Reiss v Professional Grade Constr. Group, Inc.
2016 NY Slip Op 31713(U)
September 6, 2016
Supreme Court, Kings County
Docket Number: 505788/13
Judge: Debra Silber
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6th day of September, 2016.

PRESENT:

HON. DEBRA SILBER,
Justice.

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MICHAEL REISS, HYMAN REISS a/k/a CHAIM REISS, SUSAN BORCHARDT and CHANA REISS,

Plaintiffs,

- against -

PROFESSIONAL GRADE CONSTRUCTION GROUP, INC., A&A 1958 LLC, POTENTIAL ENGINEERING, P.C., RYBAK ARCHITECTS, P.C., ALNOV ENGINEERING P.C., BIG POLL & SON CONSTRUCTION, LLC, MICHAEL RUBINSTEIN, AARON MOSHENYAT, REUVEN MOSHENYAT, YITZCHAK MOSHENYAT and ADVANCED MEDICAL GROUP, P.C.,

Defendants.

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POTENTIAL ENGINEERING, P.C.,

Third-Party Plaintiff,

- against -

INTEGRITY CONSULTING SERVICES, INC.,

Third-Party Defendant.

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DECISION / ORDER

Index No. 505788/13
Mot. Seq. # 5, 6 and 7

The following papers number 1 to 21 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3, 4-5, 6, 7-9
Opposing Affidavits (Affirmations)	10-12, 13, 14, 15, 16, 17, 18
Reply Affidavits (Affirmations)	19, 20, 21

Upon the foregoing papers, plaintiffs Michael Reiss, Hyman Reiss a/k/a Chaim Reiss, Susan Borchardt and Chana Reiss move for an order, pursuant to CPLR 3212, granting them partial summary judgment on the issue of liability against defendants A&A 1958 LLC (A&A) and Professional Grade Construction Group, Inc. (PGC).[1] Defendant Alnov Engineering, P.C. (Alnov) and defendant Rybak Architects, P.C. (Rybak), each separately move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing all claims asserted against each defendant.

Background

Plaintiffs commenced the instant action by electronically filing a summons and complaint on September 30, 2013. The complaint alleges that plaintiffs own the improved premises known as 1962 Ocean Avenue in Brooklyn, the site of a two-family residence. At all relevant times, A&A owned the adjacent lot located at 1958 Ocean Avenue.

A&A hired PGC on or about September 12, 2011[2] to excavate its lot in connection with plans to construct a mixed-use building thereon. Plaintiffs allege that their building began to suffer visible damage after the excavation commenced, and this action ensued. Plaintiffs allege, as relevant to the instant motions, that A&A, PGC and the other defendants (including architects and engineers who were allegedly connected with the excavation, such as defendants Alnov and Rybak) are strictly liable for the damage caused to their building,

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[1] Defendants PGC, A&A, Aaron Moshenyat, Reuven Moshenyat and Yitzchak Moshenyat are represented by the same counsel and have interposed one answer for all five defendants. This court, where appropriate, will refer to these defendants collectively as PGC.

[2] According to plaintiffs, the land was previously owned by defendant Advanced Medical Group, P.C. (AMG) which transferred the land to A&A. Plaintiffs also assert that the two companies share the same officers and directors, namely the Moshenyat defendants.

pursuant to the Administrative Code of the City of New York, Section 28-3309.4. Plaintiffs also allege other causes of action, sounding in negligence and trespass, against the various defendants.

Defendants then interposed answers, and, subsequently, defendant Potential Engineering, P.C. (Potential) impleaded Integrity Consulting Services, Inc. (Integrity). Discovery followed, including Michael Reiss' examination before trial on October 9, 2015. Thereafter, plaintiffs, and defendants Rybak and Alnov each filed and served the instant motions for summary judgment. Oral argument was held on April 14, 2016, and decision was reserved.

Alnov's Arguments Supporting Its Motion (Seq. #6)

Alnov, in support of its motion, argues that it had no involvement in the excavation and underpinning activities that allegedly damaged plaintiff's property. Alnov, an engineering firm, reasons that, therefore, it owed no duty of care to plaintiffs. Moreover, Alnov continues, the record contains no evidence of a breach of an alleged duty since it did not actively participate in the project. Alnov concludes that plaintiffs thus cannot establish any requisite element for a negligence claim against it.

Also, Alnov contends, plaintiffs cannot establish any privity of contract with it. Indeed, Alnov argues, no party in this action (save for Rybak) was party to any written agreement with Alnov. Alnov maintains that it provided engineering services pursuant to a contract with Rybak, an architectural firm, and solely for Rybak's benefit; none of these services included plans for excavation or underpinning. Alnov further claims that the record lacks any suggestion of a functional equivalent of privity—specifically, that Alnov knew or

should have known that plaintiffs would detrimentally rely on Alnov's engineering services. Alnov points out that the record indicates that it made no representations to any party save Rybak. Thus, Alnov argues, the record establishes that it neither owed plaintiffs a duty of care nor breached one, regardless whether any obligation would be considered contractual or otherwise. For these reasons, Alnov concludes that plaintiffs' negligence claims as asserted against Alnov must therefore be dismissed.

Next, Alnov addresses plaintiffs' trespass claim. Alnov maintains that its agents never entered plaintiffs' property, nor did they cause any equipment, materials or personnel to be on plaintiffs' property. Alnov contends that it thus cannot be liable in trespass. Further, Alnov argues that plaintiffs' nuisance claim lacks merit because Alnov never intentionally and unreasonably interfered with plaintiffs' enjoyment of their land. Alnov reiterates in this regard that it was not involved in the excavation project. Therefore, Alnov concludes, any cause of action alleging Alnov's interference with plaintiffs' property rights lacks merit and must be dismissed.

Lastly, Alnov seeks dismissal of any cross claims asserted against it. Alnov states that the record shows no written agreement whereby Alnov agreed either to indemnify any party or procure insurance coverage for any party. Therefore, Alnov states, any cross claim based on a contractual relationship must be dismissed. Moreover, continues Alnov, any cross claims for common-law contribution or indemnification also lack merit. Alnov repeats that it neither owed plaintiffs a duty of care nor breached any alleged duty. Additionally, Alnov points out that the defendants that have asserted cross claims against Alnov have failed to demonstrate that their potential liability to plaintiffs is purely vicarious and without fault.

Alnov contends that those are requirements for sustainable common-law contribution and indemnification claims. It concludes that the various cross claimants have failed to meet this requirement, and thus their cross claims against Alnov must be dismissed. For these reasons, Alnov urges the court to grant its summary judgment motion and dismiss all claims asserted against it.

Plaintiffs' Arguments Supporting Their Motion (Mot. Seq. #5)

Plaintiffs, in support of their motion, point out that Section 28-3309.4 of the Administrative Code of the City of New York imposes absolute liability on parties whose excavation work damages an adjoining property. Plaintiffs further note that courts interpreting this provision have found absolute and nondelegable liability for excavation-damage against both the owner of adjoining properties and excavator contractors employed by the owner. Here, plaintiffs claim that it is indisputable that A&A is the owner of the premises adjoining their parcel, and that PGC is the contractor hired by the owner to perform excavation work. Thus, plaintiffs claim, A&A and PGC are subject to strict liability for any damage caused by the excavation project on A&A's property.

Plaintiffs next contend that there is no dispute that plaintiffs' parcel adjoins the excavated area or that excavation occurred. Plaintiffs note the engineer's drawings disclosed by PGC, which indicate that the two properties are adjoining and that a 15-foot deep excavation was necessary to construct the planned building. Also, plaintiffs allege that the affidavit of Michael Reiss and the report of their retained expert engineer both establish that cracks began to appear in plaintiffs' building in October of 2011, concurrent with the excavation project. Plaintiffs also point out that their expert has concluded that, within a

reasonable degree of professional engineering certainty, the parties working on the excavation project failed to properly preserve and protect plaintiffs' adjoining building. Accordingly, plaintiffs conclude that they have established the necessary facts for granting them partial summary judgment on liability against A&A and PGC.

Rybak's Arguments Supporting Its Motion (Mot. Seq. #7)

Rybak, in support of its motion, argues that it is entitled to summary judgment dismissing the complaint against it because the record establishes that it had no role in the subject construction work. Specifically, Rybak, an architectural firm, notes that it did not supervise or control the subject construction work (including any shoring, bracing or underpinning). Moreover, Rybak continues, as set forth in the applicable design agreement, it was not responsible for any such work. Rybak further claims that it played no role in determining the means, methods, techniques, sequences or procedures of the subject construction work. Therefore, Rybak asserts it is entitled to summary judgment.

More specifically, Rybak points out that it did not owe plaintiffs a duty of care, it had no contractual privity with plaintiffs, and the applicable design agreement expressly disclaims any third-party rights. Also, continues Rybak, the terms of the agreement expressly delegate the responsibility for the construction work to the applicable construction contractor. Rybak contends that, as an architect, it is not liable to a third party absent actual and affirmative negligence.

Rybak argues that the record belies any such negligence. Rybak maintains that, even assuming the existence of a duty owed to plaintiffs, Rybak did not breach any such duty. Indeed, Rybak continues, the complaint does not allege that Rybak failed to adequately

perform architectural services; plaintiffs' allegations are related only to demolition, excavation and construction of the subject building. Moreover, Rybak notes that the written agreement between the owner and PGC expressly states that PGC is responsible for the protection of persons and property during the relevant work. Additionally, Rybak points out that the record indicates that the work was never directed, controlled or supervised by Rybak.

Next, Rybak attacks plaintiffs' trespass claim. Rybak claims that the record establishes that it never caused any equipment, materials or personnel to enter the plaintiff's property. Therefore, Rybak reasons that it cannot be liable in trespass. Also, Rybak asserts that plaintiff's nuisance claim is duplicative of the negligence claim. Rybak points out that both claims (wrongly) allege negligent services, which requires dismissal of the nuisance cause of action.

Lastly, Rybak argues that it is entitled to summary judgment dismissing all cross claims. Rybak reiterates that it owed plaintiffs no duty of care, and points out that any contribution or common-law indemnification claim depends on the existence of such a duty. Also, Rybak claims that the record is devoid of any written agreement that requires Rybak to indemnify any other defendant. Rybak asserts that it fulfilled its one contractual obligation to defendant AMG by providing architectural plans and specifications that were in accordance with applicable codes. Rybak further points out that plaintiffs are presently alleging that the other defendants were affirmatively negligent, and notes that a party cannot be indemnified for its own wrongdoing. Thus, Rybak concludes, any cross claim for contribution or indemnification is deficient as a matter of law, and must be dismissed. For these reasons, Rybak advocates granting its summary judgment motion in its entirety.

PGC's Arguments In Opposing Plaintiffs' Motion

PGC, in opposition to plaintiffs' motion, argues that plaintiffs have failed to objectively prove that the excavation damaged their property, and that a factual issue exists requiring denial of plaintiffs' motion. Specifically, PGC points out that absent from plaintiffs' submissions in connection with their summary judgment motion are any details of the measurements taken. PGC notes that plaintiffs have hired both a land surveying firm and a professional engineer, yet neither has offered a professional opinion that contains the results of their objective measurements of the subject building. In contrast, PGC states that it has provided an affirmed report of a retained surveying firm which indicates that plaintiffs' building underwent no significant movement as a result of the excavation project. PGC contends that, at the very least, the absence of a similar affirmed survey conducted by plaintiffs' surveyors indicates that a factual issue as to causation exists, which precludes summary judgment.

Alternatively, PGC argues that plaintiffs have not demonstrated prima facie entitlement to judgment as a matter of law. PGC suggests that plaintiffs have intentionally omitted detailed survey measurements from their papers because such measurements would indicate the weakness of their position. PGC notes that plaintiffs' engineer has submitted photographs of alleged instances of damage to the subject building; however, PGC claims, these photographs are virtually identical to others taken during the pre-excavation inspection of plaintiffs' building. PGC maintains that it is insufficient, for summary judgment purposes, for plaintiffs' alleged expert to submit photographs of cracks in the subject building and merely opine that the excavation project caused the cracks (especially given that the record,

PGC submits, contains objective evidence that plaintiffs' building did not move during the project). PGC concludes that since plaintiffs have not demonstrated prima facie entitlement to judgment as a matter of law, their motion should simply be denied.

Finally, PGC anticipates that plaintiffs will attempt to cure this deficiency—the lack of objective proof that the excavation project caused damage to their building—by submitting appropriate documents or photographs in reply papers. PGC asserts that plaintiffs should not be afforded such an opportunity, which would usurp the function of reply submissions. PGC also suggests that discovery has not been completed—party depositions remain outstanding. Additionally, PGC claims that plaintiffs have erroneously presumed that Section 28-3309.4 of the Administrative Code of the City of New York imposes absolute liability because a prior (albeit similar) statute was similarly interpreted by New York courts. PGC claims that Administrative Code § 28-3309.4 is not identical to the prior applicable provision, and, as such, no one should assume that absolute liability is warranted. Instead, PGC urges the court to consider whether the subject excavation work proximately caused damage to plaintiffs' property before finding liability. For these reasons, PGC concludes that plaintiff's motion should be denied.

Plaintiffs' Opposition to Rybak's Motion

Plaintiffs, in opposition to Rybak's motion, assert that the motion is premature because almost no discovery has occurred. Plaintiffs point out that no party has been deposed except Michael Reiss. Plaintiffs also allege that expert witness exchanges are still outstanding, and that Rybak has not made a proper evidentiary showing that supports summary judgment. Plaintiffs point out that Rybak argues that its agents played no part in

the excavation phase of the subject project, i.e., Rybak was retained by defendant AMG solely for the purpose of designing a new mixed-use building on the subject premises. However, plaintiffs claim the only record support for such an argument is the self-serving affidavit of Rybak's principal. Indeed, plaintiffs continue, that affidavit simply states, in conclusory fashion, that Rybak was not involved in the excavation. Plaintiffs regard this affidavit as insufficient, and, therefore conclude that Rybak's summary judgment motion should be denied.

PGC's Opposition to Alnov's Motion

PGC, in opposition to Alnov's motion, argues that summary judgment is premature since discovery is not yet complete. PGC points out that Alnov's moving papers include only contracts and drawing notes as record evidence to support its position and argues that such submissions are inadequate for summary judgment purposes. Instead, PGC submits that depositions of Alnov witnesses are necessary discovery items and their absence warrants denying Alnov's motion as premature.

Alternatively, PGC asserts that Alnov has not established prima facie entitlement to judgment as a matter of law. PGC states that, contrary to Alnov's present position, Alnov's services in fact directly related to the subject excavation project, as may be seen from PGC's architectural and engineering drawings which include details for underpinning and shoring work. Also, PGC points out that applicable written agreements denote the scope of Alnov's duties regarding the project and that any of Alnov's acts or omissions concerning the project are relevant, especially since plaintiffs' are alleging that every firm associated with the project negligently contributed to damaging plaintiffs' building. PGC contends that Alnov

should not be permitted to escape liability by prematurely moving for summary judgment and mainly relying on its principal's self-serving affidavit. Lastly, PGC urges the court to prevent Alnov from improving its position in its reply papers, and believes such anticipated misuse of reply papers provides an additional ground for denying Alnov's motion.

Integrity's Opposition To Alnov's Motion

Integrity, like PGC, also contends that Alnov's motion should be denied because: (1) it is premature, as significant discovery, including party depositions, remain outstanding; (2) Alnov's work product in connection with the excavation project demonstrates that Alnov, contrary to its contentions, did perform work relevant to shoring and underpinning; and (3) Alnov has not established prima facie entitlement to judgment as a matter of law simply by submitting copies of notes, contracts, architectural designs and its principal's self-serving affidavit.

Plaintiffs' Opposition To Alnov's Motion

Plaintiffs' opposition to Alnov's motion contains arguments similar to those raised by PGC and Integrity. Also, plaintiffs assert that Alnov is not presently entitled to summary judgment because, in addition to outstanding party depositions, Alnov has yet to respond to plaintiffs' discovery demands. Moreover, plaintiffs claim, the affidavit submitted by Alnov's principal should be rejected not only as self-serving but also because Alnov's principal appears to lack any personal knowledge about the subject project. Plaintiffs suggest that the affidavit does not indicate whether affiant was familiar with the project or any materials generated in connection with it. The affidavit, plaintiffs maintain, merely summarily denies

their allegations without any factual recitations. Hence, plaintiffs conclude that these failings justify denying Alnov's summary judgment motion.

Plaintiffs' Opposition To Rybak's Motion

Plaintiffs, in opposition to Rybak's motion, contend that Rybak has not eliminated factual issues regarding its role in the construction project, and, in any event, discovery remains outstanding. Plaintiffs also challenge the affidavit supporting Rybak's motion by noting that Rybak's affiant did not allege personal involvement in the relevant work; specifically, plaintiffs highlight that Rybak's affiant omitted stating whether he was at the Rybak offices when the architectural drawings were prepared. Plaintiffs describe this affidavit as conclusory and self-serving, and urge the court to consider it insufficient to establish prima facie entitlement to judgment as a matter of law and to conclude that Rybak's motion should be denied.

Integrity's Opposition To Rybak's Motion

Similarly, Integrity also wants the court to deny Rybak's summary judgment motion because discovery is incomplete. Alternatively, Integrity views the affidavit supporting Rybak's motion as self-serving and, therefore, lacking probative value. Such a self-serving, non-expert affidavit, Integrity maintains, fails to establish prima facie entitlement to judgment as a matter of law. Integrity additionally contends, in the alternative, that the architectural drawings in the record indicate that Rybak (and Alnov) provided design services directly related to the subject excavation project. Thus, Integrity reasons, factual issues exist as to whether Rybak fulfilled its professional and contractual duties—in other words, whether the architectural and engineering services were competently provided—and whether

breaches of these duties caused the alleged damage to plaintiffs' building. Integrity both concludes that Rybak has tendered insufficient evidence to eliminate all factual issues, and, lastly, argues that Rybak should be prevented from supplementing its supporting papers in a reply. Integrity thus urges the court to deny Rybak's summary judgment motion.

PGC's Opposition To Rybak's Motion

PGC, like plaintiffs and Integrity, also contend that Rybak's motion should be denied because Rybak has submitted a self-serving, non-expert supporting affidavit. Moreover, PGC alleges that factual issues exist about whether Rybak (and Alnov) committed negligent acts or omissions concerning architectural drawings. PGC thus views summary judgment as inappropriate at this stage and concludes that Rybak's motion should be denied.

Discussion

Standards For Summary Judgment

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a summary judgment motion will be granted if, upon all the papers and proof submitted, the cause of action or defense is sufficiently established to warrant directing judgment for any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of

material factual issues (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

Proponents of a motion for summary judgment must first demonstrate entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material factual issues (*see Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez*, 68 NY2d at 324; *see also Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If this burden is met, "the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated" (*Assing v United Rubber Supply Co.*, 126 AD2d 590, 590 [2d Dept 1987]; *see also Gervasio v Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [2d Dept 1985], *affd* 66 NY2d 701 [1985]). Conclusory assertions, even if believable, are not enough to defeat a summary judgment motion (*see e.g. Spodek v Park Property Dev. Assocs.* , 263 AD2d 478 [2d Dept 1999]). "[A]verments merely stating conclusions, of fact or of law, are insufficient [to] defeat summary judgment" (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). Lastly, if there is no genuine factual issue, the case should be summarily decided (*Andre*, 35 NY2d at 364).

Strict Liability Under § 28-3309.4 Of The New York City Building Code

Section 3309.4 of the New York City Building Code (Administrative Code of City of NY, tit 28, ch 7)[3] provides that:

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[3] Also properly cited as Administrative Code of the City of New York § 28-3309.4.

> "The person who causes an 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 excavation, provided such person is afforded a license to enter and inspect the adjoining buildings and property, and to perform such work thereon as may be necessary for such purpose; otherwise, such duty shall devolve upon the owner or owners of the adjoining building or buildings, who shall be afforded a similar license with respect to the property where the excavation is to be made."

Courts interpreting the predecessor statute, Administrative Code § 27-1031, have stated that "[t]he duty under the statute is intended to apply to the activities during the excavation process and to any damages suffered by the adjoining owner proximately resulting from the excavator's failure to take adequate precautions to protect adjoining structures during the excavation" (*Cohen v Lesbian & Gay Cmty. Servs. Ctr.*, 20 AD3d 309, 310 [2005], citing *Coronet Props. Co. v L/M Second Ave.*, 166 AD2d 242 [1990]; *Palermo v Bridge Duffield*, 3 AD2d 863 [1957]; *Victor A. Harder Realty & Constr. Co. v City of New York*, 64 NYS2d 310, 318 [1946]).[4] "Administrative Code § 27-1031 has been held to impose absolute liability (*see*, *Harder Realty & Constr. Co. v City of New York*, 64 NYS2d 310, 318; *Levine v City of New York*, 249 App Div 625) upon both the owner and contractor who perform the excavation (*Palermo v Bridge Duffield Corp.*, 154 NYS2d 288, *affd* 3 AD2d 863 . . .)." (*Coronet*, 166 AD2d at 243).

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[4] Contrary to A&A's contention, Building Code § 3309.4 is properly interpreted in the same manner as its predecessor (*see American Sec. Ins. Co. v Church of God of St. Albans*, 131 AD3d 903, 905 [2d Dept 2015] ["Contrary to (defendant architect's) contention, section 3309.4, like its predecessor Administrative Code § 27-1031 (b) (1), does impose absolute liability upon the 'person who causes' an excavation to be made"]).

Here, indisputably, an excavation occurred at a lot adjacent to plaintiffs' property. A&A is the adjacent property owner, and A&A hired PGC to perform the excavation. Thus, A&A and PGC are subject to absolute liability for any damage caused to plaintiffs' building.

Plaintiffs have demonstrated prima facie entitlement to judgment as a matter of law by submitting the affidavit of a professional engineer, who observed the subject building both before and after the excavation project, and who opines that the excavation project caused damage to plaintiffs' building (*see e.g. Vitale v RLD Group, LLC*, 52 Misc 3d 1213[A] [Sup Ct, Queens County 2016]). A&A and PGC, in opposition, have failed to demonstrate the existence of a factual issue as to liability. Their protestation that the alleged damage preceded the excavation is insufficient to show an issue of fact (*Id.* at *3 ["As to defendants' argument that the age and pre-existing condition of plaintiffs' property raises an issue of fact as to causation, such argument is relevant to the issue of damages, but does not factor into a proximate cause analysis under Section 28–3309.4"]). Moreover, their contention that plaintiffs' evidence is inadequate because it lacks objective measurements is unsupported by authority and thus lacks merit.[5] In sum, plaintiffs have established their right to partial summary judgment on the issue of the owner's and general contractor's liability pursuant to Building Code § 28-3309.4 by providing evidence that excavation occurred on adjacent property causing damage to their building. Accordingly, plaintiffs are entitled to recover for any damage to their building which they prove at trial was caused by the excavation work (*Id.*).

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[5] Also, this court takes judicial notice of public documents: specifically, several stop-work orders issued by the New York City Department of Buildings in connection with this project at 1958 Ocean Avenue.

However, both Rybak's and Alnov's motions for summary judgment also merit being granted. Both Rybak and Alnov, by submitting affidavits of their principals and applicable contract documents, have established that their involvement with the excavation was only to the extent of their engineering and architectural design services. Therefore, Rybak and Alnov are "neither the person[s] who made the decision to excavate nor the contractor who carried out the physical excavation work" and are not subject to liability pursuant to Building Code § 3309.4 (*American Sec. Ins. Co.*, 131 AD3d at 905, citing *Coronet Props. Co. v L/M Second Ave.*, 166 AD2d at 243; *Rosenstock v Laue*, 140 App Div 467, 470 [1910]; *cf. 87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540 [2014]). Moreover, they are not subject to liability under either a negligence theory or third-party contractual beneficiary theory (*American Sec. Ins. Co.*, 131 AD3d at 905 [no liability to plaintiffs if the architect "was not responsible for the construction means and methods or the safety precautions taken in connection with the work"]).

Also, the record indicates that plaintiffs have no viable claim against Rybak or Alnov for trespass or for interference with their property rights. A trespass claim requires an affirmative act constituting or resulting in an intentional intrusion upon a plaintiff's interest in the exclusive possession of their land (*see Stage Club Corp. v West Realty Co.*, 212 AD2d 458, 460 [1995]). "The trespass may not be based on a mere nonfeasance or an omission to perform a duty" (*Loggia v Grobe*, 128 Misc 2d 973, 974 [1985]). The alleged trespasser must intend the act which amounts to or produces the unlawful invasion (*Courtney Assocs. v 50 West 15th LLC*, 24 Misc 3d 1233[A] [2009]; *Burger*, 28 AD3d 695). Also, a claim premised upon infringement of property rights must be based on facts that are substantially

the same as needed to support a claim of trespass (*see generally Lattimer v Livermore*, 72 NY 174 [1878]). Herein, it is noted that defendant property owner brought two special proceedings for access orders, which were resolved by two justices other than the undersigned, both of which granted a license under RPAPL 881 for access to plaintiffs' property. The first was brought under Index Number 504507/12 captioned "A&A 1958 LLC v Michael Reiss, et al" and the second under Index Number 505372/15, with the same caption.

Case law separately addressing a cause of action sounding in nuisance has recognized that:

> "'In order to prevail upon a cause of action for private nuisance, the plaintiff must demonstrate "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct"' (*Hitchcock v Boyack*, 277 AD2d 557, 558, quoting *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570, *rearg denied* 42 NY2d 1102)."

(*Vacca v Valerino*, 16 AD3d 1159, 1160 [2005]; *see generally Welton v Drobnicki*, 298 AD2d 757 [2002] [plaintiffs stated a cause of action under theories of trespass and private nuisance based upon allegations of defendants' continuous trespass and private nuisance in permitting their 12 cats to enter onto plaintiffs' land and urinate, defecate and otherwise damage or interfere with plaintiffs' use and enjoyment of their property]).

Rybak and Alnov's written agreements, as stated above, do not give rise to tort liability or a duty of care in favor of non-contracting third parties, such as plaintiffs herein (*Ragone v Spring Scaffolding*, 46 AD3d 652, 654 [2007], citing *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). Nor does the record support a finding either that

plaintiffs relied on Rybak's or Alnov's performance, or that Rybak or Alnov launched an instrument of harm onto plaintiffs' building (*cf. Regatta Condominium Assn. v Village of Mamaroneck*, 303 AD2d 739, 740; *Heffez v L & G Gen. Constr.*, 56 AD3d 526, 526-527 [2008]).

Moreover, Rybak and Alnov, as explained, could not have committed a negligent act or omission vis-a-vis plaintiffs, so no party is entitled to contribution or common-law indemnification with respect to Rybak and Alnov (*see e.g. Tiffany at Westbury Condominium v Marelli Dev. Corp.*, 40 AD3d 1073, 1077 [2007] [indemnitee entitled to recover against actual wrongdoer]). Additionally, the record presents no written agreement to indemnify, which means that no basis has been shown that makes Rybak or Alnov liable for contractual indemnification to any other defendant (*cf. Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 777 [1987] ["A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances"]).

Lastly, the oppositions of plaintiffs and the various defendants to Rybak's and Alnov's motions offer "mere hope" that additional discovery "will reveal something helpful[,]" which is not a sufficient bar to summary judgment (*Bryan v City of New York*, 206 AD2d 448, 449 [2d Dept 1994], citing *Plotkin v Franklin*, 179 AD2d 746 [2d Dept 1992]). The absence of any factual issues as to whether either Rybak or Alnov caused damage to plaintiffs' building merits granting their summary judgment motions. Accordingly, it is

ORDERED that the plaintiffs' motion is granted, and they are awarded partial summary judgment on the issue of liability against defendants A&A and PGC; and it is further

ORDERED that defendant Alnov's motion is granted, and it is awarded summary judgment dismissing the complaint and all cross claims asserted against it; and it is further

ORDERED that defendant Rybak's motion is granted, and it is awarded summary judgment dismissing the complaint and all cross claims asserted against it; and it is further

ORDERED that as the complaint is dismissed as to defendants Alnov and Rybak, the caption is amended accordingly.

The foregoing constitutes the decision, order and judgment of the court.

E N T E R,

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court