct and supervise, "no evidence has been presented that Levine directed Golden Vale as to how it was to perform its work." Seltzer Reply Affirmation, ¶ 26. Also, Levine argues that, even though it had "general supervisory powers, those powers were to ensure that the work was being performed in conformity with the plans, not how the work was actually performed by Golden Vale." *Id.* In effect, Levine contends that, even if it exercised total control over the project, because Golden Vale was the only entity that performed excavation and underpinning work using means and methods solely within its control, Levine should not be liable for Plaintiffs' damages. *Id.*, ¶ 27.

However, Levine does not dispute Golden Vale's assertion that Levine was, under the subcontract, responsible to supervise and direct the excavation, and that the excavation was in excess of 10 feet below the curb line. Golden Vale Opposition Brief, at 6 (referencing Deposition of Edwards, at 190-204). Under the building code, as explained below, the depth of such excavation

may render a party or parties (including a general contractor) responsible for such excavation liable for damages sustained by adjoining buildings and properties. Further, as discussed below, there are allegations and testimonies to the effect that the foundation underpinning plan submitted by Bronzino, Golden Vale's subcontractor, did not address underpinning of the Site's west property line, and that no engineering plan or drawing for underpinning of the west property line was ever produced.⁵ See Rappel Affirmation in Support of GNY's Cross Motion, ¶¶ 34-35. Because Levine was the general manager and contractor for the project, an issue can be raised as to the degree of supervision and control it should have exercised over the project, including review of the plans and drawings submitted by the various contractors and trades retained for the project.

Also, the cases relied on by Levine in support of its cross motion are distinguishable and inapplicable. For example, in *Roddy v Nederlander Producing Company of America, Inc.* (44 AD3d 556 [1st Dept 2007]), and *Watral & Sons, Inc. v OC Riverhead 58, LLC* (34 AD3d 560 [2d Dept 2006])⁶, summary judgment relief for contractual indemnity was granted in favor of the indemnitees

⁵ As noted earlier, the Site is located to the east of Plaintiffs' six-story condominium building. Thus, the Site's west property line abuts and adjoins Plaintiffs' Building.

⁶ Notably, *Watral* was reversed by the Court of Appeals, in *Watral* (10 NY3d 180 [2008]), based on the facts in that case.

because they were the owners or licensors of property, and the indemnitors were the contractors or licensees who solely caused the injuries to third parties arising from their performance of work for the owners or licensors. In this case, however, Levine was the project manager for owner-developer 242/Gershon, and was to supervise and direct the work of Golden Vale. Thus, the alleged damages to Plaintiffs' Building could be the result of negligence of various co-defendants in these cases, individually or collectively. Moreover, although the Golden Vale subcontract speaks of indemnification in favor of Levine, it states that "such indemnification shall apply only to the extent permitted by applicable law," such as GOL § 5-322.1, which does not permit indemnification for the indemnitee's own negligence. Because an issue of fact is raised as to Levine's deficient or negligent exercise of control and supervision, its cross motion for summary judgment against Golden Vale cannot be granted at this juncture. *Karash v Adetunji*, 56 AD3d 726, 727 (2d Dept 2008) ("Where comparative negligence may have contributed to an accident, summary judgment will be precluded").

On the other hand, the argument that Golden Vale (or its insurer) should be afforded a "final opportunity" to locate its principals (including Peter McAvoy), to avoid the preclusion of its presenting evidence or witnesses at trial, is without merit. Golden Vale Opposition Brief, at 8. As discussed above, Golden

Vale had been given several opportunities to comply with the disclosure orders of this court, but repeatedly failed to do so. Therefore, its request for yet another chance to produce a witness until 90 days prior to trial should be denied.

II. SJG's Summary Judgment Motion (Motion Sequence Number 005)

SJG, the architect retained by 242/Gershon for the project, moves, pursuant to CPLR 3212, for an order declaring that SJG has no liability for the damages sustained by Plaintiffs' Building. In support of its motion, SJG submitted an affidavit of Herbert Weber (Weber Affidavit), a SJG principal and licensed architect. The Weber Affidavit asserts that: (1) pursuant to SJG's contract with 242/Gershon, controlled inspections required by the New York City Department of Buildings (DOB)⁷ that related to underpinning, shoring, bracing and structural stability of existing or adjacent buildings were all excluded from SJG's contractual services; (2) the contract between 242/Gershon and Cantor (the structural

⁷ Controlled inspections must be done during construction projects by qualified professionals, such as architects and engineers. The professional must sign a DOB form entitled "Technical Report: Statement of Responsibility" (commonly known as "TR-1") in connection with the project. By signing a TR-1, the professional assumes responsibility for the items inspected or tested (as identified in the form) and certifies that actual inspections or tests were done. In a major project, it is common place that a series of TR-1s are filed with DOB, indicating which professional is responsible for what aspects of the project. Thus, the professional who first signed a TR-1 (so as to obtain a permit from DOB to commence work) will later be substituted or superseded by other professionals assuming responsibility for specific tasks, and the new professionals will then have to certify inspection and completion of their respective tasks.

engineer), and subsequent letter agreements by such parties, indicated that Cantor was responsible for controlled inspections related to concrete, masonry and steel, but excluded controlled inspection services for structural stability during demolition and new construction; (3) Levine, as agent and project manager for 242/Gershon, entered into a subcontract with Golden Vale to provide excavation and underpinning services; (4) Golden Vale then subcontracted with Bronzino to provide excavation and underpinning work, and with Metric to provide field inspection and other services; and (5) the TR-1 filed in August 2005 by Metric indicated that the controlled inspections included underpinning and shoring work at the Site. Attached to the Weber Affidavit are various documents (Exhibits A to K) that purport to support these assertions.

SJG's motion was opposed by Plaintiffs and Levine. The bases for the opposition include: (1) even though controlled inspection relating to underpinning and structural stability was excluded from SJG's services, not taking into account the stability of adjacent structures, including Plaintiffs' Building, "may be negligence on the part of SJG"; (2) project progress meetings were held in SJG's offices where such "meetings could include structural and non-structural issues;" (3) as "expediter of the project" responsible for the filing of all necessary documents with DOB (including the initial TR-1 signed by Cantor),

"it would only seem logical" for SJG to follow-up the paper trail to ensure that subsequent TR-1s were filed properly and timely; (4) the TR-1 filed by Metric in August 2005, which relieved Cantor of its shoring responsibility, was not filed until a year and six months after the work was completed, and nine months after Plaintiffs' Building sustained damages; and (5) issues of fact remain as to SJG's liability because SJG was a "prominent figure in this project." See Mallin Affirmation and Seltzer Affirmation in Opposition to SJG Summary Judgment Motion.

The oppositions are unpersuasive because most, if not all, are based upon speculations or conclusory allegations unsupported by competent evidence. Moreover, the failure of the opponents to support their attorneys' affirmations with sworn affidavits from licensed professionals undermines their cause, because such affirmations do not constitute competent evidence sufficient to raise triable issues of fact.⁸ *Zweng v DeBellis & Semmens*, 22 AD3d 845, 846 (2d Dept 2005) (to defeat a summary judgment motion by a professional engineer, opponents to the motion must "submit an affidavit of merit from an expert competent to testify to evidentiary facts that would support their claim of professional

⁸ Attached to the Mallin Affirmation are reports prepared by Plaintiffs' experts, Alan Sare, P.E. and David Cham Estimating, Inc. However, these reports are not sworn to by the experts. More importantly, the Mallin Affirmation does not state whether such reports indicate that damages to Plaintiffs' building were caused, at least in part, by the negligence of SJG.

malpractice"). On the other hand, SJG's motion is supported by sworn affidavits of Herbert Weber, a licensed engineer. Further, Plaintiffs' reliance upon *Hussain v Try 3 Building Services, Inc.* (308 AD2d 371 [1st Dept 2003]) in support of their opposition is misplaced. In that case, the appellate court denied the defendant architect's motion for summary judgment because, despite the architect's claim that its contract with the property owner limited its duties to preparing and filing papers with DOB, the architect failed to submit such contract in support of its motion. In this case, the Weber Affidavit attached documentary evidence which indicated that SJG was not responsible for structural stability issues relating to the project. Thus, the facts are distinguishable, and the holding in *Hussain* is inapplicable. Accordingly, SJG's motion for summary judgment should be granted.

III. Plaintiffs' Summary Judgment Motion
Against GNY (Motion Sequence No. 006)

Plaintiffs commence the instant action against the insurer, GNY, seeking to recover insurance funds purportedly owed to them under an "all risk" policy issued by GNY, when their building was allegedly damaged by excavation and construction activities at the adjoining property owned by 242/Gershon. After GNY issued a letter denying coverage based on purported exclusions under the policy and asserted affirmative defenses to the complaint, Plaintiffs moved for summary judgment against GNY, arguing that

none of the exclusions and affirmative defenses apply.

GNY retained Glenn Rentschler, a structural engineer, to investigate the cause of damages to Plaintiffs' Building. Based on Rentschler's investigation, GNY now agrees with Plaintiffs that the major cause of damage to Plaintiffs' Building was the result of improper excavation and underpinning methods used to perform the work at the Site. Specifically, Rentschler opined that, based on his inspection of the Building and his review of the drawings prepared by Cantor and Bronzino, the nature of the distress seen at Plaintiffs' Building "strongly suggests that the footing of the east wall [of the Building] was disturbed or it was undermined by the adjacent work [at the Site]." Rentschler Affidavit, ¶¶ 16-19. Notably, in light of recent case law that dealt with similar defenses asserted by GNY in its denial letter and answer, GNY now acknowledges that there is coverage under Plaintiffs' insurance policy, but disagree as to the amount of damages to their building, as asserted by Plaintiffs. See e.g. Jacqueline Rappel Affirmation in Opposition to Plaintiffs' Motion and in Support of its Cross Motion (Rappel Affirmation), ¶¶ 3-5.

In support of its position, GNY contends that, although Plaintiffs' Building sustained damages due to improper excavation and underpinning at the Site, there were also pre-existing cracks (mostly cosmetic) in the Building prior to the excavation, as evidenced by the photographs taken by Vibranalysis Inc., the firm

retained by 242/Gershon to perform a pre-construction inspection of adjacent structures, including Plaintiffs' Building. GNY argues that Plaintiffs cannot recover for these building damages because they predated the excavation. *Id.*, ¶¶ 6-10.

Plaintiffs dispute GNY's position, arguing that the reports prepared by their experts, Alan Sare and David Cham, which estimated the cost of repair in excess of \$2 million, should prevail over GNY's estimated repair cost, which only concentrated upon the cost of cosmetic (as opposed to structural) repairs to the building. Despite Plaintiffs' argument, there are issues of fact regarding the magnitude of damages to the building allegedly caused by the excavation, and the degree of existing damages that predated the excavation (as to which Plaintiffs have failed to address). Thus, summary judgment cannot be granted in favor of Plaintiffs in all respects. Importantly, Plaintiffs' motion seeks summary judgment only as to the issue of whether the GNY-asserted policy exclusions and affirmative defenses apply.

Accordingly, Plaintiffs' motion for summary judgment against GNY is granted only as to the issue of liability (i.e., insurance coverage), and not as to the issue of damages (i.e., the amount recoverable), which will be addressed and determined at trial.

A. GNY's Cross Motion

In its cross motion, GNY seeks court permission to make its motion for summary judgment on its cross claims against co-

defendants (242/Gershon, Levine, Cantor and Golden Vale) more than 45 days from the filing of the Note of Issue by Plaintiffs (NOI), which was filed and served on or about January 23, 2009. On March 9, 2009, the 45th day after the NOI filing, Plaintiffs moved for summary judgment against GNY (motion sequence number 006), with such motion returnable March 27, 2009. By stipulation among the parties that was so-ordered by this court on April 8, 2009, Plaintiffs' motion and other pending motions were adjourned to May 28, 2009, with opposing papers by any party to any motion to be served on or before May 14, 2009. In the stipulation, the court noted that "[b]y so-ordering stip, court is not determining that all motions are filed timely (within court's 45 day rule)." GNY's cross motion for summary judgment, dated May 14, 2009, was opposed by Cantor, 242/Gershon, Levine and Golden Vale.⁹

Untimeliness of GNY's Cross Motion

It is undisputed that GNY's cross motion for summary judgment was filed after the court's 45-day rule, and GNY did not seek an extension of time to file the cross motion. The reason asserted by GNY as cause of the late filing is that "[h]ad plaintiffs chosen not to move against GNY, GNY would not have

⁹ Pursuant to another so-ordered stipulation, dated May 26, 2009, the parties set forth a briefing schedule for the filing and service of opposing papers and replies with respect to the various cross motions. Such stipulation also stated that the briefing schedule "is not deemed as consent to the acceptance of any motions filed beyond the Court's 45 day rule."

moved against the co-defendants ... [as] plaintiffs' motion for summary judgment was timely and as the cross motion is a result of that motion, GNY's cross motion against co-defendants is timely under the court's rules." Rappel Affirmation, ¶ 13.

CPLR 3212 (a) provides, in relevant part, that "[a]ny party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made ... except with leave of court on good cause shown." The Court of Appeals, in *Brill v City of New York* (2 NY3d 648, 652 [2004]), interpreted the statute as follows: "'good cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion - a satisfactory explanation for the untimeliness - rather than simply permitting meritorious, nonprejudicial filings, however tardy." Accord *Miceli v State Farm Mutual Automobile Ins. Co.* (3 NY3d 725, 726 [2004]) ("statutory time frames - like court-ordered time frames [see *Kihl v Pfeffer*, 94 NY2d 118 (1999)] - are not options, they are requirements, to be taken seriously by the parties").

Although the *Brill* and *Miceli* decisions did not deal with cross motions for summary judgment, the Appellate Division, First Department, has ruled on this particular issue. In *Conklin v Triborough Bridge and Tunnel Authority* (49 AD3d 320, 321 [1st Dept 2008]), the First Department concluded that an "untimely cross motion was not improperly considered, since it sought

relief on the same issues as were raised in defendants' timely motion." See also *Lapin v Atlantic Realty Apts. Co., LLC* (48 AD3d 337, 337 [1st Dept 2008]) ("marginally untimely cross motion for summary judgment was properly considered by the court because it raised nearly identical issues ... as asserted in [another party's] timely motion").

In this case, Plaintiffs' timely-filed motion for summary judgment against GNY is based on contractual privity under the insurance policy (i.e., exclusions and coverages). Yet, GNY's cross motion against the co-defendants is based on the theories of absolute liability under the building code and negligence (as discussed below). Hence, GNY's cross motion does not raise "the same" or "nearly identical issues" as those in Plaintiffs' motion against GNY. However, the record reflects that Plaintiffs also filed a timely motion for summary judgment against certain co-defendants (motion sequence number 007) based on the theories of absolute liability under the building code and negligence. In light of the legal precedent and rationale stated in *Brill*, *Miceli*, *Conklin* and *Lapin*, this court may consider the cross motion for summary judgment of GNY, as Plaintiffs' insurer and subrogee under the insurance policy.

Absolute Liability and Negligence

At the time when the damages were allegedly sustained by Plaintiffs' Building due to excavation at the Site, Section 27-

1031 (b)(1) of the Administrative Code of the City of New York (the Building Code) provided, in relevant part, that: "[w]hen an excavation is carried to a depth of more than ten feet below the legally established curb level the person who causes such excavation to be made shall ... preserve and protect from injury any adjoining structures" The courts have observed that "the statute is intended to apply to the activities during the excavation process and to any damage suffered by the adjoining owner proximately resulting from the excavator's failure to take adequate precautions to protect adjoining structures during the excavation." *Cohen v Lesbian & Gay Community Services Center, Inc.*, 20 AD3d 309, 310 (1st Dept 2005), citing, inter alia, *Coronet Properties Co. v L/M Second Ave., Inc.*, 166 AD2d 242 (1st Dept 1990). Moreover, it has been noted that Building Code § 27-1031 imposed absolute liability on the property owner upon whose property the excavation was performed, the general contractor who was responsible for discharging the duty, and the contractor who actually performed the excavation. See e.g. *Juarez v Wavecrest Management Team Ltd.*, 212 AD2d 38, 46 (1st Dept 1995), *revd on other grounds* 88 NY2d 628 (1996); *Coronet Properties*, 166 AD2d at 243; *Bello v Santiago*, 23 Misc 3d 1127 (A), NY Slip Op 50954 (U) (Sup Ct, Kings County 2009).

In this case, the depth of excavation at the Site was more than 10 feet below curb level. In fact, as testified by Edwards,

Levine's superintendent, the depth exceeded 13 feet. Deposition of Edwards, at 203. Thus, under the Building Code, unless there is evidence showing that adequate measures were undertaken to "preserve and protect from injury any adjoining structures," the co-defendants can be held absolutely liable for the alleged damages caused to Plaintiffs' Building. Co-defendants contend that, even though violation of Building Code § 27-1031 has been held to impose absolute liability, any liability can only be determined "after trial," and upon a finding that they had failed to take adequate precautions to protect adjoining structures. In effect, they contend that, based on *Coronet Properties*, 166 AD2d 242, *supra*, liability should not be determined at the summary judgment stage. *Coronet Properties*, 166 AD2d at 243 (court observed that "factual issues, together with evidence of the poor condition of the allegedly damaged buildings and of other possible causes of the damage, preclude summary disposition of this matter").

The co-defendants' reliance upon *Coronet Properties* is misplaced. In that case, plaintiff's summary judgment motion was denied because the court found that: defendants had set up a system of protection for adjacent structures; plaintiff's officer conceded that defendants had performed underpinning, bracing and shoring work; and even plaintiff's own engineer was unable to state that the damages were proximately caused by defendants'

excavation. See Respondents' Appellate Brief filed in *Coronet Properties*, a copy of which is annexed as Exhibit A to Plaintiffs' Affirmation in Response to Opposition of Levine and 242/Gershon to Plaintiffs' Motion for Summary Judgment.

In this case, the co-defendants have not presented evidence to show that Plaintiffs' Building was adequately protected during excavation. More specifically, they have failed to rebut the contention (based on pre-trial discovery) of GNY and Plaintiffs that there were no approved engineer-prepared plans or drawings for foundation underpinning of the Site's west property line that adjoins Plaintiffs' Building. Moreover, the affidavit of Henry Naughton, the engineer retained by 242/Gershon to inspect Plaintiffs' Building in January 2009 (about four and one-half years after the excavation took place), was silent as to how Plaintiffs' Building was protected during excavation, as well as to the depth of the excavation. Hence, his opinion that "there was no structural damage to [Plaintiffs' Building] causally related to any adjacent excavation," and that "there has been no demonstration of any breach of Section 27-1031 (b) (1) of the New York City Building Code," is not well supported by evidence and applicable law. Naughton Affidavit, ¶ 9. As such, he cannot opine, with a reasonable degree of engineering certainty, that Plaintiff's Building was adequately protected during excavation.

Further, the case relied on by co-defendants (*Bello v*

Santiago, 23 Misc 3d 1127 [A], NY Slip Op 50954 [U], *supra*) contained facts that are distinguishable. In particular, in *Bello*, the court noted, inter alia, that "the ALJ did not make a finding that the depth of the [excavation] hole was in excess of ten feet," and that the person who issued the violation summons testified that "he visually estimated the depth of the hole and that it is possible that the hole could only have been nine feet." *Id.* at *18. Thus, the court's refusal to grant plaintiff's summary judgment motion against defendants (based on strict liability under the Building Code) was well supported and justified by the facts of that case. In this case, the facts are undisputed that the excavation exceeded 10 feet. In such regard, *Bello* is inapplicable.

In addition, based on the documents obtained in discovery, GNY contends that 242/Gershon negligently failed to properly determine the depth and type of foundations of the adjacent structures, which information was necessary in order to protect Plaintiffs' Building with adequate underpinning. These documents include, among others, the report prepared by Langan Engineering & Environmental Services, the survey prepared by Earl Lovell - S.P. Blecher Inc., the letter written by SJG to Jeffrey Gershon dated July 24, 2003, as well as the deposition testimony of Gershon. Copies of these documents are annexed as Exhibits 9-12 to the Rappel Affirmation. 242/Gershon has not responded to or

addressed such contention.

Because GNY has made a prima facie showing, and because the co-defendants have not produced "evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial," GNY's cross motion for summary judgment is granted. *Dallas-Stephenson v Waisman*, 39 AD3d 303, 324 (1st Dept 2007). However, summary judgment is granted only as to the issue of liability, and not as to the issue of damages (or any apportionment thereof among the co-defendants), which will be addressed and determined at trial.

IV. Plaintiffs' Summary Judgment Motion (Motion Sequence No. 007)

In their amended complaint, Plaintiffs allege that damages to their building were proximately caused by defendants' failure to comply with the Building Code, and defendants' negligence to adequately and properly supervise, design, inspect and conduct excavation and construction work at the Site. In their motion, Plaintiffs seek summary judgment on the issue of liability based on defendants' violation of the Building Code.

Evidently, the relief sought by Plaintiffs (and the basis therefor) is identical to that sought by GNY in its cross motion against the co-defendants, as discussed above. Because summary judgment is granted in favor of GNY, for the reasons discussed above, summary judgment should likewise be granted in favor of Plaintiffs, but only with respect to the issue of liability, and

not with respect to the issue of damages or any apportionment thereof, which will be addressed and determined at trial.¹⁰

A. Cantor's Cross Motion

Cantor's cross motion seeks summary judgment dismissing Plaintiffs' amended complaint and all cross claims against it, with prejudice. The cross motion is opposed by all other parties, except SJG, on the grounds that Cantor's motion is untimely, and that there are issues of fact precluding summary judgment in Cantor's favor.

Untimeliness of Cantor's Cross Motion

Cantor's cross motion, dated May 14, 2009, was filed and served more than 45 days after the filing of Plaintiffs' NOI on January 23, 2009, despite this Part's widely publicized rule. Cantor argues that it did not receive the NOI in a timely manner, but concedes that its cross motion was filed more than 45 days after its receipt of the NOI. Cantor also argues that because no party is prejudiced by its late filing, and because the various motions filed by the other parties "incorrectly outlined [its] role" in the case, good cause exists for filing the cross motion outside of this court's 45 day rule. Reply to Oppositions to Cantor's Summary Judgment Motion, ¶¶ 3-5.

¹⁰ It is noteworthy that Plaintiffs subsequently submitted a sworn affidavit by their expert, David Cham of Cham Estimating Services, Inc., with respect to the repair cost estimation for the Plaintiffs' Building.

As discussed above, in *Brill v City of New York* (2 NY3d at 652), the Court stated that "'good cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion ... rather than simply permitting meritorious, non-prejudicial filings, however tardy." Thus, even a meritorious and nonprejudicial filing, in and of itself, does not adequately constitute "good cause" for a late filing. In addition, based on *Conklin* (49 NY3d 329, *supra*) and *Lapin* (48 NY3d 337, *supra*), an important factor to be considered is whether the untimely cross motion seeks relief on the same issues as those raised in other parties' timely filed motions.

In this case, it is undisputed that the motions and cross motions filed by Plaintiffs, 242/Gershon, Levine and SJG were all timely filed, and that Cantor could and should have timely filed its cross motion (but did not). It is also undisputed that the motions of 242/Gershon and Levine seek indemnity, which is not an issue relevant to or raised by Cantor. As to SJG's motion, which raises the issue as to whether structural stability was within its contractual obligation (it was not), Cantor's motion raises a somewhat similar issue, but with a notable distinction, namely: as the structural engineer for the project, Cantor signed the initial TR-1 filed with DOB, indicating that it was responsible for structural underpinning and shoring work, among other tasks.

The court finds no good cause for the late filing of the

motion. Cantor's letter to plaintiff, dated February 13, 2009, indicates that Cantor was aware that a note of issue was filed, and requested a copy of it. Cantor concedes that it was subsequently received, but on some unspecified date (a conspicuous omission given that this date may have been more than 45 days prior to Cantor's filing of its cross motion). Accordingly, as it appears to the court that Cantor merely disregarded the Part's rule, no good cause exists for the court to entertain the late cross motion. In any event, even if the cross motion was timely, it would have been denied.

Even if Cantor's Cross Motion for Summary Judgment Was
Timely, It Would Have Been Denied

In support of the argument that Cantor is entitled to summary judgment dismissing the complaint and all cross claims, Cantor points to the following: (1) even though Cantor signed the initial TR-1 with DOB, an accompanying letter from Cantor to 242/Gershon, dated February 4, 2004, stated that "construction will not be permitted to start by [242/Gershon] unless we have received copies of the processed withdrawal forms showing that we have been withdrawn for controlled inspections," along with "copies of processed TR-1 forms naming the new applicant for these controlled inspections;" (2) pursuant to a separate agreement with 242/Gershon, dated June 25, 2004, Cantor was not responsible for work related to structural stability during

demolition and new construction, and such work was to be provided by others (such as Golden Vale); (3) Cantor never received notice of the need for controlled inspections; and (4) Metric was retained by Golden Vale to take over Cantor's responsibility for controlled inspections, and Metric filed a superseding TR-1 certifying its completion of such inspections.

Cantor's arguments are unpersuasive. While it is true that Cantor is not required, pursuant to contract with 242/Gershon, to perform structural stability work (despite its title as a structural engineer), it signed the TR-1 filed with DOB, which indicated to the public (including Plaintiffs, who were not a party to that contract) that it was responsible for shoring and underpinning controlled inspections, among other tasks. Notably, the TR-1 form requires the signing professional to "file a certification of completion or to notify the [DOB] of the [professional's] withdrawal of responsibility within one year from permit issuance." In such regard, it is difficult to fathom why Cantor, who signed the TR-1 in February 2004 obligating itself to be responsible for work relating to underpinning, shoring and other tasks, did not conduct periodic visits to determine the status of the project, when excavation at the Site began in June 2004. Also, the subsequent TR-1 filed by Metric was not filed until August 2005, well more than one year after the initial TR-1 was signed and filed by Cantor, and the

subsequent Metric TR-1 certified completion of controlled inspections with respect to underpinning and shoring only.¹¹ Moreover, while there is no evidence rebutting Cantor's assertion that it never received notice of the need for controlled inspections, it agreed by its letter to 242/Gershon, dated May 20, 2003, to conduct "periodic site visits to observe the general compliance of the structure." Notably, Cantor has cited no authority to support its argument that another party's failure to comply with a contractual provision requiring it to be withdrawn from controlled inspections prior to commencement construction, or, to be notified of the commencement of the work, insulates it from all damages. In conducting its own research, it appears that dicta in *Travelers Indemnity Co. v Zeff Designs* (60 AD3d 453 [1st Dept 2009]) might support such an argument. However, in that case, the Court found that there was no evidence of negligence on the part of the party who filed the TR-1 "only to expedite the filing process for obtaining a construction permit." A party who files forms with DOB stating that it assumes responsibility for controlled inspections can be held liable, where such failure proximately causes injury. *Equitable Life*

¹¹ An additional TR-1 prepared by Metric in July 2004 was never filed with DOB. Notably, this unfiled TR-1 indicated that Metric was only responsible for controlled inspections relating to underpinning. Thus, the original TR-1 signed by Cantor still indicated that Cantor was responsible for shoring, subgrade, soil bearing pressure and reinforced masonry, among other tasks.

Assur. Society of the United States v Nico Const. Co., 245 AD2d 194 (1st Dept 1997). Here, Cantor has not demonstrated that its failure to conduct controlled inspections did not proximately cause Plaintiffs' damages.

In light of the foregoing, there is an issue of fact with respect to the exact scope of responsibilities assumed by Cantor under its private contract with 242/Gershon and the public TR-1 that bore its signature.¹² Accordingly, even if Cantor's summary judgment motion seeking dismissal of the complaint and all cross claims against it was timely, it would have been denied.

Accordingly, it is

ORDERED that the branch of the motion (motion sequence number 004) of 242 East 25th Street Associates, LLC, 242 East 25th Street Corporation, and C. Gershon Company, Inc. (collectively, 242/Gershon) seeking summary judgment against J.E. Levine Builders, Inc. (Levine) with respect to its contractual obligation to defend and indemnify 242/Gershon is granted, and its is further

ORDERED that the branch of the motion (motion sequence number 004) of 242/Gershon seeking to vacate the Statement of

¹²Additionally, Bronzino testified that he only designed underpinning plans as to the adjacent one-story building east of the Site, and that to his knowledge, Cantor was responsible for preparing the underpinning plans for Plaintiffs' Building, which adjoins the west property line of the Site. Bronzino Deposition, at 58-63.

Readiness and the Note of Issue filed by Orchard Management, Inc. and 234-240 East 25th Street Associates, L.P. (together, Plaintiffs) is denied; and it is further

ORDERED that the cross motion for summary judgment of Levine against Golden Vale Corp. (Golden Vale) with respect to its contractual obligation to defend and indemnify Levine is denied; and it is further

ORDERED that the motion (motion sequence number 005) of Stephen B. Jacobs Group, P.C. (SJG) for an order declaring that SJG has no liability for the damages sustained by the Plaintiffs' building is granted; and it is further

DECLARED that SJG has no liability for the damages sustained by the Plaintiffs' building; and it is further

ORDERED that the motion (motion sequence number 006) of Plaintiffs seeking summary judgment against their insurer, Insurance Company of Greater New York (GNY), is granted only as to the issue of liability (i.e., insurance coverage), and not as to the issue of damages (i.e., amount recoverable), with such latter issue to be determined at trial; and it is further

ORDERED that GNY's cross motion for summary judgment on its cross claims against co-defendants 242/Gershon, Levine, Golden Vale and The Cantor Seinuk Group, Inc. (Cantor) is granted only as to the issue of liability, and not as to the issue of damages or any apportionment thereof among the co-defendants, with such

latter issue to be determined at trial; and it is further

ORDERED that the motion (motion sequence number 007) of Plaintiffs for summary judgment against 242/Gershon and Levine is granted only as to the issue of liability, and not as to the issue of damages or any apportionment thereof among the co-defendants, with such latter issue to be determined at trial; and it is further

ORDERED that the cross motion of Cantor for summary judgment dismissing Plaintiffs' complaint and all cross claims against it is denied as untimely and even if timely, the motion would have been denied; and it is further

ORDERED that Golden Vale shall be precluded from introducing evidence at trial, due to its repeated non-compliance with prior discovery orders of this court.

This constitutes the Decision and Order of the court.

Dated: April 5, 2010

ENTER:



J.S.C.

EMILY JANE GOODMAN

FILED

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