[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Saliann Scarpulla Justice

PART 19

Index Number : 603257/2007

8930 SUTPHIN

VS.

WEST END CONSTRUCTION

SEQUENCE NUMBER : 011

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

otion to/for _____

_____ No(s). _____

_____ No(s). _____

_____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated 1/9/12
which disposes of motion sequence(s) no.
001, 011, 012, 013, 014, 015, 016

FILED

JAN 12 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1/9/12

Saliann Scarpulla J.S.C.
SALIANN SCARPULLA

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

----------X

8930 SUTPHIN BLVD. LLC,

Plaintiff,

Index No.: 603257/2007

-against-

WEST END CONSTRUCTION CORP., MARINO BROS. INDUSTRIES, INC., S.I. GENERAL CONSTRUCTION CORP., H & H BUILDERS, INC., A-1 TESTING LABORATORIES, INC., STRUCTURAL ENGINEERING TECHNOLOGIES, P.C., VALENTINO ASSOCIATES and RICHARD KASPARIAN,

DECISION AND ORDER

Defendants.

----------X

HARLEYSVILLE WORCESTER INSURANCE COMPANYa/s/o TOLIS PROPERTY ASSOCIATES, LLC and TOLIS PROPERTY ASSOCIATES, LLC,

Plaintiffs,

-against-

8930 SUTPHIN BOULEVARD, LLC, ACHS MANAGEMENT CORP., WEST END CONSTRUCTION (#2) INC., CORP., WEST END CONSTRUCTION GROUP OF NEW YORK, INC., MARINO BROS. INDUSTRIES, INC., S.I. GENERAL CONSTRUCTION CORP., H & H BUILDERS, INC., A-1 TESTING LABORATORIES, INC., STRUCTURAL ENGINEERING TECHNOLOGIES, P.C., VALENTINO ASSOCIATES and RICHARD KASPARIAN,

Defendants.

----------X

CAPITAL WIDE MATTRESS & FURNITURE WAREHOUSE CORP., and NEW SHAMPOO UNI-SEX HAIR SALON, CORP.,

Plaintiffs,

-against-

WEST END CONSTRUCTION CORP., 8930 SUTPHIN BOULEVARD, LLC, S.I. CONSTRUCTION CORP., S.I. GENERAL CONSTRUCTION CORP. and S.I. CONSTRUCTION, INC.,

Defendants,

----------X

8930 SUTPHIN BOULEVARD, LLC,

Third-Party Plaintiff,

-against-

H & H BUILDERS, INC., A-1 TESTING LABORATORIES, INC., STRUCTURAL ENGINEERING TECHNOLOGIES, P.C. and MARINO BROS. INDUSTRIES, INC.,

Third-Party Defendants,

----------X

TRUMBULL INSURANCE COMPANY a/s/o HARSHA MEHTA, DDS, P.C.

Index No.: 111889/2007

Plaintiff,

-against-

8930 SUTPHIN BOULEVARD, LLC, ACHS MANAGEMENT CORP., WEST END CONSTRUCTION (#2) INC., CORP.,

WEST END CONSTRUCTION GROUP OF NEW YORK, INC., MARINO BROS. INDUSTRIES, INC., S.I. GENERAL CONSTRUCTION CORP., H & H BUILDERS, INC., A-1 TESTING LABORATORIES, INC., STRUCTURAL ENGINEERING TECHNOLOGIES, P.C., VALENTINO ASSOCIATES and RICHARD KASPARIAN,

Defendants.

----------X

HARSHA D. MEHTA DENTIST, P.C.,

Plaintiff,

Index No.: 116951/2009

-against-

8930 SUTPHIN BOULEVARD, LLC, ACHS MANAGEMENT CORP., WEST END CONSTRUCTION GROUP OF NEW YORK, INC., MARINO BROS. INDUSTRIES, INC., S.I. GENERAL CONSTRUCTION CORP., S.I. CONSTRUCTION, INC., H & H BUILDERS, INC., A-1 TESTING LABORATORIES, INC., STRUCTURAL ENGINEERING TECHNOLOGIES, P.C., VALENTINO ASSOCIATES and RICHARD KASPARIAN,

Defendants.

----------X

SALIANN SCARPULLA, J.:

These five actions arise from the August 30, 2007 partial collapse of a building located at 90-02 Sutphin Blvd.[1] Tolis Properties Associates, LLP ("Tolis") owns 90-02

[1] There were previously additional actions, however, these five remain, and they have been consolidated for joint discovery.

Sutphin Blvd ("Tolis Building"). The Tolis Building collapsed due to a loss of lateral support allegedly caused by adjacent construction, underpinning and/or excavation activity taking place at 89-36 Sutphin Blvd. Plaintiff 8930 Sutphin Blvd. ("8930")[2], the owner of 89-36 Sutphin Blvd., initiated the first action, seeking to recover costs for the damages to its construction site. The Tolis Building and Harleysville Worcester Insurance Company a/s/o Tolis Property Associates, LLC ("Harleysville"), which is the Tolis Building's insurer, also initiated an action in an attempt to recover for damage to the Tolis Building. Harleysville's action is a subrogation claim to recover the money it paid to Tolis as a result of the collapse. Another action was initiated by Capitalwide Mattress & Furniture Warehouse Corp. ("Capitalwide"), New Shampoo Uni-Sex Hair Salon Corp. ("New Shampoo") and Harsha D. Mehta Dentist, P.C. ("Mehta"). These plaintiffs were tenants in the Tolis Building and are seeking to recover for alleged property and loss of business damages. Trumbull Insurance Company a/s/o Harsha Mehta D.D.S., P.C. ("Trumbull") initiated a subrogation action to recover the money it paid to Mehta. Mehta herself initiated another action in an attempt to recover property and business loss damages. Motions with sequence numbers 011, 012, 013, 014, 015, 016 and 001 are hereby consolidated for disposition.

[2] 8930 appears as a plaintiff in Index No.: 603257/2007, while it is a defendant in Index Numbers 111889/2007 and 116951/2009. As its arguments depend on its status, depending on whether it is a plaintiff or a defendant, the court will make the distinction between plaintiff 8930 and defendant 8930 where necessary.

In motion sequence number 011, Tolis and Harleysville move, pursuant to CPLR 3212, for an order granting summary judgment against defendants 8930 and H & H Builders, Inc. ("H & H"). 8930 cross-moves seeking summary judgment against H & H, and adopts the same arguments as stated by the parties in motion sequence 011.

In motion sequence 012, Marino Bros. Industries, Inc. ("Marino") moves, pursuant to CPLR 3212, for an order dismissing all claims and cross claims against it. Marino also moves, pursuant to CPLR 602 (a), for a joint trial.

In motion sequence 013, defendants 8930 and ACHS Management seek partial summary judgment dismissing various portions of the plaintiffs Capitalwide, Mehta, New Shampoo and Trumbull's actions. They also want to prevent plaintiffs Tolis and Capitalwide from claiming damages in excess of what these plaintiffs claimed as losses in their tax returns.

Defendants A-1 Testing Laboratories, Inc. ("A-1"), Richard Kasparian ("Kasparian"), H & H, and Structural Engineering Technologies, P.C. ("Structural Engineering") cross-move for the identical relief as sought in motion sequence 013. Tenants Capitalwide, New Shampoo and Mehta cross-move for partial summary judgment on the issue of liability against defendants 8930 and H & H.

In motion sequence 014, Valentino Associates ("Valentino") moves, pursuant to CPLR 3212, for summary judgment dismissing any direct and cross claims asserted

against it, with prejudice, and conditionally granting Valentino summary judgment on its cross claim against 8930 for contractual indemnification.

In motion sequence 015, Valentino seeks summary judgment dismissing various portions of the plaintiffs Capitalwide, Mehta, New Shampoo and Trumbull's actions, and also wants to prevent plaintiffs Tolis and Capitalwide from claiming damages in excess of what these plaintiffs claimed as losses in their tax returns.

In motion sequence number 016, A-1 and Kasparian move, pursuant to CPLR 3212, for an order granting summary judgment dismissing all of plaintiffs' claims, as well as any cross claims and third-party claims asserted against them. They also seek to join defendant 8930's motion seeking to limit plaintiffs' claims. A-1 and Kasparian further move for a consolidated trial.

In motion sequence 001, Trumbull moves, pursuant to CPLR 3212, for an order granting partial summary judgment as to liability in favor of Trumbull and against defendants 8930 and H & H.

BACKGROUND AND FACTUAL ALLEGATIONS

8930 was seeking to construct a three-story commercial building at 89-36 Sutphin Blvd ("the site"). Prior to construction, the site was a vacant lot. 8930 hired H & H as its construction manager, Valentino as its architect, and West End Construction Corp. ("West End") as its contractor to perform excavation, underpinning, shoring and foundation work. A-1 was hired to survey and test the soil, and Structural Engineering

was hired as an engineer on the project. West End subcontracted with Marino to perform excavation and shoring at the construction site, and contracted with S.I. General Construction Corp., ("S.I.") to perform underpinning work.

Valentino, the architect, was hired by 8930 to prepare and design construction drawings for the proposed building. Valentino alleges that it had "no responsibility for the structural design of the new building, or for designing the underpinning" and that these responsibilities were those of Structural Engineering. The contract between 8930 and Valentino provides the following, in pertinent part, with respect to Valentino's construction obligations:

> Valentino Associates shall not have control or charge of, and shall not be responsible for, construction or construction means, methods, techniques, sequences or procedures for safety precautions and programs in connection with the work or for acts or omissions of the Contractor, Subcontractors, or any other persons performing any of the work, or for the failure of any of them to carry out the work in accordance with Contract Documents.

The indemnification provision in the contract provides that 8930 shall indemnify Valentino for any claims arising from 8930's or its contractors' negligence. However, pursuant to the contract, Valentino is liable for the claims which arise out of Valentino's own negligence.

In August 2008, plaintiff 8930 settled with Valentino, and 8930's claims were discontinued via settlement against Valentino, with prejudice, and without costs to either party as against the other. The settlement agreement also indicates that the counterclaim

asserted by Valentino in its November 17, 2007 answer "is also discontinued with prejudice and without costs to either party as against the other."

In October 2010, Valentino settled with Harleysville and Tolis. Both of these plaintiffs acknowledged in their stipulation of settlement that they "likely do not have standing to recover as against [Valentino]," and that Valentino "did not actively or otherwise cause or contribute to any of their damages herein." The settlement further provides that all claims are to be discontinued as against Valentino with prejudice and without costs to any party as against another.

A-1 states that it "provides construction industry-related services to cement and soil testing to owners, contractors, architects and engineers." A-1 retained Kasparian as its consulting engineer to provide engineering services for 8930. Shazad Khan ("Khan"), the president of A-1, claims that A-1 had a "limited role" in the construction project and did not perform any of the construction work. 8930 signed two proposals that are presented by A-1. The first proposal consists of six services that were to be provided by A-1 to 8930. Apparently five out of these six services were provided to 8930, and they consisted of the following:

1. Technician to install crack monitoring device
2. Crack monitoring device [installation]
3. Technician to perform periodic reading of crack monitoring devices
4. Professional engineer's existing and adjacent structure analysis on existing garages (our engineer will visit site to perform visual inspection and document all existing cracks & defects to structure prior to construction activities. He will also make recommendation if required to monitor all existing problems).

5. Professional engineer to design shoring

The second proposal, consisting of inspection services, indicated that A-1 would be responsible for engineering services for the new building to be erected. These services were never provided since the new building was never constructed.

A-1 maintains that it did not agree to provide any designs for underpinning, "to supervise any construction work, or to perform any controlled inspections of any underpinning work." Moreover, A-1 claims that 8930 never even mentioned to it when the underpinning or shoring was to actually start. An inspection for shoring was apparently done and initialed by Kasparian on the Technical Report Statement of Responsibility that had to be filed with the Department of Buildings ("DOB"). Structural Engineering initialed the Technical Report, indicating that it is responsible for the inspection of the underpinning. West End's contract with 8930 also included that West End would be responsible for "all required permits, testing, inspections and sign-offs."

At least 12 feet was excavated underneath and next to the Tolis Building, and underpins were placed there to support it.

On June 28, 2007, in connection with the proposed construction, 8930 sent Tolis a letter in which 8930 agreed to, in pertinent part

> indemnify, defend and hold harmless Tolis Properties Associates LLC. ... from and against all losses, damages, claims and costs whether incurred or paid, on account of liability, death, injury, damage or loss to persons ... or property, in any way arising out of or connected with the performance of the work or the use by contractor or its employees, agents ... or equipment furnished or owned by Tolis ... . [8930] agrees to pay all costs and expenses

> incurred or paid by Tolis Property Associates LLC, or their affiliates on account of being charged with such liability, death, injury, loss or damage, including attorneys' fees and court costs in the defense or preparations of the defense against such charges, even if such claim or suit is groundless, false or fraudulent.

Pursuant to a contract dated June 14, 2007, West End hired Marino to perform shoring and excavation work at the site. The contract provides the following, in pertinent part:

> [Marino] is responsible for the following relating to the above Worksite:
> 1. Excavation and removal of dirt and sand from the Worksite;
> 2. Shoring four walls at the work site.
> Payments to be made to [Marino] by [West End]

Marino states that, although it was hired to perform excavation work for the project, it did not excavate any dirt from within 15 feet of the Tolis Building. Marino claims that another party excavated that area. Marino was not hired to perform any underpinning work. Marino additionally states that it provided the shoring work along the east and west borders of the site, but that there is no evidence that the shoring work contributed to the partial collapse. Marino also contends that it was not working on the day of the collapse, due to a payment dispute with West End.

Pursuant to a memo dated August 20, 2007, H & H agreed to be hired as 8930's construction manager for the project. Kenneth Hart ("Hart"), the owner of H & H, testified that, initially, H & H was writing the contracts between the owner and the subcontractors, such as the one between 8930 and West End. Hart testified that he was at the construction site about a week before the collapse, and that he noticed that West End

was "trying to underpin the underpinning." Hart continued that the underpin put in by West End was too short. Then Hart advised West End to stop working and "[p]ut dirt against the wall and let's have the engineers come here and tell you how because the pins you put in are too short." Hart claims that West End then attempted to fix the underpinnings and "that's what caused the collapse."

When asked why Hart did not simply shut down the job site to wait for the engineer after he noticed errors, Hart stated, "[i]n retrospect that's what I should have done. I said the words, but I didn't – I said, put dirt against the wall and leave it alone until Tuesday, when the holiday was over." Hart was hired after the building had already been underpinned and he testified that the underpinning could have been safely done.

Hart further testified that Valentino was at the site three days before the collapse. However, Hart believed that it was A-1 who was responsible for performing controlled inspections of the underpinning work, not Valentino. Hart conceded that he should have put a supervisor at the site prior to the collapse who also would have had the authority to stop the work. Hart explained that, if he had provided a supervisor on site who made sure that the dirt stayed against the wall, the collapse would not have occurred.

On August 30, 2007, the underpins that had been constructed under the Tolis Building allegedly failed, and this led to the collapse of the Tolis Building into the excavated areas of the site. The north wall of the Tolis Building collapsed at the south side of the site. After the collapse, the Environment Control Board of the City of New

York ("ECB") issued four violations to 8930. The first was for violating Administrative Code § 27-201 on August 30, 2007, the date of the collapse, and was described as "work contrary to approved department of buildings plans & application." On October 30, 2007, a hearing was held in front of an administrative law judge where 8930 "admitted the violation." 8930 was fined $500.00 and paid this fine.

The second was for violating Administrative Code § 27-1031, with a violation date of August 30, 2007, and stated the following:

> Failure to protect adjoining structures during excavation operations
> Notes: failure to protect adjoining structures during excavation operations noted at south side (left) approximately ninety feet long section wall collapsed due to undermining of underpinning ... .

A hearing was held on October 30, 2007 concerning this violation. 8930 admitted the violation, and was fined $1000.00, which it paid.

The third was for violating Administrative Code § 27-201, with a violation date of August 30, 2007, and was described as "work contrary to approved department of building plans & applications." A hearing was held on October 30, 2007. 8930 admitted the violation, and was fined $500.00, which it paid.

The final violation was for violating Administrative Code § 27-1032, with a violation date of August 30, 2007, and was described as the following:

> Failure to provide protection at sides of excavation.
> Notes: failure to provide protection at side of excavation noted at westside (rear) soldier & lagging leaning & out of plumb. Shoring is leaning inward into site causing earth to shift from under rear properties ... .

8930 did not appeal these violations.

As a result of the collapse, the DOB determined that the entire Tolis Building needed to be demolished. As a result of the demolition, Tolis had to terminate the leases with its tenants.

Structural Engineering was retained by ACHS Management to try and determine the cause of the collapse. Stuart Gold (Gold), a professional engineer, issued a report dated October 18, 2007, which stated that the cause of the collapse was an undersized concrete underpin. Structural Engineering's report also blamed the collapse on possible errors of other agents, including the engineers themselves. Gold writes the following, in pertinent part:

> Our assessment of the design process exposes conflicting information. The underpins placed were a single row of 6 foot in height, where the plans required 2 rows of 5 foot each. If the appropriate due diligence was performed, the plans should have contained the existing footing thickness of at the very least a minimum required thickness of the proposed underpin. By delineating on the plans to match the existing footing thickness, these plans became to [sic] generic and may not have given the contractor the proper and necessary direction to complete the required work.

Mehta, a dentist, was a tenant in the Tolis Building who allegedly sustained damages as a result of the collapse. Mehta's complaint states that, as a result of the defendants' negligence, she sustained business and property losses, and that she was forced to move to a less favorable location as a result. Trumbull insured Mehta, and paid her $162,108.00 in lost earnings as a result of the collapse. During her deposition testimony on November 11, 2010, Mehta testified that her license to practice dentistry

was suspended from December 26, 2007 until June 26, 2008. Mehta had been convicted of attempted grand larceny in the 4th degree. Apparently Mehta did not return to complete her deposition on December 15, 2010. She then withdrew her claims for lost earnings, since, as surmised by defendants, her lost earnings were based on the suspension of her license, and not the building collapse.

On December 15, 2010, the court issued an order precluding Mehta from testifying at trial and precluding her from "offering any documents or evidence at trial that Dr. Mehta took part in preparing." The order further directed Mehta's office manager to be produced as a witness, and also instructed Mehta to produce the documents requested during discovery. Mehta has not produced this witness, nor has she produced the outstanding discovery.

In action one, plaintiff 8930 alleges in its complaint that the contractors performed construction work in an improper manner, resulting in damages in excess of $1,600,000.00. Specifically, plaintiff 8930 claims that its contractors performed, among other work, underpinning and excavating work, in a negligent manner, resulting in damages. Additionally, plaintiff 8930 also alleges that West End, S.I. and Marino violated the Administrative Code by failing to take proper precautions with respect to excavation and underpinning at plaintiff's premises, and also at the neighboring property. The complaint states, in pertinent part, "these defendants failed to safeguard the property,

failed to temporary [sic] support soil and or property adjacent to plaintiff's, failed to install proper materials to shore up property adjacent to plaintiff's."

DISCUSSION

I. Summary Judgment:

"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 A.D.3d 303, 306 (1st Dept. 2007), citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 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 A.D.3d 535, 545 (1st Dept. 2008), quoting *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In considering a summary judgment motion, evidence should be "viewed in the light most favorable to the opponent of the motion." *Id.* at 544, citing *Marine Midland Bank, N.A. v. Dino & Artie's Automatic Transmission Co.*, 168 A.D.2d 610 (2d Dept. 1990). The function of the court is one of issue finding, not issue determination. *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 630 (1997).

MOTION SEQUENCE 011

Tolis and Harleysville's complaint against 8930, H & H and the other defendants, alleges four causes of action. Tolis claims that it sustained over $4 million in damages as

a result of the collapse, and Harleysville has already paid the insurance benefit in the amount of $1,209,188.00, as required by the insurance policy. Tolis and Harleysville now move, pursuant to CPLR 3212, for partial summary judgment against 8930 and H & H in their claims for negligence and failure to provide lateral support.

a. Tolis and Harleysville's Motion for Partial Summary Judgment Against 8930

Tolis and Harleysville's complaint alleges that, as "a direct and proximate result of the negligence of [8930 and H & H]" they sustained damages. They argue that 8930 had a nondelegable duty as owner to take precautions to prevent damage to adjacent property during excavation. As previously mentioned, they claim that both 8930 and H & H admitted to negligence in 8930's complaint and in Hart's testimony, and that the ECB has already determined that 8930 was negligent.

Tolis and Harleysville also refer to the report completed by Structural Engineering, which concluded that an undersized concrete underpinning was the cause of the collapse. Tolis and Harleysville provide an expert affidavit from Mark Cipolone ("Cipolone"), a professional engineer. Cipolone concludes that "the failed underpins caused portions of the Building to collapse into the area that had been excavated next to the Building." He states that the Tolis Building could have been properly underpinned and then would not have collapsed, if the "owner, architect, construction manager, engineers and contractors responsible for excavation and underpinning had performed their work in a manner consistent with acceptable industry standards" and the Administrative Code.

As previously discussed, in the original action, plaintiff 8930 alleged that the contractor defendants were negligent in that they violated provisions of the Administrative Code, which required them to take precautions with underpinning and excavating on neighboring property.

However, when Tolis and Harleysville commenced an action against 8930, 8930, as defendant, represented by different counsel, claimed that the Tolis building could not be properly underpinned due to the building's dilapidated condition. Defendant 8930 argues that a question of fact remains to preclude summary judgment in favor of Tolis and Harleysville, among other parties, since Tolis allegedly failed to maintain the building, which resulted in water damage to the walls, ceilings and structure of the building. Defendant 8930 provides testimony from the owner of West End, who testified that the Tolis building was not structurally sound, even before work was started. Defendant 8930 also provides testimony from tenants in the Tolis building, who claim that the roof used to leak, and that the landlord never inspected the building.

The elements required to prove a cause of action in negligence are: "the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and that the breach was a proximate cause of the plaintiff's injury." *Demshick v. Community Management Housing Corp.*, 34 A.D.3d 518, 519 (2d Dept. 2006).

Administrative Code of the City of New York § 27-1031 (b) (1) (since repealed), now codified in Administrative Code § 28-3309.4 (*see also* Administrative Code § 28-

3309.4.1) imposes liability on an owner and contractor for damage to adjacent structures caused by major excavation. It states:

> 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.

As set forth in *Cohen v. Lesbian and Gay Community Services Center, Inc.* (20 A.D.3d 309, 310 [1st Dept. 2005]), "[t]he duty under the statute is intended to apply to the activities during the excavation process and to any damages suffered by the adjoining owner proximately resulting from the excavator's failure to take adequate precaution to protect adjoining structures during the excavation." Accordingly, as the owner, 8930 had a duty to Tolis to ensure that the Tolis Building was protected during excavation.

8930 breached this duty to Tolis, as the evidence demonstrates that it was negligent by failing to protect adjacent structures from damage. The ECB found that 8930 violated Administrative Code § 27-1031 in that it failed to protect adjacent structures from damage, and also found that 8930 failed to provide protection at the sides of the excavation. The ECB stated in one of the violations that the wall collapsed due to undermining of underpinning. 8930 did not appeal these violations and paid the fines.

Although a violation of a municipal rule, like Administrative Code § 27-1031, does not constitute a finding of per se negligence, it is some evidence of negligence.

Elliott v. City of New York, 95 N.Y.2d 730, 734 (2001). Other expert sources also indicated that 8930 was negligent in its underpinning and excavating work. For instance, Hart testified that the Tolis building was not properly underpinned. Gold, who plaintiff 8930 intends to call as a witness, also confirmed that conclusion in his report that he wrote on behalf of Structural Engineering.

With respect to proximate cause, the record demonstrates that 8930's failure to properly underpin was the direct cause of the damage to the Tolis Building. As set forth by Tolis and Harleysville, 8930 concedes in its complaint that the actions of its contractors were negligent. Evidence, such as the report from Structural Engineering, Hart's testimony, and the record, demonstrate that the Tolis Building collapsed as a result of failed underpinning and Administrative Code violations.

In opposition, defendant 8930 contends that the Tolis Building was in such disrepair that the underpinning would have failed regardless of any precautions taken by the contractors. It claims that the Tolis Building was not structurally sound even before 8930 began construction. Martin Fradua ("Fradua"), a professional engineer, submits an expert affidavit on 8930's behalf in which he contends that the Tolis Building was in such a dilapidated condition that it would not have been possible for defendant 8930 to "adequately protect the structural stability of the building." Fradua claims to have based this statement on testimony from the tenants, who apparently witnessed water damage,

testimony from the Tolis deposition, pictures of the building, and Tolis's failure to comply with various New York City Department of Buildings Codes.

Fradua also advises that the Tolis Building, among other things, had extensions put on without approval from the Department of Buildings which compromised the structural integrity of the Building, and also had two decades of water damage. However, then Fradua explains in a footnote the following:

> Alternatively, if the ultimate finder of fact declares that the building could have been properly underpinned then the structural failure relates to certain acts or omissions of the various contractors as outlined in my expert witness exchange dated January 6, 2011. Nonetheless, such opinions are only offered in the alternative as my primary opinion is that the Tolis property was not structurally sound enough to be properly underpinned.

Citing the Appellate Division, First Department, defendant 8930 argues that:

> [S]ummary disposition [is] precluded where a trier of fact might find that defendants undertook all necessary precautions to shore and brace the adjoining building, the excavation work was performed without negligence and damage was solely attributable to the building's dilapidated condition and the excessive forces exerted upon its foundation due to earlier backfilling.

Yenem Corporation v. 281 Broadway Holdings, 76 A.D.3d 225, 232 (1st Dept. 2010).

Defendant 8930 correctly argues that summary judgment may be precluded if the damages were solely due to the Tolis Building's dilapidated condition. However, the present situation is not comparable to the one cited to in *Yenem Corporation v. 281 Broadway Holdings*, *supra*. The record in the present case merely notes that defendant 8930 and its agents noticed that the Building was not structurally sound. However there

is no indication that they "took any necessary precautions to shore and brace" the Tolis Building. Moreover, the work was not performed without any negligence since, according to Hart, the pins placed were too short.

Tolis allowed 8930 to remove soil that provided lateral support to its building, and then to install underpins, with the understanding that 8930 would take precautions to make sure that excavating, shoring and underpinning work would be done safely. It was the responsibility of the contractors to determine whether any special circumstances arose with respect to the Tolis Building's underpinning, and whether, due to its condition, it could be underpinned at all. If the contractors had allegedly foreseen that the Building was in bad condition, and noticed that the exterior wall was allegedly rotted, the underpinning and/or excavating work should not have proceeded. There is no indication that 8930 took any precaution to protect the Tolis Building. In fact, the record indicates that the underpinning work continued after Hart noticed a problem with it, despite directions to stop. As such, defendant 8930 breached its statutory duty to take adequate precautions.

The Court of Appeals has held that "[w]here the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is insufficient to withstand summary judgment." *Diaz v New York Downtown Hospital*, 99 N.Y.2d 542, 544 (2002); *see also Romano v. Stanley*, 90 N.Y.2d 444, 452 (1997) (although expert's technical or scientific basis not required as

part of the direct case, expert's affidavit to defeat summary judgment "must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered alone at trial, support a verdict in the proponent's favor"). Noticeably, Fradua's affidavit does not provide any detailed explanation of how these conditions, and not faulty underpinning, caused the Building to partially collapse. Moreover, as noted by Tolis and Harleysville, Fradua's affidavit conflicts with plaintiff 8930's complaint, which alleges that the contractors were negligent. Fradua even provides conflicting testimony within his own affidavit, explaining how if one theory fails, he is prepared to testify about another.

Accordingly, since no question of fact remains with respect to defendant 8930's negligence, Tolis and Harleysville are granted summary judgment on their claims for negligence and failure to provide lateral support.

Since questions of fact remain with respect to the amount of Tolis's damages, the request for damages is denied at this time, and damages will be assessed at trial.

b. Tolis and Harleysville's Motion for Partial Summary Judgment Against H & H

H & H was neither the owner, contractor or excavator, so it is not subject to nondelegable duties under the Administrative Code. All of the cases presented by Tolis and Harleysville in support of their motion deal with general contractors and their nondelegable duties, even if the general contractor did not perform the excavation or underpinning work.

Even if H & H, who is the construction manager, could somehow be construed as a general contractor, Tolis and Harleysville would be unable to prove the third element of negligence: that H & H's negligent acts proximately caused the partial collapse of the Tolis building.

Hart testified that he should have shut down the work site when he saw problems with the underpinning and that he should have provided supervisors on site. However, Hart also testified that he directed West End to stop working until an engineer could come on site and assess the situation. When West End allegedly ignored this directive, the underpinning failed and the Tolis Building collapsed. Had West End stopped working, it is possible that the building would not have collapsed. Gold also wrote in his report that West End may not have been given the proper direction by the engineers to complete the work. As such, although Hart admitted that H & H may have been negligent in some ways, there are issues of fact as to whether or not H & H's negligence was the proximate cause of Tolis's damages.

It is well settled that "the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his [or her] day in court [internal quotation marks and citations omitted]." *Chemical Bank v. West 95th Street Development Corporation,* 161 A.D.2d 218, 219 (1st Dept. 1990). Moreover, "where conflicting evidence is presented that would support various inferences, the issue

of proximate cause is properly a question of fact for the jury to decide." *Demshik v. Community Management Housing Corp.*, 34 A.D.3d at 521.

Accordingly Tolis and Harleysville's motion for partial summary judgment against H & H for liability, is denied.

Cross Motion of Plaintiff 8930 Against H & H

Plaintiff 8930 cross-moves for partial summary judgment against H & H, and adopts all of the arguments set forth in motion sequence 011, which is Tolis and Harleysville's motion for partial summary judgment against H & H. As previously discussed, giving the benefit of all reasonable inferences to H & H, 8930 is unable to establish that H & H's actions were the proximate cause of its damages. As such, plaintiff 8930's motion for partial summary judgment is denied.

MOTION SEQUENCE 012

Marino moves for summary judgment dismissing all claims and cross claims against it. Marino provided shoring and excavating work at the construction site. Marino claims that, because it did not excavate within 15 feet of the Tolis Building, its excavating work could not be the cause of the collapse. Marino also notes that shoring work was not alleged to be a cause of the collapse.

Marino has reached settlement agreements with plaintiff 8930, Harleysville, Tolis and Trumbull. Despite the fact that some of the plaintiffs have settled with Marino, Marino has not addressed these plaintiffs' allegations regarding the shoring work and the

excavating work. Pursuant to its contract with West End, Marino was responsible for excavation and removal of dirt and sand from the worksite. Although Marino claims to have been at least 15 feet away from the Tolis Building, it does not submit any evidence demonstrating how this distance could not make an impact on the soil around the Tolis Building. Failure of the proponent of the motion for summary judgment to make a prima facie showing of entitlement of judgment as a matter of law still "requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 (1985).

With respect to plaintiff 8930's claim for negligent shoring, A-1 has alleged in response to Marino's motion that Marino did not comply with A-1's proposals for the shoring. Marino did not refute A-1's allegations about not complying with A-1's plans. Marino merely states that, "there is no evidence that the shoring work contributed to the collapse."

Some of the parties have filed cross claims against Marino for contractual indemnification. As Marino properly argues, no defendant can establish a claim for contractual indemnification against Marino. *See e.g. Leiner v. F. Schumacher & Co.*, 78 A.D.3d 1131, 1132 (2d Dept. 2010) ("[s]ince there was no contract between GVA Williams and Schumacher, ... we award summary judgment to Schumacher dismissing GVA Williams's cross claim for contractual indemnification asserted against it").

West End was the only party that Marino contracted with, and the contract did not

contain an indemnification provision. As such, any contractual indemnification cross claims fail.

However, as issues of fact remain as to Marino's negligence with respect to the original plaintiffs' allegations, summary judgment is denied dismissing the cross claims for common-law indemnification and contribution.

Marino's motion for summary judgment dismissing any direct claims is granted. Marino, as an independent contractor, did not owe a duty to the remaining plaintiffs, who are tenants in the building. *See e.g. Espinal v. Melville Snow Contractors*, 98 N.Y.2d 136 (2002).

While Marino may be considered an excavator, its statutory duty would be to the Tolis Building. No precedent has been cited which would extend Marino's statutory liability to the tenants of the Tolis Building. Since Tolis settled with Marino, no direct claims remain.

Marino seeks a joint trial, pursuant to CPLR 602 (a). It is unclear whether Marino seeks consolidation, or a joint trial, and whether for liability and/or damages. Regardless, CPLR 602 (a) states the following:

> Generally. When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

"[C]onsolidation gives rise to a new action displacing the actions affected thereby, whereas a joint trial preserves the integrity of each of the actions [internal quotation marks and citation omitted]." *Mars Associates v. New York City Educational Construction Fund,* 126 A.D.2d 178, 185 (1st Dept. 1987). However consolidation is not proper if it results in a party being both the plaintiff and defendant, as this could result in jury confusion. *Geneva Temps, Inc. v. New World Communities, Inc.*, 24 A.D.3d 332, 335 (1st Dept. 2005).

In the present situation, a joint trial for liability and damages would be proper, because all actions, stemming from the partial building collapse which occurred on August 30, 2007, present common questions of law and facts. However, consolidation would not be practical since 8930 would be a plaintiff and defendant in the same action. The court sees no reason to try the damages separately in each action, as proposed by defendant 8930. Accordingly, Marino's motion, pursuant to CPLR 602, for a joint trial is granted.

Marino seeks summary judgment dismissing Mehta's claim. Pursuant to an order dated December 15, 2010, Mehta was precluded from testifying at trial, and is precluded from offering any documents as evidence that she took part in preparing. The record indicates that Mehta prepared a damages presentation. Mehta testified that she and an adjuster came up with the values for the damages and there are no receipts or invoices in

support of the presentation. As such, because the presentation was prepared in part by Mehta, she is precluded from offering it at trial.

Mehta has not offered any other witnesses, nor responded to the outstanding discovery requests. Because she is also precluded from testifying at trial, Mehta has no way to establish that she sustained damages as a result of the building collapse. Marino correctly cites to *CDJ Corp. v. Commodore Manufacturing Corp.* (50 A.D.3d 1084, 1084 [2d Dept. 2008]), which holds that "[u]pon preclusion of this evidence, the plaintiff would have been unable to make a prima facie showing of its damages. Accordingly, the Supreme Court properly granted that branch of the defendant's motion which was for summary judgment dismissing the complaint."

Accordingly, because Mehta's claims fail as a matter of law, Marino is granted summary judgment dismissing her claims. Moreover, because Mehta is unable to establish damages and has no claims, all defendants are granted summary judgment with respect to Mehta's claims, pursuant to CPLR 3212 (b). *See e.g. Dunham v. Hilco Construction Co.*, 89 N.Y.2d 425, 429 (1996) ("if it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion [internal quotation marks and citation omitted]").

MOTION SEQUENCE 013

Defendants 8930 and ACHS Management seek partial summary judgment dismissing various portions of the plaintiffs' actions, and they also want to prevent the

plaintiffs from claiming damages in excess of what was claimed as losses in their tax returns.

Specifically, defendant 8930 asserts that Tolis, Capitalwide, New Shampoo and Trumbull's claims for damages should be limited, for various reasons, such as being limited to what value of assets was put forth in their tax returns. Defendants 8930 and ACHS have the burden of "establishing a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *West 157th Street Association v. Sassoonian*, 156 A.D.2d 137, 139 (1st Dept. 1989).

Tolis has submitted affidavits stating that the amounts it submitted for lost income and other damages were accurate. Capitalwide and New Shampoo have submitted a verified bill of particulars and other exhibits in support of their alleged damages. The tax returns put forward by Tolis and Capitalwide can be used as probative evidence and remain a factual issue for trial. Trumbull has paid out fees to Mehta for her lost earnings, and whether or not Mehta's earnings were inflated is a question of fact for the jury. Accordingly, defendant 8930 has not demonstrated in the record how no triable issues of fact remain with respect to each plaintiff's damages, and its motion for partial summary judgment dismissing various portions of the plaintiffs' claims, is denied.

However, defendant 8930's motion to dismiss Capitalwide's claim for "charge backs" is granted, as Capitalwide was directed to provide proof of these charge backs, but

failed to do so. Additionally, as with the other defendants, defendant 8930 and ACHS Management's motion for partial summary judgment dismissing Mehta's claim, is granted.

MOTION SEQUENCES 014 and 015

In these motions, Valentino seeks summary judgment dismissing any direct claims and cross claims as against it and also conditionally granting it summary judgment on its cross claim against 8930 for contractual indemnification. Valentino also wishes to prevent various plaintiffs from claiming damages in excess of what was claimed in their tax returns.

Valentino states that it did not design the plan for the underpinning and did not "oversee, direct or control the implementation of those underpinning plans by the excavation contractor." As previously mentioned, Valentino and 8930 were the only two parties who entered into a contract with one another. 8930 signed a settlement agreement in which 8930 discontinued any claims against Valentino, and Valentino agreed to discontinue the counterclaim asserted against 8930 in its answer dated November 17, 2007, with prejudice and without costs to either party. Valentino's counterclaim against 8930 was for contractual indemnification. Valentino gave 8930 ten dollars and other good and valuable consideration for this release. Tolis and Harleysville also settled with Valentino and discontinued any claims against Valentino. Therefore these actions no longer remain against Valentino.

As properly argued by Valentino, Valentino has established that it did not owe the remaining plaintiffs a duty of care as a professional architect. Where, as here, none of the plaintiffs have a contract with Valentino for architectural design services, except for 8930, who was its direct client, the remaining plaintiffs must demonstrate that they have the "functional equivalent of privity of a contract." *Melnick v. Parlato*, 296 A.D.2d 443, 443 (2d Dept. 2002). Their claims for architectural malpractice, or negligence, must meet a three-part test for liability, which states as follows, "(1) awareness that the reports were to be used for a particular purposes or purposes; (2) reliance by a known party or parties in furtherance of that purpose; (3) and some conduct by the defendants linking them to the party or parties and evincing defendant's understanding of their reliance." *Ossining Union Free School District v. Anderson LaRocca Anderson*, 73 N.Y.2d 417, 425 (1989).

Here, none of the remaining plaintiffs can satisfy the requirement that they had a special relationship which would have given them the equivalent of privity of a contract with Valentino. The plaintiffs cannot meet the criteria for the first prong of the test, as they were not even aware of Valentino and what his architectural reports/designs were to be used for. Moreover, the remaining plaintiffs have not even attempted to argue how Valentino's services in some way contributed to the partial collapse. Accordingly, Valentino's motion for summary judgment dismissing any direct claims against it is granted. As a result of this decision, Valentino's motion to limit the plaintiffs from claiming in excess of what was on their tax returns is moot.

Because the court has found no liability against Valentino, "[t]he third-party actions and all cross claims are dismissed as a necessary consequence of dismissing the complaint in its entirety." *Turchioe v. AT&T Communications*, 256 A.D.2d 245, 246 (1st Dept. 1998).

Similarly, because Valentino will not sustain any damages as a result of these actions, the motion for summary judgment on its counterclaim for contractual indemnification against 8930 is denied. In any event, since Valentino agreed, via settlement, to discontinue its counterclaim against 8930 for contractual indemnification, Valentino can no longer pursue this claim.

Cross Motion of Tenants:

Tenants Capitalwide, New Shampoo and Mehta have cross-moved for partial summary judgment on the issue of liability against defendants 8930 and H & H.

As previously mentioned, "actual damages are an essential element of a negligence action." *IGEN, Inc. v White*, 250 A.D.2d 463, 465 (1st Dept. 1998). As Mehta cannot prove any damages at trial, she has no viable claim against either 8930 or H & H, and her cross motion for summary judgment is denied.

In general, "one who hires an independent contractor is not liable for the independent contractor's negligent acts because the employer has no right to control the manner in which the work is to be done." *Chorostecka v. Kaczor*, 6 A.D.3d 643, 644 (2d Dept. 2004). However, when the work performed is inherently dangerous, a

nondelegable duty will be imposed on the party who retained the contractor. *Klein v. Beta I LLC*, 10 A.D.3d 509, 510 (1st Dept. 2004). As the remaining tenants have established, excavation work adjacent to an existing building is an inherently dangerous activity. *Id.* As such, 8930, as the owner of the construction site who hired the contractors, will be liable to the tenants for the excavating contractor(s)' negligence.

However, H & H, who did not perform the excavating work pursuant to Administrative Code § 27-1031 (b) (1), nor hired the contractors, would not have this same duty to the tenants. As a result of this decision, the court has determined that a question of fact remains as to whether H & H's negligence was a proximate cause of the partial collapse of the building/damages. Accordingly, Capitalwide and New Shampoo's motion for partial summary judgment is granted with respect to 8930, and denied as against H & H.

Cross Motions of Structural Engineers and H & H:

Structural Engineers, a contractor, and H & H, separately cross-move for the same relief as 8930 and ACHS Management, as set forth in motion sequence 013, and adopt the same arguments.[3] Tolis and Harleysville oppose these two cross motions as being untimely filed. However Tolis's arguments are without merit since "an untimely motion or cross motion for summary judgment may be considered by the court where, as here, a

[3]8930 did not file for summary judgment against Harleysville, so Structural Engineering and H & H cannot rely on anything filed by 8930 in support of its argument against Harleysville. Although Structural Engineering apparently relies on A-1's papers as well, A-1's papers are not relevant to support its cross motion.

timely motion for summary judgment was made on nearly identical grounds [internal quotation marks and citations omitted]." *Whitehead v. City of New York,* 79 A.D.3d 858, 860 (2d Dept. 2010).

As with the other defendants, Structural Engineering and H & H's motions for partial summary judgment dismissing various portions of the plaintiffs' claims, is denied, except with respect to the dismissing Capitalwide's charge backs. Additionally, as with all of the defendants, Structural Engineering and H & H are granted summary judgment dismissing Mehta's claim.

MOTION SEQUENCE 016:

A-1 Testing and Kasparian move for summary judgment dismissing any claims, cross claims and third-party claims against them, or, alternatively, for partial summary judgment determining that they had no duty to perform controlled inspection of the underpinning. In support of its motion, among other things, A-1 argues that the contracts between A-1 and 8930 do not make A-1 responsible for the controlled inspections of the underpinning. Although A-1 was responsible for conducting the shoring inspections, the underpinning inspections were the responsibility of Structural Engineering, pursuant to the Technical Report presented to the DOB.

Harleysville, Tolis and 8930 claim that an issue of fact remains with respect to A-1's responsibilities at the worksite and its negligence in performing those responsibilities. For example, the first proposal states that A-1 is to provide crack monitoring devices to

the Tolis Building and also document all defects in structures prior to construction. Harleysville, Tolis and 8930 contend that, although A-1 did conduct a site inspection on July 25, 2007, this report was not available to 8930 until after the collapse on August 30, 2007. This report, which was dated August 24, 2007, indicated that the Tolis Building had the risk factor of three out of ten with respect to pending construction/excavation efforts to come, with ten being the worst, and that the building presented open distress cracking.

8930 was also advised, pursuant to this report, which it allegedly never received, to install crack monitors prior to starting excavation. As such, the parties claim that A-1 apparently did not issue a proper report since, just six days after the report was issued, the Tolis Building partially collapsed.

Harleysville and 8930's allegations do not raise an issue of fact with respect to A-1's liability. "[A] shadowy semblance of an issue or bald conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment [internal quotation marks and citation omitted]" (*Costello v. Saidmehr*, 236 A.D.2d 437, 438 [2d Dept. 1997]). While Harleysville claims that A-1 should have provided the August 24, 2007 crack monitoring report to 8930 prior to the collapse, it is only speculation that this report, whether or not it was received by 8930, would have led to a proper investigation to protect the Tolis Building. Additionally, there may have been no reason for the contractors to alter their activities, anyway, since the crack monitoring devices showed

only a risk of three. This would be considered, in A-1's expert's opinion, to be "a stable building for which 8930 Sutphin, its design professionals and contractors did not need to take any different actions." Furthermore, the record indicates that A-1 took readings from the crack monitors weekly, starting August 8, 2007.

Harleysville and 8930 maintain that because some of the other contractors and parties believe that A-1 Testing should have provided the controlled inspections of the underpinning, A-1 should be held responsible for this testing. However, the record indicates that A-1 did not have a contractual responsibility to provide inspections of the underpinning. With respect to contract interpretation, the Court of Appeals has held that,

> "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing."

W.W.W. Associates v. Giancontieri, 77 N.Y.2d 157, 162 (1990).

In the present case, the proposal between A-1 and 8930 indicates that A-1 was to provide crack and defect monitoring services and recommendations. There is no language in the proposal about a controlled underpinning inspection. West End's contract with 8930 states that West End will inspect the underpinning. Moreover, the form returned to the DOB indicates that Structural Engineering was to provide the controlled inspection for the underpinning, while A-1 was to inspect the shoring. In any event, A-1 would not have owed Harleysville or Tolis a duty because A-1 is an independent

contractor, who entered into a contract with 8930, and so, would not owe an independent duty as the excavator.

Accordingly, as no issues of fact remain, A-1 and Kasparian are granted summary judgment dismissing any direct claims against them. And, as previously mentioned, since the complaint is dismissed as to them, all third-party actions and all cross claims against them are dismissed as a necessary consequence.

A-1 Testing also seeks to consolidate the actions; however, as a result of this decision, this request is moot. The court has already determined that the motions are granted and orders a joint trial.

Cross Motion of A-1 and Kasparian

The motion of A-1 and Kasparian to limit plaintiffs' claims is moot as a result of the decision dismissing the tenants' claims.

MOTION SEQUENCE 001:

"Subrogation, an equitable doctrine, entitles an insurer to 'stand in the shoes' of its insured to seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse." *North Star Reinsurance Corp. v. Continental Ins. Co.*, 82 N.Y.2d 281, 294 (1993). Because Mehta is excluded from evidencing damages at trial, her negligence claims fail as against any party. As such, Trumbull, who "stands in Mehta's shoes" with respect to the subrogation action, is denied partial summary judgment against defendants 8930 and H & H.

In accordance with the foregoing, it is hereby

ORDERED that Tolis Property Associates, LLC and Harleysville Worcester Insurance Company a/s/o Tolis Property Associates, LLC's motion (motion sequence number 011) seeking partial summary judgment on the claims of negligence and failure to provide lateral support is granted with regard to liability with respect to 8930 Sutphin Blvd. LLC and denied with respect to H & H Builders, Inc.; and it is further

ORDERED that the issue of damages shall be determined at trial on this action; and it is further

ORDERED that 8930 Sutphin Blvd, LLC's cross motion for partial summary judgment against H & H Builders, Inc. is denied; and it is further

ORDERED that Marino Bros. Industries, Inc.'s motion (motion sequence number 012) for summary judgment is granted with respect to dismissing any direct claims as against it; dismissing any claims for contractual indemnification, and seeking a joint trial, and such claims are dismissed, and the motion is otherwise denied; and it is further

ORDERED that ACHS Management Corp. and 8930 Sutphin Blvd. LLC's motion (motion sequence number 013) for partial summary judgment is granted to the extent that Capital Wide Mattress & Furniture Warehouse Corp.'s claim for charge backs is dismissed, and the motion is otherwise denied; and it is further

ORDERED that Valentino Associates' motion (motion sequence number 014) for summary judgment dismissing any direct claims and any cross claims as against

Valentino Associates herein is granted and the complaint is hereby severed and dismissed in its entirety as against Valentino Associates, with costs and disbursements to Valentino Associates as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of Valentino Associates; and it is further

ORDERED that Valentino Associates' motion (motion sequence number 014) for conditional summary judgment on its claim for contractual indemnification, is denied as moot; and it is further

ORDERED that Valentino Associates' motion (motion sequence number 015) to dismiss various portions of the plaintiffs' actions and prevent them from claiming damages in excess of what was claimed in their tax returns, is denied as moot; and it is further

ORDERED that Capital Wide Mattress & Furniture Warehouse Corp., New Shampoo Uni-Sex Hair Salon, Corp.'s cross motion for partial summary judgment on the issue of liability is granted with respect to 8930 Sutphin Blvd. LLC and the issue of damages will be determined at trial on this action; and denied with respect to H & H Builders, Inc.; and it is further

ORDERED that the cross motion of Structural Engineering Technologies, P.C. is granted to the extent that Capital Wide Mattress & Furniture Warehouse Corp.'s claim for charge backs is dismissed, and the cross motion is otherwise denied; and it is further

ORDERED that the cross motion of H & H Builders, Inc. is granted to the extent that Capital Wide Mattress & Furniture Warehouse Corp.'s claim for charge backs is dismissed, and the cross motion is otherwise denied; and it is further

ORDERED that A-1 Testing Laboratories, Inc. and Richard Kasparian's motion (motion sequence number 016) for summary judgment dismissing any direct claims, cross claims and third-party claims as against them herein is granted and the complaint is hereby severed and dismissed in its entirety as against A-1 Testing Laboratories, Inc. and Richard Kasparian, with costs and disbursements to them as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of A-1 Testing Laboratories, Inc. and Richard Kasparian; and it is further

ORDERED that the part A-1 Testing Laboratories, Inc. and Richard Kasparian's cross motion for summary judgment dismissing various portions of the plaintiffs' actions and preventing them from claiming damages in excess of what was claimed in their tax returns, and its motion (motion sequence 016) seeking to consolidate the actions, is denied as moot; and it is further

ORDERED that Trumbull Insurance Company a/s/o Harsha Mehta, DDS, P.C.'s motion (motion sequence number 001) for partial summary judgment against 8930 Sutphin Blvd, LLC and H & H Builders, Inc., is denied; and it is further

ORDERED that all defendants are granted summary judgment dismissing Harsha Mehta, DDS, P.C.'s claims and such claims are dismissed; and it is further

ORDERED that the action is severed and continued against the remaining defendants.

This constitutes the decision and order of the Court.

Dated: New York, New York
January 9, 2012

ENTER:

Saliann Scarpulla, J.S.C.