Short Form Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS IAS Part 32

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TONI CHAN,

Index No. 705439/2013

Plaintiff,

Motion Date: January 13, 2016
Motion Seq. No. 5
Motion Cal. No. 37

- against-

ROKEY A. BEGUM, U.S. REGAL CONSTRUCTION CORP., HARJIT KAUR, JASJIT SINGH HEERA, RIPAD BEPARY a/k/a BOBBY BEPARY, and RAJIB AHMAD,

Defendants.

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The following papers numbered E61 to E76 read on this motion by plaintiff for summary judgment against defendants Rokey A. Begum and Ripad Bepary pursuant to CPLR §3212.

	Papers Numbered
Notice of Motion, Affidavit, Affirmation, Exhibits, Memo of Law	E61-E68
Affidavit in Opposition, Memo of Law	E69-E71
Reply Affirmation, Memo of Law	E72-E76

This Court's previous order scheduling the instant motion for a conference/hearing dated March 21, 2016 (J. Greco) is hereby vacated *sua sponte*, and, upon the foregoing papers as well as oral arguments the following is this Court's decision on the motion.

This action involves excavation that occurred on property adjoining the plaintiff's that allegedly caused damage to the plaintiff's property. Plaintiff claims that on or before November 22, 2010 defendants Begum and Bepary, alleged owners of the adjacent property at the time of excavation hired and contracted with defendant U.S. Regal Construction ("U.S. Regal") to perform certain work on their property, and that on November 22, 2010 on behalf of, at the direction of and under the supervision of Begum and Bepary, U.S. Regal did perform that excavation work. Further, that defendants failed to take any measures to secure the plaintiff's property and failed to seek a license to inspect or secure such property. Plaintiff also presented various violations issued by the New York City Department of Buildings ("NYC DOB") on November 22, 2010 and March 16, 2011, the earlier of which specifically indicated that "[d]ue to unsafe excavation the white pvc fence was broken...and the 1 story garage has a large crack". Copies of these violations were submitted, and based on same U.S. Regal was instructed to stop all work and safeguard public and property. Lastly, plaintiff hired a professional engineer to assess the damage to her property. The engineer visited the property on October 12, 2013 and

concluded that the damage was a direct result of the lack of supported excavation and prepared a report to that effect. The report was submitted as an exhibit. Plaintiff now seeks summary judgment against Begum and Bepary.[1]

In seeking summary judgment, it is well settled that the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact, (*see* CPLR §3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; *see also* Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986], Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 852 [1985]). Failure to do so requires a denial of the motion regardless of the sufficiency of the opposing papers, (*see* Winegrad *supra* at 853.) Once the showing has been made however, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material facts that require a trial, (*see* Zuckerman *supra* at 562, Alvarez *supra* at 324.)

Plaintiff contends that they have met their burden in that defendants are strictly liable under New York City Administrative Code §3309.4 and that the damage to her property was the direct result of defendants' unsafe and unsecured excavation work. NYC Admin Code §3309.4 provides as follows:

> "Regardless of the excavation or fill depth, the person who causes an excavation or fill to be made, shall, at all times and at his or her own expense, preserve and protect from damage any adjoining structures, provided such person is afforded a license in accordance with the requirements of Section 3309.2 to enter and inspect the adjoining buildings and property, and to perform such work thereon as may be necessary. If the person who causes the excavation or fill is not afforded a license, such duty to preserve and protect the adjacent property shall devolve to the owner of the adjoining property, who shall be afforded a similar license with respect to the property where the excavation is to be made" (*id.*)

It has been held that the above statute imposes strict or absolute liability upon the contractors or property owners responsible for the excavation to be made, (*see* American Sec. Inc. Co. v Church of God of St. Albans, 131 AD3d 903, 905 [2nd Dept. 2015]; *see also* Yenem Corp. v 281 Broadway Holdings, 17 NY3d 481, 489-491 [2012], 492 Kings Realty, LLC v 506 Kings, LLC, 105 AD3d 991, 995 [2nd Dept. 2013][*both discussing the virtually identical predecessor to NYC Admin Code §3309.4*].) To that effect, plaintiff need only show that defendants' actions proximately caused her damages. The Court finds that she did based upon the violations issued by the NYC DOB, and the engineer's report submitted. Additionally, the Court notes that the proximity with which the excavation and damage occurred is a most telling factor.

Given the above, the burden shifted to defendants to establish the existence of material

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[1]Plaintiff's requests for a default judgment against the non-appearing defendants were granted by short form Orders of March 24, 2015, entered March 27, 2015 and September 7, 2015, entered September 17, 2015.

facts that necessitate a trial, (*see* Zuckerman *supra* at 562, Alvarez *supra* at 324.) Defendants argue that Bepary never owned the property upon which the excavation occurred, nor was he the contractor or did he direct such contractor in the performance of their work, that likewise Begum did not instruct the contractor, that there has been no discovery in this action, and that the statute upon which plaintiff relies has been substantially changed, and there is no longer any possibility of strict liability. The Court finds these arguments unavailing.

As to the arguments based upon ownership and direction, the statute at issue applies to both owners and contractors, i.e. "persons who cause an excavation to be made," (*see* NYC Admin Code §3309.4.) It is of no consequence then that Begum, who was the titled owner of the property at the time of the excavation did not instruct and did not have any knowledge of the contractor's work. Similarly, Bepary's arguments must fail. Although he was not a titled owner of the property, he held himself out as one, and not simply by his actions (which would have created a factual issue), but on official applications to the NYC DOB. He cannot now, when convenient, disavow such ownership. Defendants' claim that a lack of discovery precludes summary judgment in this instance is unsupported by the requisite showing, i.e. that "discovery might lead to relevant evidence or that the facts essential to justify opposition...were exclusively in the knowledge and control of the movant" (Williams v Spencer-Hall, 113 AD3d 759, 760 [2nd Dept. 2014]; *see also* CPLR 3212 (f), Trobetta v Cathone, 59 AD3d 526, 527 [2nd Dept. 2009]). Again, the retention and direction of U.S. Regal is of little consequence since liability attaches to owners of property as well, (*see above*). Also, contrary to the defendants' assertion the NYC DOB was clear in the issuance of their violations that unsafe excavation caused damage. Finally, defendants argue that the new language of NYC Admin Code §3309.4, to wit: "If the person who causes the soil or foundation work is not afforded a license, such duty to preserve and protect the adjacent property owner shall devolve to the owner of such adjoining property...", completely changes the meaning of the statute and it can no longer be a considered a strict liability ordinance. While creative, this argument is wholly unsupported and inapplicable to the instant matter. Counsel may be correct if the request for a license is rejected or denied by the adjoining property owner, because then it is reasonable for such property owner to bear responsibility for any damages that may result that could have been prevented upon the granting of a license. However, such is not the situation in this instance. Plaintiff contends and defendants never refute that a license to enter her property for the purposes of preserving and protecting same was ever sought.[2]

In light of the above, plaintiff's motion for summary judgment is granted and having obtained a default judgment against all non-appearing defendants, so is the request for an inquest to assess the amount of damages, and it is hereby

ORDERED, that upon filing the Note of Issue, Statement of Readiness and after compliance with all of the Rules of the Court, plaintiff shall serve a copy of this Order and a copy

[2]Moreover, NYC Admin Code §3309.4 requires a preconstruction survey to document existing conditions of all adjacent buildings when excavation work to a depth of 5 feet within 10 feet of an adjacent building is undertaken prior to the commencement of any such work. No such survey was conducted or prepared in this instance and defendants have not demonstrated anything to the contrary.

of the Note of Issue or proof of filing the Note of Issue upon the appropriate Clerk located in Room 140 of the Supreme Court, Queens County, at 88-11 Sutphin Boulevard, Jamaica, New York, within 30 days of the entry date of this order; and it is further

ORDERED that this matter shall be set down for an inquest on Tuesday, July 12, 2016 at 9:30 a.m. in the Trial Scheduling Part, Courtroom 25, at 88-11 Sutphin Boulevard, Jamaica, New York; and it is further

ORDERED that a copy of this Order and a notice containing the date of the inquest shall be served upon all defendants at least twenty (20) days prior to the inquest. Plaintiff shall provide proof of service of the aforesaid Order and notice at the time of inquest.[3]

Dated: April 19, 2016

Rudolph E. Greco, Jr.
J.S.C.

FILED
MAY - 4 2016
COUNTY CLERK
QUEENS COUNTY

[3] A courtesy copy of this Order has been sent to counsel for plaintiff on the date hereof.