

**Wing Wong Realty Corp. v Flintlock Constr. Servs.,
LLC**

2011 NY Slip Op 30525(U)

February 7, 2011

Supreme Court, New York County

Docket Number: 101323/05

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

WING WONG REALTY CORP.,
Plaintiff,

Index No.: 101323/05

- v -

Motion Date: 11/6/09

FLINTLOCK CONSTRUCTION SERVICES, LLC,
WELL-COME HOLDINGS, LLC., VERSATILE
CONSULTING & TESTING SERVICES, INC.,
ROMAN SOROKKO, JOHN S. DEERKOSKI, P.E. &
ASSOCIATES, and/or DEERKOSKI ENGINEERING,
P.C. and DIAMOND POINT EXCAVATION CORP.,
Defendants.

Motion Seq. No.: 06

Motion Cal. No.: _____

VERSATILE CONSULTING & TESTING SERVICES,
INC., and ROMAN SOROKKO,
Third-Party Plaintiffs,

Third-Party
Index No.: 590334/08

- v -

R.A. CONSULTANTS, LLC, ROBERT ALPERSTEIN,
P.E., and THORNTON TOMASETTI,
Third-Party Defendants.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

The following papers, numbered 1 to 5 were read on these motions for summary judgment.

FILED

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

FEB 10 2011

PAPERS NUMBERED	
1	_____
2, 3	_____
4, 5	_____

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers,

Motion sequences 6 and 8 are hereby consolidated for
disposition.

In this action it is claimed that plaintiff Wing Wong Realty
Corporation's (Wing Wong) building was damaged as a result of

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

excavation, shoring and underpinning work conducted in connection with an adjacent building project. Third-party defendants, R.A. Consultants, LLC, and its principal, Robert Alperstein, P.E. (together, Alperstein) (Motion Sequence No. 8), and Thornton Tomasetti (Tomasetti) (Motion Sequence No. 6) move for an order dismissing the third-party action commenced against them by defendants/third-party plaintiffs Roman Sorokko and the company for which he worked, and of which he was its sole shareholder, Versatile Consulting & Testing Services, Inc. (together, Sorokko), and dismissing all cross claims.

Well-Come Holdings, LLC (Well-Come) decided to construct a building with an underground parking garage on a lot which it owned, which was adjacent to several other buildings owned by others, including Wing Wong. Well-Come retained a geotechnical (soil) engineer, Alperstein, who, in order to determine the nature of the building site's soil, conducted boring tests, which resulted in the issuance of a report. Alperstein made recommendations for the foundation of Well-Come's building and for temporary lateral support systems, and developed underpinning design criteria for the adjacent structures, in order to protect them. Pursuant to a March 6, 2004 proposal, Alperstein was to consult with Well-Come's design/construction team to evaluate the contractor's proposed lateral support and underpinning systems. The design team included Well-Come, Flintlock Construction

Services, LLC (Flintlock), Alperstein, Tomasetti, and the building's designer, Peter F. Poon Architect, P.C. (Poon), which was hired by Well-Come. Poon retained structural engineer Tomasetti to design the building's superstructure and foundation.

Tomasetti's contract with Poon provided that the scope of services relating to underpinning was not included within its scope of services, that the underpinning design was to be performed by an engineer retained by the contractor, that such engineer was to monitor conditions before and during the underpinning operation, and that the owner's geotechnical engineer was required to inspect the underpinnings. In addition, Tomasetti was required to review, approve or take other action on the contractors' submittals, including shop drawings, "but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents." Tomasetti contractually agreed, for an additional fee, to provide further consulting services relating to work outside the scope of its required contractual work.

Tomasetti prepared blueprints, which indicated that the contractor was required to have its engineer design shoring and underpinning. Tomasetti's principal, Narinder Chhabra (Chhabra), signed a TR-1 Statement of Responsibility form, for filing with the New York City Department of Buildings (DOB), indicating that

[* 4]

it took responsibility for controlled inspections of underpinnings and shoring. In a covering letter to Poon, Chhabra advised that Tomasetti was not responsible for any controlled inspections set forth in the form, and that it would withdraw its responsibility as soon as the owner retained an agency for that purpose.

Meanwhile, Well-Come hired Flintlock, as its general contractor. Flintlock retained subcontractor Diamond Point Excavating Corporation (Diamond), pursuant to an informal letter agreement (with Flintlock's formal standard AIA contract to follow¹), to perform, among other things, underpinning, bracing, and foundation and excavation work needed on the project. Diamond was to submit specifications for its own work, which was to be designed by a professional engineer it retained.

Diamond then retained Sorokko, allegedly pursuant to an oral agreement, to design the work Diamond was to perform. Sorokko submitted to the DOB its signed and sealed plans and a TR-1, indicating its responsibility for controlled inspections in connection with shoring and underpinning operations. Both Roman Sorokko and David Lo, Diamond's supervisor on the job who left its employ in 2006, testified at their depositions that Sorokko

¹ The formal contract was allegedly sent to Diamond long after it commenced its work and was evidently never signed by Diamond.

was retained by Diamond to create the designs, but was not retained to do controlled inspections.

The excavation and underpinning on the adjacent buildings proceeded and allegedly resulted in extensive damage to Wing Wong's building, which damage was first discovered in about July 2004, and continued throughout the construction of Well-Come's building. New York City's Buildings Department ultimately required Wing Wong's building to be vacated, finding that the damage posed a danger to the safety and lives of the occupants.

Flintlock terminated its contract with Diamond for allegedly causing damage to the adjoining buildings. That termination resulted in the removal of Sorokko. Flintlock then hired nonparty Duramax Construction Corporation to replace Diamond, and John S. Deerkoski, P.E. & Associates and/or Deerkoski Engineering, P.C. (together, Deerkoski) to replace Sorokko.

Wing Wong commenced this action for property damage and lost rental income against Deerkoski, Flintlock, Well-Come, Diamond and Sorokko, and thereafter served an amended complaint. The amended complaint against Sorokko asserted causes of action sounding in strict liability for the alleged violations of Title 27 of the Administrative Code of the City of New York (Administrative Code), principally Administrative Code § 27-1031 (b) (1), which imposes liability regardless of the degree of care exercised. Post v Kerwin, 133 App Div 404 (2d Dept 1909); Victor

A. Harder Realty & Construction Co. v City of New York, 64 NYS2d 310, 320 (Sup Ct, NY County 1946). Specifically, it was claimed that Sorokko contracted to perform underpinning, shoring, excavation, inspection and design services, that the excavation was to be carried to a depth greater than 10 feet, that Sorokko and its agents and employees were required to take steps to protect the adjacent structures, that they failed to take the necessary steps and that, as a result, Wing Wong's building was damaged. The other causes of action asserted against the Sorokko defendants sound in negligence, and claim that they were negligent "in failing to . . . properly supervise, design, oversee, inspect and/or conduct the excavation work."

Sorokko then commenced a third-party action against Tomasetti and Alperstein. The third-party complaint alleges that if Wing Wong was injured, it was the result of the third-party defendants' negligence, breach of contract, or statutory/regulatory violations, and effectively asserts claims for contribution and common-law indemnity against them, based on allegations that, although Sorokko designed the underpinning drawings, they were "revised, modified, and thoroughly changed by third-party defendants," and that one or both of the third-party defendants "issued directives to the underpinning contractor(s) that varied from or were not part of the specifications contained in the drawings."

* 7]

The third-party defendants now move for an order granting them summary judgment dismissing this action as to them. Alperstein asserts that they are entitled to summary judgment because, as part of their geotechnical services, they reviewed the underpinning and lateral support drawings provided by Sorokko, spoke to Roman Sorokko, and simply made recommendations and suggestions. Alperstein further claims that they had no duty to perform controlled inspections, or to be on the site on a daily basis. Alperstein maintains that it was Sorokko which had the duty to design the underpinnings, as reflected by the fact that Sorokko signed the TR-1.

Alperstein's motion is supported by the affidavit of its expert engineer, Rudolph Frizzi (Frizzi), who opines, based on Alperstein's foregoing assertions, that Alperstein acted in accordance with good and accepted engineering practices. Frizzi also concurs with opinions given by Robert Alperstein in one memorandum, that "most" of the problems were due to incompetent management by Flintlock or improper construction procedures, and in another memorandum, that Flintlock's and Diamond's choice not to use grouting and to use three-foot-high cuts caused settlement and cracking. Then, Frizzi conclusorily asserts that Alperstein's actions were not a cause of Wing Wong's injuries.

Alperstein further maintains that a claim for contractual indemnity will not lie, since there was no contractual

* 8]

relationship between it and Sorokko, and that common-law indemnity will not lie where the party seeking indemnification has participated to some degree in the alleged wrongdoing. On the issue of contribution, Alperstein asserts that a party cannot seek contribution from another if what is being sought is purely economic loss due to a breach of a contractual obligation.

Alperstein's indemnity and contribution arguments are also urged by Tomasetti. In addition, Tomasetti maintains that it limited its engineering services to those related to the new building's foundation and superstructure design, and had no duty to perform controlled inspections with respect to the underpinning and shoring of the adjacent structures. Tomasetti claims that it only signed the TR-1 to expedite the issuance of a building permit, and was then replaced for that purpose by Sorokko, as reflected by the fact that Roman Sorokko thereafter signed another TR-1. Chhabra adds that it played no role in design services provided by co-third-party defendant, Alperstein, and maintains that any documentation that may have been sent to him by Alperstein was done merely as a courtesy.

Sorokko opposes the motions. Roman Sorokko claims that neither he nor his firm had any duty to perform controlled inspections, and that he so advised David Lo, when Diamond retained his firm. Sorokko observes that Tomasetti never

formally withdrew its responsibility to conduct controlled inspections.

Sorokko also offers Chhabra's deposition transcript in opposition to the motions. At his deposition, Chhabra, while first claiming that his firm did not review any of Sorokko's drawings, thereafter claimed that his firm had no duty to review any of Sorokko's plans, except to make sure that none of the underpinnings would impinge on the new building, and that he never concluded that the adjacent buildings impacted on the construction of the new building. He further testified that any review of drawings on the project was done by his then employee, Pawan Gupta (Gupta). Chhabra also testified that he had no conversations with Robert Alperstein, including conversations regarding the shoring and underpinning plans, and that he never had a conversation with any other engineer on the project.

Sorokko notes that Tomasetti's Shop Drawing Log shows that multiple documents from Sorokko were submitted to Tomasetti and were reviewed by Gupta, and that the actions taken by Tomasetti included "exceptions noted," "revise and resubmit," and "rejected." Also, Robert Alperstein testified that he had conversations with Chhabra, who allegedly commented negatively about Sorokko's drawings. Sorokko also pointed to a memo sent by Chhabra/Gupta to the Poon firm, indicating that they had Sorokko's underpinning drawings with review comments by Robert

Alperstein, and that in order to review structural items, Tomasetti needed certain calculations.

Also submitted in opposition to the motions is Roman Sorokko's deposition in which he claimed that he was at a meeting with Tomasetti, Alperstein, and Lo; was informed that everything he did had to be submitted to Alperstein and Tomasetti; that if they had any comments, he had to incorporate them into his drawings and resubmit them; and that once they were done with their comments, he could submit the final plans to the DOB. Sorokko testified that he received his plans back from Tomasetti and Alperstein with comments from both, which were incorporated into the design.

Sorokko maintains that the case law relied upon by movants regarding purely economic loss in a breach of contract case is inapposite, because Wing Wong was not suing for breach of contract, but was rather suing for property damage as a result of negligence and under principles of strict liability based on violations of the Administrative Code. Sorokko asserts that there are issues raised by the evidence as to Tomasetti's and Alperstein's involvement in the design process, which require the denial of summary judgment as to the third-party defendants. Sorokko observes that contribution will lie in the event that it is found liable to Wing Wong and one or both of the third-party defendants are found to have contributed to the injury of Wing

Wong's property. Sorokko claims that common-law indemnity would apply if a design defect were found to have stemmed from a revision to the plans made by a third-party defendant.

In reply, Tomasetti and Alperstein assert, among other things, that Sorokko's papers are inadequate because they do not include an expert's affidavit.

The law is well settled that the movant on a summary judgment application bears the initial burden of prima facie establishing its entitlement to the requested relief, by eliminating all material allegations raised by the pleadings. Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Winegrad v New York University Medical Center, 64 NY2d 851 (1985); Kuri v Bhattacharya, 44 AD3d 718 (2d Dept 2007). The failure to do so mandates the denial of the application, "regardless of the sufficiency of the opposing papers." Winegrad, 64 NY2d at 853. However, where the movant demonstrates its prima facie entitlement to summary judgment, the burden shifts to the other side to raise a material triable issue of fact warranting the motion's denial. Alvarez v Prospect Hospital, 68 NY2d at 324.

Initially, it should be noted that the third-party complaint does not purport to assert a claim for contractual indemnity, presumably because the third-party plaintiff and third-party defendants had no contractual relationship, and Sorokko does not claim on this motion that they are entitled to contractual

indemnity. Also, movants' reliance on case law to the effect that contribution and indemnity will not lie where the action seeks recovery of solely economic loss, as a result of a contractual breach (see e.g. Board of Education of Hudson City School District v Sargent, Webster, Crenshaw & Folley, 71 NY2d 21 [1987]; Lawrence Development Corp. v Jobin Waterproofing, Inc., 186 AD2d 634 [2d Dept 1992]), is misplaced, since Wing Wong has asserted negligence and strict liability claims to recoup damages for its injured property, not a breach of contract claim.

Common-law, or implied indemnity, often arises in cases where vicarious liability is involved, and "is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other." Mas v Two Bridges Associates, 75 NY2d 680, 690 (1990). In general, it is available to a party held liable by operation of law because of that party's relationship to the "actual wrongdoer." Ibid. This includes parties who are held liable under provisions of law imposing absolute liability, which liability does not necessitate a finding of negligence. Id. at 689; Godoy v Abamaster of Miami, Inc., 302 AD2d 57 (2d Dept 2003). Where a party is held liable only because of another's negligence, indemnity applies. Fox v County of Nassau, 183 AD2d 746, 747 (2d Dept 1992).

Contribution applies where two or more parties "are subject to liability for damages for the same . . . injury to property." CPLR 1401. "[I]n contribution, the tort-feasors responsible for plaintiff's loss share liability for it. Since they are in pari delicto, their common liability . . . is apportioned and each tort-feasor pays his ratable part of the loss." Mas v Two Bridges Associates, 75 NY2d at 689-690. "[C]ontribution is available whether or not the culpable parties are allegedly liable for the injury under the same or different theories, and the remedy may be invoked against concurrent, successive, independent, alternative and even intentional tortfeasors." Raquet v Braun, 90 NY2d 177, 183 (1997) (internal citations and quotation marks omitted). For contribution to apply, there need not be an agreement "between or among the wrongdoers." Fox v County of Nassau, 183 AD2d at 747, citing Siegel, NY Prac § 169.

"Whether apportionment or common-law indemnity should be applied . . . requires a careful analysis of the theory of recovery against each tort-feasor." Guzman v Haven Plaza Housing Development Fund Company, Inc., 69 NY2d 559, 568 (1987); Fox v County of Nassau, 183 AD2d at 747. However, a party's right to contribution and common-law indemnity is not necessarily mutually exclusive. Mas v Two Bridges Associates, 75 NY2d at 680.

On this record, the court holds that there are issues of fact warranting the denial of summary judgment dismissing the

third-party complaint as to Alperstein. While Alperstein seeks to present its role as having offered mere suggestions and recommendations to Sorokko, Robert Alperstein's deposition testimony suggests otherwise. He testified that it was his job to evaluate the contractor's proposed lateral support and underpinning systems. He further testified as to his review of Sorokko's drawings, and that such review resulted in his comments and objections disapproving drawings and requesting revised resubmittals. It was Robert Alperstein's understanding that, until Sorokko's drawings were approved, evidently by Alperstein's firm, no underpinning work would be done. Also, Sorokko's deposition testimony supports his claim that he was required to include Alperstein's comments in Sorokko's plans.

No evidence was offered by Alperstein or Frizzi as to the propriety of each of the requested revisions, whether such requested revisions were simply to insure compliance with Alperstein's design criteria, or whether any requested revision resulted in damage to Wing Wong's building, so as to prima facie eliminate this claim raised by the third-party complaint. Frizzi's conclusory opinion on the lack of causation is unavailing. Moreover, Frizzi's reliance on certain memos issued by Alperstein to establish a lack of causation is unwarranted, since those memos did not eliminate Alperstein as a cause of injury. Further, Alperstein did not address the pleadings'

allegation that Alperstein directed the contractor's workers to deviate from the plans. Hence there is evidence that Alperstein undertook drilling and caused certain excavations to be made to the land for the purpose of protecting Wing Wong's land that imposed a further duty upon Alperstein to provide the appropriate lateral supports. Gordon v Automobile Club of America, 180 AD2d 927 (1st Dept 1917); Kimberly-Clark Corp. v. Power Authority, 35 AD2d 330 (4th Dept 1970).

Alperstein's motion to dismiss Sorokko's contribution claim against it is likewise denied. While there is no specific claim in Wing Wong's amended complaint that Sorokko was liable for the acts and omissions of anyone other than its own employees and agents, there is evidence that supports Wing Wong's claims sounding in strict liability, based on the wrongdoing of others, without any negligence on Sorokko's part. Such evidence includes the records that tend to show that Alperstein imposed certain revisions upon Sorokko that were outside of Sorokko's expertise, but within the expertise of Alperstein, as a geotechnical engineer. Until there is a determination whether such revisions were negligent, Alperstein's motion to dismiss Sorokko's common-law indemnity claim is premature and must be denied at this juncture in the action.

Here, while Tomasetti's contract provided that underpinning was to be designed by the contractor's engineer, and that

Tomasetti was to review plans for the limited purpose of checking their conformance with the design concept set forth in the contract documents, it also provided that Tomasetti, for an extra fee, could provide additional services. While Chhabra testified that Sorokko's drawings were reviewed only to ensure that they did not impinge on the new building, he further testified that he never concluded that they did. If this is true, then there is no explanation for the entries in Tomasetti's Shop Drawing Log, requiring revisions and resubmissions, which Log was not addressed in Tomasetti's reply papers by Gupta, who reviewed the drawings for Tomasetti, or by Chhabra.

Also, there are inconsistencies between Chhabra's and Robert Alperstein's deposition testimony regarding whether they had discussions about Sorokko's plans and Tomasetti's role. Alperstein asserted at his deposition that Chhabra and he agreed as to the inadequacy of Sorokko's original underpinning designs and that they "did not satisfy the principle of statics." Alperstein also testified that he believed that during the conversations he had with Chhabra regarding the underpinning design drawings, Chhabra "was going to make some comments." Alperstein thought that Tomasetti's role regarding the underpinning or shoring of adjacent buildings was similar to Alperstein's "from a structural point of view," and believed that Tomasetti also reviewed the underpinning drawings. In addition,

Tomasetti's claims conflict with Roman Sorokko's deposition testimony.

Tomasetti has offered no expert testimony as to causation and does not specifically address the central allegations of the third-party complaint about what it allegedly did; rather, it simply and vaguely discussed what its duties were and were not. That it may not have had a duty to conduct controlled inspections² is irrelevant, since the third-party complaint's claim regarding Tomasetti modifying the designs does not relate to controlled inspections, nor does the claim that Tomasetti directed the workers to take actions contrary to the plans necessarily relate to controlled inspections. Thus, Tomasetti's motion to dismiss the contribution claim shall be denied.

Furthermore, in the absence of a trial, the motion to dismiss the common-law indemnity claim is denied as premature since it is possible that Tomasetti may be found to have been negligent in connection with the plan designs that Sorokko approved (see Administrative Code § 27-724, "details of underpinning, ... bracing, or other constructions required for the support of adjacent properties or buildings shall be shown on

² That a firm signed and sealed plans does not necessarily require that firm to conduct controlled inspections. See Administrative Code § 27-132 (controlled inspections are required to be made by or under the supervision of an engineer retained by or for the owner, which engineer must be or must be acceptable to the engineer who prepared or supervised the plan's preparation).

the plans or prepared in the form of shop or detail drawings and shall be approved by the . . . engineer who prepared the plans").

Accordingly, it is

ORDERED that the motions of Thornton Tomasetti and of Robert Alperstein and R.A. Consultants, LLC for an order granting them summary judgment dismissing the third-party action and all cross claims are denied.

This is the decision and order of the court.

Dated: February 7, 2011

ENTER:

Debra A. James
J.S.C.
DEBRA A. JAMES
J.S.C.

FILED

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