

**Board of Mgrs. of Manhattan Place Condominium v
616 First Ave., LLC**

2018 NY Slip Op 31045(U)

May 23, 2018

Supreme Court, New York County

Docket Number: 652240/17

Judge: Frank P. Nervo

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 4

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THE BOARD OF MANAGERS OF MANHATTAN
PLACE CONDOMINIUM, On Its Own Behalf And On
Behalf Of Individual Unit Owners, and MANHATTAN
PLACE CONDOMINIUM,

Plaintiffs,

Index No.: 652240/17
DECISION/ORDER

-against-

616 FIRST AVENUE, LLC, JDS CONSTRUCTION
GROUP LLC, JDS DEVELOPMENT LLC, SHOP
ARCHITECTS P.C., WSP CANTOR SEINUK
STRUCTURAL ENGINEERS, RA CONSULTANTS
LLC, BURO HAPPOLD CONSULTING ENGINEERS,
P.C., ECD NY INC. and PETERSON GEOTECHNICAL
CONSTRUCTION LLC,

Defendants.
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HON. FRANK P. NERVO, J.S.C.:

In this commercial negligence action, defendants SHO P Architects P.C. (ShoP), WSP Cantor Seinuk Structural Engineers (WSP) and Buro Happold Consulting Engineers, P.C. (Buro Happold; together, the design defendants) move to dismiss the complaint as against them, pursuant to CPLR 3211 (motion sequence number 001). For the following reasons, this motion is granted.

BACKGROUND

Plaintiffs Manhattan Place Condominium and the Board of Managers of Manhattan Place Condominium (together, plaintiffs) are, respectively, the owner and the board of managers of a residential condominium building (the building) located at 630 First Avenue in the County, City and State of New York. See notice of motion, exhibit A (complaint), ¶¶ 1, 12. Defendant 616

First Avenue, LLC (616 First) is the owner of the parcel of property located next to the building at 616-626 First Avenue (the adjacent property). *Id.*, ¶¶ 2, 17. Co-defendants JDS Construction Group LLC and JDS Development LLC (together, the JDS defendants) are, respectively, the general contractor and the real estate developer that 616 hired to construct a building on the adjacent property. *Id.*, ¶ 18. The design defendants are, respectively, the architectural firm (SHoP), the structural engineering company (WSP) and the consulting engineering company (Buro Happold) that the JDS defendants retained in connection with that project. *Id.*, ¶¶ 19-23.

This action is based on structural damage that the building suffered as a result of excavation and dewatering work that was being performed on the adjacent property in 2014 in connection with defendants' building development project. *See* notice of motion, exhibit A (complaint), ¶¶ 11-16. In their pre-answer motion, the design defendants claim that they were not involved with this work, and argue that plaintiffs' claims should therefore be dismissed as against them. The design defendants have presented affidavits from officers of SHoP, WSP and Buro Happold, along with copies of the contracts that their respective companies entered into with plaintiffs, to support their arguments. *See* Notice of motion, exhibits B (Buro Happold contract), C (SHoP contract); Sigaty reply affirmation (SHoP); Engbretsen reply affirmation (Buro Happold); Hechler reply affirmation (WSP) & exhibit A (WSP contract). Plaintiffs, 616 First and the JDS defendants have submitted opposition papers with legal arguments, but no other documentary evidence.

Plaintiff commenced this action on April 26, 2017 by filing a summons and complaint that sets forth causes of action for: 1) strict liability (against all defendants); 2) negligence (against all defendants); 3) private nuisance (against all defendants); and 4) breach of contract

(against the JDS defendants). *See* notice of motion, exhibit A. Defendant RA Consultants LLC filed an answer with cross claims on June 23, 2017. Defendant Peterson Geotechnical Construction LLC (Peterson) filed an answer with cross claims on July 7, 2017. Defendant ECD NY Inc. also filed an answer with cross claims on July 7, 2017. 616 First and the JDS defendants filed a joint answer on July 12, 2017 that includes cross claims against the design defendants for: 1) contribution; 2) common-law indemnity; 3) contractual indemnity; and 4) breach of contract. *See* Kaufman affirmation in opposition, exhibit A. Peterson filed an amended answer with cross claims on July 27, 2017, and thereafter filed a third-party summons and complaint on December 12, 2017. The design defendants have not yet filed an answer. Instead, the design defendants have filed the instant motion to dismiss the complaint and the cross claims of 616 First and the JDS defendants (motion sequence number 001).

DISCUSSION

As mentioned, the design defendants are named in plaintiffs' causes of action for strict liability, negligence and private nuisance. In their motion, the design defendants assert that the documentary evidence bars all of these claims as against them, however, and argue that they should be dismissed as a matter of law. When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a), the court "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference." *See Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 (2106), citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002). However, where the documentary evidence submitted flatly contradicts the plaintiff's factual claims, the entitlement to the presumption of truth and the favorable inferences are both rebutted. *Scott v Bell Atl. Corp.*, 282 AD2d 180, 183 (1st Dept.

2001), *affd as mod Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 (2002), citing *Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 (1st Dept 1994). More particularly, the Court of Appeals holds that a “CPLR 3211 (a) (1) motion to dismiss on the ground that the action is barred by documentary evidence . . . may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002), quoting *Leon v Martinez*, 84 NY2d 83, 88 (1994). Here, the design defendants raise dismissal arguments against each of plaintiffs’ three causes of action against them.

Plaintiffs’ first cause of action for strict liability alleges that:

“Defendants are strictly liable under applicable New York law, including New York City Building Code § 3309.4, for all property damages to plaintiffs’ property resulting from their work.”

See notice of motion, exhibit A (complaint), ¶ 69. The cited Code provision, provides that “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.” NYC Administrative Code § 3309.4. The Court of Appeals recognizes that New York law has long treated this Code provision as a strict liability statute. *See Yenem Corp. v 281 Broadway Holdings*, 18 NY3d 481, 490 (2014). The Appellate Division, First Department has also consistently held that a § 3309.4 strict liability claim may not be maintained against a party that establishes “that [it] was neither the [party] who made the decision to excavate nor the contractor who carried out the physical excavation work.” *See American Sec. Ins. Co. v Church of God of St. Albans*, 131 AD3d 903, 905 (1st Dept 2015), citing *87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540, 541 (1st Dept 2014); *Coronet Props. Co. v L/M Second Ave.*, 166 AD2d 242, 243 (1st Dept 1990); *Rosenstock v*

Laue, 140 AD 467, 470 (1st Dept 1910). Here, the design defendants argue that they “were neither the landowner nor the contractor that performed the excavation or dewatering operations at the project.” *See* defendants’ mem of law at 12. Plaintiffs respond that the design defendants “have failed to show conclusively that they were not responsible for the design and decision to excavate.” *See* plaintiffs’ mem of law at 9. In reply, the design defendants repeat that they were “neither the owners of [the building] nor the parcel of land upon which it was built, nor the contractors who performed the excavation or dewatering operations.” *See* defendants’ reply mem at 9. They also present affidavits from their respective officers and copies of their respective contracts with plaintiffs. The court will review each in turn.

With respect to SHoP, the design defendants present an affidavit from its director of legal affairs, Todd Sigaty (Sigaty), as well as a copy of SHoP’s contract with 616 First. *See* Sigaty reply aff; exhibit A (SHoP contract). Sigaty states that SHoP “was not responsible for the design or construction of the excavation, excavation support, dewatering system or the protection of the adjacent buildings;” that it “did not have control over the means and methods of the construction;” and that it “did not act on behalf of the owner . . . during the excavation and dewatering operations.” *Id.*; Sigaty reply aff, ¶¶ 5, 7-8. The relevant portion of the SHoP contract provides as follows:

“§ 3.6.1.1 The Architect [i.e., SHoP] shall advise and consult with the Owner [i.e., 616 First] during the Construction Phase Services. The Architect shall have authority to act on behalf of the Owner only to the extent provided in this Agreement. The Architect shall not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, nor shall the Architect be responsible for the Contractor’s failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect shall be responsible for the Architect’s negligent acts or omissions, but shall not have

control over or charge of, and shall not be responsible for, acts or omissions of the Contractor or of any other persons or entities performing portions of the Work.”

Id.; exhibit A at 10. Nothing in the SHoP contract suggests that SHoP played any role in the subject dewatering operations. Instead, the third sentence plainly provides that SHoP was *not* to have any such role. The court finds that this documentary evidence conclusively demonstrates that SHoP was “neither the party who made the decision to excavate nor the contractor who carried out the physical excavation work.” Therefore, the court also finds that plaintiffs may not maintain a § 3309.4 strict liability claim against SHoP, as a matter of law. Consequently, the court grants so much of the design defendants’ motion as seeks to dismiss plaintiffs’ first cause of action against SHoP.

With respect to WSP, the design defendants present an affidavit from its assistant U.S. general counsel, Eric Hechler (Hechler), as well as a copy of WSP’s contract with the JDS defendants. *See* Hechler reply aff; exhibit A (WSP contract). Hechler states that WSP “provided structural design services,” but that it “was not responsible for the design or construction of the excavation, excavation support or dewatering systems,” and that it “did not have control over the means and methods of the construction as related to the excavation and dewatering systems.”

Id.; Hechler reply aff, ¶¶ 4-5, 7. The relevant portion of the WSP contract provides as follows:

“(2) WSP shall not have control or charge of, and shall not be responsible for, construction, means, methods, techniques, sequences or procedures, for safety precautions and programs in connection with the work, or for the failure of any Contractor to carry out the work in accordance with the Contract Documents.”

Id.; exhibit A. This contractual provision makes it plain that WSP had no role in any construction activity, including the subject dewatering operations. The balance of the WSP contract indicates that WSP’s structural design work consisted mainly of preparing “schematic

design,” “design development,” and “construction design” documents, and of participating in periodic meetings. The court finds that this documentary evidence conclusive demonstrates that WSP was “neither the party who made the decision to excavate nor the contractor who carried out the physical excavation work.” Therefore, the court also finds that plaintiffs may not maintain a § 3309.4 strict liability claim against WSP, as a matter of law. Consequently, the court grants so much of the design defendants’ motion as seeks to dismiss plaintiffs’ first cause of action against WSP.

With respect to Buro Happold, the design defendants present an affidavit from its North American director of operations, Joyce Engbretsen (Engbretsen), as well as a copy of Buro Happold’s contract with 616 First. *See* Engbretsen reply aff; exhibit A (Buro Happold contract). Engbretsen states that Buro Happold provided “mechanical and plumbing engineering services, facade engineering, lighting, energy modeling, building resiliency and SMART building system design.” *Id.*; Engbretsen reply aff, ¶ 4. However, Engbretsen stated that Buro Happold “was not responsible for the design or construction of the excavation, excavation support or dewatering system,” and that it “did not have control over the means and method of the construction as related to the excavation and dewatering operations.” *Id.*, ¶¶ 5, 7. The Buro Happold contract states that Buro Happold “shall provide the services described in Exhibit A,” which is the proposal that Buro Happold submitted to 616 First, and is annexed to the Buro Happold contract. *Id.*; exhibit A. That proposal specifies the six services that Engbretsen mentioned in her affidavit, but lists as “exclusions” to Buro Happold’s mechanical/plumbing engineering services: 1) “civil and site engineering;” 2) “underslab drainage design;” 3) “water feature design;” and 4) “irrigation systems design.” *Id.* Plaintiffs urge that the wording of these exclusions is

nevertheless problematic as regards Buro Happold's involvement with dewatering work. *See* plaintiffs' mem of law at 8. They particularly note that the "civil and site engineering" exclusion states that Buro Happold "will pick up drainage below the park where it enters the cellar ceiling," and suggest that this may relate to dewatering. *Id.*; Engbretsen reply aff, exhibit A. However, there is no textual basis for this suggestion. The "scope of work" portion of the Buro Happold contract does not mention dewatering work, and the above exclusion does not refer to "dewatering operations" by name, either. *Id.*, Engbretsen reply aff, exhibit A. Instead, the court notes that section 2 of the "terms and conditions" portion of the Buro Happold contract specifically states that "this agreement does not confer on Buro Happold the responsibility or the authority to control, direct or supervise construction means, methods, techniques, sequences or procedures, or safety measures and programs." *Id.* As a result, the court finds that there is sufficient documentary evidence from which to conclude that Buro Happold was "neither the party who made the decision to excavate nor the contractor who carried out the physical excavation work." Consequently, the court also finds that plaintiffs may not maintain a § 3309.4 strict liability claim against Buro Happold, as a matter of law, and grants so much of the design defendants' motion as seeks to dismiss plaintiffs' first cause of action against Buro Happold.

Plaintiff's second cause of action sounds in negligence. Pursuant to New York law, "the traditional common-law elements of negligence" are: "duty, breach, damages, causation and foreseeability." *Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218, 218 (1st Dept 2005). In their motion, the design defendants argue that they did not owe plaintiffs any duty of care. *See* defendants' mem of law at 6-12. Regarding that element of plaintiffs' claim, the complaint alleges that:

“Defendants, their agents and employees were negligent and careless in the construction, design, planning, monitoring and implementation of the site work as set forth above and as follows: failing to take necessary measures to protect [the building], including the fountain, sidewalks and plaza; failing to dewater [the building] in a safe and appropriate manner; failing to properly manage the project after learning about the conditions of [the building], including the plaza, sidewalks and fountain; failing to warn plaintiffs and the public in general of the dangerous conditions related to the excavation and dewatering of [the building]; employing incompetent or inadequate workers and means and methods of construction; and in general being reckless and careless.”

See notice of motion, exhibit A (complaint), ¶ 73. The design defendants specifically argue that they owed plaintiffs neither a statutory nor a contractual duty of care. See defendants’ mem of law at 7-11. With respect to the former, the design defendants refer to the duty set forth in NYC Admin Code (Building Code) § 3309.4, and argue that it does not apply to them because they were “neither the owners of [the building] nor the parcel of land upon which it was built, nor the contractors who performed the excavation or dewatering operations.” *Id.* at 9. Plaintiffs respond that the design defendants “have failed to demonstrate” this, and that, “on the contrary, documents submitted by SHoP and Buro Happold point to extensive oversight responsibilities,” while “WSP has submitted absolutely no proof as to the scope of its work.” See plaintiffs’ mem of law at 8. However, the court has already determined that the documentary evidence herein conclusively demonstrates that none of the design defendants was “the party who made the decision to excavate nor the contractor who carried out the physical excavation work.” Therefore, the statutory duty of care imposed by Building Code § 3309.4 clearly does not apply to them. See e.g. *Yenem Corp. v 281 Broadway Holdings*, 18 NY3d 481; *American Sec. Ins. Co. v Church of God of St. Albans*; 131 AD3d 903; *Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540; *Coronet Props. Co. v L/M Second Ave.*, 166 AD2d 242; *Rosenstock v Laue*, 140 AD 467.

With respect to a contractual duty of care, the design defendants note that none of them executed a contract with plaintiffs. *See* defendants' mem of law at 9-11. This is clearly true, as the SHoP, WSP and Buro Happold contracts all make clear. *See* Sigaty reply aff, exhibit A; Hechler reply aff, exhibit A; Engbretsen reply aff, exhibit A. The design defendants further note that subparagraph 10.5 of the SHoP contract specifically provides that "nothing contained in this agreement shall create a contractual relationship with, or a cause of action in favor of, a third party against either the Owner or the Architect." *See* defendants' mem of law at 11; Sigaty reply aff, exhibit A at 22. For its part, the court notes that the WSP contract contains a similar provision in paragraph 9 of the section entitled "disclosures for structural and engineering design services" (although the Buro Happold contract does not appear to). *Id.*, Hechler reply aff, exhibit A; Engbretsen reply aff, exhibit A. In any case, it is plain that none of the design defendants ever contracted directly with plaintiffs. As a result, the court agrees that none of the design defendants owes plaintiffs a contractual duty of care. Therefore, the court concludes that plaintiffs' negligence claim cannot survive against the design defendants, as a matter of law, because plaintiffs cannot establish the "duty of care" element under either a statutory or contractual theory. Accordingly, the court grants so much of the design defendants' motion as seeks dismissal of plaintiffs' second cause of action against them.

Plaintiffs' final cause of action alleges private nuisance. "The elements of a private nuisance cause of action are: '(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 in acting or failure to act.'" *Taggart v Costabile*, 131 AD3d 243, 247 (2d Dept 2015), quoting *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570 (1977),

citing Restatement of Torts § 822. A claim of “nuisance can be negligent; it does not have to be intentional.” *Lieberman v Cayre Synergy 73rd LLC*, 108 AD3d 426, 427 (1st Dept 2013), citing *Copart Indus.*, 41 NY2d at 569. Here, the complaint alleges that:

“Defendants acts or omissions to act, including their dewatering activities, interfered with and continue to interfere with plaintiffs’ right to use and enjoy the [building].”

See notice of motion, exhibit A (complaint), ¶ 77. The design defendants argue that “plaintiff fails to identify any alleged intentional or unreasonable interference with the use and enjoyment of the plaintiffs’ property,” and note that they “did not perform or supervise any of the excavation or dewatering operations.” See defendants’ mem of law at 13. Plaintiffs respond that the design defendants “fail to present any facts establishing that they did not intentionally and unreasonably interfere with plaintiffs’ enjoyment of their property through [the design defendants’] actions or failure to act.” See plaintiffs’ mem of law at 10. It is true that, as the moving parties, the design defendants bear the burden of proof in this motion. However, the court has already found that the design defendants have presented sufficient documentary evidence to establish that they had no role in the dewatering operations at the building. Because this documentary evidence “flatly contradicts” the factual claims made in the portion of the complaint containing plaintiffs’ private nuisance claim, the burden of proof devolves on plaintiffs instead, and plaintiffs have failed to meet that burden by presenting any evidence of their own. *Scott v Bell Atl. Corp.*, 282 AD2d at 183. Therefore, the court concludes that plaintiffs have failed to establish that the design defendants committed any “interference” with their property that would give rise to a private nuisance claim. Accordingly, the court grants so much of the design defendants’ motion as seeks the dismissal of plaintiffs’ third cause of action against them.

Finally, 616 First and the JDS defendants also oppose the design defendants' motion to the extent that it seeks dismissal of the four cross claims that they have asserted in their answer. See Kauffman affirmation in opposition, ¶¶ 1-8. These allege: 1) contribution; 2) common-law indemnity; 3) contractual indemnity; and 4) breach of contract. *Id.*; exhibit A. 616 First and the JDS defendants specifically request that the court permit them to assert these cross claims in a third-party action against the design defendants, in the event that the court should dismiss plaintiffs' complaint as against them. *Id.*, ¶¶ 7-8. They cite Appellate Division, Second Department, case law that confirms a trial court's procedural authority to do so. See e.g. *Soodoo v LC, LLC*, 116 AD3d 1033 (2d Dept 2014). In their reply papers, the design defendants cite a quantity of Appellate Division, First Department, precedent in opposition to this request. See defendants' reply mem at 10; see also *Davis v Isaacson, Robustelli, Fox, Fine, Greco & Fogelgaren*, 283 AD2d 349 (1st Dept 2001); *Martinez v Tishman Constr. Corp.*, 227 AD2d 298 (1st Dept 1996). The court notes that, in *Licata v AB Green Gansevoort, LLC* (158 AD3d 487, 490 [1st Dept 2018]), the First Department recently held that "owner defendants are not entitled to common-law indemnification or contribution from contractors . . . [where] there is no evidence that the contractors were negligent." Here, the design defendants have demonstrated that plaintiffs' negligence claims against them fail, as a matter of law. As a result, the proposed third-party contribution and indemnification claims that 616 First and the JDS defendants seek to raise against the design defendants would also fail. Therefore, there is no reason for the court to authorize 616 First and the JDS defendants to plead these particular claims in a third-party complaint, even though it has the procedural discretion to allow it. Their fourth cross claim, for breach of contract, requires different analysis.

The proponent of a breach of contract claim must plead the existence and terms of a valid, binding contract, its breach, and resulting damages. *See e.g. Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435 (1st Dept 1988). As it is pled in the July 12, 2017 answer, the fourth cross claim alleges that the design defendants “failed and neglected to comply with the terms and specifications of [their respective contracts], thereby breaching their agreements with” 616 First and the JDS defendants. *See* Kauffman affirmation in opposition, exhibit A, ¶ 63. It more specifically alleges that “if the plaintiff was caused to sustain . . . injuries . . . and in the event that any judgment is recovered . . . against [616 First and the JDS defendants], then [the design defendants] . . . are or will be responsible by virtue of the terms, covenants, warranties and clauses, and by way of a third-party beneficiary provision contained in said agreement[s].” *Id.*, ¶ 62. However, as was previously noted, both the SHoP and WSP contracts contain clauses that expressly forbid third-party claims against them. Thus, the documentary evidence conclusively refutes the cross claim’s allegation of third-party liability by either of those parties. Therefore, there is no reason to permit 616 First and the JDS defendants to re-assert their breach of contract cross claim against either SHoP or WSP as a third-party claim. The Buro Happold contract does not contain a “no third-party liability” clause, however. Further, even though it is a nebulous and non-specific allegation, at best, the fourth cross claim does recite all of the elements of a breach of contract claim, and is therefore entitled to a presumption of veracity. In addition, the court notes that the design defendants’ reply papers are devoid of any opposition to defendants’ request to convert the fourth cross claim into a third-party claim. *See* defendants’ reply mem at 10. As a result, the court deems that the design defendants have abandoned their opposition to said request, and will not deny 616 First and the JDS defendants leave to replead and serve their

fourth cross claim as a third-party breach of contract claim against Buro Happold, should they choose to do so. However, the court admonishes 616 First and the JDS defendants that any putative claim that is based *solely* on the allegation that Buro Happold breached its contractual duties regarding dewatering operations will fail, as a matter of law, because the court has already determined that Buro Happold played no part in, and had no duties with respect to, that work.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3211, of defendants SHoP Architects P.C., WSP Cantor Seinuk Structural Engineers and Buro Happold Consulting Engineers, P.C. (motion sequence number 001) is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

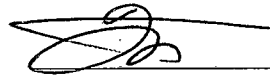
ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein.

Dated: May 23, 2018

ENTER:



JSC

HON. FRANK P. NERVO