

**211-12 N. Blvd. Corp. v LIC Contr. Inc.**

2017 NY Slip Op 33222(U)

June 30, 2017

Supreme Court, Queens County

Docket Number: 700656/16

Judge: Carmen R. Velasquez

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38  
Justice

-----x  
211-12 NORTHERN BOULEVARD CORP. and  
SAI GROCERY INC.,

Index No. 700656/16

Plaintiffs,

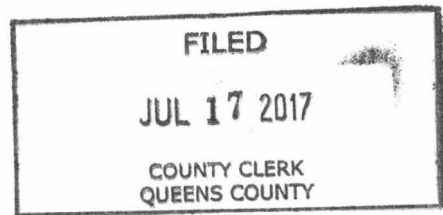
Motion

Date: July 27, 2016

-against-

M# 3

LIC CONTRACTING INC., SEUNGHOO KIM,  
JEEWHA KIM, 211 ST. LLC, TL ENGINEERING,  
PC and DUK GYOO LEE,



Defendants.

-----x  
The following papers numbered EF 63-151 read on this motion by  
the plaintiffs for summary judgment on the issue of liability  
against defendants.

|  | <u>PAPERS</u><br><u>NUMBERED</u> |
|--|----------------------------------|
| Notice of Motion - Affidavits- Exhibits.....   | EF 63-76                         |
| Affirmation in Opposition - Exhibits.....      | EF 122-127                       |
| Memorandum of Law in Opposition - Exhibits.... | EF 128-136                       |
| Replying Affirmation.....                      | EF 138-151                       |

Upon the foregoing papers it is ordered that this motion by  
the plaintiffs for summary judgment on the issue of liability  
against defendants is decided as follows:

At the outset, the court notes that pursuant to a short form  
order dated November 23, 2016, plaintiffs' motion for a default  
judgment as against defendant 211 St. LLC was granted, and the  
court directed that an inquest be held simultaneously with the  
trial. In addition, by order dated December 20, 2016, the court  
granted plaintiffs' motion for a preliminary injunction enjoining  
the defendants from taking any further actions on the subject  
property, including the development and construction at the site  
located at 211-02 and 211-04 Northern Boulevard in Bayside, New  
York that would adversely affect and damage the property located  
at 211-12 and 211-14 Northern Boulevard and the building situated  
thereon. The defendants were enjoined from removing any dirt,  
topsoil or other material which is currently providing lateral  
and subjacent support for the property and building and  
undertaking any action that will undermine the property and the

building without providing adequate and sufficient underpinning, shoring, bracing, stabilizing, reinforcing, sheeting and/or other lateral and subjacent support to the property and building. The court also granted a preliminary injunction enjoining the defendants from taking any actions to remove or vacate the stop work orders issued by the New York City Department of Buildings regarding the subject property.

Plaintiffs commenced the instant action alleging that the defendants failed to provide lateral and subjacent support for the property owned by plaintiff 211-12 Northern Boulevard Corp. while defendants were performing construction on the adjoining property. The building consists of a single integrated two story building with five commercial rental units. Plaintiff SAI Grocery Inc. is a commercial tenant at the property pursuant to a written lease agreement and operates a convenience store at the property. The adjacent property is a vacant lot. Defendant LIC Contracting LLC was the general contractor who provided construction services regarding the excavation of the adjacent property. Defendant TL Engineering, PC provided architectural and/or engineering services in connection with the project. Defendant Duk Gyoo Lee is the President of TL Engineering, PC. Plaintiffs maintain that the property is unsafe and unusable as a result of the defendants' failure to take appropriate precautions to prevent the undermining of the property. The New York City Department of Buildings issued a Vacate Order on November 18, 2015 with respect to the plaintiff's building due to unsafe conditions. The order was rescinded as to 211-14 Northern Boulevard. The Department of Buildings issued stop work orders on November 19, 2015 and December 31, 2015 with respect to the adjacent property. It was noted that there was a "failure to protect adjoining structure during excavation operations, there is a 20 foot shear cut at exposure #2."

Plaintiffs submit, *inter alia*, the affidavit of Pradip Gohil, their President, who avers that the defendants pared away and removed the soil directly next to the property line between the subject properties to a depth of more than 25-30 feet for the purpose of installing a foundation, underground parking garage and development of the adjacent property. He also avers that the defendants did not properly shore up the property or take other safety precautions. According to Mr. Gohil, as a result of defendants' activities, the building sustained visible cracking, sagging and "has essentially split apart." He further states that although emergency repairs were performed, the building will most likely need to be demolished. Mr. Gohil also explains that since the building is structurally unsound, the New York City Department of Buildings has ordered that the premises be vacated,

and all of the tenants have stopped paying rent.

Plaintiffs also submit the affidavit of Robert Antonucci, a Professional Engineer, who inspected the plaintiffs' building as well as the adjacent property. Mr. Antonucci states that the excavation of the adjacent property was undertaken without any shoring or underpinning to provide the property and the building with adequate lateral and subjacent support. Mr. Antonucci explains that as a result of the excavation of the adjacent property, the plaintiffs' building sustained severe structural damages, including large diagonal cracks with bulging at the west wall of the property. Moreover, he states that he observed that the wood joists supporting the second floor of the building were resting on a light gauge metal partition wall instead of the load bearing westerly masonry wall. Mr. Antonucci states that the building required immediate temporary shoring to prevent a total collapse, but this is only a temporary measure. He opines that a permanent repair of the building will likely require that the existing building be demolished and a new one constructed.

Mr. Antonucci further explains that he reviewed the shoring and excavation plans prepared by defendants TL Engineering and Lee and states that they are incomplete or missing information required by the New York City Department of Buildings, such as site specific drawings, documentation of existing condition of all adjacent buildings in a preconstruction survey and concrete and soil information. Mr. Antonucci also avers that no underpinning plans were prepared by the TL defendants. According to Mr. Antonucci, the TL defendants failed to properly design and monitor the project and failed to exercise that degree of care that a reasonably prudent engineer would have exercised. He states that underpinning and shoring were required to prevent damages to the building, and it was not done.

In opposition, defendants LIC Contracting Inc. and the Kim defendants submit the affidavit of Robert W. McMichael, a Civil/Geotechnical Engineer, who reviewed the documentation regarding this matter. He states that he has been unable to conduct an on site inspection due to the filing of the summary judgment motion by the plaintiffs. Mr. McMichael avers that, based on the documents he reviewed, there are issues of fact as to whether the plaintiffs' damages were caused by the construction on the defendants' property. He states that, based on photographs he reviewed, there were damages to the facade of the plaintiffs' property prior to the construction.

Furthermore, defendants TL Engineering, PC and Lee, in opposition, submit the affidavit of Mark Kilgore, a licensed

engineer, who reviewed the drawings prepared by defendant Lee as well as the other filings in this case. Mr. Kilgore opines that defendants TL Engineering, PC and Lee did not violate any professional duty of care. He states that the TL defendants were not hired to perform underpinning, foundation or excavation work at the premises nor were they hired to determine the condition of the adjoining property prior to preparing and submitting their plans. Mr. Kilgore avers that the notes section of one of the drawings states that underpinning and shoring plans would be required by a licensed New York City engineer to be submitted to the TL defendants. According to Mr. Kilgore, if the TL defendants were to undertake the preparation of plans for underpinning, excavation and shoring, it would rework the proposal under which they were retained, which is against industry standards. He further avers that the drawings prepared by the TL defendants were proper and accounted for the scope of work under the proposal.

The court will first address the motion as against defendant LIC Contracting Inc. and the Kim defendants.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993].) Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].)

The Court of Appeals in *Yenem Corp. v 281 Broadway Holdings* (18 NY3d 481 [2012]) has stated that the New York City Administrative Code § 3309.4 (formerly New York City Administrative Code § 27-1031) places strict liability on an excavator where the excavator's work causes damage to an adjoining property. Specifically, § 3309.4 provides "[r]egardless 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..." (see *Cabrera v Green Complex, Inc.*, 39 Misc. 3d 1233(A) (Civ Ct, Kings County 2013).) Indeed, the Court of Appeals noted that the original purpose of the Code section was to shift the risk of injury from the injured landowner to the excavator of the adjoining property. (*Yenem Corp. v 281 Broadway Holdings*, 18 NY3d 481, 490-491 [2012].)

The court finds that the plaintiffs have made a prima facie

showing of their entitlement to judgment as a matter of law on their claim in the first cause of action for lack of lateral and subjacent support and the fifth cause of action for violation of the building code. As owners of the adjoining property, defendants Seungho Kim and Jeewha Kim are strictly liable for the damage herein. (see *Yenem Corp. v 281 Broadway Holdings*, 18 NY3d 481, 490-491 [2012].) Further, defendant LIC Contracting Inc. was the general contractor for the project on the adjoining property. Therefore, they are responsible for the damage herein. The affidavit of Mr. Antonucci, referred to above, is very detailed and provides a strong basis for his conclusions. The court notes that contrary to the assertions set forth by defendant LIC Contracting Inc. and the Kim defendants that their expert did not inspect the property, the documentary evidence establishes that an engineer for the defendants, Victor Han, inspected the subject property in November 2015.

In addition, plaintiffs made a prima facie showing of entitlement to summary judgment on their second and third causes of action for negligence. In order to recover in a negligence cause of action, a plaintiff must establish the existence of a duty owed by the defendant towards the plaintiff, a breach of the duty and injury to the plaintiff as a result thereof. (*Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]; *Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981].) As noted above, the admissible evidence establishes that the defendants did not maintain the adjoining property in a safe condition and did not provide proper shoring, bracing or underpinning, which resulted in damage to the plaintiffs' building. The admissible evidence also establishes that the defendant LIC Contracting Inc. did not provide the proper underpinning, shoring and bracing for the project, which resulted in the damage to the plaintiffs' building. Defendants have failed to submit admissible evidence sufficient to deny summary judgment on these claims.

Plaintiffs also seek summary judgment on the sixth cause of action for nuisance. "The elements of a private nuisance cause of action are an interference (1) 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 in acting or failure to act." (*Behar v Quaker Ridge Golf Club, Inc.*, 118 AD3d 833, 835 [2d Dept 2014]; *Aristides v Foster*, 73 AD3d 1105, 1106 [2d Dept 2010].) Here, the plaintiffs made a prima facie showing of entitlement to judgment as a matter of law on the cause of action for nuisance against LIC Contracting Inc. and the Kim defendants by demonstrating that the defendants substantially interfered with the plaintiffs' use and enjoyment of their property manner

through their construction activities. Indeed, the Vacate Order from the Department of Buildings was issued as a result of the danger caused by the construction at the property, and the plaintiffs have been unable to utilize the property.

The seventh cause of action seeks to recover damages for trespass. The elements of a cause of action in trespass are an intentional entry onto the land of another without justification or permission. (*Boring v Town of Babylon*, 147 AD3d 892, 893 [2d Dept 2017]; *Marone v Kally*, 109 AD3d 880, 882 [2d Dept 2013].) The admissible evidence establishes that defendant LIC Contracting Inc. and the Kim defendants entered onto the plaintiffs' property without authorization. Indeed, Mr. Gohil states in his affidavit that defendants, without permission or consent, entered onto the plaintiffs' property and attempted to make repairs to the building, including adding cement to the wall of the building to conceal the damages the building sustained. Defendants have failed to submit any admissible evidence, such as an affidavit from someone with personal knowledge of the facts, that raises a triable issue of fact as to this cause of action.

The eighth cause of action seeks a mandatory/permanent injunction enjoining the defendants from taking any further action that would adversely affect or damage the plaintiffs' property. Injunctions of this kind are granted only in extraordinary circumstances since the movant would receive the ultimate relief requested. (see *Matos v City of New York*, 21 AD3d 936, 937 [2d Dept 2005]; *SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d 727, 728 [2d Dept 2005].) Here, inasmuch as the plaintiffs are seeking the ultimate relief, the branch of the motion for summary judgment on the eight cause of action is denied. As noted above, the court previously granted the plaintiffs' prior motion for a preliminary injunction.

The court will now address the branch of the motion by the plaintiffs for summary judgment as against defendants TL Engineering, PC and Duk Gyoo Lee.

Plaintiffs allege that defendants TL Engineering, PC and Lee assumed an obligation to the plaintiffs by filing plans and certifying that construction proceeded properly according to those plans. Plaintiffs further allege that these plans were defective in that they failed to design shoring and underpinning plans to protect the plaintiffs' building. Defendants argue that they cannot be held liable since they did not make the decision to excavate or carry out any actual excavation work.

Defendants TL Engineering and Lee were hired pursuant to a

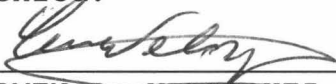
proposal entered into between defendant Lee and defendant Seungho Kim in November 2014. The work in the proposal included field measurement for new building and building extension, architectural design service, "expediting services for plan approval, permit, final sign-off and CO." The proposal further provides that defendant TL Engineering PC and Lee "shall not be responsible for any work done by Contractor..." In addition, under the proposal, the "Contractor should file shoring and underpinning plans as per filed conditions." Also, the proposal states that TL "shall not be responsible for any issue not included in the work scope."

The court finds that there are triable issues of fact as to whether defendants TL Engineering PC and Lee caused or contributed to the damage to the plaintiffs' building. (see *American Sec. Ins. Co. v Church of God of St. Albans*, 131 AD3d 903, 905 [2d Dept 2015].) Defendant Lee avers in his affidavit that the TL defendants had a very limited role under the proposal and were not retained to perform inspections or prepare underpinning, shoring or excavation plans. He explains that the TL defendants merely prepared a set of drawings, which were used only as guidelines. He further avers that under the drawings, the contractor was required to verify all field conditions and submit shop drawings signed by a New York City professional engineer to the TL defendants, and this did not occur. Defendant Lee notes that the TL defendants did not provide written approval for the excavation work to begin. In addition, defendant Lee states that the TL defendants were advised by the other defendants that LIC Contracting would be retaining a licensed engineer to prepare underpinning plans, shoring plans and excavation plans, but the TL defendants never received a copy of those plans.

Accordingly, the branch of the motion by the plaintiffs for summary judgment on the issue of liability as against defendants LIC Contracting Inc., Seungho Kim and Jeewha Kim is granted as to all causes of action asserted against them, except the eighth cause of action for a mandatory/permanent injunction, and an assessment of damages against defendants LIC Contracting Inc., Seungho Kim and Jeewha Kim shall be held at the time the case is called for trial.

The branch of the motion by the plaintiffs for summary judgment on the issue of liability as against defendants TL Engineering, PC and Duk Gyoo Lee is denied.

Dated: June 30, 2017

  
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 CARMEN R. VELASQUEZ, J.S.C.

FILED  
 JUL 17 2017  
 COUNTY CLERK  
 QUEENS COUNTY