

532 39 Realty, LLC v LMW Engineering Group LLC

2012 NY Slip Op 32798(U)

November 5, 2012

Sup Ct, New York County

Docket Number: 112480/09

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

MARCY S. FRIEDMAN, J.C.C.

PRESENT: _____
Justice

PART 57/60

Index Number : 112480/2009
532 39 REALTY, LLC
vs.
LMW ENGINEERING GROUP, LLC
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for Pane
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is denied as per
accompanying decision/order dated 10-26-12

the Clerk for random reassignment
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S): This was a Part 57 case
10-26-12 Marcy Friedman

FILED

NOV 15 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10-26-12

Marcy Friedman, J.S.C.
MARCY S. FRIEDMAN, J.S.C.

- 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

PRESENT: Hon. Marcy S. Friedman, JSC

532 39 REALTY, LLC,

Plaintiff,

Index No. 112480/09

-against-

DECISION AND ORDER

LMW ENGINEERING GROUP LLC, JIEMING WANG,
SHINE REALTY, INC., ZHI KUANG YU, PANE STONE
CONSTRUCTION INC., SHIMING TAM ARCHITECT, PC,
HENG YONG CONSTRUCTION, INC., METAL
STONE CONSTRUCTION, INC. and JOHN HSU,

Defendants.

FILED

NOV 15 2012

NEW YORK
COUNTY CLERK'S OFFICE

Motion sequence numbers 002, 003 and 004 are consolidated for disposition.

This is an action by a building owner to recover for property damage allegedly caused by construction activities at an adjacent property. Various professionals named as defendants now move for summary judgment as follows:

Motion Sequence 002:

Defendants Pane Stone Construction, Inc. (Pane) and John Hsu, a principal of Pane, move for summary judgment dismissing the Amended Verified Complaint and all cross-claims against them on the ground that there is no evidence that they actually performed or supervised any work on the construction project and that they subcontracted the entire project.

Defendant Metal Stone Construction, Inc. (Metal) cross-moves for summary judgment on the ground that it had no active involvement with the construction project.

Motion Sequence 003:

LMW Engineering Group, LLC (LMW) and Jieming Wang (Wang) move for summary judgment dismissing the Amended Verified Complaint and all counterclaims and cross-claims against them on the grounds that they

had no control over the means and methods of construction, that the designs they submitted were within the standard of care for engineers, and that plaintiff has already been compensated for all damages by its insurer.

Motion Sequence 004:

Defendants Shiming Tam Architect, PC and Shiming Tam (collectively Tam) move for summary judgment dismissing the Amended Verified Complaint and all cross-claims against them on the grounds that they were not involved with the design of the project's underpinning or responsible for performing inspections of it.

Plaintiff 532 39 Realty LLC (532 LLC), the owner of 532 39th Street, Brooklyn, New York (the 532 Property), the building adjacent to the construction site, opposes the motions and cross-moves for leave to file a second amended complaint adding claims for gross negligence and a demand for punitive damages against defendants Pane, Metal and Hsu.

FACTS

The following facts are taken from the affidavits and testimony of the parties, the pleadings and the documentary evidence, and are undisputed unless otherwise indicated.

Defendants Shine Realty, Inc. (Shine) and/or Zhi Kuang Yu (Yu) are the owners of real property at 536 39th Street, Brooklyn, New York (the 536 Property). (Am. Compl. ¶¶ 13-14; Coppola Aff. 1/26/12, Exh. C, p. 1). By letter agreement dated October 31, 2007 (Pantelidis Aff. 1/19/12, Exh. G) (the Tam Contract), Yu retained defendant Tam to perform architectural and engineering services for a five story hotel (the Hotel Project) at the 536 Property. The Tam Contract provided that Tam would prepare the design for the underpinning of adjacent buildings. (Tam Contract, p. 2). On January 16, 2008, Tam filed a Technical Report/Statement of Responsibility (form TR1) with the New York City Department of Buildings (NYCDOB), on which it indicated that it would take responsibility for the controlled inspections of the underpinning. (Pantelidis Aff. 1/19/12, Exh. K).

On March 25, 2008, Tam entered into a contract with non-party Andrew Goodrich, P.E., PLLC (Sherman Aff. 1/27/12, Exh. G) (the Goodrich Contract), under which Goodrich agreed to provide Tam with various structural engineering and related services in connection with the Hotel Project. Goodrich agreed, inter alia, to provide an underpinning plan for the excavation work. (Goodrich Contract, p. 1). The Goodrich Contract provided that Goodrich would not be responsible for supervising the construction for the protection of the public or property. (Id. at 3).

On July 2, 2008, Shine entered into a contract with defendant Pane (the Pane Contract) for the construction of the Hotel Project. (Coppola Aff. 1/26/12, Exh. C). The agreement was executed on behalf of Pane by defendant John Hsu as president. The Pane Contract named Pane as contractor and Tam PC as architect. (Pane Contract, p. 1). Under the Pane Contract, Pane agreed to "fully execute the Work described in the Contract Documents, except to the extent specifically indicated in the Contract Documents to be the responsibility of others." (Pane Contract, Art. 2). An attached letter set forth the scope of Pane's work, which included the installation of concrete slabs, foundation walls and footings. Under the heading "Sitework," the letter specified the items "Demolition" and "Remove as Necessary." (Pane Contract, 7/2/08 letter, p. 1). Pane was to be paid \$1,020,000 for its work. (Pane Contract, Art. 4.1).

Goodrich prepared a set of structural plans, dated July 3, 2008, and submitted them to Tam. Paragraph 11 of the "General" provisions of the plans stated:

"Construction means: The contractor shall retain his own consultants, including structural consultants, regarding contractor's demolition, underpinning, and construction procedures, structural stability reviews during construction etc., & on-site safety responsibilities and building department reporting and filing requirements."

(Pantelidis Aff. 1/19/12, Exh. H).

Defendant LMW is a structural engineering firm and defendant Wang is its founder and managing partner. (Wang Dep. 17-18 [Sherman 1/27/12 Aff., Exh. I]). Defendants LMW and Wang prepared Support of Excavation plans (SOE Plans) for the Hotel Project dated July 14, 2008. (Pantelidis Aff. 1/19/12, Exh. I). There is no written contract in the record between LMW and Metal. However, the SOE Plans indicate that LMW and Wang were retained as the client of Metal. (Id.) Wang testified that LMW was retained to replace Goodrich after Goodrich suffered a nervous breakdown. (Wang Dep. 11-12). Wang also testified that he was asked by the architect (Tam), owner, and contractor (Metal) to work on the building (id. at 8-9), and that he believed that he was paid by both Metal and Tam, but was not sure whether he was paid by Pane. (Id. at 13-15). Wang further stated that Metal contacted him and asked him to develop plans to supersede Goodrich for the structure of the new building as well as the foundation and excavation portion of the design. (Id. at 19). On or about July 17, 2008, LMW and Wang filed a TR1 form (Pantelidis Aff. 1/19/12, Exh. L) indicating that they would be responsible for the underpinning, structural safety and excavation inspections at the site. (Wang Dep. 133).

On August 4, 2008, Pane submitted a work permit application (form PW2) for the Hotel Project to NYCDOB. (Karel Aff. 3/7/12, Exh. 8). Pane listed itself as the applicant/contractor, and defendant Metal was listed as the filing representative and construction superintendent. (Karel Aff. 3/7/12, Exh. 8). John Hsu testified that Metal is an entity which, like Pane, is owned by his father, George Hsu. (Hsu Dep. 8-9, 22-23 [Sherman 1/27/12 Aff., Exh. H]). Hsu claimed that Pane and Metal both did the same kind of work as general contractors, and that they shared the same office space and approximately 20 employees. (Id. at 22, 24). Hsu claimed that he is a

project manager at Pane, and that his father is the only owner and officer of the companies. (Id. at 8-9, 22-23).

On or about August 15, 2008, Pane entered into a contract with defendant Heng Yong Construction, Inc. (Heng) (the Heng Subcontract) (Coppola Aff. 1/26/12, Exh. D). The Heng Subcontract was executed on behalf of Pane by John Hsu as vice president. Pane was identified as the contractor and Heng as the subcontractor. The scope of work under the Heng Subcontract, like the Pane Contract, included the installation of concrete slabs, foundation walls and footings. (Heng Subcontract, Exh. A, p. 1). Section 3.1.3 of the Heng Subcontract provided that the "Contractor's equipment will be available to the Subcontractor only at the Contractor's discretion and on mutually satisfactory terms." Section 4.1.1 provided that "[t]he Subcontractor shall supervise and direct the Subcontractor's Work, and shall cooperate with the Contractor in scheduling and performing the Subcontractor's Work to avoid conflict, delay in or interference with the Work of the Contractor, other subcontractors or Owner's own forces." However, section 3.4.1 authorized Pane to remedy, upon notice, any deficiencies in Heng's work and to reduce Heng's payments accordingly. Section 7.2.1 permitted Pane to terminate Heng, upon notice, for repeated neglect or failure to perform its work. Section 10.1 provided for Heng to be paid \$760,000 for its work.

Excavation and underpinning work for the Hotel Project commenced some time in October 2008. (See Wang Dep. 21). Plaintiff's adjacent building at 532 39th Street was damaged at some point before October 23, 2008, when the NYCDOB issued a notice of violation and stop work order addressed to Pane and Yu. (Pantelidis Aff. 1/19/12, Exh. C). Under "description of the violation," the notice cited the "failure to take adequate measures to prevent the vertical or

lateral displacement of adjoining structure being underpinned. There is diagonal ext[ernal] cracking on the brick ext[ernal] wall & foundation wall, horizontal cracking inside the Apts. of 532 39 St., and by the windows.” (Id.)

At the same time, the NYCDOB issued to Pane a Commissioner's Order to Correct Violations. (Pantelidis Aff. 1/19/12, Exh. D). Under “Violating Conditions Observed,” the order stated that “[t]he registered architect or professional engineer responsible for controlled inspections has not reported an unsafe condition to Department of Buildings and/or any other affected parties or agencies. Severe cracking [at] 532 39 St. due to underpinning operations.” (Id.)

On October 24, 2008, after learning of problems with the work, Tam purported to withdraw from responsibility for controlled inspections, underpinning and other matters by modifying the TR1 it had filed. (Karel Aff. 3/7/12, Exh. 3; Tam Dep. 67 [Coppola Aff. 1/26/12, Exh. H]). By letter dated October 31, 2008, Dayton Inspection Services notified the NYCDOB that it had been retained by Metal to monitor the 532 Property for horizontal and vertical movement. (Karel Aff. 3/7/12, Exh. 1).

Regarding the work leading up to the damage to the 532 Property, Wang of LMW testified that he believed that all of the excavation and underpinning work was being performed by a subcontractor, non-party DC Construction. (Wang Dep. 100-101). He stated that the underpinning work extended to a depth of approximately 12-13 feet below grade. (Id. at 39-40). Wang further testified that LMW was not present to do controlled inspections on the first two days of the work because it was not notified that the work had commenced. (Id. at 23-24). Wang stated that LMW first learned of the subcontractor's work when someone from Metal called to

say that 532 LLC had complained about cracks in its building, approximately a day before the stop work order was issued. (Id. at 23-25).

Wang also testified that LMW was in a "constant battle" with the subcontractor, because whenever LMW was called to do an inspection, the subcontractor would start the digging before LMW arrived. (Wang Dep. 52-53). He stated that the subcontractor's workers would improperly use a backhoe to do the digging and that, although he directed them to stop, they would always resume using it the moment he left to save time and money. (Id. at 49). Wang testified that he told Metal that what the subcontractor was doing wrong, and that the subcontractor did not know what it was doing. (Id. at 52). He said that he did not send Metal a written report about the problem because "[m]ost of the supers are not English proficient. If you write a report, then nobody will see it, nobody will look at it. The only way -- the most effective way is to call them and to scream." (Id. at 55).

Hsu testified that he knew of DC Construction but that he was not aware that they played any role in the Hotel Project. (Hsu Dep. 106). He stated that Pane signed the construction contract over to Heng completely, and that Pane merely "help[ed] out with paperwork." (Id. at 46). He claimed that Heng told him that it was going to take over the project and handle all of the control inspections and monitoring. (Id. at 66-67). Hsu said he received assurances from Heng's construction superintendent, Kevin Lin (Lin), that Heng would hire a control inspection company and an engineer to supervise the work. (Id. at 35-36, 93).

However, Hsu testified that a project manager, Danny Yen (Yen), who worked for either Pane or Metal, drove by the site approximately every two days and reported back to him on the progress of the work. (Id. at 82-83, 94). He believed that Yen was the person who brought the

stop work order back to Pane's offices. (Id. at 89-90). He also believed that Pane admitted to the violation and was found guilty of it. (Id. at 91). He said that Pane would usually recover from Heng the money for fines that Pane paid. (Id. at 90-91). Hsu stated that Metal, rather than Heng, retained Dayton to monitor the 532 Property after it was damaged because Heng could not do so, as it had no offices and no means of keeping in touch with Dayton on a day-to-day basis. (Id. at 101-103).

The 532 Property is owned by plaintiff 532 39th Street LLC (532 LLC). (Wilamowsky Dep. 9 [Coppola Aff. 1/26/12, Exh. E]). Zvi Wilamowsky is the manager of 532 LLC and he has equal shares in the LLC with three other individuals. (Id. at 8). 532 LLC purchased the 532 Property in October 2003 for \$465,000. (Id. at 69-71; Real Property Transfer Report [Coppola Aff. 1/26/12, Exh. I]). Wilamowsky recalled seeing signs for Pane when the construction area was enclosed. (Id. at 67).

532 LLC filed a claim with its insurer, Tower Insurance Company of New York (Tower). (Sworn Statement in Proof of Loss [Coppola Aff. 1/26/12, Exh. J]). The total amount of insurance available under the policy with Tower was \$613,051. (Id.) On the line of the form provided to indicate the "whole loss and damage," plaintiff specified: "'negotiated settlement' \$452,127.15." On the line provided to indicate the "amount claimed" after the \$2,500 deductible, plaintiff stated: "'negotiated settlement' at least the sum of \$449,627.15."

532 LLC received the \$449,627.15 settlement in May 2010. (Subrogation Receipt [Coppola Aff. 1/26/12, Exh. K]). As of July 2011, 532 LLC had not expended all of those funds for repairs. (Wilamowsky Dep. 117). Wilamowsky stated that plaintiff was awaiting a settlement from this action to resume work. (Id. at 118). He also stated that his understanding

was that the damages sought in this action are primarily based upon an estimate of approximately \$900,000 set forth in a September 2010 expert's report. (*Id.* at 92-93).

Plaintiff commenced this action in September 2009 and filed the Amended Verified Complaint in October 2009. As is relevant here, the complaint asserts a total of ten causes of action against the moving defendants Hsu, Pane, Metal, LMW, Wang and Tam.¹ The fifth cause of action asserts that Hsu "personally supervised and/or directed work to be performed at 536 39th Street," and that he "breached his duties to Plaintiff by performing and/or allowing and permitting work to be performed by others which damaged Plaintiff's property, and by failing to properly supervise those who were performing such work." (Am. Compl. ¶¶ 80-81). The sixth cause of action asserts that Hsu's activities constituted "a trespass by HSU, in that HSU's conduct was willful and intentional, or was so reckless as to amount to willful." (Am. Compl. ¶ 86). The seventh and eighth, and fifteenth and sixteenth causes of action allege similar claims of breach of duty and trespass in connection with the excavation as against Pane and Metal. (Am. Compl. ¶¶ 88-90, 95, 134-35, 140). The ninth and tenth causes of action assert that the excavation plans prepared by Wang and LMW were deficient, and that those defendants were otherwise complicit with others in causing damages to plaintiff's property. (Am. Compl. ¶¶ 99, 105). Finally, the eleventh and twelfth causes of action assert that the Tam defendants breached their duties as design applicants and as the parties responsible for controlled inspections, or were otherwise complicit with others in causing plaintiff's damages. (Am. Compl. ¶¶ 110-11, 116-17).

¹ The first through fourth and thirteenth and fourteenth causes of action are asserted against defendants Shine, Yu and Heng, all of whom have defaulted.

Pane/Hsu's Motion to Dismiss

In moving for summary judgment, Pane and Hsu assert that there is no evidence that they performed any work at the excavation site. They claim that Heng assumed all of the responsibility for the work when the job was "signed over" by Pane to Heng pursuant to the Heng Subcontract; that DC Construction was the only entity performing excavation; and that Pane never dealt with defendants Wang, LMW or Tam. Defendants further contend that the identification of Pane as "contractor" on the August 2008 permit cannot, standing alone and in the absence of actual participation in the work, impose liability.²

Defendants' attempt to shift the blame to Heng and others suffers from a number of factual and legal defects. "The general rule is that a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts." (Kleeman v Rheingold, 81 NY2d 270, 273 [1993]; Rosenberg v Equitable Life Assur. Soc. of U.S., 79 NY2d 663, 668 [1992]). However, there are a number of relevant exceptions. Specifically, an employer may be liable for an independent contractor's acts where it "(1) is under a statutory duty to perform or control the work, (2) has assumed a specific duty by contract, (3) is under a duty to keep premises safe, or (4) has assigned work to an independent contractor which the employer knows or has reason to know involves special dangers inherent in the work. . . ." (Id. at 668.)

A number of these exceptions apply here. First, section 3309.4 of the Administrative Code of the City of New York imposes upon a property owner and its contractors a statutory duty

²It is noted that Hsu does not claim on this motion that the complaint may not be maintained against him in his individual capacity.

to protect adjoining structures during the course of excavation work.³ Section 3309.4, which became effective on July 1, 2008, is the “equivalent provision” of repealed Administrative Code section 27-1031(b)(1). (Yenem Corp. v 281 Broadway Holdings, 18 NY3d 481, 489 n2 [2012]). The Court of Appeals recently held that former section 27-1031(b)(1) imposes strict liability for damages on owners and excavators of a construction site whose work causes damage to adjoining property, regardless of the care exercised. (Id. at 486).⁴ The court declined, however, to reach the issue of whether the subsequently enacted section 3309.4 also imposes strict liability or whether a violation of this section constitutes only some evidence of negligence. (Id. at 489 n2).

This court also will not reach this issue. While the repealed and new Administrative Code sections both require the person who causes the excavation to protect the adjoining property (provided that a license to do so is given), the new section imposes heightened

³This section provides in pertinent part:

“Regardless of the excavation or fill depth, the person who causes an excavation or fill to be made shall, at all times and at his or her own expense, preserve and protect from damage any adjoining structures, provided such person is afforded a license . . . to enter and inspect the adjoining buildings and property, and to perform such work thereon as may be necessary for such purpose. . . .

No excavation work to a depth of 5 to 10 feet . . . within 10 feet . . . of an adjacent building, or an excavation over 10 feet . . . anywhere on the site shall commence until the person causing an excavation to be made has documented the existing conditions of all adjacent buildings in a pre-construction survey.”

⁴Former section 27-1031(b)(1) provided in pertinent part:

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

requirements. The effect of the changes has not been addressed by the parties, plaintiff having argued defendant's duty only under repealed section 27-1031(b) and not under currently effective section 3309.4. For purposes of this motion, therefore, the court holds only that section 3309.4 constitutes at least some evidence of negligence. The issue of whether the section imposes strict liability will be reserved for the trial court on a fully briefed record.

The court further notes that under long settled law, section 27-1031(b) and its predecessors have been held to impose a non-delegable duty on owners and contractors. (See e.g. Palermo v Bridge Duffield Corp., 154 NYS2d 288 [Sup Ct, Kings Co 1956], affd 3 AD2d 863 [1957]; see also Rosenstock v Laue, 140 AD 467, 470 [1st Dept 1910] ["The provision would be of little value if the owner of the property upon which the excavation is made could relieve himself from all obligation to protect his neighbor's property by turning the excavation over to a contractor."]). There are no material differences between the repealed provision and section 3309.4 in this regard. The court accordingly holds that Pane is not insulated from liability by virtue of having subcontracted out the work to Heng.

As to the second exception to the general rule against an employer's liability for the acts of an independent contractor, the court finds that issues of fact exist as to the extent to which Pane assumed contractual duties regarding the excavation. Although Pane claims to have completely assigned the work to Heng, the duties under the Pane Contract and the Heng Subcontract overlap. Pane reserved various rights regarding Heng's use of its equipment, and retained the right to correct deficiencies in Heng's work. Pane never disavowed to the NYCDOB its representation on the PW2 that it was the contractor, and pled guilty and paid a fine with respect to the violation that gave rise to plaintiff's damages. Hsu admitted, at the very least, to

monitoring the progress of the work. Wilamowsky's testimony that he saw Pane signs at the site further contradicts Pane's claim that it played no role in the excavation.⁵

As to the third exception to the independent contractor rule, where the work performed is inherently dangerous, a non-delegable duty will be imposed on the employer of the independent contractor. (Klein v Beta I LLC, 10 AD3d 509, 510 [1st Dept 2004]). Excavation work adjacent to an existing building is inherently dangerous. (Hixon v Congregation Beit Yaakov, 57 AD3d 328 [1st Dept 2008], citing Klein, 10 AD3d at 510). The court accordingly holds that Pane is liable for the work delegated to Heng.

In the instant case, not only was the excavation work inherently dangerous, but there is evidence in the record from which the trier of fact could conclude that Pane had notice that Heng and DC Contracting were unfit to perform the excavation. (See Vaniglia v Northgate Homes, 106 AD2d 384, 385 [2d Dept 1984]). This evidence includes Wang's testimony, discussed above (supra at 7) that he informed Metal, a company closely allied with, if not the alter ego of, Pane, that the excavation subcontractor did not know what it was doing.

Contrary to Pane's contention, this is not a case in which liability is sought to be imposed on Pane based merely on its acts in filing for a construction permit or pleading guilty to a NYCDOB violation. Rather, the hazardous nature of the work delegated imposes a duty as a matter of law upon Pane as prime contractor, even if it had no actual involvement in the work.

⁵Hsu's testimony as to Pane's lack of involvement in the work raises credibility issues, particularly in view of various inconsistencies in his representations that appear in the record. For example, Hsu submitted an affidavit at an earlier juncture of this case (Karel Aff. 3/7/12, Exh. 2) in which he represented that he was vice president of Metal. He signed the Pane Contract as president, but at his deposition testified that he was never an officer of either company. In addition, the affidavit in question flatly denied that Metal was involved in the Hotel Project despite, as discussed above (supra at 4), Metal's documented involvement.

Alternatively, issues of fact exist as to the extent of Pane's involvement. (Compare Huerta v Three Star Constr. Co., 56 AD3d 613, 613 [2d Dept 2008][appearance of contractor's name on permit insufficient to support liability where it "had no authority to enforce safety standards, did not hire any subcontractors, did not supervise or control the work, and provided no equipment."]).

Metal's Motion to Dismiss

Metal largely adopts Pane's arguments. Its claim that it did not enter into any contracts with respect to the work and lacked any involvement in the project is belied by the record. As discussed above (supra at 4, 7), Metal was listed as the construction superintendent on the work permit. Moreover, LMW's Wang gave testimony that he was retained by Metal and reported problems with the excavation contractor's work to Metal. Again, liability is not sought to be imposed on Metal based merely on its allowing its name to be placed on a permit. Rather, issues of fact exist as to Metal's role in the project.

Motions to Dismiss of LMW, Wang and TAM

The motions of Tam, LMW and Wang to dismiss must also be denied. Tam argues that none of its services for the project involved excavation or underpinning. More specifically, it argues that although its contract with the owner included underpinning design, the contract also provided for Tam to retain a structural engineering consultant. Tam further claims that its consultant, Goodrich, was replaced by Metal with LMW/Wang, and that LMW/Wang prepared the SOE plans and filed a TR1 under which LMW/Wang assumed responsibility for controlled inspections of the underpinning. Tam thus concludes that its obligations, including its obligations under its TR1, were superseded by LMW/Wang. LMW/Wang have acknowledged

that the controlled inspections were their responsibility. Moreover, although plaintiff claims that Tam submitted SOE plans (P.'s Memo. of Law at 13), Tam avers that it never prepared SOE plans and, in fact, the only SOE plans that plaintiff submits are those prepared by LMW/Wang on July 14, 2008. (See Karel Aff. 3/7/12, Exhs. 5, 6).

Nevertheless, Tam does not establish as a matter of law that it had no involvement in, or no responsibility for, the excavation and underpinning. Tam entered into a contract with LMW, dated December 18, 2008, for LMW to provide engineering services for the project, including "1. Review and verify the current design; 2. Addressing the DOB objections related to the foundation design; 3. Taking over the design responsibility as the engineer of the record; 4. Providing signed and sealed documents for superseding the original filing in DOB." By its terms, this contract raises an issue of fact as to whether Tam continued to be responsible for work notwithstanding LMW's preparation of the SOE plans, and whether any of Tam's or Goodrich's plans may have been used in any manner in connection with the excavation.

As to LMW and Wang, the court cannot find as a matter of law that there was no defect in their SOE plans. Their expert submits a wholly conclusory affidavit stating that the plans conformed to professional standards. (Aff. of John Deerkoski, P.E., ¶ 6 [Sherman Aff. 4/26/12, Exh. E]). Plaintiff's expert submits an equally conclusory affidavit stating that the underpinning drawings did not specify additional underpinning piers at the corners of the building and the courtyard, and that the building foundation was undermined as a result. (Aff. of Benjamin Lavon, ¶ 8). However, plaintiff's expert's opinion appears to find support in a NYCDOB notice of violation and stop work order, issued on November 28, 2008 (Karel Aff. 3/7/12, Exh. 6),

which describes the violation as “inadequate details on approved plans for construction of perimeter wall footings.”

The court further notes that Wang gave uncontradicted testimony that he was unable to perform controlled inspections because the subcontractor did not give advance notice of the commencement of the excavation and he therefore did not have the opportunity to inspect. However, LMW/Wang do not eliminate issues of fact as to whether they had broader obligations in connection with the excavation. For example, the NYCDOB Order to Correct Violations, dated October 23, 2008 (Pantelidis Aff. 1/19/12, Exh. D), cites as a violation that “[t]he registered architect or professional engineer has not reported an unsafe conditions [sic] to Department of Buildings”

LMW/Wang also argue that plaintiff has been paid in full for its damages by virtue of the settlement with its insurer. This contention is without merit. Plaintiff never conceded, in its proof of loss or deposition testimony, that the approximately \$450,000 it received from Tower constituted the totality of its damages. Rather, plaintiff has always claimed that its damages were “at least” that amount. Defendants have not submitted any evidence regarding plaintiff’s actual damages. Although they have pointed to plaintiff’s concession that it did not lose any tenants and was not required to lower any rents, plaintiff’s claims for additional damages appear to relate to additional repairs. There is not sufficient evidence in the record to resolve the question of damages as a matter of law.

Plaintiff’s Motion to Amend

Plaintiff’s motion to amend the complaint to add a claim for gross negligence and a demand for punitive damages against defendants Pane, Metal and Hsu is granted. It is well

settled that leave to amend shall be freely granted provided the amendment is not plainly lacking in merit and does not cause prejudice or surprise to the nonmoving parties. (See CPLR 3025[b]; McCaskey, Davies and Assocs., Inc. v New York City Health & Hosps. Corp., 59 NY2d 755,757 [1983]; Fahey v County of Ontario, 44 NY2d 934, 935 [1978]). “Mere lateness [in seeking such relief] is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side. . . .” (Edenwald Contr. Co. v City of New York, 60 NY2d 957, 959 [1983]).

Prejudice in this context is shown where the nonmoving party is “hindered in the preparation of his case or has been prevented from taking some measure in support of his position.” (Loomis v 3Civetta Corinno Constr. Corp., 54 NY2d 18, 23 [1981]).

Here, there is no prejudice because the motion was made shortly after the filing of the note of issue in conjunction with the parties’ summary judgment motions. The amendment does not require additional discovery or raise new theories of relief, as the existing complaint pleads recklessness. Moreover, the amendment is potentially meritorious. “As the faulty underpinning of a multistory building implicates public safety, if gross negligence is proved, punitive damages may properly be awarded.” (11 Essex Street Corp. v Tower Ins. Co. of New York, 81 AD3d 516, 517 [1st Dept 2011]).

Accordingly, it is hereby ORDERED that the motion for summary judgment of defendants Pane Stone Construction, Inc. and John Hsu is denied; and it is further

ORDERED that the motion of defendant Metal Stone Construction, Inc. for summary judgment is denied; and it is further

ORDERED that the motion of defendants LMW Engineering Group, LLC and Jieming Wang for summary judgment is denied; and it is further


ORDERED that the motion of defendants Shiming Tam Architect, P.C. and Shiming Tam for summary judgment is denied; and it is further

ORDERED that plaintiff's cross motion for leave to amend its complaint is granted to the extent that plaintiff shall serve a second verified amended complaint in conformity with this order within 10 days of the date of entry of this order; and it is further

ORDERED that this action, which was on the Part 57 docket, is transferred to the Clerk of the Court for random reassignment.

This constitutes the decision and order of the court.

Dated: New York, New York
November 5, 2012


MARCY S. FRIEDMAN, J.S.C.

FILED
NOV 15 2012
NEW YORK
COUNTY CLERK'S OFFICE