

**CMS, Risk Mgt. Holdings, LLC v Skyline Eng'g,
L.L.C.**

2016 NY Slip Op 32297(U)

November 16, 2016

Supreme Court, New York County

Docket Number: 653112/2015

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

CMS, RISK MANAGEMENT HOLDINGS, LLC and COMPLETE PROPERTIES, INC., Plaintiffs, -against-

INDEX NO. 653112/2015 MOTION DATE 10/05/2016 MOTION SEQ. NO. 002 MOTION CAL. NO.

SKYLINE ENGINEERING, L.L.C., RGB GROUP INC., EUROCRAFT CONTRACTING, LLC, DUBINSKY CONSULTING ENGINEER, P.C., ELIEZER DUBINSKY, P.C., AVISHAY I. MAZOR, P.E., JOHN C. BECKER, P.E., BECKER ENGINEERING, P.C., CARL STEIN, R.A., ELEMENTAL ARCHITECTURE, LLC, 132W26 OWNER LLC, PARAMOUNT BUILDERS CONTRACTING CORP., AGL INDUSTRIES INC., CPG CONSTRUCTION & DEVELOPMENT LI CORP., and CPG CONSTRUCTION & DEVELOPMENT, CORP., Defendants.

The following papers, numbered 1 to 13 were read on this motion for summary judgment.

Table with 2 columns: Paper Description and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [] Yes [X] No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant AGL Industries Inc.'s (herein "AGL") motion for summary judgment dismissing the Complaint and all Cross-Claims against it, is denied.

Plaintiffs commenced this action for property damage alleged to have occurred to the building owned by Plaintiff Complete Properties, Inc., located at 128 W. 26th Street, New York, New York (herein "Building 128"). The Complaint alleges negligence and violations of the New York City Building Code (herein "the Building Code") in construction work conducted at 132 W. 26th Street (herein "Lot 132"), which caused an alleged already leaning building located at 130 W. 26th St. (herein "Building 130") to lose support and lean even further, causing damage to Building 128. (Mot. Exh. A).

Specifically as to Defendant AGL the Complaint alleges, among other things, that AGL provided construction services, including bracing, to stabilize Building 130, that AGL owed a duty in ensuring that “demolition, excavation and/or structural and construction and construction-related work did not cause harm,” and that AGL breached this duty by permitting Building 128 to be damaged. (Id.).

Defendant AGL now moves for an Order for summary judgment pursuant to CPLR §3212, dismissing the Complaint and any cross-claims against it. Defendants 132W26 Owner LLC (herein “Defendant 132W26”), and Paramount Builders Contracting Corp. (herein “Defendant Paramount”) oppose the motion.

AGL contends that it was retained by Defendant 132W26 to install temporary lateral bracing from September through December 2014 between Building 130 and Building 134, and to stabilize both Buildings 130 and 134 from vibrations occurring during the excavation process at Lot 132. AGL states that its work was limited to installing the cross-bracing, but was not responsible for excavation, underpinning, vibration monitoring, or any work at other properties near the excavation. That its work was completed as of December 23, 2014, and that Building 128 began experiencing lateral movement, causing it to tilt towards Building 130, when underpinning of Building 130 was being conducted on June 26, 2015.

AGL argues that because it did not conduct or participate in the underpinning or excavation of any property in the area, that it cannot be held responsible for any of Building 128's damages, thereby warranting dismissal of the action against it. That Plaintiffs' claims are all based on alleged Building Code violations, which all relate to protection of adjacent properties during excavation, and that the violation of these Codes impose absolute liability on the owner of the real property and/or the contractor performing the excavation. That these Codes do not impose liability on a contractor who does not own the property, or on a contractor who did not perform/supervise the excavation/underpinning.

AGL also contends that to the extent of any ordinary negligence claims, there are no issues of fact regarding AGL's installation of the lateral bracing causing or contributing to Building 128's damages. That the installation of the bracing did not cause/contribute to the Plaintiffs' damages because the bracing was not intended to provide any protective effect for Building 128. Also, that Plaintiff cannot rely on the *res ipsa loquitor* doctrine to create an issue of fact because the instrumentality causing the damage has to be proven to have been in AGL's exclusive control, and that it has been established that Building 128's damage was unrelated to AGL's work.

AGL further argues that all cross-claims asserted against it for common-law indemnification, contractual indemnification, and contribution should be dismissed. That there is no allegation of vicarious liability due to AGL's negligence, and that there is no evidence of AGL's wrongdoing supporting a claim for common-law indemnity

because it did not participate in the excavation/underpinning. That any contribution cross-claims must also be dismissed because there is no evidence establishing an issue of fact as to whether AGL is liable to Plaintiff, so it cannot be held liable to the other Defendants. Also, that all contractual indemnification cross-claims should be dismissed because AGL only had a contract with Defendant 132W26 which provided for indemnification for claims arising out of or relating to AGL's performance of the contract, that there is no evidence that Plaintiffs' claims arose out of/were related to AGL's work, and that a cross-claim for contractual indemnification asserted by any defendant other than 132W26 cannot stand because there were no contracts between them.

Defendant AGL attaches its expert affidavit that states the temporary lateral bracing system is utilized to temporarily reinforce structures that are under construction or have been compromised; and that the bracing system serves to stabilize the main structural elements and provide restraint where the main structural element would otherwise be free to move laterally or rotate. (See Aff. Of Frederick Procello, P.E.). This expert affidavit also states that upon the expert's own inspection of Building 128, he observed torn sealant/flashing at the parapet where Building 128 is in contact with Building 130, that there was a separation of at least two inches, and that the observed damages are consistent with lateral movement of Building 128. (Id.) This expert's professional opinion states that the installation of the temporary lateral bracing did not cause or contribute to the damages, nor did it have an intended protective effect upon Building 128. (Id.)

Defendant 132W26 opposes the motion arguing that AGL's motion should be denied because discovery has not been fully conducted and there remain issues of fact as to whether or not Plaintiff's alleged damages arose out of AGL's installation of the cross-bracing. That if the bracing was not properly installed AGL is not entitled to summary judgment, and if Plaintiffs' damages did arise from AGL's work then AGL is contractually obligated to defend and indemnify Defendant 132W26 based upon their contract. Defendant 132W26 contends that it needs discovery and depositions from AGL as to whether the lateral bracing designs were reasonable, whether the bracing was properly installed, and whether the bracing should have prevented Building 130, and in turn Building 128, from moving westward as Plaintiff contends in the Complaint.

Defendant 132W26 also contends that it is still awaiting the other co-defendants' project files to determine the initial condition of the work site, and how the work site changed during the construction to evaluate if AGL's bracing proximately caused Plaintiff's damages by failing to protect Building 130. That depositions need to be taken of AGL to determine the circumstances surrounding the installation of the cross-bracing, and that AGL has failed to make its prima facie case because it did not establish whether or not the installation of the bracing played a role in the movement of Building 130. That AGL failed to submit affidavits or evidence establishing if and when Buildings 128 and 130 laterally moved westward, or affidavits

from laborers who actually installed the bracing to determine if it was installed properly, and that triable issues of fact remain as to whether AGL properly installed the bracing providing restraint to Building 130 and in turn Building 128 from laterally moving.

For all these reasons, Defendant 132W26 argues that AGL prematurely moved for summary judgment, and that the motion should be denied under CPLR 3212(f). That Defendant 132W26 is entitled to depose AGL's laborers because only AGL witnesses can provide information regarding the bracing installation, and that other discovery such as Defendant Paramount's project file is needed to determine what caused Buildings 130 and 128 to shift (if at all), how much the buildings shifted and when did they shift.

Defendant 132W26 also contends that AGL failed to attach the pleadings to its motion, and therefore the motion is procedurally defective. However, this argument fails because AGL did attach the pleadings to its Affirmation in Support of the motion.

Defendant Paramount opposes the motion also arguing, among other things, that it is premature to grant summary judgment at this time. That inspections and testing have not been completed to determine whether the lateral bracing support failed, whether the westward movement of Building 130 occurred in or around the time of the alleged incident, and whether if such movement did occur, if it contributed to movement of Building 128.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. (Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp., 77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341[1966]; Sillman v. 20th Century-Fox Film Corp., 3 N.Y. 2d 395, 165 N.Y.S. 2d 498, 144 N.E. 2d 387[1957]; Epstein v. Scally, 99 A.D. 2d 713, 472 N.Y.S. 2d 318[1984]. Summary Judgment is "issue finding" not "issue determination" (Sillman, supra; Epstein, supra). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve (Brunetti, v. Musallam, 11 A.D. 3d 280, 783 N.Y.S. 2d 347[1st Dept. 2004]).

Defendant AGL has not established its right to summary judgment as Defendant 132W26 has raised issues of fact. Although there is no evidence that AGL participated in the underpinning or excavation of Lot 132, AGL was hired to install the cross-bracing between Buildings 130 and 134 while construction/excavation was being conducted at Lot 132. Plaintiff's Complaint does not solely set forth allegations of negligent excavation/underpinning in violation of the Building Code. The Complaint also sets forth allegations of ordinary negligence, including that Defendant AGL was retained by Defendant 132W26 to provide cross-lot bracing to stabilize Building 130. That as a result of all of the negligent construction activities taking place at Lot 132, Building 130 lost support, exacerbating its already leaning condition, thereby causing damage to Building 128. (See Mot. Ex. A PP 12 , 14, & 32-33). Further, contractual indemnification cross-claims have been asserted against AGL by 132W26 pertaining to damages, if any, arising out of AGL's work. This motion is premature as discovery remains outstanding on the conditions of the work site prior to, during, and after the alleged incident, and on the issue of contractual indemnification and whether or not Plaintiff's damages arose out of work done by AGL.

Accordingly, it is ORDERED, that Defendant AGL Industries Inc.'s motion for summary judgment dismissing the Complaint and all cross-claims against it, is denied.

ENTER:

Dated: November 16, 2016



 MANUEL J. MENDEZ
 J.S.C.

MANUEL J. MENDEZ
 J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
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