87 Chambers LLC v 77 Reade, LLC
2013 NY Slip Op 31772(U)
July 30, 2013
Sup Ct, New York County
Docket Number: 104437/10
Judge: Joan M. Kenney
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SCANNED ON 8/5/2013
[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
Justice

PART 8

Index Number : 104437/2010
87 CHAMBERS
vs.
77 READE, LLC
SEQUENCE NUMBER : 015
SUMMARY JUDGMENT

INDEX NO. 104437/10
MOTION DATE 5/31/13
MOTION SEQ. NO. 015

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits Memo of Law | **No(s).** 1-19
Answering Affidavits — Exhibits 2 opps + memo of law | **No(s).** 20-48
Replying Affidavits memo of law | **No(s).** 49-67

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

FILED
AUG 05 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/31/13

[signature], **J.S.C.**
JOAN M. KENNEY

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

---X

87 CHAMBERS LLC and IBC CHAMBERS, LLC
As Tenants in Common,

Plaintiffs,

Index No. 104437/10

CATLIN INSURANCE CO. (UK), LTD., as subrogee of 87 Chambers LLC and IBC Chambers LLC,

Intervening Plaintiff,

-against-

77 READE, LLC, LEECO CONSTRUCTION CORP., CONCRETE COURSES CORP., ANCOR CONSTRUCTION SERVICES, INC., SST CONSULTANTS, INC., WEIDLINGER ASSOCIATES, INC., BKSK ARCHITECTS LLP, VACEX INC., BRONX STEEL FABRICATORS, INC. and RICHARD C. MUGLER CO., INC.,

FILED
AUG 05 2013
COUNTY CLERK'S OFFICE
NEW YORK

Defendants.

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77 READE, LLC and LEECO CONSTRUCTION CORP.,

Third-party Plaintiffs,

Third-party Index No. 590322/11

-against-

RICHARD C. MUGLER CO., INC.,

Third-party Defendant.

---X

77 READE, LLC and LEECO CONSTRUCTION CORP.,

Second Third-party Plaintiffs,

Second Third-party Index No. 590312/12

-against-

FRUMA NAROV, NAROV ASSOCIATES, FRUMA NAROV, P.E., P.C. and VACEX, INC.

Second Third-party Defendants.

---X

KENNEY, J:

Motion sequence numbers 013, 014 and 015 are consolidated for disposition.

This action arises out of the partial collapse and subsequent demolition of plaintiffs' building, located at 87 Chambers Street a/k/a 69 and 71 Reade Street, New York, New York 10007 (87 Chambers). Plaintiffs claim that the partial collapse was caused by defendants' construction activities performed at the adjacent property, 91-95 Chambers Street a/k/a 73-77 Reade Street, New York, New York 10007 (77 Reade), which is owned by defendant 77 Reade, LLC.

77 Reade, LLC retained: Weidlinger Associates, Inc. (Weidlinger) as structural engineer, by agreement dated July 12, 2006 (Weidlinger Agreement); BKSK Architects LLP (BKSK) as architects, pursuant to an "AIA Document B141 Standard Form of Agreement Between Owner and Architect," dated June 21, 2006 (BKSK Agreement); and Leeco Construction Corp. (Leeco) as general contractor, pursuant to an "AIA Standard Form of Agreement Between Owner and Contractor," dated April 5, 2007 (Leeco Agreement). The following defendant entities were retained, some pursuant to subcontracts with Leeco, to perform work at the construction site: SST Consultants, Inc. (SST); Richard C. Mugler Co., Inc. (Mugler); Concrete Courses Corp.; Ancor Construction Services, Inc.; Vacex Inc.; and Bronx Steel Fabricators, Inc.

As early as July 2006, Weidlinger observed several cracks on the facade wall of plaintiffs' building, and recommended that "[t]hese cracks . . . be recorded and monitored prior to and during the new construction." D'Antonio aff, exhibit B. In April 2009, stress cracks were again observed during an examination of 87 Chambers. Second Amended Complaint, ¶¶ 37-38. By letter agreement between Mugler and 87 Chambers LLC, dated April 13, 2009, Mugler agreed to install "5 sets of corner brackets, 1 each at the 2nd, 3rd, 4th, 5th and roof, to connect the West wall and front facade" (Mugler Agreement). Parash aff, exhibit E.

On April 9, 2009, the New York City Department of Buildings (DOB) issued a "Notice of Violation and Hearing" to 77 Reade, LLC. Schreckinger aff, exhibit FF. The DOB's notice identified 77 Reade, LLC's violation as "failure to safeguard all persons and property affected by construction operations. Noted cracking & sagging of NW corner of 71 Reade St. [87 Chambers] caused by drilling operations." *Id.* The "remedy" identified in the notice stated: "stop all work at north side of lot (Reade St)." *Id.* On April 30, 2009, 87 Chambers sustained structural damage, including a partial collapse, which plaintiffs claim was the result of defendants' failure to provide adequate lateral support to the foundation and building. Second Amended Complaint, ¶ 39.

Catlin Insurance Co. (UK), Ltd. (Catlin) insured plaintiffs and settled their claim for $7.5 million on June 20, 2011. As a result, Catlin became subrogated to plaintiffs' claims.

The 20-count second amended complaint asserts causes of action against 77 Reade's owner, 77 Reade, LLC, and the various construction professionals it retained, for negligence, breach of contract, and violations of the Building Code of the City of New York (Building Code), sections 27-723, 27-724, 27-1028, 27-1029, 27-1031, and 27-1032.

In their answers, 77 Reade, LLC, Leeco, and Bronx Steel Fabricators, Inc. assert cross claims against their co-defendants for contribution, common-law and contractual indemnification, and failure to procure insurance. BKSK, Concrete Courses Corp., and SST assert cross claims for contribution and indemnification. Mugler asserts no cross claims.[1]

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[1] By order dated May 20, 2013, this court granted a default judgment against Vacex Inc. for failure to appear or otherwise respond to the second third-party complaint. The County Clerk's records indicate that Vacex Inc. has moved to vacate the default judgment, in motion sequence number 017, with a return date of July 24, 2013. In the instant decision and order, the court makes no determination on the motion of Vacex Inc. The court also notes that the parties fail to submit the responsive pleading of Ancor Construction Services, Inc.

77 Reade, LLC and Leeco also commenced a third-party action against Mugler (under Index Number 590322/11), asserting claims for contribution, indemnification, and failure to procure insurance. 77 Reade, LLC and Leeco commenced a second third-party action against Vacex Inc., and the engineering firms Fruma Narov, Narov Associates, and Fruma Narov, P.E., P.C. (under Index Number 590312/12), asserting claims for contribution, indemnification, and failure to procure insurance. In their answer to the second third-party action, Fruma Narov, Narov Associates, and Fruma Narov, P.E., P.C. assert cross claims for contribution and common-law and contractual indemnification against their co-defendants, and for contractual indemnification against plaintiffs.

Weidlinger, Mugler, and BKSK now move (in motion sequence numbers 013, 014, and 015, respectively) for summary judgment dismissing all claims asserted against them. The motions are opposed by plaintiffs, 77 Reade, LLC, and Leeco only.

Analysis

I. Weidlinger's Summary Judgment Motion (mot seq 013)

Weidlinger seeks dismissal of the eleventh and twelfth causes of action, for negligence and violations of the Building Code, arguing that it owed no duty to prevent plaintiffs' damages. Weidlinger also seeks dismissal of all cross claims.

A. Negligence

Weidlinger argues that it was merely a design professional that had no "contractual right to supervise and control the construction work [or] site safety," and that it cannot be liable for plaintiffs' damages arising from deficiencies in the construction "means and methods." Weidlinger Opening Brief, at 15. Specifically, Weidlinger maintains that SST was the engineer retained on the construction project to supervise and monitor the excavation activities, and to prepare designs for

the shoring, bracing, and protection of the adjacent buildings, and that Leeco was responsible for the means and methods of construction. Weidlinger argues that, therefore, it owed no duty and plaintiffs' negligence claim should be dismissed.

Negligence requires a showing of "(1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof." *Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 (1981). "Where a person contracts to do certain work he is charged with the common-law duty of exercising reasonable care and skill in the performance of the work required to be done by the contract." *Rosenbaum v Branster Realty Corp.*, 276 App Div 167, 168 (1st Dept 1949); *see also Wolf v City of New York*, 39 NY2d 568, 573 (1976) ("[w]here a person voluntarily assumes the performance of a duty, he is required to perform it carefully, not omitting to do what an ordinarily prudent person would do in accomplishing the task"). "It is settled that negligence cases by their very nature do not lend themselves to summary dismissal 'since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination.'" *McCummings v New York City Tr. Auth.*, 81 NY2d 923, 926 (1993) (citation omitted).

In support of its argument, Weidlinger relies upon *Davis v Lenox School* (151 AD2d 230 [1st Dept 1989]) and *Welch v Grant Dev. Co.* (120 Misc 2d 493 [Sup Ct, Bronx County 1983]). In *Davis*, the architect's contract with the owner of the premises limited the architect's "responsibilities to supervision of the construction, and compliance with the plans and specifications." 151 AD2d at 231. The architect "was not to have any control or responsibility 'for construction means, methods ... or for safety precautions and programs in connection with the work, for acts or omissions of the contractor, subcontractor or any other persons performing any of the work.'" *Id.* The architect,

therefore, "lacked authority to halt the work for unsafe conditions or to control or determine on-the-site working conditions," which was the contractual obligation of a subcontractor who agreed to "'take all reasonable precautions for the safety of and [to] prevent damage injury or loss to workmen.'" *Id.* The Court held that, "[i]n the absence of any contractual right to supervise and control the construction work, as well as site safety, . . . the architect[] cannot be held liable in negligence for plaintiff's injuries." *Id.*; *see also Welch*, 120 Misc 2d at 496-497 (same).

Here, the Weidlinger Agreement provided that Weidlinger was to perform certain "Construction Services," including, "[a]t the construction site, [to] observe progress of construction and its conformance to structural plans and specifications" and to "[m]ake biweekly field visits." D'Antonio aff, exhibit B, Scope of Services, at D (5). The Weidlinger Agreement contained clauses addressing the limitation of Weidlinger's liability and indemnification, but the parties deleted these provisions from the agreement. *Id.*, Schedule of Charges and Conditions, ¶¶ 5, 9. Having entered into the Weidlinger Agreement to perform this engineering work, Weidlinger "is charged with the common-law duty of exercising reasonable care and skill in the performance of the work required to be done by the contract." *Rosenbaum*, 276 App Div at 168; *Wolf*, 39 NY2d at 573. Weidlinger concedes that it failed to make biweekly field visits, as required under the agreement (Jing tr, D'Antonio aff, exhibit C, at 95-96), and nothing contained in that agreement "stripped [Weidlinger's] supervisory powers and duties." *Welch*, 120 Misc 2d at 496. Therefore, *Davis* and *Welch* are distinguishable on their facts.

Weidlinger also relies upon the Leeco Agreement, between Leeco and 77 Reade, LLC, which identified certain "Contract Documents," blue prints, and drawings that comprised these parties' agreement. Schreckinger aff, exhibit HH. Weidlinger claims that these Contract Documents

included: (1) "Structural Drawing Number S101" (Schreckinger aff, exhibit P); and (2) a document referred to as "Site Work," contained within section 02351 of a document titled "100% Construction Documents Specifications" (Site Work Addendum). Schreckinger aff, exhibit II. Structural Drawing Number S101 stated that "implementing job site safety and construction procedures (means and methods), temporary shoring, and bracing of existing construction are the sole responsibility of the contractor. Contractor shall take all necessary precautions to prevent any damage to adjacent structures and utilities." Schreckinger aff, exhibit P, ¶ E (1) (G). The Site Work Addendum stated that "[t]he Contractor shall be responsible for any damage to any adjacent structures or buildings," and that "[t]he Contractor shall retain the services of a Professional Engineer licensed in the State of New York, who shall design and supervise installation of all underpinning and shoring." Schreckinger aff, exhibit II, ¶ 1.3 (B), (D), and ¶ 3.1 (E). According to Weidlinger, these documents demonstrate that it owed no duty to prevent plaintiffs' damages.

As a preliminary matter, the Leeco Agreement referred to "S101 General Notes" among the blue prints and drawings (Schreckinger aff, exhibit HH, at 9), but it is not clear whether this reference is synonymous with Structural Drawing Number S101. Moreover, although Weidlinger claims that it prepared Structural Drawing Number S101, and that this document was part of the project's "Contract Documents" referred to in the Leeco Agreement (3/3/13 Jing aff, ¶ 3), it is undisputed that Weidlinger was not a party to the Leeco Agreement. Furthermore, the Site Work Addendum identified Weidlinger as "Structural Engineer," but this document is unsigned and is neither identified nor annexed among the various Contract Documents referred to in the Leeco Agreement. Schreckinger aff, exhibits HH and II. Therefore, this evidence fails to adequately support Weidlinger's prima facie showing.

Nor does the evidence establish Weidlinger's prima facie showing that Weidlinger's work was limited to that of a design professional. For instance, the parties submit Weidlinger and SST's "TR1: Technical Report Statement[s] of Responsibility" (TR-1) filed with the DOB. As stated in the expert engineering affidavit of Nathaniel Smith (Smith), the party submitting a TR-1 "undertakes responsibility to carry out the controlled inspections for those aspects of the projects specifically denoted on that TR-1." D'Antonio aff, exhibit D, ¶ 6; *see also RCD Bldg., L.L.C. v Park Slope Condominiums, L.L.C.*, 14 Misc 3d 1215(A), *2, 2007 NY Slip Op 50035(U) (Sup Ct, Kings County 2007) (signing a TR-1 and filing it with the DOB obligates the signing party "or qualified personnel it supervised to perform required inspections"); *27 Jefferson Ave., Inc. v Emergi*, 18 Misc 3d 336, 340 (Sup Ct, Kings County 2007). According to Smith, the party submitting the TR-1 "maintains responsibility until it specifically withdraws responsibility or another party files a superseding TR-1 which specifically states that responsibility is shifting from the initial party to the new party." Smith aff, ¶ 6. Smith also states that, "[a]ccording to industry standards, the Engineer of Record for a construction project is responsible for all aspects of engineering for that project including the effect that excavation and construction have on adjacent buildings." *Id.*, ¶ 7.

On December 3, 2007, Tian Fang Jing (Jing), on behalf of Weidlinger, submitted a TR-1 to the DOB, identifying Weidlinger's responsibility for "Structural Stability." *Id.*, exhibit F. Jing also submitted an undated "AI-1: Additional Information" form to the DOB, identifying himself as "applicant of record for Structural work." *Id.*, exhibit N. Jing submitted another TR-1 to the DOB on April 11, 2008, again identifying "Structural Stability" as Weidlinger's responsibility, and identifying Weidlinger's additional responsibility for: "Subgrade"; "Underpinning"; "Welding"; "High Strength Bolts"; "Reinforced Masonry"; "Masonry Units"; "Concrete"; "Concrete Design

Mix"; and "Concrete Test Cylinders." *Id.*, exhibit G.

In April 2009, Jing was notified by SST that "corner wall cracking at 71 Reade Street can be due to the improper foundation construction," and that "it does not appear that the existing 2'-6" wide blue stone foundation is adequately designed and constructed." D'Antonio aff, exhibit K. Jing testified that he visited plaintiffs' property, where he "saw the wall in the east wall is bulging."[2] Jing tr, at 136. Jing admitted that he never "advise[d] anyone of the observation [he] made with respect to the bulge." *Id.* at 169. This evidence supports the conclusion that Weidlinger owed duties with respect to plaintiffs' adjacent building. *See Schwartz v Merola Bros. Constr. Corp.*, 290 NY 145, 151 (1943) (contractors and subcontractors held liable where evidence was "sufficient to show notice to them of the existence of the dangerous condition"); *27 Jefferson Ave., Inc.*, 18 Misc 3d at 341 (once aware "that the excavation went below the level of plaintiff's building footings . . . [the architect] was obligated to notify DOB and to ensure remedial measures, namely underpinning, were taken"); Smith aff, ¶ 10 (according to plaintiffs' expert, Jing's failure to notify the owners of the property and the adjacent property, the general contractor, and the DOB of the bulge constituted a departure from accepted standards of practice).

In a letter dated May 29, 2008, copied to Leeco, SST informed the DOB that "we are the underpinning/Shoring Consultants and the General Contractor for [77 Reade Street]," and that the underpinning and excavation work "will . . . impact . . . the adjacent buildings . . . ." Schreckinger aff, exhibit U. On July 24, 2008, Shiu-Sen Tsai (Tsai), SST's president, submitted a TR-1 to the DOB on behalf of SST. Tsai's TR-1 identified SST's responsibility for "Underpinning," "Structural Safety – Structural Stability," "Excavation – Sheeting, Shoring, and Bracing," and "Final."

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[2] Jing could not recall the date of this site visit. Jing tr, at 132.

Schreckinger aff, exhibit T. Tsai submitted another TR-1, indicating "Certificate of Complete Inspections/Tests" for these items as of January 20, 2010. *Id.*, exhibit U. While the TR-1s of Tsai and Jing overlap in the areas of structural stability and underpinning, they do not overlap with respect to subgrade, welding, high strength bolts, reinforced masonry, masonry units, and concrete, which were not mentioned in Tsai's report. None of the evidence submitted by Weidlinger shows that these items no longer remained the responsibility of Weidlinger.

Nor does the evidence demonstrate that responsibility shifted from Weidlinger to SST. Rather, the evidence raises the possibility that Weidlinger's involvement may have continued even after Tsai filed the TR-1. The parties transmitted various emails between August and November of 2008, wherein they: requested Jing's comments on SST's "underpinning load" calculations and "possible ways to underpin the building of 71 Reade" (D'Antonio aff, exhibit, P); requested that Weidlinger "begin the work to incorporate the step footing into our plan and to do it expeditiously" (*id.*, exhibit Q); stated that "the owner and Mr. Jing [have] decided to do step footing for the east wall of the 73 Reade and west wall of 77 Reade street" (*id.*, exhibit T); requested that Jing "review the 10 items the Excavation department wanted changed or clarified on the structural drawings" (*id.*, exhibit R); and confirmed that "all drawings and revisions were done by Jing at Weidlinger" (*id.*, exhibit S). Jing testified that he did not "sign anything withdrawing [his] responsibility for the controlled inspections prior to the collapse." D'Antonio aff, exhibit C, at 211. To the contrary, Jing testified that he signed a "superseding TR-1 that relieved [him] of [his] responsibility," but that he did so only "[a]fter the collapse." *Id.* at 210-211. This evidence fails to make a prima facie showing that Weidlinger owed no duty to plaintiffs, or that any such duty was discharged. At most, the evidence raises a factual issue as to whether Weidlinger maintained "'authority to control the activity

bringing about [plaintiffs'] injury.'" *Davis*, 151 AD2d at 231; *Welch*, 120 Misc 2d at 498.

Weidlinger also relies upon a May 6, 2008 fax from SST to Leeco, summarizing the excavation work. This fax referred to underpinning and shoring but failed to limit Weidlinger's responsibility. In fact, this document stated that "[c]oordination with the EIC (Weidlinger Associates) is required" and referred to Weidlinger's drawings. Schreckinger aff, exhibit S. In addition, Weidlinger submits the deposition testimony of Tsai and Peter Lee, a principal of Leeco, in support of its argument that SST was responsible for daily on-site supervision and monitoring of excavation activities. Schreckinger aff, exhibits X, at 83, 85, 92, 124-125, 177, 182, 234; exhibit Y, at 100-101, 323. However, this testimony fails to make a prima facie showing that SST was solely responsible for this work, to the exclusion of Weidlinger, and that Weidlinger owed no duties.

The court notes Weidlinger's reliance upon *Travelers Indem. Co. v Zeff Design* (60 AD3d 453 [1st Dept 2009]), a case cited for the first time in Weidlinger's reply brief. In *Travelers Indem. Co.*, the Court held that the structural engineer "had no obligations with regard to underpinning" a party wall that damaged the plaintiff's property, reasoning that the engineer "was not contractually obligated to—and did not—perform any services related to the installation of underpinning, shoring or bracing, or to other stability measures." *Id.* at 454. The Court further reasoned that, while the structural engineer "filed a technical report form with the City, indicating that it would conduct controlled inspections of the shoring, structural stability and concrete, it did so only to expedite the filing process for obtaining a construction work permit." *Id.* at 454-455. As discussed above, however, Weidlinger fails to make a prima facie showing that it did not perform any services related to the work that caused plaintiffs' damages. While Weidlinger argues that "there is no debate about" its filing of a TR-1 solely "to expedite the release of work permits" (Weidlinger reply brief, at 10),

plaintiffs, 77 Reade, LLC, and Leeco maintain, and the evidence raises factual issues as to whether, Weidlinger remained involved in planning and designing the excavation that caused plaintiffs' damages. Therefore, *Travelers Indem. Co.* is distinguishable on its facts.

The court also notes that, although Weidlinger's arguments are based primarily upon its assertion that it owed no duty, Weidlinger also touches upon the issue of causation, albeit implicitly, in its argument that it "was not responsible for the activities that *caused* plaintiffs' damages and, as such, had no duty to prevent these damages." Weidlinger's opening brief, at 14 (emphasis added); Weidlinger's reply brief, at 2-3 (arguing that Weidlinger was not the "cause" of plaintiffs' damages). "The issue of '[p]roximate cause is a question of fact for the jury where varying inferences are possible.'" *Sweeney v Bruckner Plaza Assoc.*, 57 AD3d 347, 348 (1st Dept 2008) (citation omitted). To the extent that Weidlinger raises the issue of causation, the evidence here shows not only varying inferences but also contradictory factual assertions and testimony, which are not properly resolved by the court. *Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-11 (1st Dept 2010) ("[t]he court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues, or to assess credibility [internal citations omitted]").

For the foregoing reasons, Weidlinger's motion for summary judgment dismissing plaintiffs' twelfth cause of action for negligence is denied.

B. Building Code Claims

Weidlinger next argues that the Building Code provisions cited in the pleading do not pertain to, or impose any additional obligations upon, a design professional who had no ownership interest in a property, did not perform or supervise the excavation, and was not retained to design the bracing

and shoring for the protection of adjacent structures. Weidlinger Opening Brief, at 16-17. Plaintiffs counter that Weidlinger is liable under Building Code section 27-1031 (b).

Former Administrative Code of the City of New York § 27-1031 (b) (1) provided:

> 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.

See Yenem Corp. v 281 Broadway Holdings, 18 NY3d 481, 489 (2012) ("[s]ection 27-1031 [b] [1] was repealed effective July 1, 2008 and its equivalent provision is now contained in the New York City Construction Code [Administrative Code, tit 28, ch 33, § 3309.4]").

Weidlinger cites to three cases in support of its argument that section 27-1031 is not applicable. In *Cohen v Lesbian & Gay Community Servs. Ctr., Inc.* (20 AD3d 309, 310 [1st Dept 2005]), the Court stated that "[t]he duty under the statute is intended to apply to the activities during the excavation process and to any damage suffered by the adjoining owner proximately resulting from the excavator's failure to take adequate precautions to protect adjoining structures during the excavation." The Court held that the defendant was responsible for the repair and maintenance of its property, refusing to extend the excavator's duty in perpetuity with respect to subsequent landowners (*id.*), an issue not presently before the court in the instant action.

In *Coronet Props. Co. v L/M Second Ave.* (166 AD2d 242, 243 [1st Dept 1990]), the Court stated that section 27-1031 imposes "absolute liability upon both the owner and contractor who perform the excavation [internal citations omitted]." However, the Court denied the plaintiffs'

summary judgment motion, because factual issues existed as to "other possible causes of the damage," and based upon "evidence of the poor condition of the allegedly damaged buildings." *Id.* In *RCD Bldg., L.L.C.*, the court granted summary judgment dismissing a claim against an architect, where "no proof show[ed] that [the architect] knew about the actual underpinning being done" and the resulting "damage that was being done by the other defendants who were excavating." 14 Misc 3d 1215[A] at *6 (internal quotation marks and citation omitted).

None of these cases limits section 27-1031 to property owners and contractors who perform or supervise the excavation. *RCD Bldg., L.L.C.* suggests that Weidlinger's knowledge of the underpinning being performed may be sufficient. 14 Misc 3d 1215[A]. The evidence shows that Weidlinger prepared structural drawings and designed the step mat footing that replaced the underpinning plans, and the parties dispute whether Weidlinger prepared the excavation drawings. D'Antonio aff, exhibits B, R, S; Schreckinger aff, exhibit Z, at 8, 110-111, 170-171, 183-184. Weidlinger also assumed responsibility for structural stability and underpinning (*id.*, exhibits F and G), and served as "applicant of record for Structural work" (*id.*, exhibit N). This evidence is sufficient to create a duty under section 27-1031 of the Building Code. *See American Sec. Ins. Co. v Church of God of St. Albans*, 38 Misc 3d 274, 280 (Sup Ct, Queens County 2012) (party "caused the excavation to be made" where that party "planned for excavation to occur" under the plaintiffs' property, even though those plans were not actually followed by the excavation contractor); *Thomas J. McAdam Liquors, Inc. v Senior Living Options, Inc.*, 2008 WL 2401464, 2008 NY Misc. LEXIS 9173, *19-20, 2008 NY Slip Op 31566(U), *15 (Sup Ct, NY County June 6, 2008) ("[a]n architect or engineer may be liable for the negligent design or the negligent preparation or planning of design or engineering work").

Accordingly, Weidlinger fails to make a prima facie showing that Building Code section 27-1031 is inapplicable. At this juncture, at a minimum, a question of fact exists as to whether Weidlinger took "adequate precautions to protect adjoining structures during the excavation," and whether Weidlinger's role in the excavation work caused plaintiffs' damages. *Cohen*, 20 AD3d 309 at 310; *Coronet Props. Co.*, 166 AD2d at 243 (factual issues precluded summary disposition). Weidlinger's argument concerning building code sections 27-723, 27-724, 27-1028, 27-1029, and 27-1032 is limited to Weidlinger's conclusory assertion that these provisions "do not pertain to, or impose any additional obligations upon" Weidlinger (Weidlinger Opening Brief, at 16-17), which is insufficient to make a prima facie showing. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980) (a party seeking summary judgment must "establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor . . . , and he must do so by tender of evidentiary proof in admissible form"); *Bartee v D & S Fire Protection Corp.*, 79 AD3d 508, 508 (1st Dept 2010) (conclusory statements insufficient to satisfy prima facie showing). Accordingly, Weidlinger's motion for summary judgment dismissing plaintiffs' eleventh cause of action for Building Code violations is denied.

C. Contractual Indemnification

Weidlinger seeks summary judgment dismissing all cross claims asserted against it for contractual indemnification. Weidlinger argues that the only agreement it entered into was the Weidlinger Agreement with 77 Reade, LLC, which contains no indemnification provision.

Provisions for contractual indemnification "must be clear and unambiguous." *Ruiz-Hernandez v TPE NWI Gen.*, 106 AD3d 627, 628 (1st Dept 2013). Here, Weidlinger has made a prima facie showing that the only agreement it entered into was the Weidlinger Agreement. The

Weidlinger Agreement contained an indemnification provision, requiring Leeco to indemnify Weidlinger, but the indemnification provision is deleted with handwritten strikethrough lines and is initialed by the parties. Thus, Weidlinger has shown, prima facie, that it did not agree to indemnify any party in this contract. Only plaintiffs, Leeco, and 77 Reade, LLC oppose Weidlinger's motion, but none of these parties identifies any provision whereby Weidlinger agreed to contractual indemnification or any legal basis for this claim. Accordingly, Weidlinger's motion for summary judgment dismissing all claims for contractual indemnification is granted.

The court notes that Weidlinger's notice of motion seeks dismissal of "all claims and cross-claims." Weidlinger's request for dismissal of the contribution and common-law indemnification cross claims presumes, and is dependent upon, dismissal of plaintiffs' negligence and Building Code violations claims. Weidlinger Opening Brief, at 19. Weidlinger presents no independent legal or factual basis for dismissing the cross claims for contribution and common-law indemnification, and, therefore, Weidlinger fails to make a prima facie showing that it is entitled to summary judgment dismissing these cross claims.

D. Failure to Procure Insurance

Weidlinger seeks summary judgment dismissing the cross claims for failure to procure insurance, asserted by 77 Reade, LLC, Leeco, and Bronx Steel Fabricators, Inc. Only 77 Reade, LLC and Leeco oppose this argument, based upon the Weidlinger Agreement stating that Weidlinger's "Liability Insurance Certificate" was enclosed with the contract. D'Antonio aff, exhibit B. According to 77 Reade, LLC and Leeco, Weidlinger failed to produce the insurance certificate, thereby creating a presumption that the certificate would be harmful to Weidlinger's argument that it had no obligation to procure insurance.

As a preliminary matter, nothing contained in the Weidlinger Agreement created an obligation for Weidlinger to procure insurance. Weidlinger cannot have breached an obligation that it never had. Nor is a mere reference to a certificate of insurance sufficient to create an obligation to procure insurance. *See e.g. Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d 337, 339 (1st Dept 2003); *American Motorist Ins. Co. v Superior Acoustics*, 277 AD2d 97, 98 (1st Dept 2000). Thus, Weidlinger has made a prima facie showing that it had no obligation to procure insurance. In opposition, Weidlinger's co-defendants fail to produce any evidence obligating Weidlinger to procure insurance, thereby failing to rebut Weidlinger's prima facie showing or to raise a factual issue. Accordingly, Weidlinger is entitled to summary judgment dismissing all cross claims based upon failure to procure insurance.

II. Mugler's Summary Judgment Motion (mot seq 014)

Mugler argues that it is entitled to summary judgment dismissing plaintiffs' nineteenth cause of action for breach of contract and twentieth cause of action for negligence. Mugler also seeks dismissal of all cross claims and third-party claims, arguing that it owed no duty and did not cause plaintiffs' damages. Mugler requests attorneys' fees in the event that it prevails on its motion.

A. Breach of Contract & Negligence

Mugler argues that it owed no contractual or common-law duties to support plaintiffs' breach of contract and negligence causes of action. In arguing that it owed no duties, Mugler makes the same arguments and relies upon the same legal authority as Weidlinger, discussed above. Mugler also argues that its work did not cause or contribute to the building collapse.

Mugler agreed to install "5 sets of corner brackets, 1 each at the 2nd, 3rd, 4th, 5th and roof, to connect the West wall and front facade." Mugler Agreement, Parash aff, exhibit E. Thus, Mugler

had a contractual obligation to properly install the corner brackets. Moreover, for the same reasons discussed above, having entered into the Mugler Agreement, Mugler "is charged with the common-law duty of exercising reasonable care and skill in the performance of the work required to be done by the contract." *Rosenbaum*, 276 App Div at 168; *Wolf*, 39 NY2d at 573. Accordingly, Mugler fails to make a prima facie showing that it owed no duty to plaintiffs.

With respect to causation, Mugler testified that its employees used "a small rotary hammer" to drill three-quarter inch holes on the front facade and western wall of plaintiffs' building. Parish aff, exhibit C, at 98-100. Mugler testified that five or six holes were drilled on each floor of the front facade, that another four or five were drilled on each floor of the western wall (*id.* at 100), and that the drilling would cause "a very local portion" of the building to vibrate (*id.* at 110). Mugler also testified that it removed "some parging [concrete coating] and broken brick" from the exterior of the northwest wall and placed it on a sidewalk bridge. *Id.* at 102-106.

Mugler's engineering expert concluded that Mugler's work "did not contribute [to] or cause the partial collapse" of plaintiffs' building. Peraza aff, ¶ 3. However, according to the expert engineering affidavit of Nathaniel Smith, "[u]tilizing a rotary hammer, like the one utilized by [Mugler] in the instant matter, . . . may have locally affected the stability of the brick masonry at the northwest corner, and contributed to the already deteriorating conditions of plaintiffs' building caused by the adjacent construction." Smith aff, ¶ 6; Plaintiffs' Expert Witness Disclosure, Higgins aff, exhibit M. Smith's affidavit also states that the "removal of . . . bricks, without replacement or other stabilization of the area, may have affected the stability of the area," and that by failing to "replace the removed brick or stabilize the area, especially an area which was known to have several cracks, Mugler failed to safely and professionally complete the work for which it was contracted."

Id., ¶ 7; *see also* Osborn aff, ¶ 3 (engineering expert stating that Mugler's work "contributed to the collapse"). This evidence raises an issue of fact as to whether Mugler improperly performed its work under the Mugler Agreement or negligently caused or contributed to the collapse of plaintiffs' building. *Martin v Siegenfeld*, 70 AD3d 786, 788 (2d Dept 2010) ("[w]here the parties offer conflicting expert opinions, issues of credibility arise requiring jury resolution"); *Sweeney*, 57 AD3d 347; *Meridian Mgt. Corp.*, 70 AD3d 508.

The court notes Mugler's argument, raised in its reply papers, that plaintiffs should be precluded from relying upon new legal theories to defeat Mugler's summary judgment motion, including Mugler's brick removal and use of a rotary hammer, as showing causation and a departure from accepted industry practices. However, Mugler failed to make a prima facie showing initially, and, therefore, its motion would be denied regardless of any purported new theories advanced in opposition. *Ayotte v Gervasio*, 81 NY2d 1062, 1062 (1993) ("'[f]ailure to make . . . prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers'"). In any event, "[a] motion for summary judgment shall be supported by affidavit" (CPLR 3212 [b]), and the affidavits submitted in opposition to Mugler's motion do not raise new legal theories. Rather, the evidence makes clear that triable issues exist with respect to Mugler's liability, if any, for plaintiffs' damages. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978) ("'summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue'"). For the foregoing reasons, Mugler's motion for summary judgment dismissing plaintiffs' nineteenth and twentieth causes of action is denied.

B. Contractual Indemnification

Mugler argues that 77 Reade, LLC and Leeco's third-party claim for contractual

indemnification should be dismissed, because there was no contract between Leeco and Mugler. As a preliminary matter, Leeco's third-party complaint asserts claims for contribution (first cause of action), common-law indemnification (third cause of action), and failure to procure insurance (fourth cause of action). Nothing contained therein asserts a claim for contractual indemnification.[3] Accordingly, this portion of Mugler's motion is denied as moot.

In any event, the Mugler Agreement was entered into between Mugler and 87 Chambers LLC only, and this agreement contained no provisions concerning indemnification. Accordingly, if the pleading could be construed as asserting a claim for contractual indemnification, Mugler's motion would be granted to the extent of dismissing any such claim. *Ruiz-Hernandez*, 106 AD3d 627.

C. Common-Law Indemnification & Contribution

Mugler seeks summary judgment dismissing 77 Reade, LLC and Leeco's claims for common-law indemnification and contribution, arguing that Mugler's work neither caused nor contributed to the collapse of plaintiffs' building.

To be entitled to contribution, a party must establish that the party against whom contribution is sought owed a duty, a breach of that duty, and that the breach contributed to the plaintiff's injuries. *Schauer v Joyce*, 54 NY2d 1, 5 (1981). As discussed above, Mugler did owe a duty of care. The factual issue of causation, discussed above, and "the degree of responsibility each wrongdoer must bear," remain outstanding (*County of Westchester v Welton Becket Assoc.*, 102 AD2d 34, 46 [2d Dept 1984], *affd* 66 NY2d 642 [1985]), thereby requiring denial of Mugler's motion to dismiss the contribution claim.

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[3] The third-party complaint of 77 Reade, LLC and Leeco appears to have misnumbered causes of action due to a scrivener's error, as it fails to identify a second cause of action.

"Indemnity . . . involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another person who should more properly bear responsibility for that loss because he was the actual wrongdoer." *County of Westchester*, 102 AD2d at 46-47. To establish common-law indemnification, defendants must prove "'not only that they were not negligent, but also that the proposed indemnitor . . . was responsible for negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the injury.'" *Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808 (2d Dept 2009), quoting *Benedetto v Carrera Realty Corp.*, 32 AD3d 874, 875 (2d Dept 2006). "[T]he owner or contractor seeking indemnity must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought." *17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80 (1st Dept 1999). Thus, if the party seeking indemnification is "held liable at least partially because of its own negligence," common-law indemnity is not a viable remedy and "contribution against other culpable tort-feasers is the only available remedy." *Glaser v Fortunoff of Westbury Corp.*, 71 NY2d 643, 646 (1988); *see also Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 (1st Dept), *lv denied* 1 NY3d 504 (2003) ("'[s]ince the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine'").

As discussed above, no determination has been made concerning the extent of Mugler's – or any other defendant's – negligence, if any, in participating in the events that caused the collapse of plaintiffs' building. Accordingly, Mugler's motion for summary judgment dismissing the common-law indemnification claim is denied as premature.

D. Failure to Procure Insurance

Mugler seeks summary judgment dismissing 77 Reade, LLC and Leeco's cause of action for failure to procure insurance, arguing that it was not contractually obligated to procure insurance. Parties may orally agree to procure insurance, provided the terms are "clear and definite, and the conduct of the parties evinces 'mutual assent sufficiently definite to assure that the parties [were] truly in agreement with respect to all material terms.'" *Carlsen v Rockefeller Ctr. N., Inc.*, 74 AD3d 608, 609 (1st Dept 2010).

Here, 77 Reade, LLC submits the affidavit of its managing member, Myles Group (Group). Group's affidavit states that Mugler requested access to the construction site in order to perform repairs on plaintiffs' property. Group aff, ¶ 2. With his affidavit, Group submits his email to Mugler, dated April 13, 2009, stating as follows:

> As discussed we understand you are providing repair work on the building next door, consisting of 5 Sets of Corner Brackets to connect to the West wall and front Facade. And you needed access to our lot, [sic] Please issue a Certificate of additionally insured, [sic] To: Leeco Construction, Inc, and 77 Reade, LLC. This can be email or faxed to 212-228-0801. We will help in any way we can.

Group aff, exhibit A. Group claims that it received Mugler's "Certificate of Liability Insurance" the next day, naming 77 Reade, LLC and Leeco as additional insureds, and Group submits this certificate as documentary evidence. *Id.*, exhibit B. According to Group, Mugler began performing its work on plaintiffs' property the same day, on April 14, 2009. This evidence is sufficient to raise a factual issue as to the existence of an agreement to procure insurance among Mugler, 77 Reade, LLC, and Leeco, and the terms of any such agreement. *Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 399 (1977) ("[i]n determining whether the parties entered into a contractual agreement

and what were its terms, it is necessary to look . . . to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds"). Accordingly, Mugler's motion for summary judgment dismissing the claims based upon failure to procure insurance is denied.

E. Attorneys' Fees & Sanctions

Mugler seeks attorneys' fees and sanctions, pursuant to 22 NYCRR § 130-1.1, in the event that the court grants its motion dismissing the third-party complaint. As Mugler's motion is denied in its entirety, his request for attorneys' fees and sanctions is denied.

III. BKSK's Summary Judgment (mot seq 015)

BKSK seeks summary judgment dismissing plaintiffs' thirteenth and fourteenth causes of action for Building Code violations and negligence, respectively. BKSK also seeks dismissal of all cross claims asserted against it.

A. Negligence

BKSK seeks dismissal of plaintiffs' fourteenth cause of action for negligence, arguing that it owed no duty to protect plaintiffs' property, and that its architectural services did not contribute to or cause the collapse of plaintiffs' building. Section 2.6.2.1 of the BKSK Agreement, between BKSK and 77 Reade, LLC, provided as follows:

> The Architect [BKSK], as a representative of the Owner [77 Reade, LLC], shall visit the site at intervals appropriate to the stage of the Contractor's operations, or as otherwise agreed by the Owner and the Architect in Article 2.8, (1) to become generally familiar with the progress and quality of the portion of the Work completed, (2) to endeavor to guard the Owner against defects and deficiencies in the Work, and (3) to determine in general if the Work is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. 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.

Krevlin aff, exhibit A (emphasis added).

Article 2.8 of the BKSK Agreement provided for: BKSK to review drawings; "up to One (1) visit per week to the site . . . over the duration of the Project during construction and one additional visit per week to a limit of twenty (20)"; and "up to Three (3) inspections for any portion of the Work to determine whether such portion of the Work is substantially complete in accordance with the requirements of the Contract Documents." *Id.*, § 2.8.1. BKSK also agreed to, among other things: review the "Contractor's submittal out of sequence from the submittal schedule"; respond to the "Contractor's requests for information where such information is available to the Contractor from a careful study and comparison of the Contract Documents, field conditions, other Owner-provided information, Contractor-prepared coordination drawings, or prior Project correspondence or documentation"; "Change Orders and Construction Change Directives requiring evaluation of proposals"; "provid[e] consultation concerning replacement of Work resulting from fire or other cause during construction"; "evaluat[e] an extensive number of claims submitted by the Owner's consultants, the Contractor or others in connection with the Work"; "evaulat[e] substitutions proposed by the Owner's consultants or contractors and mak[e] subsequent revisions to Instruments of Service resulting therefrom"; and "prepar[e] design and documentation for alternate bid or proposal requests proposed by the Owner." *Id.*, § 2.8.2.

Relying upon the same line of cases as Weidlinger and Mugler, including *Davis* and *Welch* (discussed above), BKSK claims that the limiting language contained in the last two sentences of

section 2.6.2.1 negates the existence of any duty owed by BKSK. As discussed above, however, "[w]here a person contracts to do certain work he is charged with the common-law duty of exercising reasonable care and skill in the performance of the work required to be done by the contract." *Rosenbaum*, 276 App Div at 168; *Wolf*, 39 NY2d at 573.

Here, BKSK testified that it had "[l]imited involvement" in the construction project between March and April of 2009, and that BKSK may have conducted one site visit during that time. Capece tr, Parash aff, exhibit C, at 148-149. In addition, the Weidlinger Agreement was addressed to BKSK, stating that Weidlinger "noticed that the facade wall of the adjacent existing building on the east side of the parking lot has several cracks. These cracks should be recorded and monitored prior to and during the new construction." D'Antonio aff, exhibit B. BKSK testified that it never took "any steps to determine the extent of these cracks." Capece tr, at 84-85. In addition, BKSK admitted that it was involved in discussions concerning the cracks on the wall of the adjacent property, and the "architectural impact" of replacing the underpinning plans with step mat foundation. *Id.* at 121, 128-129. By letter to Leeco dated June 12, 2008, BKSK attached "comments on the conceptual Underpinning Drawings" for "Shoring and Underpinning." Fromm aff, exhibit E. BKSK testified that it also received revised plans for underpinning and shoring (*id.*, exhibit F, at 123), and the parties submit a June 20, 2008 email copied to BKSK, purporting to attach a "revised underpinning, sheeting and shoring plan," indicating that "[t]his will be the plan that they're submitting to DOB for approval. Please review and make any comments or suggestions as you deem necessary." *Id.*, exhibit G.

The parties also submit an August 14, 2008 fax sent from SST to Leeco, Weidlinger, and BKSK, summarizing options for underpinning. *Id.*, exhibit H. On September 9, 2008, BKSK was

copied on an email from 77 Reade, LLC to Jing at Weidlinger, requesting that Jing "begin the work to incorporate the step footing into our plan and do it expeditiously." *Id.*, exhibit I. BKSK testified that there was no contingency plan in place "in the case of settlement or movement of any of the adjacent buildings" (*id.* at 145), even though BKSK admitted that "there could be impact" on the adjacent buildings during the construction (*id.* at 146). According to BKSK, "there was the design team in place that were addressing these issues," including shoring and structural engineers who "were looking at this – exactly these issues, so the right people were looking at the right things." *Id.* However, BKSK testified that it "*overs[aw]* a . . . consulting team . . . of engineers and other consultants," all of whom provided input on the construction project. *Id.* at 18-19 (emphasis added); *see also* BKSK Agreement, § 2.1.1 (stating that "[t]he Architect shall coordinate the services provided by the Architect and the Architect's consultants with those services provided by the Owner and the Owner's consultants").

For these reasons, BKSK fails to make a prima facie showing that it satisfied its obligations contained in section 2.6.2.1 and article 2.8 of the BKSK Agreement. Nor has BKSK made a prima facie showing that it owed no duty. At a minimum, factual issues exist as to whether BKSK satisfied its contractual obligations and fulfilled any duties owed to plaintiffs. For the same reasons discussed above with respect to the motions of Weidlinger and Mugler, whether the work performed by BKSK contributed to or caused the collapse of plaintiffs' building also raise factual issues that cannot be resolved on the instant motion.

B. Building Code Violations

BKSK next seeks dismissal of plaintiffs' thirteenth cause of action for Building Code violations. In support of its argument concerning section 27-1031, BKSK relies upon essentially the

same legal authority as Weidlinger. These cases, and the evidence before the court, fail to show, prima facie, that BKSK is entitled to summary judgment dismissing this cause of action. *RCD Bldg., L.L.C.*, 14 Misc 3d 1215[A] at *6; *American Sec. Ins. Co.*, 38 Misc 3d at 280; *Thomas J. McAdam Liquors, Inc.*, 2008 WL 2401465, 2008 NY Misc. LEXIS 9173, *19-20. At this juncture, factual issues exist as to whether BKSK took "adequate precautions to protect adjoining structures during the excavation," and whether BKSK's role in the excavation work caused plaintiffs' damages. *Cohen*, 20 AD3d 309 at 310; *Coronet Props. Co.*, 166 AD2d at 243. Accordingly, BKSK's motion for summary judgment dismissing plaintiffs' thirteenth cause of action for Building Code violations is denied with respect to section 27-1031.

BKSK also seeks summary judgment on the thirteenth cause of action to the extent based upon Building Code sections 27-723, 27-724, 27-1028, 27-1029, and 27-1032. Section 27-723 dealt with inspections after excavation of the "soil material directly underlying footings, foundation piers, and foundation walls." Section 27-724 required "controlled inspection" of certain "constructions or excavations required for or affecting the support of adjacent properties or buildings." Section 27-1028 required the protection of adjoining properties or buildings "[w]henever an excavation or fill is to be made that will affect safety, stability, or usability of adjoining properties or buildings." Section 27-1029 required that the owner of an adjoining property be given 48 hours written notice of "subsurface operations . . . that may impose loads or movements on adjoining property." Section 27-1032 required that "the sides of all excavations . . . be protected and maintained by shoring, bracing and sheeting, sheet piling, or by other retaining structures."

BKSK argues that these provisions are "simply inapplicable" and "irrelevant." BKSK Opening Brief, at 12-13. With respect to some of these provisions, BKSK offers conclusory

arguments or no legal argument at all, other than a citation to the statute, which are insufficient to make a prima facie showing. *Zuckerman*, 49 NY2d at 562; *Bartee*, 79 AD3d at 508. Moreover, although this portion of BKSK's motion is unopposed, all of these provisions pertain to excavation work and the protection of adjoining properties, which comprise, at least in part, the factual bases of plaintiffs' claims, thereby requiring denial of BKSK's motion "'regardless of the sufficiency of the opposing papers.'" *Ayotte*, 81 NY2d at 1062. Giving plaintiffs, as nonmovants, the benefit of every favorable inference (*Negri v Stop & Shop*, 65 NY2d 625 [1985]), BKSK's motion for summary judgment dismissing plaintiffs' claims based upon violations of Building Code sections 27-723, 27-724, 27-1028, 27-1029, and 27-1032 is denied. *See Sommer v Federal Signal Corp.*, 79 NY2d 540, 554 (1992) ("[t]he court's role on a motion for summary judgment is to determine whether there is a material factual issue to be tried, not to resolve it").

C. Indemnification & Contribution

BKSK next seeks dismissal of all cross claims asserted against it for indemnification, contribution, and apportionment. For the same reasons discussed above with respect to Mugler's motion, no determination has been made concerning the extent of BKSK's – or any other defendant's – negligence, if any, in participating in the events that caused the collapse of plaintiffs' building. Accordingly, BKSK's motion for summary judgment dismissing these cross claims is denied.

D. Contractual Indemnification & Failure to Procure Insurance

BKSK seeks dismissal of the cross claims for contractual indemnification, asserted in the answers of Weidlinger, 77 Reade, LLC, Leeco, Fruma Narov, Narov Associates, and Fruma Narov, P.E., P.C. BKSK also seeks dismissal of the cross claims based upon failure to procure insurance, asserted in the answers of Bronx Steel Fabricators, Inc., Weidlinger, 77 Reade, LLC, and Leeco.

This portion of BKSK's motion is unopposed, and BKSK makes a prima facie showing that it did not agree to contractual indemnification or to procure insurance with respect to any of these co-defendants. Accordingly, BKSK's motion for summary judgment is granted to the extent of dismissing all cross claims based upon contractual indemnification and failure to procure insurance.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of defendant Weidlinger Associates, Inc.. (motion sequence number 013) is granted to the extent that all cross claims for contractual indemnification and failure to procure insurance asserted against Weidlinger Associates, Inc. are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the motion for summary judgment of defendant Richard C. Mugler Co., Inc. (motion sequence number 014) is denied; and it is further

ORDERED that the motion for summary judgment of defendant BKSK Architects LLP (motion sequence number 015) is granted to the extent that all cross claims for contractual indemnification and failure to procure insurance asserted against BKSK Architects LLP are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the action shall continue; and it is further

ORDERED that the parties proceed to mediation and/or trial, forthwith.

Dated: July 30, 2013

ENTER:

J.S.C.

FILED

AUG 05 2013

COUNTY CLERK'S OFFICE
NEW YORK