

Crotona 1967 Corp. v Procida Constr. Corp.
2017 NY Slip Op 30905(U)
March 28, 2017
Supreme Court, Bronx County
Docket Number: 27067/2015E
Judge: Ruben Franco
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

CROTONA 1967 CORP.,

Index No. 27067/2015E

Plaintiff,

-against-

**MEMORANDUM
DECISION/ORDER**

PROCIDA CONSTRUCTION CORP., JONES LANG
LASALLE and INTERNATIONAL LEADERSHIP
CHARTER SCHOOL,

Defendants.

HON. RUBEN FRANCO

Defendant Jones Lang Lasalle (“JLL”) moves for summary judgment pursuant to CPLR §3212, seeking dismissal of all claims and cross-claims asserted against it.

This is an action brought by the owner of the property located at 318 West 231st Street in Bronx County (“318 West”), to recover for damage caused to his property during excavation during construction of a School (“the Project”) at the abutting property, 322 West 231st Street (“322 West”), owned by defendant International Leadership Charter School (“International”). The Complaint asserts three causes of action against defendants based upon theories of negligence stemming from alleged violations of Sections 27-1031(b)(1), 27-1032 and 27-1029, of the New York City Administrative Code. More specifically, plaintiff alleges that defendants failed to perform proper soil borings at the site, failed to ensure the integrity of the structural foundation of 318 West, and failed to effectuate the proper underpinning/shoring required under the Administrative Code.

The moving party in a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, presenting sufficient evidence to demonstrate the

absence of any material issues of fact (see, Alvarez v. Prospect Hospital et al., 68 NY2d 320, [1986]; Winegard v. New York Univ. Med Center, 64 NY2d 851, [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]; Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, [1957]). Failure of the movant to sustain its burden requires denial of the motion, regardless of the sufficiency of the opposition Winegard v. New York Univ. Med. Center, *supra*, at 853. Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Gaddy v. Eyler, 79 NY2d 955 (1992); Alvarez v. Prospect Hospital, et al., *supra*; Zuckerman v. City of New York, *supra*.

In support of the motion, JLL submits the affidavit of Randy Apfelbaum (“Apfelbaum”), who states the following: He has been employed by JLL for 12 years and is currently Senior Vice President. On December 23, 2013, JLL was hired by International and entered into a Project Management Agreement (“PMA”) to provide management services on an existing construction project at 322 West. Pursuant to the PMA, dated December 23, 2013, among JLL’s responsibilities, was to advise International regarding the construction project. This entailed organizing documents, monitoring contractors, coordinating deliveries, assisting International with regard to payments, progress and budgets, and to act as a liaison with regard to issues arising from the construction of the School.

Prior to International retaining JLL, construction of the School had commenced, notwithstanding provision 4.0 of the PMA which states that the “The parties expect the Project commence on January 1, 2014 and be completed by August 31, 2014 with closeout by September 30, 2014 (the ‘Estimated Project Schedule’).”

Apfelbaum states that, JLL was not retained to provide any services with regard to determining the methods used to perform excavation or foundation work on the Project; that it did not draft any construction, shop, design or other drawings with regard to the excavation or foundation work on the Project; that it did not make any decisions as to how or where the excavation was to be carried out on the Project; and, that it did not perform excavation or foundation work on the Project.

JLL also submits a letter from defendant Procida Construction Corp. ("Procida"), signed by attorney Sarah Williams, dated October 30, 2013, titled "**Incident Report**," "Re: crack in adjacent property." The letter states, in pertinent part, the following:

During pile driving operations Monday 10/21/13 an existing crack at 3013 Riverdale Avenue (refer to pre con survey developed by Vibra Tech for additional info) expanded 13.5 mm +/- at the cellar level east wall continued up through a portion of the first floor. We immediately stopped all work and have retained the services of Richard Mugler and Howard Shapiro to implement and support/secure as necessary the aforementioned.

Apfelbaum further states that, as shown by the "Incident Report", the excavation work began in the Fall of 2013. Moreover, it was performed by Intercoastal Foundation and Shoring ("Intercoastal") under the direction of Macia Inspection and Testing, pursuant to Intercoastal's contract with International and Procida, dated August 7, 2013. Apfelbaum also asserts that Landair was the Project Manager working on the Project prior to JLL's retention.

JLL asserts that any damages allegedly sustained by plaintiff as a result of alleged negligent excavation occurred at least two months prior to JLL's involvement in the Project, and since it did not perform or supervise the excavation work at the time the alleged damages occurred, nor at any other time, there is no basis for liability against it.

In opposition to the motion, defendant Procida contends that the motion is premature as no discovery has taken place. More specifically, Procida posits that plaintiff has not particularized its claim and that the case is devoid of any detail about liability, damages, theory of liability, date or dates of loss, and whether plaintiff's claim for damages stems from a single incident, multiple incidents or a continuation of a construction method. Plaintiff and Procida also contend that JLL's PMA with International provides for extensive control and supervisory responsibility of the Project by JLL.

The court finds that JLL has made a *prima facie* demonstration of its entitlement to judgment as a matter of law. Plaintiff and Procida have failed to raise a triable issue of fact which would preclude summary judgment.

Procida's Incident Report establishes that on October 13, 2013, there was an existing crack at the cellar wall on the 318 Property. At this point in time work immediately ceased and Procida retained the services of another firm to secure the affected property. The affidavit of Apfelbaum, and the PMA between JLL and International, clearly establish that JLL was not hired by International until December 23, 2013, with its services to commence on January 1, 2014, some two months after plaintiff's damages were allegedly sustained. No evidence has been produced to sustain the claims of plaintiff and Procida that JLL was on the Project, or had any management or supervisory role at, or proximate, to the time of plaintiff's alleged damages. The court notes that no affidavit was submitted by an officer, employee or worker of Procida, the General Contractor, to establish responsibility of JLL for plaintiff's alleged damages, nor has any explanation been proffered for the failure to do so.

Plaintiff submits the affidavit its principal, Tracy Cohen, who attaches to its opposition

papers, a one page document which he refers to as “The Plans,” and a picture posted on the job site at 322 West 231st Street. “The Plans” indicates, *inter alia*, that the Project was under way on November 4, 2013, a point not disputed by JLL, but does not establish that JLL had any responsibility for the Project at the time of plaintiff’s alleged damages. The picture attached as posted to the job site states that JLL was the owners’ Representative. However, the date that the picture of the posting was taken is not shown, nor does it constitute proof that JLL was the “Owners’ Representative” at the time of plaintiff’s alleged damages. The court notes that a Work Permit issued by the NYC Buildings Department is part of the picture. However, the information which it contains is illegible and unreadable.

Notwithstanding the claim by plaintiff and Procida that JLL’s PMA with International is broad enough to encompass responsibility for excavation at the job site, no evidence has been submitted to establish that JLL had any responsibility for the Project at the time the damages were allegedly caused to plaintiff’s property.

The fact that discovery has not been completed does not prohibit granting summary judgment (see Chemical Bank v. PIC Motors Corp., 58 N.Y.2d 1023 [1983]). A party opposing a summary judgment motion on the grounds that discovery has not been completed must “... tender an affidavit or affidavits averring the existence, in admissible form, of proof which would present a triable issue of fact, or, if hearsay, an acceptable excuse for failure to present firsthand knowledge (*Id.* at 1026). Plaintiff and Procida fail to contradict the factual averments contained in Apfelbaum’s affidavit and the supporting documents annexed thereto. Neither plaintiff nor Procida has demonstrated that discovery is necessary in order to oppose JLL’s motion.

Defendant JLL’s motion for summary judgment is granted, and plaintiff’s Complaint against

JLL and Procida's cross-claim against JLL, are dismissed.

This constitutes the Decision and Order of the court.

Dated: March 28, 2017

A handwritten signature in black ink, appearing to read "Ruben Franco", is written over a horizontal line.

Ruben Franco, J.S.C.

HON. RUBÉN FRANCO