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

PRESENT: JOAN M. KENNEY J.S.C. PART 8

Justice

Index Number : 112083/2007

CHI FU, INC.

VS.

31 MONROE REALTY, LLC

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. 112083/07

MOTION DATE 8/10/10

MOTION SEQ. NO. 003

MOTION CAL. NO. 1

this motion to/for summay judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-14
2 Answering Affidavits — Exhibits X Motion was withdrawN	15-22 (23 motio
Replying Affidavits	24-27

Cross-Motion: ☒ Yes ☐ No withdrawN

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

Dated: September 10, 2010

JOAN M. KENNEY J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☒ DO NOT POST ☐ REFERENCE

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 8

----------X

Chi Fu, Inc.,

Plaintiff,

-against-

31 Monroe Realty, LLC, Morgan Construction NY, Inc. and Anflo Industries, Inc.,

Defendants.

----------X

Anflo Industries, Inc.,

Third-Party Plaintiff,

-against-

K.T. Seung, P.E. and Glen Island Construction Corp.,

Third-Party Defendants.

----------X

DECISION & ORDER
Index #: 112083/2007
Motion Date: 8/10/10
Mot Seq.: 003

Joan M. Kenney, J.:

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion for summary judgment and cross motion for an Order of preclusion/compel.

Papers	**Numbered**
Notice of Motion, Affirmation, Exhibits	1 - 14
2 Affirmations in Opposition	15 - 22
Notice of Cross Motion	23
Reply Affirmation	24 - 27

Upon the foregoing cited papers, the Decision and Order of this Motion is as follows:

Plaintiff seeks an Order, pursuant to CPLR 3212, for judgment on liability against defendants 31 Monroe Realty, LLC (31 Monroe) and Morgan Construction NY, Inc. (Morgan) (together, the Monroe Street Defendants).

The Monroe Street Defendants' cross-motion for discovery is

withdrawn in accordance with their counsels' letter dated August 9, 2010.

FACTUAL BACKGROUND

Plaintiff is the owner of a building located at 112 Madison Street, New York, N.Y. (the Building). 31 Monroe owns 31 Monroe Street, New York, N.Y., which is adjacent to the Building(the adjacent premises). Morgan was the general contractor for 31 Monroe in connection with the excavation and construction work at the adjacent premises (the construction project). Defendant/Third-party plaintiff, Anflo Industries, Inc. was a subcontractor for the excavation work for Morgan in connection with the construction project. On November 28, 2006, vibrations from the adjacent premises allegedly caused damage to the Building (see verified bill of particulars, items 1, 3).

Plaintiff alleges that, in November 2006, the excavation work for the construction project at the adjacent premises began (Man EBT, at 27). Plaintiff asserts that, in performing the excavation, defendants failed to properly shore up and adequately underpin the excavation site, resulting in damage to the Building (verified bill of particulars, items 2, 3). Plaintiff further states that the excavation was 10 to 12 feet below grade level. Plaintiff also asserts that, on or after November 28, 2006, the excavation work caused cracks in the foundation and exterior wall of the Building

and to the interiors of several apartments in the Building (*id.*, item 10; supplemental bill of particulars, items 1-11).

Plaintiff further contends that, on May 7, 2007, it entered into an agreement (the Agreement) with the Monroe Street Defendants in which they agreed that the excavation caused damage to the Building and agreed to make certain repairs (Agreement, ¶¶ 2, 5, 10). Plaintiff alleges that the Monroe Street Defendants have failed to make all the repairs (Holman affirmation, ¶ 4).

ARGUMENTS

Plaintiff claims that under the Administrative Code of the City of New York (the Code) §27-1031 [b] [1] (now Code §28-3309.4) (the Excavation Rule), the Monroe Street Defendants are liable as a matter of law, since they caused damage during an excavation to adjoining premises.

The Monroe Street Defendants assert that the Building was in poor condition prior to the construction project (Cohen affidavit, ¶ 7) and that the excavation work of concrete underpinning, as reflected in the daily project reports prepared by Morgan, stabilized the Building's rear wall and foundation (*id.*, ¶¶ 8, 11). They further allege that the alternative of removing the rubble wall would have increased the risk of cracking (*id.*, ¶ 9). They contend that the damage to the Building was not caused by the excavation, but was rather the result of preexisting conditions

including water penetration, general age, rot and prior ineffective repairs (*id.*, ¶¶ 12-15).

The Monroe Street Defendants state that plaintiff has not shown that they were negligent in the manner in which they conducted the construction project, that the Excavation Rule does not establish negligence per se, but rather is merely some evidence of negligence, and that, therefore, plaintiff has not established entitlement to judgment as a matter of law.

DISCUSSION

A party seeking summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material factual issues (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). If the movant fails to make this showing, then its motion must be denied (*id.*). Once the movant meets its burden, the opposing party must then produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]).

The Excavation Rule states, in pertinent part:

> "When an excavation is carried to a depth more than ten feet below the legally established curb level the person who causes such excavation to be made shall, at all times and at his or her own expense, preserve and protect from injury any adjoining structures, the safety of which may be affected by such part of the excavation as exceeds ten feet below the legally established curb level provided such person is afforded a license to enter and inspect the adjoining buildings and property."

The purpose of this rule is to impose a duty on a landowner or other party performing excavation work "to take adequate precautions to protect adjoining structures during the excavation" (*Cohen v Lesbian & Gay Community Servs. Ctr., Inc.*, 20 AD3d 309, 310 [1st Dept 2005]).

"[V]iolation of a State statute that imposes a specific duty constitutes negligence per se, or may even create absolute liability" (*Elliott v City of New York*, 95 NY2d 730, 734 [2001]). However, violation of a municipal ordinance or local rule is not negligence per se, but rather is merely some evidence of negligence (*id.* at 734). Violation of a municipal ordinance or local rule, therefore, is insufficient to establish entitlement to judgment as a matter of law. The Code is a local law that is not the equivalent of a state statute and, consequently, its violation is generally not negligence per se (*id.* at 735-736).

The Excavation Rule has been held to be an "unsuitable

candidate for elevation to the status of a state statute imposing per se negligence " (*Yenem Corp. v 281 Broadway Holdings*, -AD3d-, 904 NYS2d 392, 395 [1st Dept 2010]).

Plaintiff states that motions to reargue are pending in the Yenem case, which it characterizes as "incorrectly-decided" (Holman reply affirmation, ¶ 6). It also asserts that if a building's preexisting poor condition can be considered, then fewer precautions would need to be taken for such a building (*Yenem, 904* NYS2d at 406 [*Catterson, dissenting*]).

Initially, the preexisting poor condition of a building affects whether the excavation by an adjoining landowner has caused the alleged damage to the premises. If a building has preexisting poor conditions, damage may not have been caused by the excavation.

Also, excavation may have been properly conducted with appropriate and reasonable safeguards to prevent damage to adjoining premises. Damage might be caused despite a party's acting reasonably under the circumstances and, therefore, without fault.

Most significantly, stare decisis binds this court to follow Yenem, since it is the holding of an appellate court on the point of law at issue (*Matter of Midland Ins. Co.*, 71 AD3d 221, 225 [1st Dept 2010]; *Mountain View Coach Lines v Storms*, 102 AD2d 663, 664 [2nd Dept 1984]). Yenem is binding as the holding of the appellate

court in this Department.

There is no basis to find negligence per se based upon plaintiff's allegation that the Excavation Rule was violated.

Plaintiff has not presented evidence that establishes that the Monroe Street Defendants acted unreasonably in the conduct of the Reconstruction Project. The Agreement does not establish that the Monroe Street Defendants acted unreasonably in the construction project.

Moreover, the Monroe Street Defendants have produced evidence that they took appropriate and reasonable precautions to shore and brace the adjoining building during excavation and that damages were due to the Building's dilapidated condition (*see Yenem* at 397). Therefore, the Monroe Street Defendants have raised material issues of fact that preclude summary judgment and plaintiff's motion for summary judgment against them is denied. Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on liability against 31 Monroe Realty, LLC and Morgan Construction NY, Inc. is denied, in its entirety; and it is further

ORDERED, that the parties appear for their previously scheduled mediation on September 27, 2010.

Dated: September 10, 2010

ENTER:

JOAN M. KENNEY
J.S.C. J.S.C.