

B. Brages Assoc. LLC v 125 W. 21st LLC

2010 NY Slip Op 33237(U)

October 14, 2010

Supreme Court, New York County

Docket Number: 114320/09

Judge: Joan A. Madden

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SCANNED ON 11/18/2010
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Joan A. Madden
Justice

PART 11

Index Number : 114320/2009
B.BRAGES ASSOCIATES LLC
vs.
125 WEST 21ST LLC
SEQUENCE NUMBER : 001
DISMISS ACTION

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 decided in accordance with the annexed Memorandum Decision and order

FILED
NOV 17 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: October 14, 2010

[Signature]
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
NEW YORK COUNTY: PART 11

B. BRAGES ASSOCIATES LLC,
Plaintiff,

Index No.: 114320/09

- against -

DECISION/ORDER

125 WEST 21ST LLC, ALCHEMY PROPERTIES,
INC., ALCHEMY 21ST STREET LLC, ALCHEMY
15-21 LLC, FOX & FOWLE ARCHITECTS, P.C.,
SEVERUD ASSOCIATES CONSULTING ENGINEERS,
P.C., DAGHER ENGINEERING PLLC, LANGAN
ENGINEERING AND ENVIRONMENTAL SERVICES,
INC., 21ST CONSTRUCTION LLC and MRC II
CONTRACTING, INC.,

Defendants.

FILED
NOV 17 2010
NEW YORK
COUNTY CLERK'S OFFICE

MADDEN, JOAN, J.:

In this action, plaintiff B. Brages Associates LLC (Brages), the owner of a building located at 131 West 21st Street in Manhattan, sues to recover for property damage sustained as a result of construction activities (construction project) on adjacent property owned by defendant 125 West 21st LLC (defendant owner). Defendant FXFowle Architects, P.C. (FXFowle), s/h/a Fox & Fowle Architects, P.C., makes this pre-answer motion (sequence number 001), pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint or, alternatively, pursuant to CPLR 3212, for summary judgment dismissing the complaint, and any and all cross claims against it. By separate motion (sequence number 002), defendant Langan Engineering and Environmental Services, Inc. (Langan) moves, pre-answer, pursuant to CPLR 3211 (a) (1) and

(7), to dismiss the complaint as against it. Defendant Severud Associates Consulting Engineers, P.C. (Severud) also moves (sequence number 003), pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint, and/or for summary judgment, pursuant to CPLR 3212, dismissing the complaint, and any and all cross claims and counterclaims against it.¹ The above motions are consolidated for purposes of their disposition.

It is well settled that in determining a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. See CPLR 3026. 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 within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994); *see* 511 W. 232nd *Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 (2002); *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 (2001). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005); *see* *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582,

¹While Severud contends that its motion to dismiss pursuant to CPLR 3211 and 3212 is not a pre-answer motion, it failed to submit a complete set of the pleadings, including its answer, with its moving papers, as required by CPLR 3212 (a). Although Severud provided a copy of its answer on reply, the copy is unsigned and unverified, and the accompanying affidavit of service also is not signed or notarized.

591 (2005). Thus, "the court's role in a motion to dismiss is limited to determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint." *Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 (1st Dept 2002); see *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). "Further, any deficiencies in the complaint may be amplified by supplemental pleadings and other evidence." *AG Capital Funding Partners, Inc.*, 5 NY3d at 591; see *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 (1976); *Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 (1st Dept 2009). When documentary evidence is considered, dismissal is warranted "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 *Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 303 (2001); *Leon v Martinez*, 84 NY2d at 88.

The standards for summary judgment, similarly, 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 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). As courts have long observed, "[s]ince it deprives the litigant of [its] day in court, [summary judgment] is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues." *Andre v Pomeroy*, 35 NY2d 361, 364 (1974).

FXFOWLE MOTION TO DISMISS (seq. no. 001)

The instant complaint alleges that, on or about and prior to November 2, 2006, plaintiff's property, a four-story apartment building located at 131 West 21st Street, New York, New York, was damaged as a result of defendants' negligence during demolition, excavation, and construction of a building on adjoining property, located at 125 West 21st Street. As against defendant FXFowle, the architect for the construction project, the original complaint alleges that FXFowle negligently prepared drawings,

acted as contractor or subcontractor, performed excavation, demolition and construction work, failed to adequately secure plaintiff's building, failed to secure proper permits, negligently retained contractors and subcontractors, and failed to adequately supervise work, resulting in damage to plaintiff's building. See Verified Complaint, Ex. A to Rowland Aff. in Support of FXFowle's Motion to Dismiss, ¶¶ 187-211.

FXFowle moves for dismissal on the basis that it had no contractual or statutory duty with respect to the excavation, demolition and construction work that allegedly caused damage to plaintiff's property, and therefore had no duty to plaintiff. In support of its motion, FXFowle submits an affidavit from its principal, Daniel Kaplan (Kaplan), and documentary evidence, including the contract between FXFowle and defendant 125 West 21st LLC, and copies of various applications and work permits filed with the New York City Department of Buildings (DOB) in connection with the construction project. See Kaplan Aff. in Support of Motion to Dismiss; DOB Applications and Permits, Exs. E, F, G, H to Rowland Aff. in Support.

In his affidavit, Kaplan attests that, pursuant to its agreement with defendant owner, FXFowle was retained by 125 West 21st LLC solely to provide architectural services for the construction project, including preparing design drawings and specifications, and that it was not a contractor or subcontractor

on the construction project, performed no demolition, excavation or construction work, and had no obligation to retain and/or supervise the contractors who performed the construction, demolition and excavation work for the project. Kaplan Aff. in Support, ¶¶ 5-9. According to Kaplan, FXFowle was not required to prepare drawings in connection with the excavation, demolition, shoring and/or underpinning for the project (*id.*, ¶ 10), and had no contractual or statutory duty to protect adjoining properties during construction. *Id.*, ¶¶ 11, 13. Counsel for FXFowle also contends that the DOB applications and permits demonstrate that FXFowle submitted no plans or applications in connection with excavation and underpinning work during the construction project. FXFowle argues that the documentary evidence, together with sections of the New York City Building Code pertaining to the protection of adjoining properties during construction (Administrative Code of the City of New York, §§ 27-1009, 27-1031 [b] [1], 27-1026 [c]), establish, as a matter of law, that FXFowle cannot be liable for damages to plaintiff's property.

In opposition, plaintiff and defendants 125 West 21st LLC, Alchemy 21st Street LLC, and 21st Construction LLC (collectively, defendant owner)² argue that the allegations of the complaint are

²No other defendant submitted opposition to any of the instant motions. Nor is it clear on the record before the court which of the non-moving defendants, if any, have answered or otherwise appeared.

sufficient to state a cause of action against FXFowle. Plaintiff and defendant owner also argue that the motion is premature because discovery is necessary to explore issues of fact raised by documents submitted by FXFowle, including its agreement with defendant owner, as to the scope of FXFowle's responsibilities with respect to the construction project.

Plaintiff also asserts, in opposition, that it served an amended complaint, after FXFowle made its motion, which clarifies that its cause of action against FXFowle is not based on allegations that FXFowle actually engaged in any construction, demolition or excavation work, and adds allegations based on negligent design and preparation of architectural drawings and specifications, failure to supervise work, and failure to secure proper permits. See Amended Verified Complaint, Ex. A to DeSantis Aff. in Opp., ¶¶ 177-194. Plaintiff further submits an affidavit from Roberta Friedman, the managing partner of plaintiff, who attests that damage to plaintiff's property was caused not only during excavation and demolition, but as a result of other construction work. See Friedman Aff., annexed to Spitz Sur-Reply Aff.

In reply, FXFowle, while not objecting to service of the amended complaint, maintains that documentary evidence establishes its entitlement to dismissal, and submits additional documents, including drawings related to sheeting and

underpinning, additional DOB applications, and a Technical Report (TR-1) filed by another entity. See Rowland Reply Aff., Exs. A-E. FXFowle argues that these additional documents establish that it prepared no underpinning and shoring plans, completed no TR-1 forms, had no obligation to conduct controlled inspections, and obtained no permits in connection with the construction project. FXFowle further argues that, pursuant to its agreement with defendant owner, it had no obligation to engage in or supervise any construction work.

The agreement between FXFowle and defendant owner provides that FXFowle, as architect, was responsible for the preparation of drawings and specifications during the Schematic Design Phase, the Design Development Phase, and the Construction Documents Phase of the construction project (see generally AIA Standard Form of Agreement, Ex. A to Kaplan Aff., Article 2), including drawings that "establish and describe the size and character of the Project as to architectural, structural, mechanical and electrical systems, materials and other elements as may be necessary." *Id.*, § 2.3.1. The agreement also provided that FXFowle was responsible for administering the construction contract (*id.*, § 2.6.2), which included site visits "to become generally familiar with the progress and quality of the Work completed and to determine in general if the Work is being performed in a manner indicating that the Work when completed

will be in accordance with the Contract Documents." *Id.*, § 2.6.5

The agreement limited FXFowle's responsibilities by providing that:

The Architect shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions or programs in connection with the Work, since these are solely the Contractor's responsibility under the Contract for Construction. The Architect shall not be responsible for the Contractor's schedules or failure to carry out the Work in accordance with the Contract Documents. The Architect shall not have control over or charge of acts or omissions of the Contractor, Subcontractors, or their agents or employees, or of any persons performing portions of the Work.

Id., § 2.6.6.

By its terms, the agreement also required, among other things, that FXFowle review "site use and improvements; selection of materials, building systems and equipment; and methods of Project delivery" (§ 2.2.2); review "alternative approaches to design and construction of the Project" (§ 2.2.3); prepare drawings and specifications setting forth in detail the requirements for construction (§ 2.4.1); and assist the owner and construction manager in connection with filing documents required for governmental approvals (§ 2.4.5). In addition, the agreement provided that FXFowle had authority to reject work which did not conform to the contract documents, and to require additional

inspection and testing of such work (§ 2.6.10). Riders to the agreement also indicate that additional services included "[c]onducting controlled inspections" (Rider No. 1, ¶ 3 [f]); filing and assisting with filing DOB documents (Appendix A, at 2); and demolition and excavation plans and specifications and permits (Appendix B, at 13).

Thus, contrary to FXFowle's contention, neither the agreement between FXFowle and defendant owner, nor the DOB filings and other documents submitted by FXFowle, conclusively establish that the scope of FXFowle's responsibilities excluded any work related to excavation, demolition and construction work. Although FXFowle argues that the contract is unambiguous, the language of the rider and appendices regarding inspections and demolition-related work raise issues of fact as to FXFowle's actual involvement in those activities. Further, the DOB applications and permits are not self-explanatory, and are not explained or interpreted by Kaplan or any other witness. Nor is there any representation that the submitted documents are a complete set of relevant applications, work permits, or certifications filed in connection with the construction project. FXFowle asserts that it obtained no permits and filed no applications in connection with the construction project, but it fails to address documents identified by DOB as having been filed by it in connection with the construction project. See DOB

website, Buildings Information System (www.nyc.gov/html/dob/html/bis/bis.shtml) (indicating that Kaplan filed documents with DOB). Similarly, the TR-1 form, submitted on reply, does not identify who was responsible for inspecting, among other items, shoring, structural stability, or curtain wall, and raises questions as to what other TR-1s were filed in connection with the construction project, and by whom.³ See Technical Report, Ex. B to Rowland Reply Aff. The sheeting and underpinning plans also are not self-explanatory or conclusive as to the scope of FXFowle's responsibilities. See Sheeting & Underpinning Plans, Ex. A to Rowland Reply Aff.

Moreover, even if FXFowle was not actually engaged in demolition, excavation and construction work, and was not responsible for supervising or inspecting such work, an architect may be liable for negligent preparation or planning of design work. See *Kung v Zheng*, 73 AD3d 862 (2d Dept 2010); *Board of Educ. of City of N.Y. v Mars Assoc.*, 133 AD2d 800 (2d Dept 1987); *McAdam Liquors, Inc. v Senior Living Options, Inc.*, 2008 WL 2401464, 2008 NY Misc LEXIS 9173, **19-20 (Sup Ct, NY County 2008). While FXFowle argues that it prepared no plans or drawings in connection with underpinning and excavation, it

³It is not uncommon for a series of TR-1s to be filed during a construction project. See *Orchard Mgt., Inc. v Insurance Co. of Greater N. Y.*, 2010 WL 1640129, 2010 NY Misc LEXIS 1852, **16 n 7 (Sup Ct, NY County 2010).

presents no evidence to show what drawings and specifications were prepared or reviewed by it, and no evidence to show that it was not negligent in the performance of its work. See *McAdam Liquors, Inc.*, 2008 WL 2401464, 2008 NY Misc LEXIS 9173, at **22. Further, an architect's duty of professional care may extend beyond the client with whom it has a contractual relationship, to "members of a limited and foreseeable class who rely upon the architect's services being performed properly." *Id.*, 2008 WL 2401464, 2008 NY Misc LEXIS 9173, at *17, citing *Gordon v Holt*, 65 AD2d 344, 349 (4th Dept 1979); see generally *Strauss v Belle Realty Co.*, 65 NY2d 399, 402 (1985); *White v Guarente*, 43 NY2d 356, 363 (1977). That class arguably includes adjoining property owners. See *Schayes v Spier*, 2008 WL 2481830, 2008 NY Misc LEXIS 9527, **6 (Sup Ct, NY County 2008).

Accordingly, as the allegations are sufficient to assert a negligence claim against FXFowle, and documentary evidence does not conclusively establish a defense as a matter of law, FXFowle has not established its entitlement to summary judgment or to dismissal under CPLR 3211 (a) (1) or (a) (7). As issue has not been joined, summary relief is not available. See CPLR 3212 (a). In any event, at this early stage of proceedings in the case, summary judgment would be premature. Pursuant to CPLR 3212 (f), summary judgment should be denied when it appears "that facts essential to justify opposition may exist but cannot then be

stated," especially when "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 *Rodriguez v DeStefano*, 72 AD3d 926, 926 (2d Dept 2010); *Colicchio v Port Auth. of N.Y. & N.J.*, 246 AD2d 464, 465 (1st Dept 1998). Here, plaintiff has raised issues warranting discovery.

To the extent that FXFowle seeks dismissal of any cross claims, FXFowle neither identifies nor addresses any cross claims against it, and that branch of the motion also is denied.

LANGAN MOTION TO DISMISS (seq. no. 002)

Defendant Langan, which provided engineering services for the construction project, argues that the complaint fails to state a cause of action against it because it alleges only that Langan was a general contractor, contractor or subcontractor, and was negligent in performing construction, excavation or demolition work on the project. In support of its motion, Langan submits an affidavit of Alan R. Poeppel, a professional engineer and Senior Associate employed by Langan, who attests that Langan only provided geotechnical services, pursuant to a contract with defendant owner, and that plaintiff has not sustained or alleged any damages resulting from Langan's services. Langan also annexes a copy of its contract with defendant owner. See Langan Proposal for Engineering Services (Langan Agreement), Ex. 2 to

Memorandum of Langan in Support of Motion to Dismiss.

Pursuant to its agreement with defendant owner, Langan provided engineering services, which included, among other things, the preparation of geotechnical reports, including an analysis of the subsurface investigations; recommendations for foundation system, allowable bearing capacities, and estimated settlements; and recommendations for excavation support and underpinning. See Langan Agreement, at 3. The agreement further required Langan to prepare technical specifications for the foundation, including earthwork and subgrade preparation, and sheeting, shoring and underpinning. *Id.* According to the agreement, Langan also provided "controlled engineering inspection of foundation related construction, as required by the Building Code," and performed vibration monitoring. *Id.* at 4.

Thus, the contract, by its terms, raises questions as to the scope and performance of Langan's obligations with respect to excavation, construction, and inspection, and provides a basis for the claim against Langan. Further, as noted above with respect to FXFowle's motion, plaintiff served an amended complaint during the pendency of Langan's motion, which clarifies that the claims against Langan arise out of its provision of engineering services, including the preparation of geotechnical reports and supervision of construction or excavation, and alleges that plaintiff's property was damaged as a result of the

[* 6]
negligent performance of such services. See Amended Complaint, ¶¶ 225-248.

Notably, Langan submits no reply to plaintiff's opposition, and does not object or otherwise respond to the amended complaint. As the allegations of the amended complaint are sufficient to state a negligence claim against Langan, and the documentary evidence does not conclusively establish a defense against the claim, Langan's motion to dismiss is denied.

SEVERUD MOTION TO DISMISS (seq. no. 003)

Defendant Severud was hired by defendant owner as the structural engineer for the construction project. Severud moves to dismiss the complaint, and any and all cross claims and counterclaims against it, on the ground that it was hired solely to design the structural components of the building, and had no contractual or statutory duty with respect to the construction, demolition, excavation and/or underpinning work which allegedly caused damage to plaintiff's property. Severud argues that the complaint fails to state a cause action because it incorrectly alleges that Severud performed construction, demolition and excavation work, and fails to allege that Severud negligently designed the project or that any damage to plaintiff's property resulted from any alleged negligent design. In support of its motion, Severud submits an affidavit of Ahmad S. Ardebili, the Senior Associate at Severud, and documentary evidence, including

its agreement with defendant owner, and copies of documents filed with DOB in connection with the construction project.

According to Ardebili, Severud was hired solely to design the structural components of the building, which included the footing, columns, girders, beams and slabs, and also was responsible for calculating the gravity load and/or the weight the building would be able to sustain. Ardebili Aff., ¶ 5. Ardebili also asserts that Severud had no responsibility for protecting plaintiff's property, did not engage in any construction, demolition, excavation or underpinning work on the construction project, and was not a general contractor, contractor or subcontractor. *Id.*, ¶¶ 4-7. Ardebili further attests that Severud's agreement with defendant owner expressly excluded any control over or responsibility for the means and methods of construction, and any services in connection with shoring, sheeting or underpinning (*id.*, ¶¶ 8-11); and that Severud was not required to, and did not, prepare any drawings in connection with excavation or demolition for the project. *Id.*, ¶ 12.

In opposition, plaintiff submits a second amended complaint, served after Severud made its motion, which withdraws allegations that Severud performed demolition, excavation, and construction work, and acted as a general contractor, contractor or subcontractor on the construction project. The second amended

complaint adds allegations that Severud provided structural engineering services, including the preparation and review of design documents regarding the structural components for the building to be constructed, and that plaintiff's property was damaged as a result of Severud's negligence in providing such engineering services. See Second Amended Verified Complaint, Ex. A to DeSantis Aff. in Opp., ¶¶ 199-216.

Severud argues that the amended complaint and second amended complaint are "null and void" under CPLR 3025, because they were served without leave, "after the expiration of the time to respond." Singer Reply Aff., ¶ 2. While plaintiff contends that the amended complaints were served as of right, it also, in the alternative, requests leave of court to deem the amended and second amended complaints timely served.

CPLR 3025 (a) provides that "[a] party may amend [its] pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." Under CPLR 3211 (f), however, "[s]ervice of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order." Thus, service of a pre-answer motion to dismiss also extends the time

in which a plaintiff can amend the complaint as of right. See *Johnson v Spence*, 286 AD2d 481, 483 (2d Dept 2001); *STS Mgt Dev. v New York State Dept. of Taxation & Fin.*, 254 AD2d 409, 410 (2d Dept 1998). There is some authority that a second amended complaint served before defendants have answered an amended complaint may also be served as of right under CPLR 3025 (a). See *Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 403, 406 (2d Dept 2009); *Connolly v Napoli Kaiser & Bern LLP*, 2010 WL 2642704, 2010 NY Misc LEXIS 2772, **3-4 (Sup Ct, NY County 2010).

Here, plaintiff served the first amended complaint on February 17, 2010, and the second amended complaint on March 18, 2010, while the motions of FXFowle, Langan, and Severud were pending. Both FXFowle and Langan moved to dismiss, pursuant to CPLR 3211 (a), prior to answering the complaint. As defendants' motions extended their time to answer, plaintiff was not required to obtain leave of court before serving the amended complaint, as least with respect to defendants FXFowle and Langan. See *Johnson v Spence*, 286 AD2d 481, *supra*; *STS Mgt Dev., Inc. v New York State Dept. of Taxation & Fin.*, 254 AD2d 409, *supra*.

Severud, however, asserts that it served an answer on December 10, 2009. Even assuming that the amended complaint and second amended complaint were not served as of right with respect to Severud, it is well settled that leave to amend a pleading should be freely given by the court in the absence of prejudice

or surprise. CPLR 3025 (b); *McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755 (1983); see also *Amaro v Gani Realty Corp.*, 60 AD3d 491, 493 (1st Dept 2009) (court properly granted leave to amend complaint requested in opposition to motion to dismiss, dispensing with motion to amend). In addition, the merits of a proposed amended pleading should not be decided unless the pleading is "palpably insufficient or clearly devoid of merit." *MBIA Ins. Corp. v Greystone & Co.*, 74 AD3d 499, (1st Dept 2010); see *Thomas Crimmins Contr. Co. v City of New York*, 74 NY2d 166 (1989); *Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 366 (1st Dept 2007).

The court finds that no prejudice or surprise would accrue to Severud, as the circumstances giving rise to the claim, the parties involved, and theory of liability are set out in the original complaint. The second amended complaint withdraws some factual allegations and adds allegations that Severud negligently performed engineering services, including preparation of structural designs and plans, which resulted in damage to plaintiff's property. Plaintiff also submits an affidavit from its managing partner to amplify the pleadings, and she alleges, relying in part on a report of an engineer who inspected plaintiff's building, that damage to the building occurred not only as a result of excavation work, but also during other construction work.

Viewing the pleadings and the evidence in the light most favorable to plaintiff, the allegations of the second amended complaint are sufficient to state a cause of action against Severud. Nor does Severud's documentary evidence eliminate triable issues of fact as to the scope of its responsibilities as structural engineer on the construction project. Severud's agreement with defendant owner provides that Severud's services included, among other responsibilities, preparation of structural designs and calculations, signing and sealing DOB forms prepared by others, and "drawings and specifications that set forth in detail the requirements for the construction of the structural component of the project." See Jan. 2005 Proposal, Ex. B to Singer Aff. in Support. A later proposal submitted by Severud, which indicates that it will provide controlled inspection for the project, although not for subgrade for footing, foundation piers and foundation walls, is unsigned and raises issues of fact as to Severud's responsibilities for controlled inspections. See Jan. 2006 Proposal, Ex. C to Singer Aff. in Support.

Severud accordingly has not established its entitlement to dismissal of the complaint, pursuant to either CPLR 3211 or CPLR 3212. As issues of fact are raised by Severud's documents, and considering that plaintiff has not had an opportunity to conduct discovery, summary judgment also should be denied as premature. See *Rodriguez v DeStefano*, 72 AD3d 926, *supra*; *Colicchio v Port*

Auth. of N.Y. & N.J., 246 AD2d 464, *supra*; *Baron v Incorporated Vil. of Freeport*, 143 AD2d 792, *supra*. The branch of Severud's motion seeking dismissal of all cross claims and counterclaims also is denied, as Severud does not address, or even identify, any cross claims or counterclaims against it.

Accordingly, it is

ORDERED that the motions of defendants Fox & Fowle Architects, PC (seq. no. 001), Langan Engineering and Environmental Services, Inc. (seq. no. 002), and Severud Associates Consulting Engineers, P.C. (seq. no. 003), are denied; and it is further

ORDERED that the second amended complaint is deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that defendants are directed to serve an answer to the second amended complaint within 30 days of the date of this decision, a copy of which is being mailed to counsel by my chambers; and it is further

ORDERED that a preliminary conference shall be held in Part 11, room 351, 60 Centre Street, New York, NY, on December 2, 2010 at 9:30 am.

Dated: October 14, 2010

J.S.C.

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