

Marbilla, LLC v 143/145 Lexington LLC

2013 NY Slip Op 30898(U)

April 25, 2013

Sup Ct, New York County

Docket Number: 117132/2006

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. ...
Justice

PART 2

Index Number : 117132/2006
MARBILLA LLC
vs.
143/145 LEXINGTON LLC
SEQUENCE NUMBER : 013
DISMISS

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

The following papers, numbered 1 to _____, were read on this motion to/for _____
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

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

FILED

APR 29 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 4/25/13

Grey, 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

-----X

MARBILLA, LLC,

Plaintiff,

Index No.: 117132/2006

-against-

Action No. 1

143/145 LEXINGTON LLC, GREEN CIRCLE
CONSTRUCTION LLC, JOHN LAYTON, M&R
EUROPEAN CONSTRUCTION CORP.,
HOWARD I.SHAPIO & ASSOCIATES CONSULTING
ENGINEERS, P.C., JAMES SCHELD and MANUAL GLAS,

Defendants.

-----X

143/145 LEXINGTON LLC, GREEN CIRCLE
CONSTRUCTION LLC and JOHN LAYTON,

Third-Party Plaintiffs,

-against-

FILED

M&R EUROPEAN CONSTRUCTION CORP.,

APR 29 2013

Third-Party Defendant. **NEW YORK
COUNTY CLERK'S OFFICE**

-----X

HOWARD I.SHAPIO & ASSOCIATES CONSULTING
ENGINEERS, P.C., JAMES SCHELD

Second Third-Party Plaintiffs,

-against-

M&R EUROPEAN CONSTRUCTION CORP.,

Second Third-Party Defendant.

-----X

-----X

M&R EUROPEAN CONSTRUCTION CORP.,

Third Third-Party Plaintiff,

-against-

VERSATILE CONSULTING & TESTING SERVICES INC.,
VERSATILE ENGINEERING PC and ROMAN SOROKKO, PE
Third Third-Party Defendant.

-----x

M&R EUROPEAN CONSTRUCTION CORP.,
Fourth Third-Party Plaintiff,

-against-

DELTA TESTING LABORATORIES INC. and
WARREN GEORGE INC.,
Fourth Third-Party Defendant.

-----x

M&R EUROPEAN CONSTRUCTION CORP.,
Fifth Third-Party Plaintiff,

-against-

IRON HEAD ENTERPRISES LLC,
Fifth Third-Party Defendant.

-----x

M&R EUROPEAN CONSTRUCTION CORP.,
Sixth Third-Party Plaintiff,

-against-

SKYSCRAPER STEEL CORP.,
Sixth Third-Party Defendant.

-----x

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

-----x

143/145 LEXINGTON AVENUE, LLC,

Plaintiff,

-against-

Index No.: 603831/2008

Action No. 2

M&R EUROPEAN CONSTRUCTION CORP., JOHN
DOE NO. 1 through JOHN DOE NO. XX and XYZ
CORP. NO. 1 through XYZ CORP. NO. XX, the last
forty names being persons or entities intended to be
con-tractors, subcontractors, or sub-subcontractors whose
names are fictitious and unknown to Plaintiff,

Defendants,

-----X

M&R EUROPEAN CONSTRUCTION CORP.,
Third-Party Plaintiff,

-against-

GREEN CIRCLE CONSTRUCTION, LLC,
HOWARD I.SHAPIRO & ASSOCIATES CONSULTING
ENGINEERS, P.C., JAMES SHELD, MANUAL GLAS,
VERSATILE CONSULTING & TESTING SERVICES, INC.,
VERSATILE ENGINEERING, P.C.,
ROMAN SOROKKO, WARREN GEORGE, INC.,

Third-Party Defendants,

-----X

M&R EUROPEAN CONSTRUCTION CORP.,
Second Third-Party Plaintiff,

-against-

IRON HEAD ENTERPRISES, LLC,

Second Third-Party Defendant,

-----X

-----X

M&R EUROPEAN CONSTRUCTION CORP.,
Third Third-Party Plaintiff,
-against-

SKYSCRAPER STEEL CORP.
Third Third-Party Defendant.

-----X

M&R EUROPEAN CONSTRUCTION CORP.,
Fourth Third-Party Plaintiff,
-against-

DELTA TESTING LABORATORIES INC. and
WARREN GEORGE INC.,
Fourth Third-Party Defendant.

-----X

M&R EUROPEAN CONSTRUCTION CORP.,
Fifth Third-Party Plaintiff,
-against-

IRON HEAD ENTERPRISES LLC,
Fifth Third-Party Defendant.

-----X

M&R EUROPEAN CONSTRUCTION CORP.,
Sixth Third-Party Plaintiff,
-against-

SKYSCRAPER STEEL CORP.,
Sixth Third-Party Defendant.

-----X

YORK, J.:

Motions sequence number 10, 11, 13, 14, 15 and 16 in the first action (Index No. 117132/2006) and corresponding motions in the second action (Index No. 603831/2008) are consolidated for disposition.

BACKGROUND

The two joined actions are for property damage related to construction of a 13-story residential building at 143/145 Lexington Avenue, New York, New York (the "Premises"). Problems with construction started in December 2005-January 2006 when adjoining buildings experienced movement, tipping towards the premises and cracking. The Department of Buildings issued a stop-work order on January 20, 2006, rescinded a month later after the neighboring buildings stabilized.

In the first action (index No. 117132/2006), Marbilla LLC ("Marbilla"), fee owner of 141 Lexington Avenue, New York, New York, sued 143/145 Lexington LLC -- fee owner of the Premises; Green Circle Construction LLC ("Green Circle") -- the general contractor; John Layton ("Layton") -- construction superintendent; Howard I. Shapiro & Associates Consulting Engineers, P.C. ("Shapiro") and James Scheld ("Scheld") -- structural engineers; and Manual Glas ("Glas") -- the architect, for negligence in demolition, excavation and other construction activities on the Premises, resulting in cracks at its adjoining property. In the second action (index No. 603831/08), 143/145 Lexington LLC sued M&R European Construction Corp. ("M&R"), an excavation and underpinning subcontractor, for negligence in performance of its work, resulting in additional construction costs, construction delays and damages to the Premises and to the adjoining property. Third party actions added as defendants Roman Sorokko ("Sorokko"), an underpinning engineer for the project, and his companies, Versatile Consulting

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and Testing Services, Inc. and Versatile Engineering, P.C.; Delta Testing Laboratories Inc. (“Delta”), which conducted soil testing and controlled inspections; Warren George Inc. (“George”), a subcontractor which excavated test holes and pits; and Skyscraper Steel Corp. (“Skyscraper Steel”), a shoring subcontractor. The Marbilla and Lexington actions were joined in 2010 for discovery and trial. Motions resolved in this decision are submitted in both actions and numbered according to the sequence in the Marbilla action.

Marbilla’s motion for summary judgment (sequence number 10)

Plaintiff Marbilla moves for partial summary judgment on its first cause of action based upon breach of the former New York City Administrative Code §27-1031(b)(1) against defendants 143/145 Lexington LLC, Green Circle, Layton and M&R. The relevant provision of the code is:

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.

Marbilla points to the sound condition of its building prior to construction on the neighboring property, the damages appearing when the excavation and underpinning were in progress, and submits that the excavation’s depth exceeded ten feet.

Defendants 143/145 Lexington LLC, Green Circle and Layton oppose the motion on several grounds. They contest that 141 Lexington was in good condition and that the excavation exceeded ten feet. In their opinion, plaintiff failed to show that their efforts to support the adjoining properties were inadequate. M&R asserts that cracks in the building were caused not by its excavation and underpinning, but by demolition of the existing structure at 143/145

Lexington, in which it was not engaged. In addition, M&R claims that it was not provided a license to examine 141 Lexington, and thus cannot be held liable under the Code.

Discussion

The former Administrative Code of the City of New York § 27-1031 (b) (1) (replaced by § 3309.4) imposes absolute liability on a person who causes excavation below ten feet. Yenem Corp. v 281 Broadway Holdings, 18 NY3d 481, 490-91; 941 N.Y.S.2d 20 [2012]. Longstanding case law identifies persons subject to the Code as owners of the building under construction (Rosenstock v Laue, 140 AD 467, 470-71; 125 N.Y.S. 361 [1st Dept 1910]), general contractors (Fagan v. Pathe Industries, 274 A.D. 703, 86 N.Y.S.2d 859 [1st Dep't 1949]) and excavation subcontractors (Palermo v Bridge Duffield Corp., 154 NYS2d 288, 290-91 [Sup Ct 1956] affd., 3 AD2d 863, 161 NYS2d 755 [2d Dept 1957]). 143/145 Lexington LLC, Green Circle and M&R are within Code's ambit while John Layton may be liable if he played the role of general contractor.

It is undisputed that Marbilla granted permission to defendants to inspect its building and that 143/145 Lexington LLC hired a firm, John V. Dinan and Associates, Inc., to prepare a pre-construction report on adjoining properties. There is no evidence in the record that M&R ever requested access to 141 Lexington Avenue or was denied a license to enter the property (Pl. Reply Memorandum of Law, PP. 8-9).

Defendants 143/145 Lexington LLC, Green Circle and Layton contend that the Code is not applicable to the present case because Marbilla failed to prove that excavation was conducted to the depth of more than ten feet.

As evidence of the depth of excavation Marbilla submitted an affidavit of its expert, Kimbal Beasley, and deposition testimony of James Scheld with annexed pictures. Mr. Beasley

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testified that he took probes and examined the underlying structures in the basement of 141 Lexington Avenue, and, based on these examinations, determined that the excavation depth was below 10 feet. James Scheld testified that the depth of the excavation at the front of the project was 13 feet and 10 feet six inches at the rear. He took a series of photographs of the site on July 13, 2006, including the excavation pit walled in concrete. From the presence of equipment, a person and ladders it is clear, in his opinion, that the excavation exceeded ten feet.

Defendants 143/145 Lexington LLC, Green Circle and Layton criticize the affidavit of Kimbal Beasely for failure to state the nature, location and measurements of the probes he allegedly took in 2007 and to annex photographs of his inspections. In addition, this expert was not disclosed by plaintiffs prior to making the motion, and thus his affidavit cannot be admitted into evidence. They also discount Scheld's testimony, since his assessment of the depth of the excavation was made in July 2006, during his field visit. Defendants claim that circumstances have changed on the site since January 2006 when the damages were allegedly incurred (Evans Aff. at ¶ 12).

The court finds that Beasely's affidavit is not sufficient to establish a *prima facie* case that excavation was to a given depth. It is conclusory and not supported by evidentiary materials. Scheld, in contrast, provided a drawing for a sheeting wall next to the excavation pit which his firm created in November 2005 and filed with the Department of Buildings (Hanan Affirmation, Scheld Affidavit, Exh.1) The drawing clearly shows that excavation along the whole front line of the property was to be at the depth of 13 feet, and along the rear line at the depth of 10 feet, 6 inches. The pictures taken in July 2006 confirmed that excavation indeed reached at least this depth. Defendants do not offer their own information on the excavation's depth though as an owner and contractor they presumably know it. Instead, they rely on

Sorokko's testimony that in January 2006 the underpinning's depth was less than six feet. Plaintiff reasonably responds that there is a difference between the depth of underpinning and overall depth of excavation. The documentary evidence presented by Scheld supports the plaintiff's case, and defendants failed to raise an issue of fact concerning the threshold excavation depth. The Administrative Code § 27-1031 (b) (1) applies to the circumstances of the present case.

Under the absolute liability standard of Administrative Code § 27-1031 (b) (1), plaintiff is not required to prove negligence. Accordingly, defendants 143/145 Lexington, Green Circle and Layton's argument that plaintiff failed to prove that their efforts to laterally support the Marbilla building were inadequate is without merit. However, plaintiff still needs to demonstrate that the excavation was a proximate cause of its damages.

Marbilla refers to the report prepared by John V. Dinan and Associates, which surveyed 141 Lexington in November 2004, and to contemporaneous photographs, as proof of the pre-construction condition of their property. According to Willian Rosner, the principal of Marbilla, after the construction started at the adjoining property his building suffered extensive vertical and horizontal cracks along four floors of its façade and damage to the interior (Rosner Affidavit, July 17, 2012, at ¶¶17-18, 28). To establish the time of this damage plaintiff cites documents and admissions by defendants' witnesses. Roman Sorokko, in his letter dated January 12, 2006 addressed to M&R, identified M&R's deviations from his underpinning plans. He recommended that contractors create temporary shoring consisting of steel beams between the exterior walls of 141 and 147 Lexington Avenue (Beasley Affidavit, Exh, B). Mark Zweibon, a member of 143/145 Lexington LLC, testified that he was first notified that the adjoining buildings were shifting on January 6 or 7, 2006 (Zweibon Deposition, P. 88, Arden Affirmation,

Exh. H). The first signs of the damage were racked and out of plumb doors – a fact of which Rosner immediately informed Layton. 143/145 Lexington LLC, in its own lawsuit against M&R (action No. 2) repeated Sorokko’s observations about improper underpinning. John Layton admitted that M&R’s work affected neighboring properties (Layton Deposition, P. 85, Arden Aff. Exh. E), that he first noticed a small crack either at the very end of 2005 or beginning of 2006 (*id.*, P.42) and that in a few months the cracks enlarged and “went from being something very minor to being a much more dramatic and larger cracks and in more locations than they originally were.” (*id.*, PP.46-47). Marbilla claims that the damage continued to enlarge through May 2006.

Defendants question Rosner’s claim that prior to excavation his building was in good condition. They cite John Layton’s recollections of his visit to 141 Lexington Avenue at the time of John V. Dinan’s report. He noticed two conditions – that the fire escape was not properly anchored to the wall of the building and that the floors were not level (Layton Deposition, October 27, 2011, PP. 698-700, 704, 708). Reviewing John V. Dinan’s report, Layton could point to the fact that a window on the fourth floor toed out by one to two inches, which, in his opinion, indicated that “other things were probably not level.” (*id.*, at P. 710). In another part of his deposition, however, Layton stated that when he inspected the first cracks in 141 Lexington in 2006, the floors were “to [his] eye” “flat and level” on each floor (*id.*, at 13).

The parties disagree about the extent to which construction activities may have affected 141 Lexington Avenue. In the present case, as in Yenem, the “building’s allegedly poor condition did not raise an issue of fact as to causation; though certainly relevant to any measure of damages, consideration of the building’s prior condition does not factor into a proximate cause analysis under section 27-1031 (b) (1).” Yenem Corp. v 281 Broadway Holdings, 18 NY3d at

490-91. Defendants 143/145 Lexington LLC, Green Circle and Layton misinterpret this holding of the Court of Appeals to mean that plaintiff is precluded from comparing the condition of its property before and after construction as evidence that construction caused its damages. On the contrary, the holding was addressed to defendants -- in opposing the motion for summary judgment under Administrative Code § 27-1031 (b) (1) they cannot raise an issue of fact as to causation by introducing evidence that the damaged building was not in a perfect state. This motion for summary judgment is on liability only, and does not concern the magnitude of damages.

M&R asserts that cracks in the building were due to demolition. It refers to Rosner's deposition testifying that he first saw cracks in the rear wall in 2005. He specified that "serious damages" appeared in 2006. (Rosner Deposition, January 6, 2010, P. 628). According to M&R, horizontal movement of neighboring buildings cannot be attributed to underpinning. Rather, the buildings moved in the direction of the void left by the demolished structure (Berman Aff. at ¶18). M&R's expert, Joseph Mills, P.E., avers that the movement may have started during the demolition, and the fact that it was noticed later is not relevant (Mills Affidavit, at ¶15, Berman Exh. A.). In addition, during his inspection of 2009, Mills noticed relatively recent cracking in the middle of the building indicating a sagging. He concludes: "Clearly something else is at work other than excavation at the building site." (*id.* at ¶16).

In proving that defendant's actions were a proximate cause of its damages, "plaintiff is not required to exclude every other possible cause, but need only offer evidence from which proximate cause may be reasonably inferred. Plaintiff's burden of proof on this issue is satisfied if the possibility of another explanation for the event is sufficiently remote or technical to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be

drawn from the evidence.” Burgos v Aqueduct Realty Corp., 92 NY2d 544, 550; 684 N.Y.S.2d 139 [1998](internal quotations omitted).

Evidence about the nature and timing of damages, opinions of engineers (Sorokko and Scheld) directly involved in the construction project together with admissions by defendants other than M&R would lead any reasonable jury to infer that improperly done underpinning was a proximate cause of damages to Marbilla’s property. Joseph Mills’s alternative explanations are “sufficiently remote.” He did not present any evidence to support his claim that a mere removal of a building would result in settling of adjoining buildings. Neither could he account for the timing of the buildings’ first movements. To conclude that demolition, rather than excavation, was responsible for cracks in the neighboring buildings would require a jury to make conjectures and to speculate rather than draw logical inferences.

Defendants could not raise an issue of fact in relation to proximate cause. Plaintiff Marbilla established its entitlement to judgment as a matter of law against defendants 143/145 Lexington LLC, Green Circle and M&R based on Administrative Code § 27-1031 (b) (1). The role of John Layton as an individual is considered in motion No 14.

Delta’s Cross-Motion

Delta Testing Laboratories, Inc. cross-moves for summary judgment pursuant to CPLR §3013 and 3212 or, in case the motion is not granted, for an order pursuant to CPLR 3042 precluding third-party plaintiff M&R European Construction Corp. from introducing evidence against Delta at trial.

First, it contends that a claim against it must be dismissed based on the doctrine of the law of the case. Justice Friedman determined in her order of March 29, 2012 that M&R’s pleadings against Green Circle were devoid of sufficient details. Delta reasons that the same

third-party complaint by M&R, deemed to be insufficient against Green Circle, must also be deemed insufficient against all of the third-party defendants in Action No. 2 (Klauber Reply Aff, at ¶7). Next, Delta argues that it had no agreement with any party to the action except Green Circle. Since plaintiffs in the two joined actions did not assert direct claims against Delta which was impleaded by M&R, they cannot now oppose Delta's motion (*id.*, at ¶5). Finally, it asserts that there is no affirmative showing of its negligence.

143/145 Lexington LLC, Green Circle and Layton, as defendants in action No. 1, 143/145 Lexington LLC as plaintiff in action No.2, and M&R and Skyscraper Steel, all oppose the motion. They emphasize that even if there had been deficiencies in the particularity of M&R complaint against Delta more than two years ago, since then the parties have actively litigated the matter and the pleadings against Delta have been amplified by evidentiary material including dozens of depositions and multiple documents. (Rohlfing Aff. at ¶ 9). Parties opposing Delta's motion substantiate their allegations of its negligence by providing evidence that it repeatedly failed to follow Sorokko's underpinning plans in performing its controlled inspections of M&R's work.

Discussion

Delta's reliance on the law of the case doctrine is misplaced. Justice Friedman's order resolved the dispute between M&R and Green Circle, and did not concern Delta. Reasoning by analogy is not encompassed by the notion of "the law of the case." Neither can Delta avail itself of CPLR 3013 at this stage of the proceedings. As a result of discovery it has sufficient "notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved" to defend itself against allegations of negligence.

Both Delta and its opponents cite Espinal to characterize the duties Delta owed to other participants in the construction project.

Under our decisional law a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party... As a matter of policy, we have generally declined to impose liability to that degree. On the other hand, we have recognized that under some circumstances, a party who enters into a contract thereby assumes a duty of care to certain persons outside the contract... *Moch*, *Eaves Brooks* and *Palka* identify three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, “launche[s] a force or instrument of harm” (*Moch*, 247 N.Y. at 168, 159 N.E. 896); (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties (*see Eaves Brooks*, 76 N.Y.2d at 226, 557 N.Y.S.2d 286, 556 N.E.2d 1093) and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (*see Palka*, 83 N.Y.2d at 589, 611 N.Y.S.2d 817, 634 N.E.2d 189). These principles are firmly rooted in our case law, and have been generally recognized by other authorities (*see e.g.* Restatement [Second] of Torts § 324A).

Espinal v Melville Snow Contractors, Inc., 98 NY2d 136, 138-39; 746 N.Y.S.2d 120 [2002].

On Delta's view, its contractual obligations to Green Circle do not give rise to tort liability to third parties. It did not “launch a force or instrument of harm” since it was not hired to provide any drawings or blueprints for the project or to perform any actual labor or construction work for it (Klauber Aff. at ¶20). Nor did it displace M&R in its excavation and underpinning work. Merely examining Sorokko's underpinning plans and observing the work performed by M&R did not render Delta a guarantor or insurer with respect to this work (Klauber Reply Aff., at ¶26). Accordingly, other parties had no reason to rely on Delta's inspections. The TR-1 (Technical Report) signed by Delta and submitted to the Department of

Buildings obligated it to conduct controlled inspections but did not obligate it to make sure that there is no damage to the neighboring property .

Courts have found that negligence in conducting controlled inspection can lead to liability independent of contract. Equit. Life Assur. Soc. of U.S. v Nico Const. Co., Inc., 245 AD2d 194, 19; 666 N.Y.S.2d 602 [1st Dept 1997] (the record showed that there was testimony directly linking the failure to conduct controlled inspections of the concrete and a substantial number of voids in the pool walls); 620 Broadway v. Rusabo, 2007 WL 2176940 (Sup Ct NY Cty 2007) (triable issue of fact as to whether failure of engineer of record on construction project to make controlled inspections called for in soil analysis report, prepared in connection with construction project, was a proximate cause of damage done to neighboring building through undermining of wall of neighboring building precluded summary judgment for engineer in negligence action brought by corporate owner of neighboring building); Orchard Management, Inc. v. Ins. Co. of Greater New York, 2010 WL 1640129 (Sup Ct NY Cty 2010) (summary judgment denied to a party who filed forms with DOB stating that it assumes responsibility for controlled inspections and could not demonstrate that its failure to conduct controlled inspections did not proximately cause plaintiffs' damages).

According to Delta's principal witness, Bernard Lucchese, it was Delta's contractual obligation to inspect the underpinning work and to stop, and correct it, if it did not conform to the engineer's specifications (Lucchese Deposition, May 29, 2012, PP. 321-322, 328,338, 416-417). Delta's opponents draw attention to detrimental reliance, the second exception in Espinal. They note that Roman Sorokko, the underpinning engineer, emphasized the importance of several requirements that he specifically wrote on his underpinning plans. First, before the concrete is poured, the soil must be compacted to 95% of dry density. Sorokko explained that the

term "dry density" is crucial because evaporation of water may lead to the settlement of soil. Only in the laboratory, or, exceptionally, with specialized equipment in the field, can inspectors test dry density of soil. If the requisite density is not achievable, the engineer must be informed so that he can adjust his plans. The second requirement is to allow concrete to reach 75% of its strength before dry pack is placed on top of it and the load is transferred to the underpinning. It takes seven to ten days for regular concrete to solidify (Sorokko Deposition, April 5, 2012, PP.53-61). Both of these requirements were not met, as Sorokko pointed out in his letter of January 12, 2006 addressed to M&R. The issue is whether Delta, which conducted controlled inspections, had an obligation to notice deviations from the original underpinning plan, inform the engineer about it and/or stop work until the problem was resolved.

Bernard Lucchese, engineer from Delta, expressed the opinion that there was no need to do compaction testing of the original sub-soil for footing bottoms or underpinning, and that a visual inspection was sufficient (Lucchese Deposition, at PP.44-46, 76). Following Sorokko's notations on the plan he was asked: "How would you follow those plans, simply doing it visually or by poking it with a rebar?"

A. You can't.

Q. Then how would you meet the requirements that the soil be compacted to 95% of dry density if you can't do it visually?

A. I know the soil was firm, it wasn't going anywhere, all right, it was dry, there was no problem with that and for me that was suitable. We do that for all footings, we don't do dry compaction tests for footings

(*id.*, at PP.94-95).

Bernard Lucchese acknowledged that part of Delta's controlled inspection of the underpinning job was to check whether dry pack was installed (*id.*, at PP.153-154). As Roman

Sorokko stressed, placing the dry pack is the most important item for the whole job after compaction. "If the dry pack is not placed or placed unscrupulous[ly] [*sic*] the building might settle (Sorokko Deposition, P.64). However, Luccese could not tell from his records when the load was transferred (that is, the dry pack placed) on concrete poured on December 20, 2005.

A. Well, if they were doing the dry packing, it would show up, that would be about the time the load would be transferred.

Q. Well, can you determine from your records when the dry packing was done on the pin that was poured on December 20, 2005?

A. I don't see it... I have to check to see if we were even checking the dry packing. (Lucchese Deposition, P. 133).

Reading his own reports, Lucchese could not identify where the excavation was done on a particular day, and whether the required sequence was followed (*id.*, P 159). If these reports are not clear for their author, as well as an underpinning engineer, reliance on them would be detrimental to various parties. M&R cited McKernan's (its witness') testimony that M&R relied on controlled inspection with respect to soil conditions and approval before pouring concrete (Berman Aff., at ¶24-25). In addition, Layton testified that Delta's reports were untimely, about a month after the inspections occurred (Layton Deposition, August 9, 2011 278, 378) and thus he could not take any corrective actions with regard to Delta's observations. Successive reports in early January 2006 concluded that if the movement of neighboring buildings continued, it would stop the underpinning work. The next report noted that the movement continued, but no order to stop the work was issued, despite Delta's authority to do so.

Given that the very purpose of controlled inspections is to signal when it is proper to proceed with the work or to alert participants in the construction project to the deviations from the plans, Delta's opponents raised numerous issues of fact as to Delta's carelessness in

conducting inspections or its conscious disregard of clearly stated instructions. For this reason Delta's motion for summary judgment must be denied.

Warren George Inc.'s motion for summary judgment (sequence number 11)

Warren George Inc. is a boring/drilling company retained by Delta for two test borings and two test pits at 143/145 Lexington Avenue. The test borings were done in the back yard and in the sidewalk located in front of the site, the test pits in the basement of the existing building. George did not analyze the samples but provided them in sealed sample jars along with the related boring logs to Delta for testing. The work was completed over two weeks in January 2004. Delta paid George in full and made no complaints about the quality of its work. George argues that it was retained by Delta and had no contractual relationship with any other party in the two actions. It maintains that it complied with the New York City Building Code and questions whether four holes dug could in any way have affected the construction project and led to damages alleged by plaintiffs.

M&R, opposing the motion, asserts that George was responsible for more than digging a few holes. It submits copies of records from the borings which contain information on soil conditions "which is exactly what the structural engineers, underpinning engineer, architect, general contractor and even M&R relied upon to determining how this work was to proceed and what type of protection was needed for the neighboring buildings" (Berman Aff. at ¶5). According to M&R, the presence of ground water in one of the pits dug by George inside the existing structure cannot be attributed to rain and that George should have discovered the water and done something about it (*id.*, at ¶9).

George responded that it was Delta that added the classes of soil and affixed its engineer's stamp to Warren George's boring log without its consent (Clark Reply Aff. at ¶7). As to ground water found in the pit, the pit was too shallow to have reached the water table, and it was not George's task to analyze the source of this water.

Delta, in its partial opposition to George's motion, does not find fault with George's work. Rather, it requests that if summary judgment is granted to this subcontractor, it is granted to Delta as well in relation to soil analysis, since at present it is impossible to determine whether the sample borings were improperly taken or improperly analyzed (Klauber Aff., at ¶5).

Skyscraper Steel opposed the motion on the ground that it did not have discovery. However, at a discovery scheduling conference it did not submit any discovery requests concerning George.

Warren George made out a *prima facie* case for summary judgment. Its opponents could not point to any evidence demonstrating that it had duties beyond those in its contact with Delta, or that it performed its duties negligently. All claims against Warren George Inc. are thus dismissed.

Manual Glass' motion for summary judgment (sequence number 13)

Manual Glass moves, pursuant to CPLR 3211(a)(1) and/or CPLR 3211(a)(7) and CPLR 3212, for summary judgment dismissing complaints and all cross-claims and counter-claims against him.

Glas argues that documentary evidence unequivocally establishes that he owed no contractual or statutory duty as to construction, demolition and /or excavation work, including

underpinning work that allegedly damaged Marbilla's property. §2.6.2.1 of the AIA Standard Form of Agreement Glas entered into with 143/145 Lexington LLC provides that :

The Architect shall neither have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents. (Sherman Aff., Exh. H).

In his testimony Glas explained that "underpinning is part of the means and methods of the construction excavation" (Glas Deposition, June 12, 2012, P. 190). Glas' prior motion for summary judgment was denied by Justice Friedman on May 21, 2010 without prejudice. Glas filed a TR-1 form with the Department of Building on August 13, 2004 that included his responsibility for the underpinning. This created an issue of fact as to whether he was indeed responsible for the supervision of the underpinning. According to Glas, he signed the August 13, 2004 TR-1 as a courtesy to the project owner, in accordance with the common architectural practice of expediting the building approval process before any excavation and underpinning work has actually been performed. Documents filed by Glas contained structural drawings from another firm, Cantor Seinuk, which, in accordance with common practice, included suggested, non-final and never- implemented underpinning designs. (*id.*, at 196). It is to this evidence that Marbilla, 143/145 Lexington LLC, Green Circle and Layton point in their opposition to Glas' motion (Marbilla Memorandum of Law, P. 19; Evans Aff., at ¶¶11-13). Once an underpinning contractor was hired, Delta took over this responsibility and filed a superseding TR-1 signed by Bernard Lucchese and dated November 17, 2005 (Sherman Aff., Exh. K). In his deposition testimony, Lucchese acknowledged his signature and stamp on that TR-1 (Lucchese Deposition, P. 150-153). Roman Sorokko, and not Glas, created the underpinning plans. Glas testified that he

did not have to file a document with the Building Department formally withdrawing his signature on a TR-1.

In his deposition testimony Roman Sorokko confirmed that it is common practice for architects to file a preliminary TR-1 and take responsibility for controlled inspections (Sorokko Deposition, April 11, 2012, PP. 135-136). This practice is taken into account by courts.

While the engineering subcontractor filed a technical report form with the city indicating it would conduct controlled inspections of the shoring, structural stability and concrete, it only did so to expedite the filing process for obtaining a construction work permit. Stability measures were the contractor's responsibility. The contractor was to retain a licensed professional engineer to provide the necessary designs and required inspections, and the contractor was to provide all measures and precautions necessary to prevent damage and settlement for existing or new construction.

Travelers Indem. Co. v. Zeff Design, 60 A.D.3d 453, 875 N.Y.S.2d 456 [1st Dep't 2009].

Nothing in the record indicates that Manuel Glas was otherwise involved in underpinning.

Skyscraper Steel, another party opposing the motion, states that it was present at Glas' deposition, but did not have a chance to serve written discovery requests on him. It did not specify what kind of information it seeks from Glas. "A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" Bailey v. New York City Tr. Auth., 270 A.D.2d 156, 157; 704 N.Y.S.2d 582 [1st Dept 2000]. Manuel Glas' motion for summary judgment is granted.

143/145 Lexington LLC, Green Circle and Layton's motion for summary judgment (sequence number 14).

Defendants 143/145 Lexington LLC, Green Circle and John Layton move to dismiss all claims and counter-claims against John Layton as an individual and for summary judgment to dismiss that part of Marbilla's damage claim which seeks compensation for lost rents on the ground that plaintiff failed to mitigate damages. Marbilla is the only party to oppose the motion.

Defendants argue that Layton acted solely in his capacity as the general superintendent of the project on behalf of Green Circle and that there are no reasons to pierce the corporate veil of Green Circle to place liability on one of its individual members. Layton is a member of 143/145 Lexington LLC and the managing member of Green Circle. All contracts with subcontractors were concluded either by 143/145 Lexington LLC or Green Circle, Layton took out construction loans solely on behalf of 143/145 Lexington LLC and approved payments to subcontractors in his capacity as the general superintendent of Green Circle (Evans Aff. At ¶¶17-22).

The only evidence Marbilla adduces to support the claim that Layton might be held individually liable is the fact that Layton was paid for his work not through Green Circle but through Iron Head (Marbilla Memo of Law P. 17). The significance of this fact remains unexplained except for a suggestion that Layton may have been a construction manager on the project.

In order to pierce the corporate veil, a plaintiff must show that the dominant corporation exercised complete domination and control with respect to the transaction attacked, and that such domination was used to commit a fraud or wrong causing injury to the plaintiff. Factors to be considered include the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the

allegedly dominated corporation; whether dealings between the entities are at arm's length; whether the corporations are treated as independent profit centers; and the payment or guaranty of the corporation's debts by the dominating entity. No one factor is dispositive.

Fantazia Intern. Corp. v CPL Furs New York, Inc., 67 AD3d 511, 512; 889 N.Y.S.2d 28 [1st Dept 2009].

Marbilla failed even to raise an issue that John Layton completely dominated either Green Circle or 143/145 Lexington LLC and used this domination to commit a wrong against Marbilla. Accordingly, all claims and counter-claims against John Layton as an individual are dismissed in both actions.

In the second part of their motion defendants request that plaintiff's claim for recovering lost rents be dismissed. It relies on William Rosner's admission in his deposition that he made a deliberate choice not to repair the premises. "I made a value judgment, a business decision, a prudent business decision that (a) I wasn't going to remediate these apartments because I did not cause the damage and (b) the apartments were not habitable." (Rosner Deposition, March 31, 2009, P. 892). "I was not about to remediate the damage. The litigation was ongoing, and it was not my responsibility. It was the responsibility of Green Circle LLC to repair my building and cover my damages." (*id.* P.915).

The parties do not dispute that Marbilla made repairs to apartments occupied by existing tenants at the time of construction activity at 143/145 Lexington. Marbilla repaired walls, windows, adjusted doors and sealed some cracks (Rosner Deposition, at 102). Rosner acknowledged that these tenants left the building at the expiration of their leases from June 2006 to October 2007. It is equally undisputed that these apartments were not re-let and that no further repairs were undertaken.

Defendants analyzed the financial transactions between Rosner, Marbilla and other companies controlled by the Rosner family concluding that Marbilla was in a position to pay for the repairs. Rosner and his wife paid, from their personal financial resources, a \$1,175,000 mortgage on the property, as well as real estate taxes and other expenses. There were numerous deposits in and out of Marbilla's accounts.

Rosner's affidavit in opposition states that, through John Layton, 143/145 Lexington LLC initially promised to repair damage to the rental units but did not do so. Rosner made it possible for the tenants to remain by making necessary, urgent and costly repairs. These costs, however, were far from the almost two million dollars it would require, in his opinion, to return the building to a habitable condition (Rosner Affidavit, at ¶6). A contractor estimated that it would cost in excess of 1,6 million dollars to restore the building (*id.* at ¶23). The fact that Rosner made loans and capital contributions to Marbilla over the years does not mean that he should have advanced his own money to remediate the building (*id.* at ¶25).

"It was defendants' burden to establish not only that plaintiff failed to make diligent efforts to mitigate its damages, but also the extent to which such efforts would have diminished its damages." LaSalle Bank Nat. Ass'n v Nomura Asset Capital Corp., 47 AD3d 103, 107-08; 846 N.Y.S.2d 95 [1st Dept 2007] (internal quotations omitted).

At issue is whether Marbilla's efforts to minimize damages were reasonable and whether it should have restored the residential units at its own expense in order to rent them pending the outcome of this litigation. The parties dispute the extent of damages incurred at 141 Lexington Avenue. In Marbilla's view, the defects are structural and substantial, while 143/145 Lexington LLC argues that they are mostly cosmetic and easily repaired. The defendants did not provide estimates of costs to repair the residential units and at what prospective rents Marbilla could

have rented them. The amount of damages will be determined at trial. With this information in mind, a jury will determine whether Marbilla made a wise decision to leave the apartments vacant for years. This is not the court's task on a motion for summary judgment. Accordingly, this part of defendants' motion for summary judgment is denied.

Howard I. Shapiro's and James Scheld's motion for summary judgment (sequence number 15)

Defendants Howard I. Shapiro and James Scheld move for summary judgment to dismiss all claims and counterclaims against them. Defendants assert that Scheld cannot be liable for any of the causes of action or cross-claims as he was acting solely within his capacity as an employee of Shapiro. Shapiro cannot be responsible for the damages since its responsibilities did not include activities related to underpinning or providing lateral support for adjacent structures. Its responsibilities were limited to: 1) designing a sheeting wall to be installed at the rear and front of the construction site, the sole purpose of which is to retain soil from entering the site and not for the protection of adjacent structures; 2) performing controlled inspections of the installation of the sheeting wall; 3) preparing paperwork in connection with setting up a crane outside the construction site. (Hanan Aff., at ¶10). Defendants state that no party provided expert testimony to establish any factual issue with regard to Shapiro's and Scheld's liability. Roman Sorokko, who designed the underpinning, testified that the sheeting wall at the front and rear of the yard would not protect the adjacent buildings (Sorokko Deposition, at P. 242). This was also confirmed in the deposition of M&R's principal (McKiernan Deposition, PP. 419,420). Both Mr. Sorokko and Mr. McKiernan agree that the wall Shapiro designed, and for which it performed

controlled inspections, did not have a relation to the protection of adjacent structures, the only issue in this case.

The motion is unopposed, except for Skyscraper Steel's claim that it must be given a chance to conduct discovery. As in the case with Warren George Inc., Skyscraper Steel does not intend to submit any discovery requests to Shapiro or Scheld. Accordingly, defendants' motion for summary judgment is granted.

Iron Head's motion for summary judgment (sequence number 16)

Defendant Iron Head Enterprises LLC moves for summary judgment to dismiss all claims and counter-claims against it on the ground that Iron Head did not do any construction work at the premises. Iron Head had no contracts with parties to the two actions, and is not known to them. Iron Head was formed by John Layton, and he is its sole member. In Layton's words, Iron Head provided his "intellectual services to various groups relative to construction and redevelopment", including such services to Green Circle (Layton Deposition, at PP.22, 27). As managing member of Green Circle, Layton was paid through Iron Head for administrative services on the 143/145 Lexington construction project. M&R impleaded Iron Head, alleging that Iron Head breached its obligations pursuant to contracts and agreements. No proof of such contracts was submitted, nor is there any proof that Iron Head ever performed work for M&R or any other party, and no money passed between them.(Azoulay Aff. at ¶15).

Skyscraper Steel, in its opposition to this motion, joined by M&R, cited lawsuits initiated by Iron Head against 143/145 Lexington LLC and Green Circle. In one of them (index No. 100323/2010, New York Supreme Court, New York County) Iron Head alleged that in May 2005 it entered into agreement with Green Circle to provide construction management and

supervision services for the construction project at 143/145 Lexington Avenue (Tipton Aff., Exh.3, at ¶7). In their answer to the complaint, 143/145 Lexington LLC and Green Circle denied such an agreement and asserted that Layton was a construction manager on the project, while Green Circle was a shell company with no employees. Iron Head was Layton's alter ego. (Tipton Aff., Exh. 4, ¶¶21, 24). There is an issue of fact as to what role, if any, Iron Head played in the construction project, and its motion for summary judgment is denied.

CONCLUSION

For all the foregoing reasons it is

ORDERED, that plaintiff Marbilla's motion for partial summary judgment on liability only is granted against defendants 143/145 Lexington Avenue LLC, Green Circle Construction Corp. and M&R European; and it is further

ORDERED, that defendant Delta Testing Laboratories' cross-motion for summary judgment is denied; and it is further

ORDERED, that defendant Warren George Inc.'s motion for summary judgment is granted, and all claims and counter-claims against it are dismissed; and it is further

ORDERED, that defendant Manuel Glas' motion for summary judgment is granted and all claims and counter-claims against him are dismissed; and it is further

ORDERED, that part of defendants 143/145 Lexington Avenue LLC, Green Circle Construction Corp. and John Layton's motion for summary judgment, which is to dismiss all claims and counter-claims against John Layton as an individual, is granted; the remaining part of the motion, which is to dismiss Marbilla's damages for lost rents, is denied; and it is further

ORDERED, that defendants Howard I. Shapiro's and James Scheld's motion for summary judgment is granted and all claims and counter-claims against them are dismissed; and it is further

ORDERED, that defendant Iron Head's motion for summary judgment is denied

Dated: 4/25/13

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LOUIS B. YORK
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LOUIS B. YORK
J.S.C.

FILED

APR 29 2013

NEW YORK
COUNTY CLERK'S OFFICE