

<b>Lexington Ins. Co. v Galleria Condominium</b>
2014 NY Slip Op 32676(U)
October 3, 2014
Supreme Court, New York County
Docket Number: 156326112
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

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LEXINGTON INSURANCE COMPANY, as Subrogee of INDEX NO. 156326/12  
ELDAD LLC, ELDAD PRIME, LLC and all other  
named insured under policy number 4271656,  
STRATHMORE INSURANCE COMPANY as Subrogee  
of MENDY'S GALLERIA, LLC, and TRAVELERS  
EXCESS AND SURPLUS LINES COMPANY a/s/o  
AMSTERDAM HOSPITALITY GROUP,

Plaintiff,

-against-

GALLERIA CONDOMINIUM, BROWN HARRIS  
STEVENS RESIDENTIAL MANAGEMENT, LLC,  
SKY 4, LLC, STREAMLINE WINDOWS, INC.,  
LAWLESS & MANGIONE ARCHITECTS  
ENGINEERS, LLP, and MARIO LABOT &  
ASSOCIATES, PC,

Defendants.

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JOAN A. MADDEN, J.:

In this subrogation action, defendant Mario Labot & Associates, PC (Labot) moves for summary judgment dismissing the complaint as against it. Plaintiffs Lexington Insurance Company (Lexington) and Travelers Excess & Surplus Lines Co. a/s/o Amsterdam Hospitality Group (Travelers), and defendants SKY 4 LLC (SKY) and Lawless & Mangione Architects (L &M), all oppose the motion. Defendants Galleria Condominium (Galleria) and Brown Harris Stevens Residential Management, LLC (Brown Harris) cross-move for summary judgment on their cross-claims for contribution and indemnification against SKY and Streamline Windows, Inc. (Streamline), and SKY opposes the cross-motion.

The accident underlying this action occurred on June 6, 2012, at a 57-story, mixed-use luxury condominium building known as the Galleria Condominium, located at 115-117 East 57<sup>th</sup> Street in Manhattan. A window in unit 52A, owned by defendant SKY, fell from the 52<sup>nd</sup> floor and landed on the building's eight-story glass atrium, damaging, *inter alia*, the commercial portion of the building, owned by Lexington's insured, Eldad LLC and Eldad Prime LLC (collectively "Eldad"). Defendant Galleria is the owner of the building and defendant Brown Harris the managing agent. Defendant Streamline was apparently responsible for the installation of the window in Unit 52A, and defendant L & M was the architectural firm that apparently prepared shop drawings relating to the installation of the window. Defendant Labot is an engineering firm that allegedly provided specifications with respect to the installation of the window.

Defendant Labot's motion for summary judgment is denied as premature, since the motion is made prior to the completion of document discovery and prior to any depositions. See CPLR 3212(f); *241 Fifth Ave Hotel LLC v. GSY Corp.*, 110 AD3d 470 (1<sup>st</sup> Dept 2013). While Labot asserts its role in the project was "so minimal and specific that any negligence on its part would be limited to issues arising out of that limited scope of work," and submits an affidavit by Mario Labot, its principal, other evidence raises issues at this stage as to the nature and extent of Labot's role and participation. This evidence includes an inspection report dated December 13, 2005, in which Mario Labot states as follows: "Based on the visible connections observed in apartment 52/53A and field report #17 of Superstructures it is conclusive that the head of the windows are not secured effectively. Since the type of existing fastener is not suitable for concrete application and is now rusted, some even had broken off, additional fasteners are

required.” Moreover, Labot’s submissions lack any detail as to the terms of its agreement, the scope of the work it was hired to perform, or even the other party to the agreement.

Additionally, issues of fact are raised based on the expert affidavit of John Flynn, a professional engineer, submitted in opposition by plaintiff Travelers. Flynn states that it is his opinion, based on a reasonable degree of engineering certainty, that Labot “in making his calculations, admittedly without visiting the location, relied upon inadequate shop drawings to prepare his calculations and apparently failed to identify the errors within the drawings.” Flynn also states, *inter alia*, that Labot: 1) “failed to provide a workable set of documents for the control of the connection of the new windows”; 2) “failed to perform due diligence by not investigating the nature of the existing aluminum window frame that was to remain and upon which the new window relied for support”; 3) “failed to investigate the nature of the attachment of the existing aluminum frame to the building”; 4) “failed to identify and communicate the nature and location of key structural elements (particularly mullions and cross-braces) that were critical to the integrity of the new window installation”; 5) “failed to require the installer or any other party to identify the condition and integrity of the existing aluminum window frame, the failure of which caused the window to fall”; 6) “within 3 months of performing his calculations for window connection, visited the subject premises and recognized the inadequacy of the existing window wall header connection to the building and called for the installation of additional fasteners for the building as a whole but failed to advise Streamline of his findings”; and 8) “upon his visit in December 2005 was aware of, or should have been aware of, the condition of the mullions and braces (and may even have been aware of the missing brace) but

failed to investigate and revise his calculations or advise the window contractor of the need to update the calculations.”

Under these circumstances, summary judgment is premature. This denial is without prejudice to renewal upon the completion of discovery or as ordered by the Court.

The cross-motion by defendants Galleria and Brown Harris for summary judgment on their cross-claims against co-defendants SKY and Streamline, based on two alteration agreements, is denied. Defendants Galleria and Brown Harris submit only incomplete copies of the alteration agreements. This denial is without prejudice to renewal based on papers that include complete copies of the alteration agreements.

Accordingly, it is

ORDERED that the motion for summary judgment by defendant Mario Labot & Associates, PC, is denied without prejudice to renewal upon the completion of discovery or as ordered by the Court; and it is further

ORDERED that the cross-motion for summary judgment by defendants Galleria Condominium and Brown Harris Stevens Residential Managements, LLC, is denied without prejudice to renewal based on papers that include complete copies of the alteration agreements.

DATED: ~~September~~ *October 3, 2014* ~~2014~~

ENTER:

  
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**HON. JOAN A. MADDEN**  
U.S.C.