

B. Brages Assoc. LLC v 125 W. 21st LLC

2014 NY Slip Op 31269(U)

May 8, 2014

Supreme Court, New York County

Docket Number: 114320/09

Judge: Joan A. Madden

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

PRESENT: Hon Joan A. Miller
Justice

PART 11

Index Number : 114320/2009
B.BRAGES ASSOCIATES LLC
vs.
125 WEST 21ST LLC
SEQUENCE NUMBER : 009
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 11

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
 Answering Affidavits — Exhibits _____ | No(s). _____
 Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the
attached Memorandum Decision + order.

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

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Dated: May 8, 2014

[Signature], 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
NEW YORK COUNTY: PART 11

B. BRAGES ASSOCIATES LLC,

Index No.: 114320/09

Plaintiff,

- against -

DECISION/ORDER

125 WEST 21ST LLC, ALCHEMY PROPERTIES,
INC., ALCHEMY 21ST STREET LLC, ALCHEMY
15-21 LLC, FOX & FOWLE ARCHITECTS, P.C.,
SEVERUD ASSOCIATES CONSULTING ENGINEERS,
P.C., DAGHER ENGINEERING PLLC, LANGAN
ENGINEERING AND ENVIRONMENTAL SERVICES,
INC., 21ST CONSTRUCTION LLC and MRC II
CONTRACTING, INC.,

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

Defendants.

MADDEN, JOAN, J.:

In this action, plaintiff, the owner of a building located at 131 West 21st Street in Manhattan, sues to recover for property damage sustained as a result of construction activities on adjacent property located at 125 West 21st Street. Defendant Langan Engineering and Environmental Services, Inc. moves, and defendants 125 West 21st LLC, Alchemy Properties, Inc., Alchemy 21st Street LLC, Alchemy 15-21 LLC, and 21st Construction LLC, cross move (seq. no. 009), to dismiss the complaint, pursuant to CPLR 3211 (a) (5), based on the statute of limitations. By separate motions, defendants MRC II Contracting, Inc. (seq. no. 010) and Severud Associates Consulting Engineers, P.C. (seq. no. 011) also seek dismissal of the complaint on statute of limitations grounds. The motions are consolidated for purposes of their disposition.

BACKGROUND

Plaintiff B. Brages Associates LLC (Brages) is the owner of a four-story mixed use building located at 131 West 21st Street, New York, New York (the building). Roberta Friedman (Friedman) is a principal of Brages, and resides in the building. Friedman Dep., Ex. G to Bundschuh Aff. in Support of Alchemy Cross Motion (Bundschuh Aff.), at 7, 11. Defendants 125 West 21st LLC, Alchemy Properties, Inc., Alchemy 21st Street LLC, and Alchemy 15-21 LLC (collectively Alchemy) are the owners and developers of property located at 125 West 21st Street (the adjacent property). In 2006, Alchemy began construction of a residential condominium building on the adjacent property (the project), then a parking lot, and hired 21st Construction LLC as the construction manager for the project. Defendant Langan Engineering and Environmental Services, Inc. (Langan) provided geotechnical engineering services for the construction project, and defendant Severud Associates Consulting Engineers, P.C. (Severud) provided structural engineering services for the project. Defendant MRC II Contracting, Inc. (MRC) performed excavation work, and retained engineer Michael Luther to prepare underpinning plans and to inspect MRC's work.

Construction on the adjacent property began in late May 2006 with excavation and underpinning work. According to Ken Bier, Project Superintendent employed by Alchemy, the underpinning

work, intended to support and protect adjacent buildings and property during excavation, was completed and inspected by August 2006. See Bier Aff., annexed to Bundschuh Aff., ¶¶ 17-18; Technical Report, Ex. D to Imossi Aff. in Support of Langan's Motion (Imossi Aff.). Plaintiff contends that final inspection of the underpinning occurred on November 1, 2006 (see Spitz Aff. in Opposition to Defendants' Motions [Spitz Aff. in Opp.]), the date the Technical Report was filed with the Department of Buildings. See Technical Report, Ex. D to Imossi Aff.

Shortly after excavation work began, Friedman noticed problems with her building, including doors not closing, the cellar door out of alignment, and cracks in her bathroom and the hallways. Friedman Dep., Ex. I to Imossi Aff., at 159, 166-167; Friedman Dep., Ex. G to Bundschuh Aff., at 116-117.¹ When Alchemy did not respond to her complaints, and "it really looked like there was going to be a problem," Friedman hired an engineer, Ron Becker (Becker), to inspect the damage to her building. *Id.* at 119; Friedman Dep., Ex. E to Imossi Aff., at 115-117, 119. On June 6, 2006, Becker inspected the building and then prepared and sent a report to Friedman. See Building Inspection Report, dated June 12, 2006, Ex. H to Imossi Aff.

¹Friedman was deposed over four days, on July 11, 2001, September 1, 2011, October 21, 2011, and June 11, 2012. Transcripts, or portions thereof, are annexed to different parties' papers, and are referred to by exhibit number rather than date.

In his report, Becker noted that ongoing excavation and underpinning work at the adjacent property "might have caused some undesired movement (settlement) resulting in cracks throughout the four story building at 131 West 21st street," and he further stated:

"During the inspection of the ground floor we noticed cracks along the floor adjoining the east party wall and separation between cabinets and partition, which is an indication of movement of the building as a result of the ongoing excavation. In addition, the access door to the cellar shifted and does not open or close properly (out of square). The main stair to the building is beginning to separate from the wall, leaving a 1/2" gap. The 4th floor apartment had cracks at various locations as a result of the excavation. The stairs leading to the roof had a 3/4" gap from the wall."

Id.

Becker recommended that safety measures be taken "to mitigate any additional hazardous conditions" and to prevent "any further damage." *Id.* At her deposition, Friedman testified that, before she hired Becker, she saw that the stairs to the building were separating from the wall and there was a gap between the stairs leading to the roof and the wall (Friedman Dep., Ex. G to Bundschuh Aff., at 120-121); and she stated that Becker's June 12, 2006 report identified damages that she had noticed at that time. *Id.* at 119; Friedman Dep., Ex. H to Bundschuh Aff., at 13-14. Becker sent his report to Alchemy, with a letter in which Becker urged the owner to "take all

precautions not to further damage the referenced property," and stated that he expected that crack monitoring gauges would be placed in the building and repair work would be undertaken by the owner. See Letter, dated June 12, 2006, Ex. G to Imossi Aff.

Becker's June 12, 2006 letter to Alchemy was also sent to Fred Seeman, an attorney retained by Friedman in connection with her property damage claims. Seeman subsequently notified Alchemy, in early October 2006, that "the Brages property has suffered damage due to the ongoing construction at the Alchemy property," and he requested that Alchemy "perform a walkthrough at the premises to assess the damages and to together plan a program of remediation." Letter dated October 4, 2006 Ex. K to Imossi Aff.; see Friedman Dep., Ex. G to Bundschuh Aff., at 129-131. Friedman testified that prior to the date of her attorney's letter to Alchemy, she noticed damages to the exterior of the building, and saw that "the parapet wall, the building had moved." *Id.* at 132-133. After her attorney sent the October 4, 2006 letter, Friedman testified, she continued to complain to Alchemy about damages to her property, and although Alchemy previously had made some repairs to the building, she was told it would do no more. *Id.* at 142-143, 140-141.

In March 2007, Friedman asked Becker to conduct a second inspection of her building, after which he submitted a report to Friedman. See Building Inspection Report dated April 12, 2007,

Ex. D to Spitz Aff. in Opp. In this report, Becker stated that the building was suffering "serious structural damage." The report continued:

"Due to work at the adjacent building, your building is experiencing some horizontal movement, resulting [in] a separation of over 1-3/4" from the floor joist to the west bearing wall. . . . There are cracks throughout the building. As a result, the entry door is out of square and the apartment doors do not close properly. In addition, a separation of the west wall from the roof joist cause[d] some leak at the fourth floor apartment. The entrance stairs are not level due to movement of the building."

Id. Becker went on to recommend that all required safety measures be taken to mitigate additional damage, and noted that "since the stability of the building is in question," repair work should start as soon as possible. *Id.*

Plaintiff's attorney was copied on Becker's second report, and he then sent a letter to Alchemy, dated April 26, 2007, in which he stated that the Brages building "continues to suffer damage caused by the ongoing construction next door," "the situation has greatly worsened," and the building has begun to settle. Letter, dated April 26, 2007, Ex. G to Spitz Aff. in Opp. He identified the damages sustained as:

- "1. Roof and skylight damaged. Cracks opened on roof leading to leaks.
2. Front and Cellar doors (as well as many doors in the building) have been rendered out of alignment.
3. Vermin and Rodent infestation.
4. Area around lintel of rear store door is cracked.

5. Basement ceiling is depressed.
6. Building stairway is cracking.
7. Gaps created under building wall baseloads.
8. Granite counter top pulled away from wall.
9. Bathtub grout loosened.
10. Broken roof fence.
11. Flooring on the Fourth Floor . . . has pulled away.
12. Ceiling of the Ground Floor Store has pulled away from the wall and store cabinets have become misaligned.
13. Hallway needs to be painted upon completion of the necessary repairs."

Id.

Friedman testified that some of the damages identified in Seeman's letter were present prior to October 2006, and stated that "the bulk of the damages occurred while the excavation was taking place" prior to October 2006. Friedman Dep., Ex. G to Bundschuh Aff., at 145, 146. Damages which Friedman identified as occurring prior to, as well as after, October 4, 2006, included roof and skylight damage, front and cellar doors out of alignment, rat infestation, cracked area around rear door lintel, basement ceiling depressed, building stairway cracking, granite counter top pulled away from wall, bathtub grout loosened, fourth floor flooring pulled away, and ground floor ceiling pulled away. *Id.*, at 150-155; Friedman Dep., Ex. H to Bundschuh Aff., at 181-182, 193-194.

In May 2007, in response to Seeman's April 26, 2007 letter, Alchemy asked Rand Engineering (Rand) to investigate plaintiff's complaints. After inspecting the building, Rand prepared a report. See Site Visit Report #20, Ex. H to Spitz Aff. in Opp.

The report noted that Alchemy had responded to the 13 items of damages identified in Seeman's letter, had conducted some repairs and intended to do some more; it also noted that there were building defects that appeared to predate construction on the adjacent property. *Id.*

During the summer of 2007, when construction on the adjacent property was rising above the height of plaintiff's building, construction debris fell on and damaged the roof of plaintiff's building. Friedman Dep., Ex. G to Bundschuh Aff., at 151. In August 2007, a polyurethane substance used to coat the side of the building under construction clogged the gutters and drains of plaintiff's building and caused flooding during a heavy rain. Friedman Dep., Ex. F to Spitz Aff. in Opp., at 61, 65, 67-69; Friedman Dep., Ex. N to Bundschuh Reply Aff., at 224-226, 229-231, 273-275. The flood damaged personal property of plaintiff's commercial and residential tenants, and water warped hardwood floors, sheet rock and cabinetry. Friedman Dep., Ex. F to Spitz Aff. in Opp., at 67-69, 72, 76-79. In addition, plaintiff testified, falling debris, including wet cement, broken concrete and dust, damaged the building's main roof, roof parapet, fire escape and skylight; and two smaller roof areas in the rear of the building on the first and second floors were damaged. Friedman Dep., Ex. F to Spitz Aff. in Opp., at 40-42, 129, 133; Friedman Dep., Ex. G to Bundschuh Aff., at 151; Friedman Dep.,

Ex. N to Bundschuh Reply Aff., at 189, 222-223.

Following the flood in plaintiff's building, Rand was asked by Alchemy to visit plaintiff's building and to meet with Friedman and assess the water damage to the building. Rand visited the building on August 9, 2007, and issued a report of its observations on that date; it also issued a follow-up report after a site visit on August 16, 2007. See Site Visit Report #38 and Site Visit Report #39, Exs. I, J to Spitz Aff. in Opp. In its report following the August 9, 2007 site visit, Rand noted that the purpose of its visit was "to assess the moisture infiltration after the unusually heavy rainfall on Wednesday, August 8." Site Visit Report #38, Ex. I to Spitz Aff. in Opp., at 1. Rand reported seeing drains clogged with "particulate matter," mortar droppings adhered to roof surfaces and the fire escape, moisture damage to the second floor residential unit and first floor commercial units, and it advised Friedman to discuss with Alchemy "mutually agreeable repairs." *Id.* at 1-2. After a site visit on August 16, 2007, to discuss with Alchemy representatives the "reported moisture infiltration" at plaintiff's building, Rand prepared a report noting that, notwithstanding observations of building conditions that appeared to predate the construction project, "there was sufficient indication that Alchemy's construction activity contributed to moisture infiltration" in that some of the material clogging the

[* H]
drains was construction debris. Site Visit Report #39, Ex. J to Spitz Aff. in Opp.

Plaintiff then retained FSI Architecture (FSI) in March 2008 to inspect the building, and, in opposition to defendants' motions, plaintiff submits an affidavit of James Cicalo, a registered architect and president of FSI. See Cicalo Aff., Ex. E to Spitz Aff. in Opp. Cicalo attests that he conducted multiple site visits between March and May 2008, and wrote a report identifying damage caused by excavation and underpinning, and damage caused after vertical construction began, and stated that, in his opinion, damage caused by excavation was separate and distinct from damage caused once vertical construction began. *Id.* at 2. He also opined that the damage identified in Becker's June 12, 2006 report did not describe "significant structural damage," but the April 12, 2007 report did. *Id.* at 2-3. According to Cicalo, as a result of the vertical construction, "the building began to shift and lean towards the east . . . [and] [t]he entire interior staircase was observed bowing to the east. *Id.* at 3. He further attests that damage to the joists, which threatened the structural stability of each floor, was discovered only after the walls were opened up in April 2008. *Id.* He concludes that "the structural integrity of the building was not apparent when excavation began on May 26, 2006." *Id.* at 5.

Plaintiff commenced this action on October 13, 2009.

Defendants contend that the complaint should be dismissed because the statute of limitations for plaintiff's claims expired on June 6, 2009.

Discussion

CPLR 214 (4) provides that an action to recover damages for "an injury to property" must be commenced within three years of the accrual of the cause of action. "The Statute of Limitations does not run until there is a legal right to relief" (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]), that is, "when all of the facts necessary to the cause of action have occurred." *Aetna Life & Cas. Co. v Nelson*, 67 NY2d 169, 175 (1986); see *Hahn Auto. Warehouse, Inc. v American Zurich Ins. Co.*, 18 NY3d 765, 770 (2012). "As a general proposition, it is upon injury that a legal right to relief arises in a tort action and the Statute of Limitations begins to run." *Ackerman v Price Waterhouse*, 84 NY2d 535, 541 (1994) (internal citations omitted); see *Kronos, Inc.*, 81 NY2d at 94.

Where, as here, a property damage claim arises from allegedly negligent construction work on adjacent property, the cause of action accrues when the damage becomes visible or otherwise apparent. See *Public Serv. Mut. Ins. Co. v 341-347 Broadway, LLC*, 96 AD3d 473, 473-474 (1st Dept 2012); *Reyes-Dawson v Goddu*, 74 AD3d 417, 418 (1st Dept 2010); *Mark v Eshkar*, 194

AD2d 356, 357 (1st Dept 1993); *Musk v 13-21 E. 22nd St. Residence Corp.*, 2012 WL 6707316, 2012 NY Misc LEXIS 5775, *15-16, 2012 NY Slip Op 33021(U) (Sup Ct, NY County 2012); *Vitale v S&P 26 Dev. Assocs. LLC*, 2009 WL 2848084, 2009 NY Misc LEXIS 6071, *2, 2009 NY Slip Op 31983(U) (Sup Ct, NY County 2009).

Generally, the statute of limitations begins to run at the first sign of damage, even when the damage gets progressively worse. See *Atlantic Express Trans. Corp. v Weeks Marina, Inc.*, 68 AD3d 903 (2d Dept 2009) (damage to building from nearby blasting accrued when roof leak reported, not when additional damage, including cracks and molding separating from wall, developed); *Vitale*, 2009 NY Misc LEXIS 6071, at *3-4 (damage to party wall apparent during construction when holes and cracks appeared even though "continuing weakening" of wall alleged); *Koelling v D'Angelo*, 38 Misc 3d 1208(A), 2013 NY Slip Op 50021(U) (Sup Ct, Queens County 2013) (damage to driveway caused by neighbor's tree roots apparent years earlier, even if it was initially de minimis and became "exceedingly worse" in recent years). Further, damage claims accrue when damage is first observed, even where the extent of the damage may not be known. See *Reyes-Dawson*, 74 AD3d at 418 (plaintiff knew or should have known, when she first complained about installation of fireplace in party wall, that damage could be structural and her failure to further investigate did not extend limitations period); *Alamio v*

Town of Rockland, 302 AD2d 842 (3d Dept 2003) (claim untimely where plaintiff observed water stains on walls years ago and took no action to investigate); see also *Musk*, 2012 WL 6707316, 2012 NY Misc LEXIS 5775, at *15-16 (where alleged damage consisted of vibrations and noise emanating from renovation of adjacent coop apartment, claim accrued when the noise and vibrations were audible and apparent, not years later when inspection revealed source of noise and vibrations).

When damage is to the surface of property, the statute of limitations commences when "the damage has become visible through the development of injuries to the surface" of plaintiff's property. *Mark*, 194 AD2d at 357 (citation omitted); see *Public Serv. Mut. Ins. Co.*, 96 AD3d at 474 (flood damage apparent when it occurred); *Mandel v Estate of Tiffany*, 263 AD2d 827, 829 (2d Dept 1999) (for statute of limitations purposes, injury to plaintiff's property was apparent when trees were removed, not when landslide occurred years later); *Cranesville Block Co. v Niagara Mohawk Power Corp.*, 175 AD2d 444, 446 (3d Dept 1991) (damage, cutting of railroad tracks on plaintiff's property during installation of gas line, was apparent when it was done not when later discovered). In *Mark*, however, the court found that where plaintiff alleged structural damage resulting from loss of lateral support caused by negligent construction of a new foundation for a shared party wall, the claim accrued not

when "relatively minor damage" to the wall appeared during renovation, but years later when "larger cracks, allegedly structural, became manifest." 194 AD2d at 357.

An awareness that damage could occur, without any visible signs of damage, does not start the running of the statute of limitations. See *Public Serv. Mut. Ins. Co.*, 96 AD3d at 474 (letter from plaintiff's attorney expressing concern that adjoining construction project would cause damage does not show damage was apparent); *Russell v Dunbar*, 40 AD3d 952, 953 (2d Dept 2007) (claim for damage due to leak during renovation of adjoining property did not accrue when plaintiff heard water running in walls but when water damage appeared). Moreover, later-appearing damage separate from the initially reported damage, arising from the same construction project, may provide a later accrual date. See *Public Serv. Mut. Ins. Co.*, 96 AD3d at 473-474 (although claim for flood damage to ground floor and cellar was untimely, claim for later-appearing damage to building facades, upper floors, and roof could be timely); *Atlantic Express Transp. Corp.*, 68 AD3d at 905 (earlier reported damage to building was time-barred, but later reported damage to parking lot on property was timely); see also *Vitale*, 2009 WL 2848084, 2009 NY Misc LEXIS 6071, at *3-4 (claim for building damage resulting from demolition untimely, but claim for encroachment of new wall was permitted as continuing trespass).

In this case, the parties do not dispute either that the three-year statute of limitations applies or that plaintiff's claim accrued when damage was apparent. The disputed issue is when the alleged damage became apparent. Defendants contend that plaintiff's claim accrued in June 2006, when Becker inspected the building and issued his report, and structural damage to the building was or should have been apparent. Plaintiff contends that the statute of limitations began to run not in June 2006, when only "minor cracking" appeared, but in April 2007, when Becker's second report stated that there was "serious structural damage" to the building. See Spitz Aff. in Opp., at 15, 17.

Relying chiefly on *Public Serv. Mut. Ins. Co.* (96 AD3d 473) and *Mark* (194 AD2d 356), *supra*, plaintiff argues that, because Becker's June 12, 2006 report did not identify significant structural damage, and the October 4, 2006 letter from Friedman's attorney also did not mention the word "structural" in connection with the damages claimed, the minor damage observed before April 2007, like the minor damage observed in *Mark*, was not the accrual date for plaintiff's claim of structural damage. Plaintiff further argues that, as in *Public Serv. Mut. Ins. Co.*, defendants cannot show that structural damage to the building was apparent until April 12, 2007, when Becker reported that there was "serious structural damage" which brought into question "the structural stability of the building." See Building Inspection

Report, dated April 12, 2007, Ex. D to Spitz Aff. in Opp.

However, it is clear that the damages observed in June 2006 are similar to the damages reported in April 2007, even if some conditions were getting worse. Like Becker's April 2007 report, the June 2006 report noted gaps between stairways and walls, cracks throughout the building, doors out of alignment, and separation between cabinets and partition, which, Becker noted in June 2006, indicated "movement of the building as a result of the ongoing excavation." See Building Inspection Report, dated June 12, 2006, Ex. H to Imossi Aff.; Building Inspection Report, dated April 12, 2007, Ex. D to Spitz Aff. in Opp. Friedman testified that, prior to retaining Becker, she had noticed doors out of alignment, cracks in the hallways, and gaps between the main stairs and the roof stairs and the walls, and was aware of the damage identified in Becker's June 2006 report. Friedman Dep., Ex. I to Imossi Aff., at 159, 166; Friedman Dep., Ex. G to Bundschuh Aff., at 120-121.

Friedman further testified that damages reiterated in her attorney's April 2007 letter to Alchemy, including outside and inside doors out of alignment, roof and skylight damage and cracks on roof, gaps under building wall baseloads, flooring pulled away, ceiling of ground floor pulled away, store cabinets misaligned, and counter top pulled away from wall, were apparent before October 2006. See Letter dated April 26, 2007, Ex. G to

Spitz Aff. in Opp.; Friedman Dep., Ex. G to Bundschuh Aff., at 150-155. She also testified that most of the damages to the building occurred during excavation, which ended in August 2006. See Friedman Dep., Ex. G to Bundschuh Aff., at 146.

Notwithstanding that Becker did not expressly state in his June 2006 report that there was structural damage to the building, the damages identified in that report are the same kind of damages Becker later identified as signs of structural damage. Thus, structural damage to the building as a result of defendants' construction activities was apparent or should have been apparent to plaintiff as early as June 2006, and the claims for such damages are time-barred. See *Atlantic Express Transp. Co.*, 68 AD3d 903 (claim for building damage from nearby blasting accrued when roof leakage noticed even though plaintiff asserted full extent of damages, including cracks and molding separating from walls, did not appear until later).

Plaintiff also argues that additional damage occurred within the statutory period, in July and August 2007, when construction debris damaged the roof and when, during a heavy rainstorm, flooding occurred in the building after drains became clogged with construction debris. There is no dispute that damage from this flooding was not known or reported before August 2007, and, according to Rand, at least some of the damage claimed by plaintiff was the result of construction debris. See Site Visit Report #38, Ex. I to Spitz Aff. in Opp.; Site Visit Report #39,

Ex. J to Spitz Aff. in Opp.

Defendants assert that this claim for damages also is untimely, because no damage after November 2006 was specifically alleged in the complaint, the amended complaint, or the second amended complaint, and was only alleged in the third amended complaint, which, defendants argue, was dismissed. The court notes that only defendant Gibraltar moved to dismiss the third amended complaint, and only Gibraltar's motion was granted. No other party moved to dismiss the third amended complaint and, in fact, defendants Alchemy, Langan, and MRC answered it and asserted cross claims. Even if the third amended complaint was not authorized, defendants had notice of the construction debris damage when it occurred, were made aware during discovery, and prior to bringing the instant motions, that it was part of plaintiff's claim, and are not prejudiced by the assertion of the claim. See generally *Duffy v Horton Mem. Hosp.*, 66 NY2d 473, 477 (1985) (adding a new theory of recovery arising out of occurrence already in litigation does not conflict with purpose of limitations period to protect defendants and courts from litigating and adjudicating stale claims). Moreover, plaintiff's claim for additional damages arising out of the same construction project does not necessarily constitute a separate cause of action. See *Atlantic Express Transp. Corp.*, 68 AD3d 393 (separate damages arising from same work treated differently for statute of limitations period but not separate cause of action);

Vitale, 2009 WL 2848084, 2009 NY Misc LEXIS 6071 (same).

As courts have long observed, because summary judgment "deprives the litigant of [its] day in court, it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues." *Andre v Pomeroy*, 35 NY2d 361, 364 (1974); see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012). The evidence must be viewed in a light most favorable to the nonmoving party (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and the motion will be granted only where movant has tendered sufficient proof in admissible form "to warrant the court as a matter of law in directing judgment" (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and the nonmoving party cannot "establish the existence of material issues of fact which require a trial of the action." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; see *Vega*, 18 NY3d at 503; *Zuckerman*, 49 NY2d at 562.

In view of all the evidence, the court cannot conclude that, as a matter of law, plaintiff's claim for damages arising out of construction activities and debris in July and August 2007, including flooding of parts of the building, is untimely. To the extent that defendants argue that they cannot be liable for such damages because their work on the project was completed by then or was unrelated to construction activity at that time, they submit no depositions, affidavits or other evidence in support of those arguments, and the court, on the record before it, cannot

determine those issues as a matter of law.² The court otherwise does not address and makes no finding as to the merit of plaintiff's negligence claims or the liability of any of the defendants for the remaining property damage claim.³

Accordingly, it is

ORDERED that the motion of Langan and the cross motion of Alchemy (seq. 009), the motion of MRC (seq. 010), and the motion of Severud (seq. 011) are granted in part and denied in part; and it is further

ORDERED that the complaint is dismissed to the extent that it asserts a claim for damages to the structural integrity of the building resulting from excavation and construction on the adjacent property; and it is further

ORDERED that the claim for damages allegedly resulting from construction activity and debris during July and August 2007 is severed and shall continue; and it is further

ORDERED that the parties shall appear for a status conference on May 29, 2014, at 9:30 am, room 351, 60 Centre Street, New York, NY.

Dated: May 8, 2014

FILED c.
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²MRC's motion papers are missing affidavits and exhibits, and while it appears there may have been a clerical error when the papers were filed, MRC's liability nonetheless cannot now be determined.

³The court did not consider plaintiff's sur-reply submitted in Severud's motion to dismiss, as it was not authorized or warranted.