

**437 W. 16th St. LLC v 17th & 10th Assoc., LLC**

2015 NY Slip Op 32660(U)

April 17, 2015

Supreme Court, New York County

Docket Number: 600100/07

Judge: Marcy Friedman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

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437 WEST 16TH STREET, LLC,

*Plaintiff,*

– against –

17TH AND 10TH ASSOCIATES, LLC, et al.,

*Defendants.*

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INDEX NO.: 600100/07

DECISION/ORDER

This is an action for damage to a building caused by construction at an adjoining property. The action was tried without a jury, and decision was reserved pending the parties' submission of proposed findings of fact and conclusions of law.

The subject building (building) is located at 437 West 16th Street in Manhattan. The building is owned by plaintiff 437 West 16th Street, LLC (16th LLC or Owner). It was originally purchased by Paul and Carol Kleinberg, who are the owners of 16th LLC to which the building was subsequently transferred. The Kleinbergs also own Kleinberg Electric, Inc. Defendant 17th and 10th Associates, LLC (17th LLC or Developer) is the owner and developer of the property adjacent to the west and north walls of the building. Defendant, The Related Companies, L.P. (Related), guaranteed certain obligations of the Developer.

It is undisputed that the parties entered into a Zoning Lot Development Agreement (ZLDA) under which the Developer agreed to indemnify and hold 16th LLC harmless from any loss, cost, or expense, including reasonable attorney's fees, as a result of the construction.

(ZLDA section 4.2 [B].) By order dated May 29, 2010, this Court (Fried, J.) granted partial summary judgment to plaintiff, holding that the indemnification provision was enforceable and that defendants 17th LLC and Related “are liable to plaintiff for vibration-related, underpinning-related and foundation-related damage to plaintiff’s building, as well as for masonry and roof damage to plaintiff’s building, and the issue of the amount of a judgment to be entered remains to be determined.” (Id. at 12.) The issue at trial was therefore what damages, in particular, were caused by the construction and what costs were reasonably necessary to remediate such damages.

There is no dispute as to the stages or timing of the construction. The construction was performed in three phases: demolition; dewatering and underpinning; and construction of the new adjacent building. Demolition began in early 2006 and continued through mid-July 2006. Dewatering and underpinning began in August 2006 and continued until August 18, 2006, when the New York City Department of Buildings issued a Stop Work Order. The underpinning resumed in mid-October 2006 and continued through early November 2006. The construction of the new building was performed from December 2006 through February 2007. (See Chart by Mueser Rutledge, Plaintiff’s Consulting Engineers [P.’s Ex. 22] [showing time-line for phases of work].) The parties dispute the extent of damage to the building as a result of this work.

As to the demolition stage, in February 2006, the building sustained a vertical crack at its southwest corner. Mr. Kleinberg testified that in March 2006, he observed another crack in a fifth floor office, after feeling a vibration from a concrete slab hitting the ground. (Nov. 4 Transcript [Tr.] at 124, 127-128.) Mr. Kleinberg subsequently retained Mueser Rutledge to monitor the building.

Plaintiff claims far more extensive damage during the dewatering and underpinning stage. According to the report of Mueser Rutledge and the testimony at trial of Domenic

D'Argenzio, a professional engineer who was a senior associate with that firm, by August 22, 2006, the building had settled on the order of 1/2 to 3/4", and numerous new cracks had developed in the exterior masonry facade and interior plaster walls at or near the southwest corner of the building. In addition, some door and windows were now misaligned. (Aug. 22,'06 Mueser Rutledge Report [P.'s Ex. 17].) When dewatering and underpinning resumed in October 2006, Mueser Rutledge observed new cracks on the south and north facades and in the interior of the building. (Oct. 23,'06 Mueser Rutledge Report [P.'s Ex. 20].) On the basis of its on-site monitoring and inspections, Mueser Rutledge concluded that by mid-November 2006, the settlement along the west wall of the building ranged from approximately one and one-quarter inches at the south end to almost two inches at the north end. (P.'s Ex. 22; D'Argenzio Testimony, Oct. 28,'13 Tr. at 74-76.) Mr. D'Argenzio testified that the settlement was caused by dewatering and improper practices in constructing the underpinning pits, and that the west wall settled "anywhere from one and a quarter to one and three quarter inches," which was consistent with the damage observed on the building on the south and west facade. (Id. at 76, 79.)

Plaintiff also produced Keith Kesner, PhD, a professional engineer, who was qualified by this court as an expert in engineering. Mr. Kesner visited the premises on repeated occasions starting in January 2007, for the purpose of assessing the structural damage and assisting Sharon Lobo, a registered architect, in assessing the extent of the damage to the building. Mr. Kesner testified that the damages he observed at the building were consistent with settlement exceeding one inch in magnitude. (Oct. 29,'13 Tr. at 206-208.) He also testified as to the mechanism by which the settlement of the west wall affected the floor joists in the building and caused damage to its interior. (Oct. 28,'13 Tr. at 146, 169-170, 175-177, 181-185; Oct. 29 Tr. at 191-203.)

Finally, plaintiff produced Ms. Lobo, who inspected the premises on numerous occasions

starting in January 2006, and prepared a preliminary repair scope in (P.'s Ex. 25) and final repair scope in July 2007 (P.'s Ex 27), setting forth the repairs claimed to be needed to remediate damage sustained by the building as a result of the adjacent construction, and estimating their cost.

Defendants do not dispute that the building sustained a vertical crack at its southwest corner in February 2006. Defendants challenge Mr. Kleinberg's attribution of this damage to something hitting the building, but do not deny that their own consultant, AKRF, which had performed a preconstruction survey on May 26, 2005, and which again inspected the building on February 17, 2006, issued a report noting the existence of a crack on the southwest facade of the building which was not noted during the initial survey and appeared to have occurred since then. (AKRF Dec. 9, '05 Report based on May 26, '05 inspection [P.'s Ex. 5]; AKRF Feb. 23, '06 Report [P.'s Ex. 6].) As to Mr. Kleinberg's testimony that another crack occurred in a fifth floor interior in March 2006, defendants rely on the testimony of their structural engineer, Joseph Buongiorno, that even at the closest distance to the building from which the slab could have been dropped, the vibration levels could not have been of a magnitude sufficient to have damaged the building. (Dec. 16, '13 Tr. at 13-17.)

As to the damage from dewatering and underpinning, defendants acknowledge that the west wall settled as a result on August 15, 2006 and that the DOB issued a Stop Work Order on August 18. Defendants contest the amount of the settlement, relying on the report in mid-August 2006 of defendants' surveyor, Contractors Line and Grade South (L&G), which found settlement of the west wall in mid-August 2006 of 1/8 to 3/8 of an inch, as opposed to the 1/2 to 3/4 of an inch found by Mueser Rutledge at that time. (Ds.' Proposed Findings of Fact and Conclusions of Law, ¶ 19 [Ds.' Findings]; L&G Report [Ds.' Ex B]; Aug. 22, '06 Mueser Rutledge Report [P.'s

Ex. 17].) Defendants also sharply dispute plaintiff's claims as to further settlement of the wall by November 2006, claiming that plaintiff's expert's opinion as to such settlement "rests solely on the unreliable tiltmeter data" – i.e., data obtained from tiltmeters installed at the premises by Mueser Rutledge. (See Ds.' Findings, ¶ 21.) Defendants rely on Mr. Buongiorno's testimony, based on optical surveys conducted by L&G and other monitoring data, that there was no substantial settlement of the west wall, and that settlement of that magnitude would have led to a "partial collapse." (Dec. 16,'13 Tr. at 68-71.) Mr. Buongiorno also prepared a spreadsheet comparing the estimates prepared by various consultants to the insurance carrier and comparing the estimates to that prepared by Ms. Lobo. (Ds.' Ex. DDD-1.) This spreadsheet includes a repair scope prepared by Rimkus Consulting Group, Inc., a consultant to AIG Claims Services, which sets forth the repairs that defendants acknowledge were occasioned by the adjacent construction, and estimates their cost.

The court holds that plaintiff's witnesses gave highly credible testimony that the adjacent construction caused the following extensive damages to the building: cracks to the south (front) facade and the north (rear) facade; cracks to interior finishes on all floors of the building; sloped floors throughout the building; misalignment of doors and windows throughout the building; damage to the basement concrete topping and slab; and damage to the roof deck.

In so holding, the court finds that Ms. Lobo's testimony as to the damages that were caused to the building by the construction was based on thorough inspection of the building on a room-by-room basis, and careful comparison of her observations of the conditions in the building with the pre-construction surveys performed both by defendants' consultant, AKRF, and plaintiff's consultant, Mueser Rutledge. Her observations of damages were fully documented by the extensive photographs taken of the conditions. During the trial, the court qualified Ms. Lobo

as an expert in architecture, damage assessment remediation, and cost estimation, based on her extensive experience in these fields. (Oct. 30, '13 Tr. at 423.) Indeed, it does not appear that defendants object to her ability to identify damage, as opposed to her ability to identify the source of damage – whether vibrations or settlement. (See id. at 425-426.) Ms. Lobo was unquestionably qualified to identify such damages as exterior cracks in masonry and mortar, cracks in interior finishes and floors, and misaligned doors and windows. She was also unquestionably qualified to ascribe their occurrence to the adjacent construction, and her testimony to that effect was entirely credible given that these conditions did not exist at the time of the preconstruction reports. To the extent that the cause of a condition or the extent of the condition required the expertise of a structural engineer, Ms. Lobo readily acknowledged that fact. Thus, she acknowledged that she did not have the expertise to opine on the effect of the crack in the basement slab on the stability of the building. (Id. at 384.) She also candidly acknowledged that she did not know whether the cracks she observed were caused by vibration or settlement, but testified persuasively that her opinion that the cracks were caused by the construction did not require the isolation of the particular construction activity. (See id. at 452-453, 476-478.)

In crediting this testimony, the court notes that under settled law, a plaintiff need not prove with mathematical certainty that damages were caused by a particular act of the defendant, but must prove that the damages were a natural and probable result of the defendant's act. (Ashland Mgt. Inc. v Janien, 82 NY2d 395 402 [1993].) Here, in particular, Ms. Lobo made the determination as to causation based on her expertise, and comparison of the pre-construction and post-construction conditions. (See New Life Holding Corp. v Turner Constr. Co., 2014 NY Misc Lexis 4407 [Sup Ct, NY County Oct. 3, 2014, Index No. 650993/11] [noting that courts have

held in construction cases that it is reasonable to infer causation based on the nature and timing of the damages.) To the extent that her identification of damage required the expertise of an engineer, she worked with Mr. Kesner. (Lobo Testimony, Oct. 29, '13 Tr. at 306; Kesner Testimony, Oct. 29, '13 Tr. at 194.)

An additional analysis is required as to plaintiff's claim that the adjacent construction caused sloping of the floors throughout the building. This item of repairs involves the most significant cost and has occasioned one of the most significant disputes between the parties. Ms. Lobo testified that she observed sloping of the floors throughout the building. (Oct. 30, '13 Tr. at 387.) While her testimony was based on her observations, Mr. Kesner gave testimony as to causation. He explained that because of how the floor joists were supported, resting on steel framing, the floor settlement was not as "uniform" as might have been expected. (Oct. 28, '13 Tr. at 146, 175-177.) As the west wall settled, the joists settled, causing cracks in the interior finishes, movement of doors and partition walls, and movement of floors. (Oct. 29 Tr. at 196-197.) Mr. Kesner testified that he observed gaps between the floor joists and masonry walls in 30 to 40 locations in the basement and numerous locations on higher floors. (Oct. 28 Tr. at 181-185.) Damage continued until the building reached an equilibrium in 2008. (Oct. 29 Tr. at 202-203.) As noted above, Mr. Buongiorno testified that plaintiff's claim as to the continuing settlement of the west wall was based on unreliable tiltmeter data. He further testified that the joists settled contemporaneously with the wall (Dec. 16, '13 Tr. at 89-90), and attributed the sloping of the floors to the age of the building.

The court credits the credible testimony of Mr. Kesner. Defendants challenge that testimony based on Mr. Buongiorno's claim as to the unreliability of the tiltmeter readings. The court rejects that challenge for several reasons. First, Related's professional engineer Richard

Balsler inspected the building after the initial dewatering and issued a report dated August 28, 2006 (P.'s Ex. 62) which stated that he had observed shear cracks in the masonry of the street (south) facade, distortions of the most westerly window openings, and shear cracks in the masonry of the west property line wall. He opined that “[t]he shear cracks and distortion were caused by differential settlement of the foundation at the Southwest Corner of 437 West 16th Street and the foundation immediately adjacent to the Corner.” He further noted that the condition was “not severe” or “unsafe” and that it was possible that some of the shear cracks pre-existed the dewatering and underpinning operations. His report also noted, with respect to the interior, that “the settlement has caused the most westerly line of window openings in the Front Facades to be out of square by 1/2 inch, plus or minus. . . .” He also noted various interior shear cracks, and that “[t]he floor structures above the Cellar appear to slant approximately 1/4 to 1/2 an inch in 10 feet in the area of the Southwest Corner of 437 West 16th Street.” He noted no additional movement of the street facade and west wall between the date of his report and the events of the week of August 14, but concluded: “Based on my experience in similar situations, additional movement of the superstructure will occur during the 30 days after the events. The movement of the brick masonry superstructure and the floor and roof structures in the area of the Southwest Corner will continue until the superstructure attains equilibrium.”

It is noteworthy that defendant did not produce this witness. Moreover, Mr. Buongiorno failed to address Mr. Balsler’s report. Mr. Buongiorno’s testimony ignores that settlement continued to occur, as evidenced by October 23, 2006 Mueser Rutledge report, noting damage to the south and north facades and the interior of the building. (P.’s Ex. 20.)

The court rejects Mr. Buongiorno’s testimony that the tiltmeter readings and/or calculations, which continued to record settlement after August 2006, are wholly unreliable.

(Dec. 16, '13 Tr. at 38-40, 47-50.) A credible foundation for the use of the tiltmeter calculations was laid by Mr. D'Argenzio who testified as to the placement and function of the tiltmeters at the premises and the readings at the various stages of the construction. (Oct. 28, '13 Tr. at 65-76.) He also testified credibly that the tiltmeter was an acceptable alternative to optical monitoring. (Id. at 125-127.) Defendants challenge Mr. Kesner's reliance on the tiltmeter data on the ground that he did not review the underlying tiltmeter data or verify Mueser Rutledge's calculations. Contrary to defendants' contention, his testimony is not rendered incompetent on this basis, as an expert may rely on evidence in the record – here, the Mueser Rutledge readings as to which Mr. D'Argenzio testified. (See Hambusch v New York City Tr. Auth., 63 NY2d 723, 725 [1984].)

Finally, the court holds that Mr. Buongiorno's testimony was consistently lacking in credibility. In 2007, Mr. Buongiorno prepared the Rimkus estimate acceding to damage in the amount of \$614,626. (Ds.' Ex. DDD-1.) In October 2009, he submitted an affidavit to the court in which he categorically stated “within a reasonable degree of engineering certainty that any settlement was minor in nature and fails to explain the damage to the structure, facade or interior as alleged by the plaintiff.” (Aff., ¶ 6 [P.'s Ex. 67].) Not only did he deny that the construction caused structural damage, but he failed to concede even that the construction caused cracks, concluding: “Based upon my investigation, training and professional experience, I am able to state within a reasonable degree of engineering certainty, that any damage to the Kleinberg Building was pre-existing and construction related activities performed by and on behalf [of] Urban on the adjacent property did not result in the reported damage.” (Id., ¶ 29.) At the trial, he acknowledged crack damage, but continued, notwithstanding its pervasiveness, to characterize it as insignificant – this, notwithstanding his own report that the damage was over \$600,000.

For the above reasons, the court rejects Mr. Buongiorno's testimony as to the lack of need for remediation of sloping floors. To the extent that Mr. Buongiorno opined that any damage to the floors or other parts of the building was limited to the area within 10 feet of the southwest corner of the building (see Dec. 16, '13 Tr. at 77-80), the Court is unpersuaded by that testimony. Rather, the court accepts Mr. Kesner's credible testimony as to the continuing settlement of the building and its impact on the floors at numerous locations throughout the building.

The court accordingly holds that plaintiff has demonstrated that it is entitled to costs for repairs to cracks across the north and south facades, cracks to interior finishes throughout the building, sloped floors throughout the building, misaligned doors and windows throughout the building, and the entire basement slab. The court further holds that plaintiff has demonstrated that it is entitled to the cost of replacement of the roof deck, as it was extensively damaged by use of the roof as a staging area for the construction.

A number of repair items for which plaintiff seeks reimbursement must, however, be disallowed. Plaintiff's itemization of repairs is set forth in a document prepared by Erwin-Lobo-Bielinski PLLC (ELB Estimate [P.'s Ex. 27].) The item for a new brick skin for the south facade (\$336,000) will not be awarded, as the facade was affected by some cracks due to age prior to the construction. Costs for repair or replacement of the flagpole and clock on the south facade and of the south sidewalk will not be awarded, as plaintiff has not demonstrated that these items were damaged by the construction. To the extent that the cost of a second means of egress is sought, that item has not been shown to have been required by the building code as a result of work at the building.

The court also declines to award the requested item for lost rents (\$344,000), as plaintiff's conclusory testimony is insufficient to demonstrate that rents were payable by

Kleinberg Electric to plaintiff or that rents from other tenants were uncollectible. The court also declines to award financing costs (approx. \$275,000), as plaintiff has not shown that financing was necessary to pay for the repairs. It is noted that plaintiff does not appear to seek reimbursement of items included in the ELB Estimate for expenses for moving the Kleinberg Electric office or accommodating the Kleinbergs in a hotel during the repairs.

Plaintiff's consulting fees and attorney's fees, in an amount to be determined, will be approved.

In holding that plaintiff is entitled to damages, the court rejects defendants' contention that because many of the expenses were paid by Kleinberg Electric and because Kleinberg Electric was not a party to the ZLDA, such expenses cannot be recovered from defendants under the ZLDA. As the expenses were incurred for repairs needed to the building as a result of damage caused by the construction, they are recoverable notwithstanding the lack of documentation of the making of a loan by Kleinberg Electric to plaintiff or the apparent lack of observation of corporate formalities by Kleinberg Electric and plaintiff 16th LLC -- each a close corporation with the Kleinbergs as the sole members or officers.

The court further holds that the specific amount of damages cannot be determined on the record at the trial. Plaintiff seeks damages based on the ELB Estimate. The court finds that Ms. Lobo credibly testified that the work was generally performed, and that items were replaced "in kind" or to match the existing color, material, and style. (Oct. 30, '13 Tr. at 387-388.) However, plaintiff must correlate the amount of damages awarded for the items the court has allowed with specific invoices, and not merely with amounts in an estimate. Moreover, plaintiff must provide evidence with a reasonable level of detail that the work that was actually performed for which reimbursement is sought was remediation in kind.

It is accordingly hereby ORDERED that judgment for plaintiff is held in abeyance pending continued trial which shall be scheduled after consultation with the parties.

This constitutes the decision and order of the court.

Dated: New York, New York  
April 17, 2015

  
MARCY FRIEDMAN, J.S.C.