

Topcuoglu v Hotel 124, LLC
2013 NY Slip Op 31232(U)
June 7, 2013
Supreme Court, New York County
Docket Number: 650647/2012
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. EILEEN BRANSTEN

PRESENT: _____ J.S.C. _____
Justice

PART 3

Index Number : 650647/2012
TOPCUOGLU, SALLY
vs.
HOTEL 124, LLC
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 650647/2012
MOTION DATE 1/17/2013
MOTION SEQ. NO. DD1

The following papers, numbered 1 to 3, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2</u>
Replying Affidavits _____	No(s). <u>3</u>

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 6-7-13


EILEEN BRANSTEN
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: PART 3

-----X
SALLY TOPCUOGLU and CEM TOPCUOGLU,

Plaintiffs,

- against -

Index No. 650647/2012
Motion Date: 1/17/2013
Motion Seq. No. 001, 003
& 004

HOTEL 124, LLC, CONDO 124 LLC, ROSS &
ASSOCIATES, LLC, THE AVANTE BUILDING
GROUP CORPORATION, GLADIATORS
CONTRACTING CORP., H. THOMAS O’HARA
ARCHITECT, PLLC, HENRY T. O’HARA, R.A.,
NAROV ASSOCIATES, FRUMA NAROV, P.E.,
LANGAN ENGINEERING AND ENVIRONMENTAL
SERVICES, INC., ALAN POEPEL, P.E., DOMANI
CONSULTING, INC., ROBERT LUCCHETTI, P.E.,
and THE CARRIAGE HOUSE CONDOMINIUM,

Defendants.

-----X

EILEEN BRANSTEN, J.:

Motion sequence numbers 001, 003 and 004 are consolidated for disposition.

This matter comes before the Court on three motions to dismiss filed by
Defendants Narov Associates and Fruma Narov, P.E. (motion sequence 001), Henry T.
O’Hara, R.A. (motion sequence 003), and Gladiators Contracting Corp. (motion sequence
004). Each motion seeks dismissal of the Complaint and all cross-claims pursuant to
CPLR 3211(a)(1) and (7). For the reasons that follow, Defendant Gladiators Contracting
Corp.’s motion is granted, and the remaining motions are denied.

I. Background

This action arises from alleged damage to the Plaintiffs' condominium unit located at 264 West 124th Street, Unit 2, New York, New York, which is a building known as The Carriage House. Plaintiffs claim that the damage occurred as a result of allegedly improper excavation, shoring, sheeting and underpinning work performed during the construction of a new twelve-story hotel at 260-262 West 124th Street, also known as 2296 Frederick Douglass Boulevard, New York, New York (the "Project"). The land on which the Project was being built surrounds approximately three-quarters of the Carriage House.

Plaintiffs have sued a number of companies and individuals associated with the Project. Defendants Hotel 124, LLC and Condo 124 LLC (collectively, the "Hotel") are alleged to be the owners of the property on which the Project is located. (Compl. ¶¶ 18, 19.) Defendant Ross & Associates, LLC ("Ross") was the general contractor. *Id.* ¶ 29. Defendant Gladiators Contracting Corp. ("Gladiators") was the "demolition contractor." *Id.* ¶ 30. Defendant H. Thomas O'Hara Architect, PLLC ("O'Hara PLLC") was allegedly the architect for the Project. *Id.* ¶ 31. Plaintiffs have also sued Henry T. O'Hara, R.A. ("O'Hara"), who is alleged to be a licensed architect "associated" with O'Hara PLLC. *Id.* ¶ 32. In fact, O'Hara is the sole managing member of O'Hara PLLC. (O'Hara Aff. ¶ 1.) Defendant Narov Associates was allegedly the "foundation engineer," while Defendant

Fruma Narov (collectively, the “Narov Defendants”) is a professional engineer associated with Narov Associates. (Compl. ¶¶ 33, 34.)

Plaintiffs allege that work on the Project commenced in or around 2007. (Compl. ¶ 24.) Plaintiffs’ apartment is a duplex unit on the second and third floors. *Id.* ¶ 22. Up until August 2009, the apartment was occupied by tenants paying rent in the amount of \$5,000 per month. *Id.* ¶ 23. Plaintiffs maintain that the apartment then became uninhabitable “due to construction work being performed by or on behalf of Defendants in connection with the Project, . . .” *Id.* Plaintiffs allege that, in 2008 and 2009, complaints were lodged with the New York City Departments of Buildings (“DOB”) and that multiple violations were issued by DOB inspectors “concerning problems with the excavation and related work at the Project site, as well as the failure to protect the adjoining structure.” *Id.* ¶ 61.

On November 12, 2009, the Hotel, Ross, The Carriage House Condominium, and the individual units owners of the Carriage House entered into a License Agreement providing for, among other things, access by the Hotel to the Carriage House in order to perform certain work described as the “Protection Work.” (Compl. ¶¶ 39-41.) The Protection Work included “providing adequate underpinning, shoring and stabilization of the base” of the Carriage House. *Id.* ¶ 43; *see also* Nardiello Affirm., Ex. A, § 3. Section 18 of the License Agreement provided that the Hotel would pay the Plaintiffs the sum of

\$34,000 as reimbursement for the lack of use and enjoyment of their apartment unit, and the additional sum of \$6,000 every month the License Agreement was in effect, commencing on December 1, 2009. (Compl. ¶ 60.)

The complaint alleges that, on April 21, 2011, Plaintiffs' counsel notified counsel for the Hotel that the adjacent construction activities and related work had caused extensive damage to Plaintiffs' apartment, including "severe cracking of the walls, damage to the windows and damaged millwork and tiles." (Compl. ¶ 67.) Plaintiffs demanded that the Hotel take immediate action, per its alleged responsibilities under the License Agreement, to repair the damage to the apartment. *Id.* ¶ 68.

On April 28, 2011 and May 5, 2011, the Plaintiffs' apartment was inspected by Paul J. Angelides, P.E., P.C. ("Angelides"), a consulting and forensic engineer. (Compl. ¶ 70.) Angelides produced a report dated June 4, 2011. *Id.* ¶ 71; *see also* Nardiello Reply Affirm., Ex. B. As described in the complaint, the Angelides report attributes the damage to Plaintiffs' apartment as "consistent with conditions caused by differential lateral movement and subsidence of the building as a result of the excavation and retaining structure work that was performed in connection with construction of the foundation for the hotel." (Compl. ¶ 72).¹ Angelides concluded that the system designed to shore the

¹Although the Angelides report is not attached to the complaint, it is quoted from and paraphrased extensively at paragraphs 72 through 82 of the complaint. A copy has been submitted by counsel for the Narov Defendants.

Carriage House ““was not effective”” (*id.* ¶ 73); that “the damage to the Apartment was ‘the result of earth movement from the construction and excavation activity on the surroundings properties’” (*id.* ¶ 77); that the damages were ““preventable had adequate care been exercised during the excavation and underpinning activity for the new hotel to provide support for the foundation’” of the Carriage House (*id.* ¶ 78); that the damage was “consistent with conditions caused by the ineffective excavation and shoring activity, including, among others, the lack of adequate shoring, the undermining of the (Carriage House) and vibrational damage to the (Carriage House) from pile driving on the Property” (*id.* ¶ 80); and that an estimated \$480,000 worth of damage occurred to the apartment “as a result of the failure of the contractors to exercise due care in connection with the excavation, shoring, underpinning and related work performed as part of the Project.” *Id.* ¶ 82.

This action was commenced on March 2, 2012, after further attempts by Plaintiffs’ counsel to get the Hotel to repair the alleged damage to Plaintiffs’ apartment and/or pay monetary damages were unsuccessful. *See* Compl. ¶¶ 83 - 88. The Complaint asserts the following five causes of action: (1) strict liability against all Defendants pursuant to Section 27-1031(b)(1) of the Administrative Code of the City of New York; (2) negligence against all Defendants; (3) breach of the License Agreement by the Hotel; (4) private nuisance against all Defendants; and (5) indemnification from the Hotel pursuant

to the License Agreement. Several Defendants who have answered the complaint, have also asserted cross claims against some or all of the moving Defendants seeking contribution, common law indemnification, and/or contractual indemnification.

II. Discussion

The moving Defendants seeks pre-answer dismissal of the strict liability, common law negligence, and private nuisance claims. After a brief discussion of the three claims, each Defendants' motion will be considered in turn.

A. *Strict Liability*

Former Administrative Code § 27-1031(b)(1)² provides:

When an excavation is carried to a Dep'th more than ten feet below the legally established curb level **the person who causes the 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 (emphasis added).

Administrative Code § 27-1031 imposes absolute liability on the owner, general contractor and subcontractors who perform the excavation. *Yenem Corp. v. 281*

²Administrative Code § 27-1031 was amended effective July 1, 2008, and its equivalent can be found in the New York City Construction Code (Admin Code, tit 28, ch 33, § 3309.4).

Broadway Holdings, 18 N.Y.3d 481, 486 (2012); *Coronet Prop. Co. v. L/M Second Ave.*, 166 A.D.2d 242, 243 (1st Dep't 1990); *Palermo v. Bridge Duffield Corp.*, 154 N.Y.S.2d 288 (Sup. Ct. Kings Cnty. 1956), *aff'd* 3 A.D.2d 863 (2d Dep't 1957); *Fagan v. Pathe Indus.*, 274 A.D. 703, 706 (1st Dep't 1949). A defendant is not liable where "[t]here was no proof that [this] Defendant . . . participated in or knew of the damage that was being done by the other Defendants who were excavating . . ." *Hoffman v. Dyruff*, 259 A.D. 837, 838 (2d Dep't 1940), *aff'd* 285 N.Y. 695 (1941).

Recently, the Second Department appears to have rejected a property owner's argument that the project architect and structural engineer for the newly-constructed adjacent building could be subject to statutory liability under Administrative Code § 27-1031(b)(1), as opposed to common-law negligence, in an action to recover damages to the Plaintiff's building from faulty underpinning. See *492 Kings Realty, LLC v. 506 Kings, LLC*, 105 A.D.3d 991 (2d Dep't 2013).³ However, *492 Kings Realty* was a summary judgment ruling, where the architect and engineer established, as a matter of law, that they did not provide any services related to the methods utilized to protect the Plaintiff's property. At least two trial courts have imposed statutory liability against an architect who had some involvement in the underpinning operations. *Am. Sec. Ins. Co. v. Church*

³This decision was only released by the Second Department on April 24, 2013, after the submission of Defendants' motions and oral argument.

of God of St. Albans, 38 Misc.3d 274 (Sup. Ct. Queens Cnty. 2012); *27 Jefferson Ave., Inc. v. Emergi*, 18 Misc.3d 336 (Sup. Ct. Kings Cnty. 2007).

B. *Common-Law Negligence*

Plaintiffs also sue for common-law negligence. A party who enters into a contract to perform construction-related services may be liable to third parties for personal injuries or property damage, despite the lack of privity, under one of the three exceptions noted by the Court of Appeals in *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 140-141 (2002), one being whether the Defendants, “in the performance of their contractual obligations, launch[ed] a force or instrument of harm by creating or exacerbating a dangerous condition.” *492 Kings Realty, LLC v. 506 Kings, LLC*, 105 A.D.3d at 994; *see also Powell v. HIS Contractors., Inc.*, 75 A.D.3d 463, 464 (1st Dep’t 2010).

C. *Private Nuisance*

“The elements of a common-law claim for a private nuisance are: ‘(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act.’” *Berenger v. 261 W. LLC*, 93 A.D.3d 175, 182 (1st Dep’t 2012) (quoting *Copart Indus. v. Consol. Edison Co. of N.Y.*, 41 N.Y.2d 564, 570 (1977)).

D. *Narov Associates' Motion to Dismiss (Motion Sequence No. 001)*

The complaint alleges that Narov Associates was the “foundation engineer,” and, on information and belief, “was responsible for or played a substantial role in connection with . . . the shoring, bracing, underpinning and/or related work performed in connection with the Project.” (Compl. ¶¶ 33, 34). Fruma Narov, the principal of Narov Associates, submits an affidavit in which she claims that her firm was hired by the Feil Organization to provide structural engineering services for the Project, pursuant to an unsigned letter dated January 30, 2008 containing Narov’s revised proposal. (Narov Aff., Ex. A.) Ms. Narov claims that this unsigned proposal, and various filings that were made with the DOB by other participants in the Project (*Id.*, Exs. B -I), conclusively establish that the Narov Defendants had no involvement with, or responsibility for, the preparation of engineering plans for the excavation, sheeting, shoring or underpinning work at the Project. Further, Ms. Narov argues that this work was undertaken by Defendants Langan Engineering and Environmental Services, Inc., Alan Poeppel, P.E., The Avanti Building Group Corporation and/or Domani Consulting, Inc. in early 2008. (Narov Aff., ¶ 14.) Citing Section 2 of a document attached to the proposal, entitled “Standard Conditions For Structural Engineering Services,” Ms. Fruma further contends that the Narov Defendants had no contractual responsibility to supervise the contractors or subcontractors working at the Project, and no control over the means or methods of

construction, including the excavation, sheeting, shoring or underpinning work. (Narov Aff., ¶ 11 & Ex. A.)

When a motion to dismiss is premised upon documentary evidence pursuant to CPLR 3211(a)(1), “such motion may be appropriately granted only where the documentary evidence utterly refutes Plaintiff’s allegations, conclusively establishing a defense as a matter of law.” *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002). Affidavits submitted by a Defendant do not constitute documentary evidence upon which a proponent of dismissal can rely. *Correa v. Orient-Express Hotels, Inc.*, 84 A.D.3d 651 (1st Dep’t 2011); *Berger v. Temple Beth-El of Great Neck*, 303 A.D.2d 346, 347 (2d Dep’t 2003); David D. Siegel, Practice Commentaries, McKinney’s Consol. Laws of NY, Book 7B, CPLR C3211:10, at 21–22. Accordingly, the affidavit of Fruma Narov will be considered only insofar as it serves as a vehicle for the submission and authentication of documentary evidence.

While a signed contract qualifies as documentary evidence, *Fontanetta v John Doe I*, 73 A.D.3d 78, 84-85 (2d Dep’t 2010), the Narov Defendants are relying on an unsigned proposal to define the entire scope of their responsibilities at the construction site. In addition, that document provides that the Narov Defendants anticipated that the Carriage House “will most likely require underpinning” and that they agreed to make “periodic site visits” and “keep Client informed of the progress and quality of the structural work and

shall endeavor to guard the Owner against defects and deficiencies in such work of the Contractor.” (Narov Aff., Ex. A.) The Hotel, in opposing the motion to dismiss, argues that the Narov Defendants’ motion does not provide a complete record of their connection to the Project, and furnishes additional DOB documents showing filings by the Narov Defendants for “other - structural” and “other-foundation” work. *See Bieder Affirm. Ex. B.* The Angelides report, as per paragraph 72 of the complaint, states that the damage to Plaintiffs’ apartment was “consistent with conditions caused by differential lateral movement and subsidence of the building as a result of the excavation and retaining structure work that was performed in connection with the foundation for the hotel.” The Narov Defendants, as the foundation engineers, have not established their entitlement to dismissal of any of the claims asserted against them based on documentary evidence, and thus motion sequence number 001 is denied.

E. *Gladiators’ Motion to Dismiss (Motion Sequence No. 004)*

The complaint alleges that Gladiators was the “demolition contractor,” and, on information and belief, “was responsible for or played a substantial role in connection with . . . the shoring, bracing, underpinning and/or related work performed in connection with the Project.” (Compl. ¶ 30). Gladiators submits an affidavit from Jover Narango, the president of Gladiators, who claims that Gladiators was hired as a subcontractor by Hotel

124, LLC, pursuant to a written agreement dated May 1, 2007, for the specific and sole purpose of demolishing the three existing buildings located on the site of the Project down to existing street level and, citing the contract, the “foundation walls” of the existing buildings were not included in Gladiators’ price for the job. (Narango Aff., ¶¶ 3 and 4, Ex. G.) Mr. Narango avers that Gladiator’s work at the site was completed on or before October 12, 2007, at which time his company was paid in full and complimented by Hotel 124, LLC on a job well done. *Id.* ¶ 9 & Ex. H. He claims that this was well before excavation was begun on the site. *Id.* ¶ 11. Thus, Gladiators contends that it should be dismissed from this case, pre-answer, because the company had no involvement in any activity relating to the excavation, sheeting, shoring or underpinning work at the construction site, and that its only responsibility was for the demolition of the three existing structures down to street level and not below.

In the face of Gladiators’ documentary evidence negating the complaint’s factual allegations about the company’s involvement in the work that allegedly damaged the Carriage House and/or Plaintiffs’ apartment, neither the Plaintiffs nor any cross-claiming Defendant has come forward with anything but raw conjecture about what discovery may reveal. The fact that there may be DOB filings other than the documents submitted on these motions does not help Plaintiffs’ case, since the entire universe of DOB filings for the Project are a matter of public record to which the other parties and their counsel

would have access. And although the copy of the May 1, 2007 contract proffered by Gladiators is not signed by Hotel 124, LLC (*see* Narango Aff., Ex. G), counsel for Hotel 124, LLC has specifically, in opposition to this motion, acknowledged the validity of this contract. *See* O'Connell Affirm. ¶ 12. The complaint, and the Angelides report, upon which it relies, make no claim of negligence with respect to the demolition of the existing buildings on the site of the Project, and clearly place the responsibility for the damage to Plaintiffs' apartment with the work performed in connection with the excavation of the new foundation and the construction of the new building, work which did not involve Gladiators. Gladiators' work was completed by mid-October 2007, prior to the filing for a permit to perform the excavation work in January 2008 (*see* Narov Aff. Ex. B) and well before the issuance of any violations by the DOB. *See* Compl. ¶¶ 61-64. Accordingly, Gladiators' motion to dismiss the complaint is granted.

F. *O'Hara's Motion to Dismiss*

O'Hara argues that Plaintiffs' complaint fails to state a claim against him because, as the principal of O'Hara PLLC, and pursuant to Limited Liability Company Law § 609, he cannot be held personally liable for the acts of the corporate entity. Although a corporate officer may not be held liable for the negligence of a corporation simply because of his relationship to it, *Aguirre v. Paul*, 54 A.D.3d 302, 304 (2d Dep't 2008), if

a managing member commits, or participates in the commission of a tort, whether or not he is acting on behalf of the limited liability company, he is liable to third persons injured thereby. *Greenway Plaza Office Park-1, LLC v. Metro Constr. Serv.*, 4 A.D.3d 328, 329 (2d Dep't 2004); *Rothstein v. Equity Ventures*, 299 A.D.2d 472, 474 (2d Dep't 2002); *Kopec v. Hempstead Gardens*, 264 A.D.2d 714, 716 (2d Dep't 1999); *Bellinzoni v. Seland*, 128 A.D.2d 580, 580-581 (2d Dep't 1987).

Here, while the complaint alleges that O'Hara was "associated" with O'Hara PLLC, the architect of record on the Project (Compl. ¶ 9), Plaintiffs also allege, on information and belief, that O'Hara was "responsible for or played a substantial role in connection with . . . designing and/or implementing the shoring, bracing, underpinning, and/or related work in connection with the Project." *Id.* ¶ 32. Thus, Plaintiffs are not merely alleging that O'Hara is vicariously liable for the negligence of his firm by virtue of his status as the managing member, but is alleging that he was personally involved in the work that damaged Plaintiffs' apartment. On a motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the complaint must be liberally construed in the light most favorable to the Plaintiff and all allegations must be accepted as true. *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). "Whether a Plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc.*

v. Goldman, Sachs & Co., 5 N.Y.3d 11, 19 (2005). As such, the complaint adequately states a claim against O'Hara personally.

III. Conclusion and Order

For the foregoing reasons, it is

ORDERED that the motion (seq. no. 001) of Defendants Narov Associates and Fruma Narov, P.E. for pre-answer dismissal of the complaint, and all cross claims, is denied; and it is further

ORDERED that the motion (seq. no. 003) of Defendant Henry T. O'Hara, R.A. for pre-answer dismissal of the complaint is denied; and it is further

ORDERED that Defendants Narov Associates, Fruma Narov, P.E. and Henry T. O'Hara, R.A. are directed to serve and file an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the motion (seq. no. 004) of Defendant Gladiators Contracting Corp. for pre-answer dismissal of the complaint, and all cross claims, is granted, pursuant to CPLR 3211(a) (1), and the complaint and all cross claims are severed and dismissed as

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against said Defendant, with costs and disbursements as taxed by the Clerk of the Court,
and the Clerk is directed to enter a judgment of dismissal in favor of said Defendant.

Dated: New York, New York

June 7, 2013

ENTER:

A handwritten signature in black ink, appearing to read "Eileen Bransten", written over a horizontal line.

Hon. Eileen Bransten, J.S.C.