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

PRESENT: HON. PAUL WOOTEN Justice PART 7

PUBLIC SERVICE MUTUAL INSURANCE COMPANY a/s/o LEONARD ASSOCIATES, LLC,

Plaintiff,

- against-

341-347 BROADWAY, LLC, 343 BROADWAY PROPERTIES, LLC, LEVIEV BOYMELGREEN DEVELOPERS LLC, BOYMELGREEN DEVELOPERS, INC., 88 LEONARD STREET, LLC, TISHMAN CONSTRUCTION CORPORATION, URBAN FOUNDATION COMPANY, INC., URBAN FOUNDATION/ ENGINEERING, LLC,

Defendants.

INDEX NO. 105886/2009

MOTION DATE

MOTION SEQ. NO. 002

The following papers were read on this motion for summary judgment, pursuant to CPLR 3212.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ■ Yes ☐ No

Motion sequence numbers 002 and 003 are hereby consolidated for disposition.

Defendants Urban Foundation Company, Inc. (UFCO) and Urban Foundation/ Engineering, LLC (UFE) (together as Urban Defendants) move for summary judgment in their favor dismissing the complaint as against them (Mot. Seq. 002). Defendants Leviev Boymelgreen Developers LLC, Boymelgreen Developers, Inc., and 88 Leonard Street, LLC (together as Boymelgreen Defendants) cross-move for summary judgment in their favor dismissing the complaint as against them. Defendants 341-347 Broadway, LLC, 343 Broadway Properties, LLC, and Tishman Construction Corporation (Tishman) (together as Broadway Defendants) move for summary judgment in their favor dismissing the complaint as against

them (Mot. Seq. 003). Plaintiff Public Service Mutual Insurance Company a/s/o Leonard Associates, LLC (Plaintiff) opposes both motions and the cross motion.

Factual Background

Plaintiff insured real property at 78-80-82 Leonard Street, New York County (the Insured Property), owned by Leonard Associates, LLC (the Landlord). As a result of construction activity at 88 Leonard Street (the Construction Site), the Insured Property sustained damages and Plaintiff paid its policyholder $434,538. The Urban Defendants were hired to construct a new building at the Construction Site and Tishman was engaged as construction manager. The other defendants variously owned and/or managed portions of the Construction Site, where now a 21-story apartment building stands.

On April 27, 2009, Plaintiff commenced the instant action asserting causes of action as against all defendants for negligence and violation of municipal, state and/or federal regulations (Complaint attached as Ex. A to Mot. Seq. 002). The Insured Property is a five-story residential building, with a health club occupying the first floor, a basement and a sub-basement. It was built in 1861 and has landmark status. The verified bill of particulars charged, among other items, damage to the front and rear facades, the exterior wall and slab in the basement, door and window frames, interior floors, brick masonry, and cornice sections of the roof where there was no pre-existing damage (Ex. E attached to Mot. Seq. 002, ¶ 4). It states that "the property damage was caused on or about October 5, 2006, or in the time period immediately before such date" (*Id.*, ¶ 1).

Legal Standards

"Subrogation, an equitable doctrine, allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse" (*Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d 654, 660 [1997]).

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-*

Stephenson v Waisman, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact'" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Urban Defendants state, in the first prong of their summary judgment motion, that UFCO should be dismissed as a defendant, because it is only the prior name of UFE used from 1965 to 1986, and UFCO has not performed construction work since 1986. They gave notice of this to the other parties on September 1, 2009, attaching an affidavit to this effect from Harriet Bilofsky, UFE's risk manager, employed by the company since 1967 (Ex. F attached to Mot. Seq. 002).[1] Their letter also asked the other parties to execute a notice of discontinuance. In response, Plaintiff asked for written confirmation of UFCO's status, in a letter dated January 6, 2010 (Ex. L attached to Mot. Seq. 002). Tishman refused to discontinue against UFCO, by a letter dated January 8, 2010, because the New York State Division of Corporations listed UFCO as an active company (Ex. M attached to Mot. Seq. 002). When Plaintiff received a copy of Tishman's letter, it too refused to agree to UFCO's discontinuance, in a letter dated January 19, 2010 (Ex. O attached to Mot. Seq. 002). Receipt of a copy of UFE's contract with Tishman, naming UFE alone as the contractor for the construction project, did not change Plaintiff's and Tishman's position (Ex. N attached to Mot. Seq. 002).

In its opposition to the motions and cross motion for summary judgment, Plaintiff does not address the issue of UFCO's status, although it generally claims that the motions and cross motion are premature due to lack of discovery. The Boymelgreen Defendants and the

[1]Bilofsky Aff. also attached as Ex. K to Mot. Seq. 002.

Broadway Defendants are also silent on the issue in their respective applications for summary judgment. Under these circumstances, the first prong of Urban Defendants' motion is granted and the complaint as against UFCO is dismissed.

Urban Defendants argue, in the second prong of their motion for summary judgment, that Plaintiff did not commence this action within the applicable three-year statute of limitations for "an action to recover damages for an injury to property"[2] (CPLR 214 [4]). They claim that UFE began work at the Construction Site, pursuant to its contract with Tishman, in October 2004 and "was substantially completed with its work in January 2006" (Clark Aff., ¶ 23). They submit approximately 200 daily work logs, dated October 18, 2004 to January 20, 2006, for the project (Ex. S attached to Mot. Seq. 002).

A law firm representing Leonard Worth Associates LLC (LWA), the "net lessee of the premises 80 Leonard Street," wrote 341-347 Broadway, LLC, and Boymelgreen Developers, Inc., with a copy to Tishman, on February 18, 2005, asserting that, according to LWA's engineer, "your work may have disturbed support for said wall [east wall at 80 Leonard Street]" (Ex. U attached to Mot. Seq. 002). This purported initial notice was more than four years before the instant action commenced. LWA is an "Extended Named Insured" on Plaintiff's policy (Ex. E attached to Mot. Seq. 002), and is included in the signed subrogation agreement, dated April 17, 2009, assigning all the policyholders' rights for the property damage claim of $434,538 to Plaintiff (Ex. T attached to Mot. Seq. 002).

On March 6, 2005, still more than four years before the instant action commenced, the Landlord's counsel informed 341-347 Broadway, LLC, and Boymelgreen Developers, Inc., that their proposed work "threaten[s] the stability of our client's building . . . [and their] drilling activity adjacent to our client's East wall . . . is now causing flooding into our client's building" (Ex. V attached to Mot. Seq. 002). On July 14, 2005, more than three and a half years before the

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[2]The Boymelgreen Defendants' cross motion adopts and incorporates the Urban Defendants' arguments regarding the statute of limitations and the Broadway Defendants' motion (Mot. Seq. 003) parallels them.

instant action commenced, Tishman wrote to UFE that Kenneth Sferazza, manager of the health club on the first floor, informed Tishman that settlement of the building caused damage "to interior finishes, cracking of ceilings/walls, racking of doors" (Ex. W attached to Mot. Seq. 002). The letter also referred to previously-discussed "glass issues" and "the water flooding issue."

The Urban Defendants submit an affidavit from Sferazza, in which he states that, based on his personal recollection, "all damage to that portion of 80 Leonard Street leased to [the health club] which is the subject of this lawsuit, occurred while the adjacent foundation work for 88 Leonard Street was occurring in 2004-2005." Additionally, Sferazza states that he "notified the owners of 80 Leonard Street in 2004-2005, Leonard Associates LLC, about damage to that portion of 80 Leonard Street leased to [the health club] while the foundation work at 88 Leonard Street was occurring 2004-2005."

Finally, the Urban Defendants provide a copy of a letter to LWA from Feld, Kaminetzky & Cohen, P.C. (the Engineering Firm), dated September 12, 2006 (Ex. Q attached to Mot. Seq. 002). The Engineering Firm was engaged by LWA to review the existing structural conditions of the Insured Property in light of the adjacent construction activity. The Engineering Firm visited the Insured Property on August 30, 2006, which it describes as "a follow-up visit," and made several observations, including:

- Shifting of a second-floor facade keystone by two inches.
- Crack in the interior mezzanine plaster.
- Cracks in the SE corner masonry wall.
- Shifting window frames in SE corner.
- Cracks in the swimming pool.
- Cracks in the health club's floors.

The Urban Defendants contend that Plaintiff's claim, in the verified bill of particulars, that the damages occurred "on or about October 5, 2006" is contradicted by this letter. LWA apparently acted many weeks before that date to have a professional inspection of the damaged premises.

LWA's letter of February 18, 2005 offered predictions that may have come true, but did

not offer evidence of tangible harm. The Landlord's letter of March 6, 2005 cites physical damage to the Insured Property by flooding, but this was not the damage for which Plaintiff compensated its policyholder.

Tishman knew of allegations regarding damage in or around the health club "to interior finishes, cracking of ceilings/walls, racking of doors" by July 14, 2005, when it wrote to UFE. This comports with Sferazza's current recollections of the effect of construction on the Insured Property, which he conveyed to Tishman at the time. Tishman's July 14, 2005 letter also spoke of "issues not relating to the foundation" outlined in a "previous letter," a document which never surfaced. This leaves the impression that issues relating to the foundation had been encountered, in addition to those specified. On this basis, the negligence cause of action would have accrued no later than July 14, 2005, and the statute of limitations had lapsed when the action commenced. However, the Tishman letter, and its author, Richard S. Ortiz, in an affidavit submitted in support of the Broadway Defendants' motion, do not offer evidence of damage to the facade or parts of the Insured Property outside the confines of the health club.

Plaintiff argues that there is no evidence to support Sferazza's allegation that he, or anyone else, advised the Landlord of damage to the Insured Property as early as Sferazza claims he observed it during construction in 2004-2005. The damage Sferazza reported to Tishman, described in the letter of July 14, 2005, was confined to the health club's premises, according to Plaintiff, an area not covered by Plaintiff's policy. It is undisputed that Tishman eventually paid the health club for its damages, without involving the Landlord or Plaintiff. Something more than Sferazza's word is needed to conclude that there is no factual dispute about the timing of notice to the Landlord of the physical damage to the Insured Property that Plaintiff later paid to repair. His affidavit addresses "damage to that portion of 80 Leonard Street leased to [the health club]," not any other part of the Insured Property's interior or exterior.

Plaintiff submits the affidavit of Louis V. Greco, Jr., the Landlord's managing member

(Ex. B attached to Byoun Affirm). Greco distinguishes the health club's damages from the Landlord's, the subject of the instant action. The health club suffered damages that mostly "appeared to be the result of large amounts of water used in drilling through soil and bedrock over a period of months" (Greco Aff., ¶ 4). Damage to the Insured Property "consists of extensive structural damage to the facade and residential upper floors and roof" (*Id.*, ¶ 7). He states, somewhat awkwardly, that the Landlord "was notified of the aforementioned property damage to the facade and upper residential floors beginning until about June, 2006" (*Id.*, ¶ 9). Plaintiff relies on the June 2006 date as the accrual date of the action (Byoun Affirm., ¶ 11). According to Greco, the Landlord made its claim to Plaintiff in August 2006. Plaintiff concludes that this action, commenced on April 27, 2009, is timely.

Plaintiff ignores LWA's letter, of February 18, 2005, which warned those involved in the construction project of anticipated "claim, damage, personal injury, cost, or expense," because of their choice not to underpin "the east wall at 80 Leonard Street." The letter advised several defendants that, according to LWA's engineer, "your work may have disturbed support for said wall." It also asks, somewhat opaquely, "whether your self-initiated review of the work done, by the health club tenant has revealed anything but as described in the Building Department record."

LWA, the net lessee of the Insured Property and an Extended Named Insured under Plaintiff's policy, was on notice of the harm threatened by the construction project next door, as of February 18, 2005, and, in turn, served notice on those responsible for the construction by its letter of that date. However, the letter is not evidence of manifest damage to the Insured Property which is a necessary element for establishing the accrual date of the property damage claim (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993] ["as a general proposition, a tort cause of action cannot accrue until an injury is sustained. That, rather than the wrongful act of defendant or discovery of the injury by plaintiff, is the relevant date for marking accrual"] [citations omitted]; *Mark v Eshkar*, 194 AD2d 356, 357 [1st Dept 1993] ["this cause of action

accrued in 1989, when the new structural cracks appeared," not when the shoddy construction occurred]).

Therefore, the second prong of the Urban Defendants' motion, the Boymelgreen Defendants' cross motion and the Broadway Defendants' motion for summary judgment shall be denied.

Accordingly, it is,

Motion Sequence 002

ORDERED that the first prong of the motion for summary judgment by defendants Urban Foundation Company, Inc. and Urban Foundation/ Engineering, LLC is granted and the complaint as against Urban Foundation Company, Inc. is dismissed, and the Clerk is directed to enter judgment accordingly; it is further,

ORDERED that the second prong of the motion for summary judgment by defendants Urban Foundation Company, Inc. and Urban Foundation/ Engineering, LLC is denied; it is further,

ORDERED that the cross motion for summary judgment by defendants Leviev Boymelgreen Developers LLC, Boymelgreen Developers, Inc., and 88 Leonard Street, LLC is denied; it is further,

Motion Sequence 003

ORDERED that the motion for summary judgment by defendants 341-347 Broadway, LLC, 343 Broadway Properties, LLC, and Tishman Construction Corporation is denied.

This constitutes the Decision and Order of the Court.

Dated: June 23, 2011

Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**