

**Allstate Ins. v Rego Park Holdings, LLC**

2013 NY Slip Op 30931(U)

February 13, 2013

Supreme Court, Queens County

Docket Number: 26465/2010

Judge: Denis J. Butler

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IA Part 12  
Justice

ALLSTATE INSURANCE, PEI CHAO x  
COMPANY, as subrogee of PEI CHAO  
and PEI CHAO, LU HUA CHAO and  
YAKOV INOYATOV,

Plaintiffs,

-against-

REGO PARK HOLDINGS, LLC, ANTONIO  
MOURTIL, ALL ISLAND MASONRY, INC.,  
FEGARI SITE CONSTRUCTION, INC.,  
BOBCAT CONSTRUCTION CORP.,  
EMILY LIN d/b/a LIN & ASSOCIATES  
ARCHITECTS P.C., and PAUL BECK  
d/b/a PAUL BECK ASSOCIATES P.A.,

Defendants.

ALL ISLAND MASONRY, INC., x

Third-Party Plaintiff,

-against-

RIVER CONCRETE INC.,

Third-Party Defendant.

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The following papers numbered 1 to 39 read on this motion by defendant Paul Beck d/b/a Paul Beck Associates, P.A. ("PBAPA") pursuant to CPLR 3212 for summary judgment dismissing all claims and cross-claims asserted against PBAPA; on the motion by Antonio Mourtil pursuant to CPLR 3212 for summary judgment dismissing the complaint; on the motion by defendants Rego Park Holdings LLC ("Rego Park Holdings") and Bobcat Construction Corp. ("Bobcat") for summary judgment on their cross-claims for indemnification against Fegari Site Construction, Inc. ("Fegari") and All Island Masonry, Inc. ("All Island") and for summary judgment dismissing

portions of the plaintiffs' claims, including the demand for punitive damages and attorneys' fees; and on the motion by Lin Associates Architects P.C. s/h/a Emily Lin d/b/a Lin and Associates Architects, P.C. ("Lin") pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims.

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Notices of Motion - Affidavits - Exhibits.....	1-13
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Upon the foregoing papers it is ordered that the motions are determined as follows:

This is an action to recover for property damages allegedly sustained by plaintiffs Pei Chao and Lu Hua Chao, the owners of a residence at 65-07 Booth Street, Rego Park, New York and Yakov Inoyatov, the owner of a residence at 65-15 Booth Street, Rego Park, New York, as a result of construction work being performed at property located at 65-11 Booth Street, Rego Park, New York, which is situated between the plaintiffs' residences. The plaintiffs' complaint contain causes of action for negligence, nuisance, ultra hazardous activity, reckless endangerment, trespass and negligence in the preparing of architectural and engineering plans.

The property located at 65-11 Booth Street was owned by the defendant Rego Park Holdings. Rego Park Holdings is a Limited Liability Company whose members include defendant Antonio Mourtil and Farhad Nabatkhorian. Rego Park Holdings hired Bobcat as the General Contractor for the work being performed at 65-11 Booth Street. Bobcat is a domestic corporation whose shares are owned by Mourtil and Nabatkhorian.

On or about October 27, 2006, PBAPA contracted to provide structural engineering services for the construction of an eight-story multiple dwelling and health care facility at 65-11 Booth Street. PBAPA's services included the designing of the structural framework and foundation, including notes, details and schedules, in accordance with the architectural drawings prepared by the architect, defendant Lin. Defendant Lin, however did not draft the plans. The plans were drafted by Mourtil and "sealed" by defendant Lin. The drawings provided by Mourtil and "sealed" by Lin indicated the work did not involve plaintiffs' property as it demonstrated that the footing for plaintiffs' foundations would

be at the same elevation as the footing for the new building. Thus, the structural design generated by PBAPA assumed no underpinning was to occur. PBAPA's drawings for the project, however, included details for generic underpinnings should they be necessary.

In July 2008, construction began at 65-11 Booth Street. Rego Park Holdings entered into a contract with Fegari to perform excavation work using heavy equipment at the subject premises. Rego Park Holdings also had a contract with All-Island Masonry to perform any necessary underpinning, including hand excavation. All-Island Masonry subcontracted the actual underpinning work to third-party defendant River Concrete, Inc. (River Concrete").

During the pre-construction excavation work underpinnings were done to the each of the plaintiffs' properties located at 65-09 and 65-15 Booth Street. Plaintiffs' allege the underpinnings were done without their consent and without permits from the Department of Buildings as required by the New York City Construction Code. Plaintiffs contend that the underpinning work was not done in accordance with any plans submitted by defendant PBAPA. Upon the developer being informed that underpinnings were necessary on the adjacent properties, it engaged LTPE Consulting P.C. ("LTPE"), a structural engineering firm, to prepare shoring plans. The Court notes on the TR-1s submitted on this motion, that PBAPA did not check the box for underpinning. LTPE, however, subsequently filed a TR-1 with shoring plans.

Plaintiffs allege that defendants' construction activities caused damages to their premises; defendants interfered with the plaintiffs' use and enjoyment of their property and defendants entered the plaintiffs' premises without permission. Plaintiffs specifically allege that the excavation work at 65-11 Booth Street and the underpinning done to their property caused and/or contributed to plaintiffs' alleged property damages.

A party moving for summary judgment must show by admissible evidence that there are no material issues of fact in controversy and that they are entitled to judgment as a matter of law (see, Alvarez v Prospect Hosp., 68 N.Y.2d 320 [1986]; Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851 [1985]). To set forth a claim of negligence a plaintiff must establish a duty owed to plaintiff, a breach of that duty, and a showing that the breach of the duty constituted a proximate cause of the injury (see, Ingrassia v Lividikos, 54 A.D.3d 721 [2 Dept 2008]). Here, the defendant PBAPA established its prima facie entitlement to summary judgment as the evidence submitted established that PBAPA was not involved in the underpinning/excavation operations

performed at the construction site. The deposition testimony of all parties established that PBAPA was not on site at any time and did not oversee the excavation or underpinning operations at the project. The structural design generated by PBAPA for the project assumed no underpinning was necessary. Additionally, the deposition testimony of the various subcontractors on the job site confirms that the underpinning work undertaken was not done with any involvement of PBAPA and was not based upon the plans drawn by PBAPA. As such, there was no breach of duty committed by PBAPA.

Defendant Lin has also established its prima facie entitlement to summary judgment. For a defendant to be held liable for negligence it must be shown that the defendant owed a duty to the plaintiff (see, DiPonzio v Riorda, 89 N.Y.2d 578 [1997]; Chahales v Westchester Joint Water Works, 47 A.D.3d 610 [2 Dept 2008]; Ocera v Zito, 212 A.D.2d 681 [2 Dept 1995]). Defendant Lin did not owe any duty to the plaintiffs. The work performed by defendant Lin consisted of architectural services in designing the building. Defendant Lin did not provide any underpinning plans. Defendant Mourtil testified that defendant Lin was not retained to perform any engineering work or draw up any structural plans. Furthermore, even if defendant Lin owed a duty to plaintiffs, there is no evidence proffered of any breach of such duty. There are no allegations that the design of the building was flawed. Additionally, defendant Lin had no involvement in the actual construction performed on the subject property, did not appear at the construction site and did not perform any excavation or underpinning work thereat.

Plaintiffs cannot maintain causes of action for nuisance, trespass, ultra-hazardous activity or reckless endangerment against defendants PBAPA or Lin. Neither Lin nor PBAPA were involved in the construction activity and neither intruded upon the plaintiffs' property or interfered with the plaintiffs' right to use and enjoy their land (see, Kaplan v Incorporated Vil. of Lynbrook, 12 A.D.3d 410 [2 Dept 2004]; Hilltop Nyack Corp. v TRMIA Holdings, 264 A.D.2d 503 [2 Dept 1999]; Stage Club Corp. v West Realty Co., 212 A.D.2d 458 [1 Dept 1995]).

The opponent of a summary judgment motion must present admissible evidence that is sufficient to raise an issue of fact (see, Zuckerman v City of New York, 49 N.Y.2d 557 [1980]). In opposition, plaintiffs and co-defendants failed to raise an issue of fact that would warrant denial of the summary judgment motion. The fact that the plans from Lin and PBAPA did not recognize the need for underpinning does not raise an issue of fact sufficient to warrant denial of the motions. The plans provided by Lin and

PBAPA indicated the underpinnings probably should not be needed. However, PBAPA did provide generic underpinning plans. Plaintiffs and co-defendants' argument that because PBAPA and Lin failed to go to the jobsite to investigate whether underpinning was necessary the summary judgment motions should be denied is without merit. When underpinning was found to be needed, neither PBAPA nor Lin was involved in this determination or work and the plans PBAPA provided were not utilized. The issue in this case is not whether underpinning should have been included in the plans, but whether the underpinning excavation operations were negligently performed, causing the damage to the plaintiffs' adjacent property. No evidence is presented that either PBAPA or Lin were responsible for the means and methods of the underpinning operations.

Defendant Mourtil has moved for summary judgment dismissing the complaint against him on the ground that there can be no liability against him in his individual capacity. In an affidavit submitted in support of his motion, defendant Mourtil stated that all the work done with respect to the excavation performed at the subject premises was contracted within his scope of authority as an officer and/or shareholder of Rego Park Holdings and Bobcat, and not in his individual capacity. Additionally, defendant Rego Park Holdings, not defendant Mourtil, is the title owner of the premises, and defendants Rego Park Holdings and Bobcat hired the subcontractors to perform the excavation work. Inasmuch as corporations have a separate legal existence from that of their officers and shareholders and there is no basis to pierce to corporate veil, defendant Mourtil established his prima facie entitlement to judgment as a matter of law (see, Kok Choy Yeen v NWE Corp., 37 A.D.3d 547 [2 Dept 2007]; John John, LLC v Exit 63 Dev., LLC, 35 A.D.3d 540 [2 Dept 2006]). In opposition, no party hereto raised an issue of fact sufficient to defeat the summary judgment motion herein. The argument that Mourtil played an active role in the construction project does not raise an issue of fact as a corporation has to act through its employee or agent. All of the work that Mourtil performed, including signing contracts and drafting plans, was done in his official capacity. The claims that Mourtil was acting in his individual capacity are merely speculative.

The branches of the motion by Rego Park and Bobcat for summary judgment dismissing the causes of action for ultra hazardous activity and reckless endangerment are granted. This is a case involving property damage stemming from alleged negligence, which led to a construction-related accident. There was no evidence proffered that the construction project was an ultra hazardous activity or that the defendants acted with actual

malice (see, 532 Madison Ave. Gourmet Foods v Finlandia Ctr., 96 N.Y.2d 280 [2001]; Regis v City of New York, 269 A.D.2d 515 [2 Dept 2000]). Additionally, reckless endangerment is not recognized as an independent civil cause of action.

The branch of the motion by Rego Park and Bobcat for summary judgment dismissing the cause of action for nuisance is granted, without opposition.

With respect to the branch of the motion seeking summary judgment on trespass, defendants Rego Park and Bobcat failed to establish entitlement as a matter of law. While defendants contend that there was a party wall easement on the Chaos' property, the alleged trespass occurred when the underpinning was performed. The underpinning allegedly included removing soil from under the wall. As such, there is an issue of fact as to whether a trespass occurred during the installation of the underpinning. Further, the statements by defendant Moutril that the plaintiff Inoyatov consented to the underpinning does not warrant dismissing the trespass cause of action against Inoyatov, as plaintiff Inoyatov denies making any such statement. As such, this raises an issue of fact whether plaintiff Inoyatov consented to the underpinning sufficient to deny summary judgment.

With respect to the branch of the motion wherein Rego Park and Bobcat seek to dismiss plaintiffs' claims for attorneys' fees and punitive damages, punitive damages are available only when the misconduct alleged is beyond mere negligence, such as when the tortfeasor acted wantonly, maliciously or with a reckless disregard that transcends mere carelessness or the wrongdoer engaged in intentionally oppressive or outrageous misconduct (see, New York University v Cont. Ins. Co., 87 N.Y.2d 308 [1995]; Arnold v Siegel, 296 A.D.2d 363 [2 Dept 2002]; Kopec v Hempstead Gardens, 264 A.D.2d 714 [2 Dept 1999]). Here, the evidence established that defendants Rego Park Holdings and Bobcat did not engage in conduct evidencing the high degree of moral culpability necessary to sustain a demand for punitive damages in a negligence action (see, Fernandez v Suffolk County Water Auth., 276 A.D.2d 466 [2 Dept 2000]; Lee v Health Force, 268 A.D.2d 564 [2 Dept 2000]). Generally, attorneys' fees and disbursements are incidents of litigation and parties are responsible for paying their own attorneys' fees, unless an award of such fees is authorized by an agreement between the parties or by a statute or court rule (see, Matter of A.G. Ship Maintenance Corp. v Lezak, 69 N.Y.2d 1 [1986]). As there was no such agreement between the parties and the plaintiffs have not pled any statute or court rule permitting recovery of these fees, plaintiffs' claims for attorneys' fees is dismissed.

With respect to the branches of the motion wherein defendants Rego Park Holdings and Bobcat seek summary judgment on indemnification, Rego Park Holdings and Bobcat have failed to establish their prima facie entitlement in that they have failed to establish as a matter of law that the accident arose from the work of All Island or Fegari. The accident could have arisen from the work performed by All Island or it could have arisen from the work performed by Fegari. Therefore, summary judgment in favor of Rego Park Holdings and Bobcat is not warranted against either All Island or Fegari (see, Baczyk v Park 25<sup>th</sup> Assoc., 261 A.D.2d 180 [1 Dept 1999]). As Rego Park Holdings and Bobcat have failed to prove that they were free from negligence, they are not entitled to summary judgment on their claim for contractual indemnification, as such a finding would be premature (see, McAllister v Construction Consultants L.I., Inc., 83 A.D.3d 1013 [2 Dept 2011]).

With respect to the branches of the motion seeking summary judgment based on the failure of All Island and Fegari to procure insurance, Rego Park Holdings and Fegari failed to establish prima facie entitlement. A party seeking summary judgment based on an alleged failure to procure insurance must demonstrate a contract provision requiring that such insurance be procured and show that such provision was not complied with (see, DiBuono v Abbey, LLC, 83 A.D.3d 650 [2 Dept 2011]). Based on the evidence submitted, there is an issue of fact as to whether Fegari and All Island properly procured insurance naming Rego Park Holdings and Bobcat as additional insureds. Therefore, summary judgment is not warranted.

Accordingly, defendant PBAPA's motion for summary judgment dismissing the complaint and all cross-claims against said defendant is granted.

Defendant Mourtil's motion for summary judgment dismissing the complaint against said defendant is granted.

The branches of the motion by defendants Rego Park and Bobcat for summary judgment dismissing the reckless endangerment, ultra hazardous activity and nuisance causes of action are granted and those causes of action are dismissed as against defendants Rego Park and Bobcat. Furthermore, plaintiffs' claims for punitive damages and attorneys' fees are dismissed.

The branch of the motion by defendants Rego Park and Bobcat for summary judgment dismissing the trespass cause of action is denied.

The branch of the motion by defendants Rego Park and Bobcat for summary judgment on their cross-claim for indemnification against the defendants Fegari and All-Island is denied.

Defendant Lin's motion for summary judgment dismissing the complaint and all cross-claims against said defendant is granted.

This Constitutes the Decision and Order of the Court.

Dated: May , 2013

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Denis J. Butler, J.S.C.