

**Georgitsi Realty LLC v Armory Plaza, Inc.**

2018 NY Slip Op 34463(U)

February 23, 2018

Supreme Court, Kings County

Docket Number: Index No. 45669/2007

Judge: Wayne P. Saitta

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 29 of the Supreme Court of the state of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23<sup>rd</sup> day of February, 2018.

**P R E S E N T:**

Hon. Wayne P. Saitta, Justice.

-----X Index No.:45669/2007  
GEORGITSI REALTY LLC, 1504 REALTY LLC,  
ARTHUR STRIMLING, LISA SEGAL, TIMOTHY PIETRZAK,  
CATHERINE SHANNON, BORIS GILZON, MARTIN ZOLTOWSKI,  
AND MEMORIAL BAPTIST CHURCH OF BROOKLYN, and NEW HAMPSHIRE  
INSURANCE COMPANY a/s/o 1504 REALTY LLC,

**DECISION and ORDER**

Plaintiffs,

v.

ARMORY PLAZA, INC, ARMORY HEIGHTS, LLC,  
JACK LOCICERO, LORENZO LOCICERO, BRICOLAGE  
DESIGNS, INC, HENRY RADUSKY, DODGLAS PULASKI,  
SANCHEZ ASSOCIATES, PC, LOUIS SANCHEZ, ABRAHAM  
HERTZBERG, WONGOOD CONSTRUCTION, XINGJIAN  
CONSTRUCTION, INC, IMMOBILIARIA BUILDERS CORP,  
DIAMOND POINT EXCAVATING CORP, d/b/a DIAMOND  
POINT EXCAVATION CORP, JAFCO GROUP, INC,  
ABC INC /CORP/ LLC/LP/PARTNERS 1-9, AND  
JOHN/JANE DOES 1-50,

Defendants.

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Plaintiff GEORGITSI REALTY, LLC, (“GEORGITSI”), moves this Court for an Order pursuant to CPLR § 3212 for Summary Judgment against ARMORY PLAZA, INC., ARMORY HEIGHTS, LLC, JACK LOCICERO, LORENZO LOCICERO, WONGOOD CONSTRUCTION, XINGJIAN CONSTRUCTION, INC., IMMOBILIARIA BUILDERS CORP.; Plaintiffs ARTHUR STRIMLING, LISA SEGAL, TIMOTHY PIETRZAK,

CATHERINE SHANNON, BORIS GILZON, MARTIN ZOLTOWSKI, 1504 REALTY LLC, and MEMORIAL BAPTIST CHURCH OF BROOKLYN, (“STRIMLING Plaintiffs”), move this Court for an Order pursuant to CPLR § 3212 for Summary Judgment against ARMORY PLAZA, INC, ARMORY HEIGHTS, LLC, JACK LOCICERO, LORENZO LOCICERO, XINGJIAN CONSTRUCTION, INC, DIAMOND POINT EXCAVATING CORP, d/b/a DIAMOND POINT EXCAVATION CORP, and JAFCO GROUP, INC; Defendant XINGJIAN moves this Court for an Order pursuant to CPLR § 3212 for Summary Judgment against the Plaintiffs dismissing the complaint against it; the STRIMLING Plaintiffs move this Court for an Order pursuant to CPLR § 3212 for Summary Judgment against BRICOLAGE DESIGNS, INC, HENRY RADUSKY, DOUGLAS PULASKI; GEORGITSI cross moves this Court for an Order pursuant to CPLR § 3212 for Summary Judgment against BRICOLAGE DESIGNS, INC., HENRY RADUSKY, DOUGLAS PULASKI; the STRIMLING Plaintiffs move this Court for an Order pursuant to CPLR § 3212 for Summary Judgment against SANCHEZ ASSOCIATES, PC, LOUIS SANCHEZ, ABRAHAM HERTZBERG and IMMOBILIARIA BUILDERS CORP; the BRICOLAGE Defendants move this Court for an Order pursuant to CPLR § 3212 for Summary Judgment against the Plaintiffs dismissing the complaint against them; Plaintiff NEW HAMPSHIRE INSURANCE COMPANY, (“NEW HAMPSHIRE”), moves this Court for an Order pursuant to CPLR § 3212 for Summary Judgment against ARMORY PLAZA, INC, ARMORY HEIGHTS, LLC, JACK LOCICERO, LORENZO LOCICERO, BRICOLAGE DESIGNS, INC., HENRY RADUSKY, DOUGLAS PULASKI, SANCHEZ ASSOCIATES, PC, LOUIS SANCHEZ, ABRAHAM HERTZBERG, WONGOOD CONSTRUCTION, XINGJIAN CONSTRUCTION, INC, IMMOBILIARIA BUILDERS CORP, DIAMOND POINT EXCAVATING CORP, d/b/a DIAMOND

POINT EXCAVATION CORP, and JAFCO GROUP, INC.; and NEW HAMPSHIRE moves this Court pursuant to CPLR 3025(b) to amend its complaint.

Upon reading the Notice of Cross-Motion for Summary Judgment by Jack S. Dweck, Esq., Attorney for Plaintiffs, GEORGITSI REALTY, LLC and HELEN KAMBESELES, dated January 7<sup>th</sup>, 2014, together with the Affidavit of Plaintiff, HELEN KAMBESELES, dated January 7<sup>th</sup>, 2014, together with the Affirmation of Jack S. Dweck, Esq., dated January 7<sup>th</sup>, 2014, together with the Affidavit of George N. Geannakakes, dated December 12<sup>th</sup>, 2007, together with the Affidavit of George N. Gennakakes, dated June 10<sup>th</sup>, 2009, and all exhibits annexed thereto; the Memorandum of Law on behalf of GEORGITSI REALTY, LLC, in Support of its Cross-Motion for Summary Judgment on the Issue of Liability, dated January 8<sup>th</sup>, 2014; the Affirmation in Opposition to GEORGITSI REALTY, LLC's Cross-Motion for Summary Judgment of Timothy G. McNamara, Esq., Attorney for Defendant, IMMOBILARIA BUILDERS CORP., dated April 22<sup>nd</sup>, 2014, and all exhibits annexed thereto; the Memorandum of Law in Support of Defendant, IMMOBILARIA BUILDERS CORP's Opposition to Plaintiff GEORGITSI REALTY, LLC's Cross-Motion for Summary Judgment, by Timothy G. McNamara, Esq., dated April 22<sup>nd</sup>, 2014; the Affirmation in Reply of Michael A. Gauvin, Esq., Attorney for Defendants, XINGJIAN CONSTRUCTION, INC., dated April 25<sup>th</sup>, 2014, together with the Affidavit of Chao Fei Li, undated; the Affirmation in Reply to the Opposition of Defendant IMMOBILARIA BUILDERS CORP to Plaintiff GEORGITSI's Cross-Motion for Summary Judgment by Jack S. Dweck, Esq., dated April 28<sup>th</sup>, 2014, and all exhibits annexed thereto; the Affirmation in Opposition to Plaintiff GEORGITSI REALTY LLC's Cross-Motion for Summary Judgment, by Ann P. Eccher, Esq., Attorney for Defendants, DIAMOND POINT EXCAVATING CORP., d/b/a DIAMOND POINT EXCAVATION

CORP., JAFCO GROUP, INC., dated May 29<sup>th</sup>, 2014; the Notice of Motion for Summary Judgment on the Issue of Liability by Michael Hiller, Esq., Attorney for Plaintiffs, ARTHUR STRIMILING, LISA SEGAL, TIMOTHY PIETRZAK, CATHERINE SHANNON, BORIS GILZON, MARTIN ZOLTOWSKI, MEMORIAL BAPTIST CHURCH OF BROOKLYN and 1504 REALTY, LLC, dated July 18<sup>th</sup>, 2014, together with the Affirmation in Support of the STRIMLING Plaintiffs' Motion for Summary Judgment by Michael Hiller, Esq., dated July 18<sup>th</sup>, 2014, together with the Affidavit of Custodian of Records, Richard Grossman, dated July 10<sup>th</sup>, 2014, together with the Affidavit of Arnold Rosenshein, dated April 23<sup>rd</sup>, 2009, together with the Affidavit of Pastor Stephen Christopher, dated April 22<sup>nd</sup>, 2009, together with the Affidavit of Lisa Segal, dated April 24<sup>th</sup>, 2009, together with the Affidavit of Timothy Pietrzak, dated April 24<sup>th</sup>, 2009, together with the Affidavit of Martin Zoltowski, dated April 22<sup>nd</sup>, 2009, together with the Affidavit of Architect Gitta Robinson, dated April 28<sup>th</sup>, 2009, together with the Affidavit of V. Douglas Platt, Jr, dated April 22<sup>nd</sup>, 2009, and all exhibits annexed thereto; the Memorandum of Law in Support of the STRIMLING Plaintiffs' Motion for Partial Summary Judgment on the Issue of Liability by Michael Hiller, Esq., dated July 18, 2014; the Affirmation in Opposition by Ann P. Eccher, Esq., dated September 2<sup>nd</sup>, 2014, and all exhibits annexed thereto; the Affirmation of Michael A. Gavin, Esq., dated September 3<sup>rd</sup>, 2014, together with Affidavit of Chao Fei Li, dated April 25<sup>th</sup>, 2014, together with the Affidavit of Arthur Kwok, dated April 25<sup>th</sup>, 2014, and all exhibits annexed thereto; the Affidavit of Custodian of Record of Richard Grossman, dated July 11, 2014, and all exhibits annexed thereto; the Memorandum of Law by Michael A. Gavin, Esq., dated September 3<sup>rd</sup>, 2014; the Affirmation in Opposition to GEORGITSI REALTY, LLC's Cross-Motion for Summary Judgment, by Michael Konopka, Esq.,

Attorney for Defendants, ARMORY PLAZA, INC, ARMORY HEIGHTS, LLC, JACK LOCICERO and LORENZO LOCICERO, dated September 18<sup>th</sup>, 2014, together with the Affidavit of LORENZO LOCICERO, dated September 18<sup>th</sup>, 2014, and all exhibits annexed thereto; the ARMORY Defendants' Memorandum of Law in Opposition to GEORGITSI REALTY, LLC's Cross-Motion for Summary Judgment, by Michael Konopka, Esq., dated September 18<sup>th</sup>, 2014; the Reply Affirmation of Jack S. Dweck, Esq., dated October 2<sup>nd</sup>, 2014; the Affirmation in Opposition to the Second STRIMLING Motion for Summary Judgment by Michael Konopka, Esq., dated January 6, 2015, together with the Affidavit of LORENZO LOCICERO, dated January 6<sup>th</sup>, 2015, and all exhibits annexed thereto; the ARMORY Defendants' Memorandum of Law in Opposition to STRIMLING Second Motion for Summary Judgment of Michael Konopka, Esq., dated January 6<sup>th</sup>, 2015; Affirmation in Support Volumes I, II and III, of Michael Konopka, Esq., undated; the Affirmation in Reply and in Further Support by Michael S. Hiller, Esq., dated January 12<sup>th</sup>, 2015; the Memorandum of Law in Reply and Further Support of the STRIMLING Plaintiffs' Motion for Partial Summary Judgment on Issues of Liability as Against DIAMOND POINT EXCAVATING CORP., d/b/a/ DIAMOND POINT EXCAVATION CORP., JAFCO GROUP INC. and XINGJIAN CONSTRUCTION, INC., undated; the Exhibits to Memorandum of Law in Reply and Further Support of the STRIMLING Plaintiffs' Motion for Partial Summary Judgment on Issue of Liability as Against the ARMORY Defendants, undated; the Memorandum of Law in Reply and Further Support of the STRIMLING Plaintiffs' Motion for Partial Summary Judgment on Issue of Liability as Against the ARMORY Defendants of Michael S. Hiller, Esq., dated January 27<sup>th</sup>, 2015; the Affirmation in Reply and in Further Support of the STRIMLING Plaintiffs' Motion for Partial Summary Judgment

by Matthew L. Berkman, Esq., Attorney for Plaintiffs, ARTHUR STRIMLING, LISA SEGAL, TIMOTHY PIETRZAK, CATHERINE SHANNON, BORIS GILZON, MARTIN ZOLTOWSKI, MEMORIAL BAPTIST CHURCH OF BROOKLYN and 1504 REALTY, LLC, dated January 28<sup>th</sup>, 2015, together with the Affidavit of Pastor Stephen Christopher, dated January 12<sup>th</sup>, 2015, together with the Affidavit of Timothy Pietrzak, dated January 12<sup>th</sup>, 2015, together with the Affidavit of Cantor Lisa B. Segal, dated January 12<sup>th</sup>, 2015; the Supplemental Exhibits in Support of the Motion by the STRIMLING Plaintiffs for Summary Judgment of Michael S. Hiller, Esq., dated July 6<sup>th</sup>, 2015; the Notice of Motion, dated July 11<sup>th</sup>, 2016, together with the Affirmation of Dana Purcaro, Esq., and all exhibits annexed thereto; the Memorandum of Law by Dana Purcaro, Esq., dated July 11, 2016; the Affirmation in Support by Fern Flomenhaft, Esq., Attorney for NEW HAMPSHIRE INSURANCE COMPANY, dated July 19<sup>th</sup>, 2016, and all exhibits annexed thereto; the Supplemental Affirmation in Further Support of STRIMLING Plaintiffs' Motion for Summary Judgment, by Michael S. Hiller, Esq., dated July 19<sup>th</sup>, 2016; the Supplemental Memorandum of Law in Support of the Motion by the STRIMLING Plaintiffs for Summary Judgment by Michael Hiller, Esq., dated July 19<sup>th</sup>, 2016; the Notice of Cross-Motion for Summary Judgment on the Issue of Liability against the Architects by Michael S. Hiller, Esq., dated July 21<sup>th</sup>, 2016; the Affirmation in Support of STRIMLING Plaintiffs' Cross-Motion for Summary Judgment against the Architect, by Michael S. Hiller, Esq., dated July 21<sup>st</sup>, 2016; Exhibits in Support of the Cross-Motion by the STRIMLING Plaintiffs for Summary Judgment against the Architects, undated; Notice of Cross-Motion for Summary Judgment on the Issue of Liability against the Architects, of Jack S. Dweck, Esq., dated July 21<sup>st</sup>, 2016; the Supplemental Affirmation in Opposition by Thomas A. Bizzaro, Jr., Esq., the Attorney

for DIAMOND POINT EXCAVATING CORP., d/b/a DIAMOND POINT EXCAVATION CORP., JAFCO GROUP, INC, dated August 19<sup>th</sup>, 2016, together with the Affidavit of Peter C. Taylor, dated August 11<sup>th</sup>, 2016 and all exhibits annexed thereto; the Supplemental Affirmation in Opposition to Plaintiff GEORGITSI REALTY, LLC's Cross-Motion for Summary Judgment, of Timothy G. McNamara, Esq., dated August 18<sup>th</sup>, 2016, and all exhibits annexed thereto; the Affirmation in Opposition to Plaintiff GEORGITSI REALTY, LLC's Cross-Motion for Summary Judgment, by Thomas A. Bizzaro, Jr., Esq., dated August 19<sup>th</sup>, 2016, together with the Affidavit of Peter Taylor, dated August 11<sup>th</sup>, 2016, and all exhibits annexed thereto; the Affirmation in Opposition to Plaintiff GEORGITSI REALTY, LLC's Supplemental Cross-Motion for Summary Judgment, of Michael Konopka, Esq., dated August 19<sup>th</sup>, 2016, and all exhibits annexed thereto; the Memorandum of Law by Michael Konopka, Esq., dated August 19<sup>th</sup>, 2016; the Affirmation in Opposition of Timothy F. Hill, Esq., dated August 19<sup>th</sup>, 2016 and all exhibits annexed thereto; the Memorandum of Law by Timothy F. Hill, Esq., dated August 19<sup>th</sup>, 2016; the Affirmation in Opposition by Dana Purcaro, Esq., Attorney for XINGJIAN CONSTRUCTION, INC., dated August 19<sup>th</sup>, 2016, and all exhibits annexed thereto; the Memorandum of Law of Dana Purcaro, Esq., dated August 19<sup>th</sup>, 2016 and all exhibits annexed thereto; the Affirmation in Opposition to the Cross-Motion by Defendant XIANJIAN CONSTRUCTION INC., for Summary Judgment by Michael S. Hiller, Esq., dated August 19<sup>th</sup>, 2016, together with the Exhibits in Opposition to the Cross-Motion by Defendant XINGJIAN CONSTRUCTION, INC., for Summary Judgment, undated: the Affirmation in Opposition to XIANJIAN'S Motion for Summary Judgment by Michael Konopka, Esq., dated August 19<sup>th</sup>, 2016, and all exhibits annexed thereto; the Affirmation in Opposition Volume II, III and IV by Michael Konopka, Esq.,

undated; the ARMORY Defendants' Memorandum of Law in Opposition to XINGJIAN Motion for Summary Judgment of Michael Konopka, Esq., dated August 19<sup>th</sup>, 2016; the STRIMLING Plaintiffs' Notice of Motion for Summary Judgment on the Issue of Liability by Michael S. Hiller, Esq., dated August 26<sup>th</sup>, 2016, together with the Affirmation in Further Support of the STRIMLING Plaintiffs' Motion for Summary Judgment on the Issue of Liability, dated August 22<sup>nd</sup>, 2016; the Exhibits to the STRIMLING Plaintiffs' Notice of Motion for Summary Judgment on the Issue of Liability by Michael S. Hiller, undated; the Affirmation of Jack S. Dweck, Esq., dated September 6, 2016; the Reply Affirmation of Jack S. Dweck, Esq., dated September 6<sup>th</sup>, 2016; the Notice of Cross-Motion of Cecily A. Harris, Esq., Attorney for Defendants, BRICOLAGE DESIGNS, HENRY RADUSKY and DOUGLAS PULSAKI, dated September 8<sup>th</sup>, 2016, together with the Affirmation in opposition to Plaintiff's Cross-Motion against the Architects and in Support of the Architects Cross-Motion for Summary Judgment, dated September 9<sup>th</sup>, 2016; the Exhibits A Through I, together with the Exhibit J, together with the Exhibits K Through L, together with the Exhibit M, together with the Exhibit N, together with the Exhibits O Through W to Defendants BRICOLAGE DESIGNS, HENRY RADUSKY and DOUGLAS PULSAKI's Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Cross-Motion for Summary Judgment on Strict Liability, by Cecily A. Harris, Esq., undated; Defendants BRICOLAGE, HENRY RADUSKY and DOUGLAS PULASKI's Memorandum of Law in Support of their Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Cross-Motion for Summary Judgment on Strict Liability, of Cecily A. Harris, Esq., dated September 7<sup>th</sup>, 2016; the Affirmation in Reply in Further Support of Dana Purcaro, Esq., dated September 12<sup>th</sup>, 2016 and all exhibits annexed thereto; the Affirmation in Reply and

Further Support of the STRIMLING Plaintiffs' Motion for Summary Judgment of Michael S. Hiller, Esq., dated September 12<sup>th</sup>, 2016 and all exhibits annexed thereto; the STRIMLING Plaintiffs' Supplemental Memorandum of Law in Reply and Further Support of their Motion for Summary Judgment by Michael S. Hiller, Esq., dated September 12<sup>th</sup>, 2016; the Affirmation in Reply and Further Support of Dana Purcaro, Esq., dated September 12<sup>th</sup>, 2016, and all exhibits annexed thereto; the Memorandum of Law in Further Support and in Reply to the ARMORY Defendants' Opposition by Dana Purcaro, Esq., dated September 12<sup>th</sup>, 2016; the Memorandum of Law in Further Support and in Reply to the STRIMLING Plaintiffs Opposition by Dana Purcaro, Esq., dated September 12<sup>th</sup>, 2016; the Affirmation in Opposition to the STRIMLING Plaintiffs' Motion for Summary Judgment of Timothy G. McNamara, Esq., dated October 3<sup>rd</sup>, 2016; the Affirmation in opposition to the Architects' Cross-Motion for Summary Judgment and in Reply and Further Support of the STRIMLING Plaintiffs' Cross-Motion for Summary Judgment, of Jason Zakal, Esq., dated October 5<sup>th</sup>, 2016, and all exhibits annexed thereto; the STRIMLING Plaintiffs' Memorandum of Law in Opposition to the Architects' Cross-Motion for Summary Judgment and in Reply and Further Support of the STRIMLING Plaintiffs' Cross-Motion for Summary Judgment, by Michael S. Hiller, Esq., dated October 6<sup>th</sup>, 2016; the Affirmation in Opposition to BRICOLAGE Defendants' Cross-Motion for Summary Judgment of Jack S. Dweck, Esq., dated October 6<sup>th</sup>, 2016; the Affirmation in Further Support of the Architects' Cross-Motion for Summary Judgment, of Cecily A. Harris, Esq., dated October 14<sup>th</sup>, 2016, and all exhibits annexed thereto; the Defendants BRICOLAGE, HENRY RADUSKY and DOUGLAS PULSAKI'S Memorandum of Law in Further Support of their Cross-Motion for Summary Judgment of Cecily A. Harris, dated October 14<sup>th</sup>, 2016; the Affirmation in

Opposition by Timothy F. Hill, Esq., dated November 8<sup>th</sup>, 2016, and all exhibits annexed thereto; the Affirmation in Reply and in Further Support of the STRIMLING Plaintiffs' Motion for Summary Judgment on the Issue of Liability as against IMMOBILIARIA, of Jason E. Zakal, Esq., dated November 9<sup>th</sup>, 2016, and all exhibits annexed thereto; the Affirmation in Reply and in Further Support of the STRIMLING Plaintiffs' Motion for Summary Judgment on the Issue of Liability as against the ENGINEERS, of Jason E. Zakal, Esq., dated December 2<sup>nd</sup>, 2016, and all exhibits annexed thereto; the Notice of Cross-Motion by Fern Flomenhaft, Esq., dated December 28<sup>th</sup>, 2016, together with the Affirmation in Support, dated December 28<sup>th</sup>, 2016, and all exhibits annexed thereto; the Affirmation in Opposition of Stephen J. Molinelli, Esq., Attorney for Defendants, DIAMOND POINT EXCAVATING CORP., d/b/a DIAMOND POINT EXCAVATION CORP., JAFCO GROUP, INC., dated January 10<sup>th</sup>, 2017, and all exhibits annexed thereto; the Affirmation in Opposition to Cross-Motion for Summary Judgment by Plaintiff NEW HAMPSHIRE INSURANCE COMPANY a/s/o 1504 REALTY, LLC, of Dana Purcaro, Esq., dated February 17<sup>th</sup>, 2017, and all exhibits annexed thereto; the Memorandum of Law of Dana Purcaro, Esq., dated February 17<sup>th</sup>, 2017; the Affirmation in Opposition to Cross-Motion of Michael Konopka, Esq., dated March 2<sup>nd</sup>, 2017; the Affirmation in Opposition to Plaintiff NEW HAMPSHIRE INSURANCE COMPANY's Cross-Motion for Summary Judgment of Timothy N. McNamara, Esq., dated March 27<sup>th</sup>, 2017; the Affirmation in Opposition of Timothy F. Hill, Esq., dated April 27<sup>th</sup>, 2017, together with the Affirmation in Opposition, dated November 8<sup>th</sup>, 2016; the Notice of Cross-Motion of Fern Flomenhaft, Esq., dated May 10<sup>th</sup>, 2017, together with the Affirmation in Support, dated May 10<sup>th</sup>, 2017, and all exhibits annexed thereto; the Affirmation in Opposition to the Cross-Motion of Plaintiff, NEW HAMPSHIRE

INSURANCE a/s/o1504 REALTY LLC, of Stephen J. Molinelli, Esq., dated May 18<sup>th</sup>, 2017; the Reply Affirmation of Fern Flomenhaft, Esq., dated August 1<sup>st</sup>, 2017 and after argument of counsel and due deliberation thereon,

Plaintiff GEORGITSI's motion for Summary Judgment is granted as to the ARMORY Defendants and IMMOBILARIA and denied as to XINGJIAN; the STRIMLING Plaintiffs' motion for summary judgment is granted as to the ARMORY Defendants and DP/JAFECO, and denied as to XINGJIAN; the STRIMLING Plaintiffs' motion for summary judgment against SANCHEZ and IMMOBILARIA is granted; XINGJIAN's motion for summary judgment dismissing the complaint and all cross claims against it is denied, the STRIMLING Plaintiffs' motion for summary judgment against the BRICOLAGE Defendants is denied, Plaintiff GEORGITSI's motion for summary judgment against the BRICOLAGE Defendants is denied, the BRICOLAGE Defendants motion for summary judgment dismissing the complaint against them is denied, NEW HAMPSHIRE's motion for summary judgment is granted as to the ARMORY Defendants, the SANCHEZ Defendants, and IMMOBILARIA, and denied as to DP/JAFECO, XINGJIAN and BRICOLAGE, and NEW HAMPSHIRE's motion to amend the complaint is granted for the reasons set forth below.

### FACTS

The Plaintiffs commenced this action seeking to recover for damage they allege was done to their property during the excavation of a property adjacent to theirs. Plaintiffs are various neighboring property owners who allege that the excavation and construction of a new residential building, at 406-414 15<sup>th</sup> Street, Brooklyn, ("the

project”), caused extensive damage to their properties. Plaintiffs contend that a lack of, and improper, shoring and bracing of the soil, as well as the excavation itself led to ground shifting, subsidence and vibrating which have caused their properties to shift, and their walls and structures to crack. They allege causes of action pursuant to Administrative Code section 27-1031(b) and negligence, in nuisance, trespass and conversion.

### The parties

Plaintiffs ARTHUR STRIMLING, LISA SEGAL, TIMOTHY PIETRZAK, CATHERINE SHANNON, BORIS GILZON, MARTIN ZOLTOWSKI, 1504 REALTY LLC and MEMORIAL BAPTIST CHURCH OF BROOKLYN, (“the STRIMLING Plaintiffs”), are seven residential homeowners and a church whose properties adjoin the excavation.

These homeowners’ homes are located on 16<sup>th</sup> Street and are attached rowhouses. Each property has a backyard that extends to a rear fence which abuts 406-414 15<sup>th</sup> Street. The church is located on the corner of 16<sup>th</sup> Street and 8<sup>th</sup> Avenue and its rear lot line abuts the side lot line of 406-414 15<sup>th</sup> Street, which also adjoins 406-414 15<sup>th</sup> Street.

Plaintiff 1504 REALTY LLC owns a multi-story residential building located at 1504 8<sup>th</sup> Avenue, Brooklyn, which adjoins 406-414 15<sup>th</sup> Street.

Plaintiff GEORGITSI REALTY LLC, (“GEORGITSI”), is the owner of a four-story residential apartment building located at 1502 8<sup>th</sup> Avenue, also known as 1412 15<sup>th</sup> Street, which adjoins 406-414 15<sup>th</sup> Street.

Plaintiff NEW HAMPSHIRE INSURANCE COMPANY, (“NEW HAMPSHIRE”), is the subrogee of 1504 REALTY LLC, which owned the property located at 1504 8<sup>th</sup> Avenue. Plaintiff NEW HAMPSHIRE paid 1504 REALTY LLC for damages to its building, pursuant to an insurance policy it issued.

The STRIMLING Plaintiffs, Plaintiff GEORGITSI and Plaintiff 1504 REALTY LLC each commenced actions to recover for damages which were consolidated under this index number by Order, dated April 3, 2008.

Plaintiff NEW HAMPSHIRE commenced an action in New York County under Index # 101772/2009 to recover monies it paid to its insured for damage it claims was caused by the excavation. This action was consolidated under this index number by Order dated January 27, 2010.

Defendant ARMORY PLAZA INC owned the property located at 406-414 15<sup>th</sup> Street, Brooklyn, from October 17, 2005 until June 27, 2006, at which time Defendant ARMORY PLAZA INC sold the property to Defendant ARMORY HEIGHTS LLC.

Defendant JACK LOCICERO and Defendant LORENZO LOCICERO are the principals of both ARMORY PLAZA INC and ARMORY HEIGHTS LLC, (collectively known as “the ARMORY Defendants” or “ARMORY”).

Defendant XINGJIAN CONSTRUCTION INC, (“hereinafter XINGJIAN”), is alleged to have been a general contractor on the project. XINGJIAN’s position is that it was not the general contractor for the project and that it did not perform any work on the project other than installing a construction fence. It denies any other involvement in the project, including the excavation.

Defendant IMMOBILARIA BUILDERS CORP, (hereinafter “IMMOBILARIA”), is alleged to have been a general contractor on the project. IMMOBILARIA’s position is that it was not the general contractor for the project and that it’s work was limited to work on the building after the excavation and foundation were completed.

Defendant WONGOOD CONSTRUCTION INC, (hereinafter “WONGOOD”), is alleged to have been a general contractor on the project. It has not appeared in this action and is in default.

Defendant DIAMOND POINT EXCAVATION CORP/JAFKO CONSTRUCTION INC, (“hereinafter DP/JAFKO”), is alleged to have been the excavator on the project. It admits it installed 10-13 caissons as part of the excavation, but it denies having done the excavation work that caused the damage to the Plaintiffs’ properties. JAFKO CONSTRUCTION INC is the successor entity of DIAMOND POINT EXCAVATION CORP, (“DP”), (collectively “DP/JAFKO”).

Defendant BRICOLAGE DESIGNS, (“BRICOLAGE”), were the architects on the project, and Defendant HENRY RADUSKY and Defendant DOUGLAS PULASKI worked for BRICOLAGE as architects, (hereinafter “the BRICOLAGE Defendants”).

Defendant SANCHEZ ASSOCIATES, PC, ("SANCHEZ ASSOCIATES"), were engineers on the project, and Defendants LOUIS SANCHEZ and ABRAHAM HERZBERG were engineers who worked for SANCHEZ ASSOCIATES, (collectively "the SANCHEZ Defendants"). Both LOUIS SANCHEZ and ABRAHAM HERZBERG are deceased.

The project involved the construction of a new multi-story building with an underground parking garage. To accommodate the garage, the site was excavated 60 feet deep and up to the Plaintiffs' property lines. Plaintiffs allege that the Defendants failed to properly shore and brace the surrounding properties prior to and during the excavation. Plaintiffs allege that as the result of the failure to shore, as well as the drilling holes for piles, the adjacent properties sunk and shifted toward the excavation, causing loss of soil and vegetation, causing destabilization of their properties, and causing cracks and other structural and non-structural damage to the Plaintiffs' buildings.

On September 23, 2004, LOUIS SANCHEZ submitted structural drawings in conjunction with a Plan Work Approval Application to the Department of Buildings, ("DOB") for a permit to construct a new building, which he signed as a licensed professional engineer.

On August 8, 2005, XINGJIAN submitted three applications to the DOB; one for a new building permit, as well as one for a sidewalk shed and one for construction

equipment. The applications were signed by Chao Xia Li as President of XINGJIAN and indicated that XINGJIAN was the general contractor.

On March 1, 2006, ARMORY entered into an agreement entitled "project allowances" with XINGJIAN which provided that XINGJIAN would, among other duties, coordinate subcontractors. The contract itemized work for a total base price of \$3,797,000.00, which included an itemized list of work. The line items for demolition, excavation or foundation work were valued at zero.

On May 1, 2006, the ARMORY Defendants entered into a construction contract with XINGJIAN. Annexed to the contract as Exhibit A was a list of items which made up the scope of the work. The line items for demolition, excavation or foundation work were valued at zero, and the contract specifically excluded foundation work.

On March 14, 2006, the ARMORY Defendants entered into a contract with DIAMOND POINT for general excavation, which superseded a previous contract of December 31, 2004.

On June 27, 2006, ARMORY PLAZA sold the property to ARMORY HEIGHTS LLC.

On March 21, 2007, RADUSKY forwarded to ARMORY's new engineers an e-mail dated March 16, 2007 which the DOB had sent to BRICOLAGE. The e-mail contained a list of outstanding items to be addressed at the project, including a revision to the shoring plan showing the use of pipe section horizontal braces detailed sequence of operation for the piles which were just completed, a request for a detailed sequence of general excavation and shoring, a request for a sign off on all piles and grade beams

when completed, and a request for the latest monitoring report of movement at 1504 8<sup>th</sup> Avenue.

On September 12, 2008, XINGJIAN submitted an alteration work permit application to the DOB.

Four statements of Technical Responsibility ("TR-1") were filed with the DOB in connection with the project; two by SANCHEZ ASSOCIATES and two by BRICOLAGE.

On October 5, 2003, RADUSKY of BRICOLAGE signed a TR-1 form undertaking responsibility for the subgrade inspections of the property.

On September 23, 2004, SANCHEZ of SANCHEZ ASSOCIATES signed a TR-1 form undertaking responsibility for inspecting the underpinning, to ensure it was adequate to protect the adjoining properties during the excavation. The TR-1 also required SANCHEZ to perform inspections of the subgrade of the property.

On July 24, 2005, PULASKI of BRICOLAGE signed a TR-1 form undertaking responsibility for the inspection of the subgrade of the property.

On August 14, 2006, SANCHEZ of SANCHEZ ASSOCIATES signed a TR-1 for the shoring, bracing and underpinning of the project. This TR-1 specifically provides that the details of underpinnings, cofferdams, caissons, bracing, or other construction required for the support of adjacent properties or buildings shall be shown on the plans or prepared in the form of shop or detail drawings, and shall be approved by the architect or engineer who prepared the plans. The TR-1 also required SANCHEZ to perform inspections of the subgrade of the property.

Several Notices of Violations and stop work orders were issued by the DOB during the excavation of the site.

On March 24, 2006, a stop work order was issued to ARMORY PLAZA for failure to safeguard public [sic] and private property affected by construction operations, which exposed half of the tree roots in the adjacent property located at 395 16<sup>th</sup> Street, which created a hazardous condition in case of the tree pulling away from the soil and falling.

On April 26, 2006, a Notice of Violation was issued to ARMORY PLAZA for failure to safeguard the adjacent property located at 389 16<sup>th</sup> Street, and it noted that the masonry garden wall at the rear of 389 16<sup>th</sup> Street had sustained damage.

On July 23, 2006, a stop work order and Notice of Violation was issued to ARMORY PLAZA and WONGOOD due to unspecified conditions at the rear of the adjacent building located at 1504 8<sup>th</sup> Avenue.

On August 9, 2006, a stop work order and Notice of Violation and Hearing was issued to ARMORY PLAZA for failure to safeguard the adjacent property located at 399 16<sup>th</sup> Street. The DOB inspector noted “during drive piling phase of excavation around the property line of 406 15<sup>th</sup> Street, the rear yard portion of property at 399 16<sup>th</sup> St approx.: 4 ft wide by 6 ft deep has collapsed and sunk. Rear fence sagging, leaning toward construction site creating a safety hazard for occupants at 399 16<sup>th</sup> St.”

On April 20, 2007, a stop work order was issued to ARMORY HEIGHTS, as owner, and IMMOBILARIA, as contractor, “due to soil loss and settlement at the

adjoining lot 1504 8<sup>th</sup> Avenue which resulted in foundation settlement cracking in the south brick exterior wall”.

On April 20, 2007, separate Notices of Violation were issued to ABRAHAM HERTZBERG and LOUIS SANCHEZ which read that

“structural foundation plans are inadequate in that plans are not complete and of sufficient clarity to indicate the nature and extent of proposed sheet, shoring, bracing and tangent pile wall for +/-30 ft deep excavation. The size, height and location of adj. exist. structures on exp 2 (1502 & 1504 8<sup>th</sup> Ave) are not provided and or shown inaccurately. The drawings do not show the different conditions along the wall adj. bldg. 1504 8<sup>th</sup> Ave. Ref to appln #301987161. Note: the tangent pile wall excavation yielded causing the partial collapse of rear wall of 1504 8<sup>th</sup> Ave (and 100% removal after) and foundation settlement of 1502 8<sup>th</sup> Ave, 1506 8<sup>th</sup> Ave. Revise NB foundation drawings to upgrade structural design for tangent pile wall design and its bracing.”

On May 22, 2007, a stop work order and Notice of Violation was issued to ARMORY HEIGHTS and IMMOBILARIA which read “due to soil loss bldg. at 1504 8<sup>th</sup> Ave/foundation continues to move. Major settlement crack (new) have appeared with bracing in place. Adjacent to 406 15<sup>th</sup> Street”.

## ARGUMENTS

### GEORGITSI's motion against ARMORY, IMMOBILARIA, XINGJIAN

Plaintiff GEORGITSI moved for summary judgment against the ARMORY Defendants, IMMOBILARIA and XINGJIAN, arguing each Defendant is strictly liable to the Plaintiffs pursuant to NYC Administrative Code section 27-1031(b)(1), and also that each is liable to Plaintiffs based on claims for negligence, and gross negligence. In its

reply in support of its motion, it sought summary judgment on the same claims against DP/JAFCO.

The ARMORY Defendants oppose the motion arguing that Plaintiff GEORGITSI is not entitled to a finding of strict liability as GEORGITSI has failed to allege that he granted a license to the ARMORY Defendants to permit them access to Plaintiff's property. The ARMORY Defendants also they argue that GEORGITSI's proofs that ARMORY caused excavation to be made are insufficient to shift the burden to the ARMORY Defendants.

IMMOBILARIA opposed the motion arguing that Plaintiff GEORGITSI failed to submit sufficient evidence in support of its claims that IMMOBILARIA caused excavation, that GEORGITSI has failed to shift the burden to IMMOBILARIA, and that there is a question of fact as to IMMOBILARIA's involvement with the excavation portion of the project.

XINGJIAN opposes Plaintiff GEORGITSI's motion and argues that it was not a general contractor on the project, that it did not cause excavation at the site, and that its involvement on the project was limited to the erection of a construction fence.

DP/JAFCO also opposes Plaintiff GEORGITSI's motion arguing that Plaintiff GEORGITSI seeks summary judgment against DP/JAFCO for the first time in their reply. They further argue that Plaintiff GEORGITSI failed to submit any admissible evidence which demonstrates that DP/JAFCO performed any work which proximately caused the damage at its property.

STRIMLING Plaintiffs' motion against ARMORY, XINGJIAN, SANCHEZ, IMMOBILARIA and DP/JAFCO

The STRIMLING Plaintiffs moved for summary judgment against the ARMORY Defendants, XINGJIAN, the SANCHEZ Defendants, IMMOBILARIA and DP/JAFCO, arguing that each is strictly liable to the Plaintiffs pursuant to NYC Administrative Code section 27-1031(b)(1), that there is uncontroverted evidence that each party caused the excavation which caused the damage to the STRIMLING Plaintiffs' property, or, alternatively, that they are entitled to summary judgment on their causes of action sounding in negligence.

Plaintiff NEW HAMPSHIRE submits an affirmation in support of the STRIMLING Plaintiffs' motion against the ARMORY Defendants, DP/JAFCO and XINGJIAN, and also in support of the STRIMLING Plaintiffs' separate motion seeking summary judgment against the SANCHEZ Defendants and IMMOBILARIA.

ARMORY opposes the STRIMLING Plaintiffs' motion, arguing that the Plaintiffs are not entitled to a finding of strict liability against them as Plaintiffs have not shown that they provided the ARMORY Defendants a license to enter their property. They further argue that the conflicting engineer affidavits submitted by Plaintiffs and the ARMORY Defendants create questions of fact as to whether the shoring and bracing of the excavation was adequate, and whether the ARMORY Defendants' actions damaged Plaintiffs' property, which precludes summary judgment.

DP/JAFCO opposes the STRIMLING Plaintiffs' motion arguing that the STRIMLING Plaintiffs have failed to submit evidence that DP/JAFCO performed any work which was the proximate cause of the alleged damage.

XINGJIAN opposes the STRIMLING Plaintiffs' motion arguing that it was not a general contractor on the project, that it did not cause excavation at the site and that its involvement on the project was limited to the erection of a construction fence. XINGJIAN argues that Plaintiffs have failed to submit any evidence to show that XINGJIAN performed any excavation work on the project.

SANCHEZ ASSOCIATES opposes the STRIMLING motion arguing that they are not subject to the theory of strict liability pursuant to 27-1031(b)(2) because as project engineers, they are neither the party who decided to excavate, nor are they the contractor which performed the excavation, and therefore they cannot be held liable.

#### XINGJIAN's motion for summary judgment

XINGJIAN moved for summary judgment seeking dismissal of against the Plaintiffs complaint against it, and to dismiss all cross claims against it.

XINGJIAN argues that it was not the general contractor on the project and had nothing to do with the excavation. It also argues that its work on the property was limited to the erection of a construction fence, and therefore it is entitled to summary judgment.

The STRIMLING Plaintiffs oppose the motion, arguing that there was a contract between ARMORY and XINGJIAN which listed XINGJIAN as general contractor.

The ARMORY Defendants oppose the XINGJIAN motion, arguing that ARMORY had a contract with XINGJIAN to act as the general contractor, and that XINGJIAN was the general contractor during some period of time after excavation began. ARMORY also argues that the testimony of Chao Fei Li of XINGJIAN that XINGJIAN was not the general contractor is inconsistent, and therefore cannot provide a basis upon which to grant XINGJIAN's motion.

GEORGITSI's motion against BRICOLAGE

Plaintiff GEORGITSI moves for summary judgment against BRICOLAGE, RADUSKY and PULASKI, however, the supporting affirmation does not address the BRICOLAGE Defendants' role in the excavation.

STRIMLING Plaintiffs' cross motion against BRICOLAGE

The STRIMLING Plaintiffs cross move for summary judgment against the BRICOLAGE Defendants. The STRIMLING Plaintiffs argue that the BRICOLAGE Defendants are liable because they were hired by ARMORY to oversee the project, because they executed and filed two TR-1 forms with the DOB, which obligated them to

ensure compliance with the Administrative Code, and because they knew that the excavation was being done improperly but failed to take action to stop it.

The BRICOLAGE Defendants argue that they are not subject to strict liability for the excavation and that their filing of the TR-1 forms does not render them liable. They argue that they neither prepared any structural or excavation plans, nor did they assume responsibility for structural or excavation work on the site.

#### BRICOLAGE's cross motion

The BRICOLAGE Defendants cross moved for summary judgment dismissing the Plaintiffs' actions against them. The BRICOLAGE Defendants argue that they neither prepared any structural or excavation plans, nor did they assume responsibility for structural or excavation work on the site.

The STRIMLING Plaintiffs oppose the BRICOLAGE Defendants' cross motion arguing that as the result of their work on the excavation, BRICOLAGE caused damage to Plaintiffs' property as well as interfered with their use and enjoyment of their land.

Plaintiff GEORGITSI opposes the cross motion arguing that BRICOLAGE has not met its burden for summary judgment.

Plaintiff NEW HAMPSHIRE's motion against ARMORY, DP/JAFCO, SANCHEZ, IMMOBILARIA

Plaintiff NEW HAMPSHIRE, as subrogee of 1504 REALTY LLC, cross moves for summary judgment against the ARMORY Defendants, DP/JAFCO, XINGJIAN, the SANCHEZ Defendants and IMMOBILARIA, finding them strictly liable for damage caused by the excavation.

The ARMORY Defendants oppose the motion saying it is premature as NEW HAMPSHIRE's rights as subrogee have not yet been determined, and they repeat the defenses they raised in opposition to the other Plaintiffs' motions, as well as in opposition to the XINGJIAN motion.

IMMOBILARIA opposes the motion arguing that as with the other Plaintiffs' motions, NEW HAMPSHIRE's motion should be denied as IMMOBILARIA was not involved in the excavation and was not on site until after the foundation was laid.

The SANCHEZ Defendants oppose NEW HAMPSHIRE's motion, arguing NEW HAMPSHIRE neither states against whom it is moving or the grounds upon which it is moving. The SANCHEZ Defendants further rely on their substantive opposition to the STRIMLING Plaintiffs' motion for summary judgment.

XINGJIAN opposes the motion, arguing that XINGJIAN was not involved in the excavation.

DP/JAFCO argues that NEW HAMPSHIRE has not asserted any claims against it and has failed to name it as a defendant, and therefore NEW HAMPSHIRE is not entitled to relief against DP/JAFCO.

NEW HAMPSHIRE's motion to amend the complaint

NEW HAMPSHIRE moved to amend its complaint to add Defendant DP/JAFCO as an additional party. NEW HAMPSHIRE argues that DP/JAFCO cannot be found to be prejudiced or surprised by NEW HAMPSHIRE's mistaken belief it had already served an amended complaint naming DP/JAFCO as a defendant.

DP/JAFCO opposes the motion, arguing that the amended complaint does not make any specific allegations against DP/JAFCO. DP/JAFCO also argues procedural deficiencies since NEW HAMPSHIRE did not annex the pleadings to its motion. It also notes that NEW HAMPSHIRE would need to remake its "me too" motion for summary judgment (with the STRIMLING Plaintiffs' motion) after DP /JAFCO joined issue. Finally, DP /JAFCO argues that even were the Court to permit NEW HAMPSHIRE's "me too" motion, the Plaintiffs have failed to show that DP /JAFCO is strictly liable for the Plaintiffs' damages.

**ANALYSIS**

Former Administrative Code of the City of New York § 27-1031 (b) (1), which was in effect at the time of the excavation, required that "[w]hen an excavation is carried to a depth more than ten feet below the legally established curb level, the person who causes such excavation to be made shall, at all times and at his or her own expense, preserve and protect from injury any adjoining structures." A violation of Administrative Code §

27-1031 (b) (1) imposes absolute liability upon the “person who causes” an excavation to be made. *Am. Sec. Ins. Co. v Church of God of St. Albans*, 131 AD3d 903, 905 [2d Dept 2015].

Administrative Code § 27-1031 has been held to impose absolute liability upon both the owner of the property, and the contractor who performs the excavation, for failing to take adequate precautions to protect adjoining structures where the excavation was the proximate cause of the damage. *Coronet Properties Co. v L/M Second Ave, Inc*, 166 AD2d 242, 560 NYS2d 444 [1st Dept 1990].

Administrative Code § 27-1031 (b) (1) imposes absolute liability on a person who causes excavation below ten feet. *Yenem Corp. v. 281 Broadway Holdings*, 18 N.Y.3d 481, 490-91, 941 N.Y.S.2d 20, 964 N.E.2d 391; 941 N.Y.S.2d 20 [2012]. The words “the person or persons causing such excavation to be made” apply to the owner of the property who employs a third person to make such an excavation.

Longstanding case law identifies persons subject to the Code to include: owners of the building under construction (*Rosenstock v. Laue*, 140 A.D. 467, 470-71, 125 N.Y.S. 361; 140 A.D. 467, 125 N.Y.S. 361 [1st Dept 1910]), general contractors (*Fagan v. Pathe Industries*, 274 A.D. 703, 86 N.Y.S.2d 859 [1st Dep't 1949]) and excavation subcontractors (*Palermo v. Bridge Duffield Corp.*, 154 N.Y.S.2d 288, 290-91 [Sup Ct 1956] *affd*, 3 A.D.2d 863, 161 N.Y.S.2d 755 [2d Dept 1957]), see also *Marbilla, LLC v. Lexington LLC*, 2013 WL 1857680 (NY Sup).

It has also been held that a general contractor is liable pursuant to Administrative Code §3309.4 which replaced §27-1031(b)(1) in 2008, and is substantially the same. 87 *Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540, 998 NYS2d 15 [1st Dept 2014].

### ARMORY

Plaintiffs move for summary judgment against the ARMORY Defendants as owners of the property and person who caused the excavation to be made.

The ARMORY Defendants caused the excavation as ARMORY PLAZA INC and ARMORY HEIGHTS LLC owned the property during the period during which the excavation took place, and the ARMORY Defendants contracted with various parties to excavate in preparation for construction of a building on the property.

The ARMORY Defendants argue that they cannot be found liable as Plaintiffs fail to specify the dates upon which Administrative Code § 27-1031 (b) (1) was violated, and therefore it cannot be known if the property was owned by ARMORY PLAZA, INC or ARMORY HEIGHTS, LLC when the excavation occurred. The property was transferred by deed on June 27, 2006 from ARMORY PLAZA to ARMORY HEIGHTS. Since the excavation began prior to that transfer, and continued after the transfer, both ARMORY entities owned the property at times when the property was being excavated and therefore, both are strictly liable. Furthermore, Jack LoCICERO admitted that ARMORY PLAZA, INC and ARMORY HEIGHTS, LLC were related entities that they controlled, and that the property was transferred for no consideration.

The ARMORY Defendants' further argument that the Plaintiffs are not entitled to summary judgment pursuant to Administrative Code § 27-1031 (b) (1) because Plaintiffs have failed to show that they granted access to their properties to ARMORY so that ARMORY could perform the work necessary to protect the Plaintiffs' property is without merit.

Plaintiffs stated that ARMORY did not seek a license to protect their properties before excavating. Plaintiffs' claims that no license was sought shifts the burden to the ARMORY Defendants to demonstrate that they attempted to obtain, but were denied, a license to enter the Plaintiffs' property for the purposes of inspecting and protecting the adjacent land owner's land.

Unlike the situation in *Chan v Begum*, 153 AD3d 1223, 1225(2<sup>nd</sup> Dept 2017), where the court found a question of fact as to whether there was a license, Lorenzo LoCICERO admitted in his deposition that he did not ask for permission to enter the properties of any of the adjacent landowners prior to the excavation. He further stated that he did not recall that he or anyone else on behalf of ARMORY attempted to enter the Plaintiffs' property prior to the excavation. JACK LoCICERO testified that he never contacted the Plaintiffs prior to the time the job began.

LORENZO LoCICERO states in his affidavit only that he filed with the DOB the 5 day notices served on all of the neighbors. However, a 5 day notice is not a request to perform underpinning; it is merely notice that an owner is going to excavate. LORENZO LoCICERO does not state that ARMORY either requested or was denied a license to underpin from the Plaintiffs.

Since the Plaintiffs have established that the ARMORY Defendants owned the property, that they contracted for the excavation work below ten feet of the curb line, and never sought a license from the Plaintiffs in violation of Administrative Code § 27-1031 (b) (1), they are strictly liable for the damages caused to Plaintiffs' property.

### XINGJIAN

Plaintiffs move for summary judgment against XINGJIAN as a general contractor and XINGJIAN moved for summary judgment dismissing the Plaintiffs' complaint against it.

General contractors are strictly liable for violations of Administrative Code § 27-1031 (b) (1). *Fagan v. Pathe Industries*, 274 A.D. 703, 86 N.Y.S.2d 859 [1st Dep't 1949].

XINGJIAN argues it was not the general contractor and it was not responsible for the excavation as and did nothing more than erect a construction fence.

Chao Fei Li, a supervisor for XINGJIAN, submitted an affidavit in which he states that although ARMORY considered hiring XINGJIAN as a general contractor, XINGJIAN was never actually hired to perform work on the project.

Chao Fei Li stated that XINGJIAN installed a construction fence on the project, and did nothing more. In his EBT, he said that it took about two days to install the fence, and he stated that XINGJIAN was paid only a very small amount of money for the construction fence.

The parties submitted a copy of a construction contract signed on March 20, 2006 (but dated May 1, 2006) between ARMORY PLAZA and XINGJIAN CONSTRUCTION INC for \$3,797,000. Annexed to the contract as Exhibit A was a list of items that made up the scope of work covered by the contract. Next to each item was a dollar amount. The dollar amount listed next to demolition, foundation and excavation was zero. Section 4.3 of the contract specifically excluded the foundation work from the contract.

The parties also submitted an unsigned "project allowance" agreement between ARMORY PLAZA, Owner, and XINGJIAN, Contractor, dated March 1, 2006, which lists the allowances in the contract for the total price of \$3,797,000. The list of allowances matches the Exhibit A annexed to the March 20<sup>th</sup> construction agreement. It includes zero allowances for demolition, foundation and excavation.

However, there is other evidence that supports the Plaintiffs' claim that XINGJIAN was a general contractor on the project.

XINGJIAN appears as the general contractor on three different work permit applications with the New York City Department of Buildings, one of which was for the construction of a new building, which was dated August 5, 2005, and signed by Chao Xia Li, as President.

Further, an alteration work permit application was signed by XINGJIAN supervisor, Chao Fei Li, on behalf of XINGJIAN, as general contractor, dated September 12, 2008, which was over three years after the new building permit application was filed on August 5, 2005 by XINGJIAN, and after the excavation began.

Additionally, both LORENZO and JACK LoCICERO testified that ARMORY hired XINGJIAN as a general contractor on the project. LORENZO LoCICERO testified that XINGJIAN coordinated construction activities, hired sub-contractors, and oversaw the work.

Further, in his EBT, Chao Fe Li states that XINGJIAN was still on the project site at the time the surrounding buildings were showing cracks. He said he was told by Chao Xia Li, the owner of XINGJIAN, that there was a lawsuit, and therefore XINGJIAN would not be doing any more work, and so Chao Fe Li left the job. Chao Fe Li also stated in his EBT that pursuant to the March 20, 2006 contract, XINGJIAN removed all construction debris and left the project in a broom clean condition. These assertions are inconsistent with the statement made in his affidavit that XINGJIAN did nothing more than install a construction fence.

Chao Fe Li's testimony that he left the job after cracks started appearing in adjacent buildings, together with the fact that XINGJIAN filed applications for a new building permit as general contractor, and the fact that XINGJIAN filed an application for an alteration permit in 2008, all raise questions of fact as to XINGJIAN's role on the project and whether it was the general contractor during the period the excavation was performed. On the other hand, the fact that demolition and excavation were specifically excluded from the terms of the agreements between ARMORY and XINGJIAN leaves open the question of whether XINGJIAN supervised, or was otherwise responsible for any part of the excavation.

Therefore, Plaintiffs are not entitled to summary judgment as to XINGJIAN's liability as a general contractor, and XINGJIAN is not entitled to summary judgment dismissing the complaint against it.

### IMMOBILARIA

Plaintiffs argue that because IMMOBILARIA was a general contractor on the project, and performed work on the excavation, it is therefore strictly liable pursuant to 27-1031(b) for the damages caused by the excavation.

In support, the Plaintiffs cite the testimony of LORENZO LoCICERO that IMMOBILARIA was a general contractor while the excavation was ongoing, and that IMMOBILARIA pulled the permits for its work. LORENZO LoCICERO further testified that IMMOBILARIA became the general contractor after XINGJIAN left, and that it supervised the work, coordinated construction activities, and hired and worked with subcontractors.

LORENZO LoCICERO stated that ARMORY and IMMOBILARIA had a written contract but he could not recall who signed it either on behalf of ARMORY or on behalf of IMMOBILARIA. However, neither ARMORY nor IMMOBILARIA produced a copy of a contract between them. LORENZO LoCICERO stated that he observed IMMOBILARIA perform bracing work in the excavation.

JACK LoCICERO also testified that IMMOBILARIA workers actually performed the bracing work for the excavation.

Neither LoCICERO could recall the year that IMMOBILARIA began work but JACK LoCICERO stated that IMMOBILARIA was on site until the end of the project.

IMMOBILARIA does not deny that it was a contractor on the project, however it argues that Plaintiffs have not met their burden for summary judgment to demonstrate IMMOBILARIA was a general contractor, or supervised the excavation.

IMMOBILARIA argues that the only evidence that it was a general contractor on the project is provided by ARMORY, and that ARMORY's testimony is vague and unreliable.

IMMOBILARIA also cites the deposition of Carl Crozzoli of DP/JAFCO, who stated that the only general contractors he dealt with on site were the LoCICERO brothers.

While no contract was produced between ARMORY and IMMOBILARIA hiring IMMOBILARIA as the general contractor, there are DOB Notices of Violations for violations of Administrative Code § 27-1031 against IMMOBILARIA related to excavation, and during the time the excavation was taking place.

The DOB issued Notices of Violation and stop work order dated April 20, 2007 to IMMOBILARIA, which read, "excavation in process" failure to protect adjoining structure. IMMOBILARIA was named as contractor.

The DOB also issued a notice of violation and stop work order dated May 22, 2007 to IMMOBIALRIA, which read "major soil loss. Inadequate shoring." IMMOBILARIA was named as contractor.

IMMOBILARIA's arguments that the uncertified copies of DOB records are insufficient as evidence that IMMOBILARIA was a general contractor on the project because they were not certified and because they do not demonstrate that IMMOBILARIA was on site at the time the violations were issued are without merit. Certified copies of these DOB violations were submitted by Plaintiff GEORGITSI.

While the DOB violations relating to the excavation are not conclusive proof that IMMOBILARIA was the general contractor or was working on the excavation, they are evidence that IMMOBILARIA was working on the project in April and May of 2007.

The DOB Notice of Violations that IMMOBIALRIA was on site during the excavation, together with the testimony of JACK and LORENZO LoCICERO that IMMOBILARIA performed bracing work during the excavation, are sufficient to make out a prima facie case that IMMOBILARIA caused excavation within the meaning of 27-1031(b).

IMMOBILARIA submits no affidavit from any officer or employee to contest the testimony of the LoCICEROS that IMMOBILARIA worked on the excavation, or to contest the allegations made in the Notices of Violation. IMMOBILARIA submits no affidavit from any one with knowledge stating that it was not a general contractor or that it did not work on the excavation.

The only evidence IMMOBILARIA submits are certified records of Builder Bank, which financed the project, for the period of time it conducted inspections of the site while the site was being excavated.

The Builders Bank records include a series of seven Draw Reports conducted by BC Group, PE. The Draw Reports were based upon physical inspections of the property prior to and through completion of the excavation. Each of the seven Draw Reports submitted provides a description of the progress of the excavation at the time of each inspection, and made recommendations as to both the work as well as to payments to be authorized for work completed.

The sixth Draw Report, dated June 12, 2007, indicates that the construction and placement of the concrete slab was underway. IMMOBILARIA notes that it does not appear on any of the draw reports until the 7<sup>th</sup> Draw Report, dated September 18, 2007, at which point it notes that the excavation was complete. It also notes that Builders Bank refers to IMMOBILARIA only with respect to work that is unrelated to excavation, including construction of walls and decks.

IMMOBILARIA argues that the fact that Builders Bank first mentions IMMOBILARIA after the completion of the excavation, and the fact that they are only mentioned in relation to work on the building supports its position that it was not involved in the excavation. However, the Draw Reports do not state that they exclusively describe who was participated in or was onsite during the excavation work. More significantly, the DOB violations issued to IMMOBILARIA for failure to protect adjoining structures and inadequate shoring were issued in April and May of 2007, during which time, according to the Builders Bank records, the excavation was ongoing.

IMMOBILARIA has failed to submit any evidence to raise a question of fact to show that IMMOBILARIA was not the general contractor on site at some point during the

period of time the excavation was ongoing, or that it did not perform bracing work in the excavation, and therefore the Plaintiffs are entitled to summary judgment against IMMOBILARIA.

STRIMLING motion against DP/JAFCO

The STRIMLING Plaintiffs move for summary judgment against DP/JAFCO, arguing DP/JAFCO caused excavation.

ARMORY contracted with DP/JAFCO to do the excavation on the project. There are two contracts submitted by the parties between ARMORY and DP/JAFCO. The first CONTRACT is dated December 31, 2004. The December 31, 2004 contract provides that DP will investigate existing utilities, layout the casing locations, install bracing as indicated on the drawing by SANCHEZ and ASSOCIATES, install grout for shoring, excavate to 40 feet, and retain a licensed engineer to prepare the design of the shoring and file the TR-1 and inspect the excavation.

The second contract is dated March 14, 2006 and contains the same items as the prior contract. It lists the total cost of the project at \$2,720,000. This contract states that DP would perform the excavation. The March 14, 2006 contract provides unit prices, which includes a unit price for excavation.

DP/JAFCO submits the affidavit of Carl Anthony Crozzoli, the General Manager of DP/JAFCO. Crozzoli states that DP installed 10-13 caissons on the west side of the

property, and thereafter, DP was advised by the LoCICEROs that DP's services were no longer required.

In his EBT, Crozzoli stated that the LoCICEROs bought him out of the contract for \$60,000, and that Crozzoli did not charge the LoCICEROs for the work DP had done installing the 10-13 caissons. Crozzoli said that he was bought out of the contract by the LoCICEROs about three weeks after the delivery of the equipment to the site, and that DP then leased the machinery to ARMORY, and that ARMORY's employee "Ruben" and JACK LoCICERO operated the machinery.

The STRIMLING Plaintiffs submit the affidavit of structural engineer V Douglas Platt, Jr. (Platt), who bases his affidavit on several examinations and inspections of the properties surrounding the site.

Platt states that the piles were installed improperly and the shoring and bracing of the surrounding properties was inadequate, resulting in substantial soil migration and settlement, which directly caused severe damages to the surrounding properties and buildings. He states that gaps between the driven piles allowed soil from outside the excavation to flow into the excavation, causing sink holes adjacent to the piles, which in turn caused the adjacent properties to settle. In his report, Platt states that the pile driving caused densification of the surrounding soils, which caused soil settlement and the damage to the Plaintiffs' properties. He also stated that the settlement was compounded by driving so many piles adjacent to one another around the entire construction site perimeter.

DP/JAFCO submitted the affidavit of Peter C Taylor, PC, (Taylor), who bases his opinions on review of the preliminary engineering report of the late Henry R. Naughton, PE, who had been employed by Taylor's employer, Affiliated Engineering Laboratories.

Taylor stated that the plans called for the installation of 262 caissons and for the site to be excavated to about 35 feet. He stated that DP/JAFCO augured 12 holes 55 feet deep along 18 feet of the northwest property line, and placed caissons into those holes before ceasing the work. Taylor concludes that the damage being claimed by the Plaintiffs was not caused by the involvement of DP/JAFCO on the property.

Taylor admits that tangent caisson construction does not form a watertight seal, and that gaps between caissons can allow soil migration. Taylor states that the augering of approximately twelve holes and subsequent placement of the caissons would not have produced vibrations of sufficient magnitude to travel through the soil and result in damage to the buildings. Taylor states that DP/JAFCOs work did not create an annular void space between the adjacent undisturbed soil and the outside of the 18 inch diameter caisson that was significant enough to cause the damage alleged by the Plaintiffs.

Taylor also states that the excavation was dug to the south property line of 406 15<sup>th</sup> Street, which is also the north property line of the buildings located at 389-399 16<sup>th</sup> Street, and that the soil subsidence in the rear yards of the 16<sup>th</sup> Street properties was not significant enough to cause the damage claimed to the buildings, which were 35 feet from the north property line.

Taylor states that DP/JAFCO installed the first twelve caissons along the northwest property line, not in the vicinity of the south property line where the missing soil is alleged to have caused the damage, and therefore the damage was caused by the other Defendants.

Finally, Taylor stated that the major structural crack observed at 1504 8<sup>th</sup> Avenue was first observed on July 25, 2006 and that a previous inspection on July 22, 2006 showed only a small non-structural crack which was first reported 9 months after DP/JAFCO was no longer working on site. Taylor does not state how he knows when DP/JAFCO completed their work.

Even though DP/JAFCO admits that it installed a number of caissons, it argues Plaintiffs should not be granted summary judgment against it because there is a question of fact as to whether the damage was caused by its work. However, as articulated in *Vitale v RLD Group, LLC*, issues related to causation do not factor into a strict liability analysis pursuant to §28-3309.4. *Vitale*, at 52 Misc 3d 1213(A) (Sup Ct Queens 2016).

Both Administrative Code § 27-1031(b)(1) and §28-3309.4 impose absolute liability upon the “person who causes” an excavation to be made. In this case, it is not disputed that DP/JAFCO carried out at least a portion of the physical excavation work by installing caissons that were designed to retain the soil abutting the excavation. *Am. Sec. Ins. Co. v Church of God of St. Albans*, 131 AD3d 903, 905 [2d Dept 2015].

While their work constituted only a portion of the excavation, installation of caissons is part of the excavation, and therefore DP/JAFCO caused excavation within

the meaning of the Administrative Code. The liability under Administrative Code § 27-1031(b)(1) is not dependent on the degree of care exercised by the persons making the excavation as the liability is absolute and unqualified. *Yenem Corp. v 281 Broadway Holdings*, 18 NY3d 481, 941 NYS2d 20 (2012).

Therefore, DP/JAFCO is jointly and severally liable for the damage caused by the excavation. The extent to which they are entitled to indemnification or contribution from other defendants also involved in causing the excavation to be made is a matter to be resolved through their cross claims.

#### BRICOLAGE Defendants

Plaintiffs move for summary judgment against the BRICOLAGE Defendants pursuant to section 27-1031(b), and the BRICOLAGE Defendants move for summary judgment dismissing the Plaintiffs' claims against them.

The BRICOLAGE Defendants argue they are not liable pursuant to Administrative Code section 27-1031(b)(2) because they were not involved in the excavation.

It is not disputed that the BRICOLAGE Defendants were hired by the ARMORY Defendants to perform architectural services for the project. BRICOLAGE, RADUSKY and PULASKI were the only architects hired for the project.

LORENZO LoCICERO testified that the BRICOLAGE Defendants were hired to draw up the plans for the building to ensure the work was being done properly, and to deal with the DOB to resolve any issues.

RADUSKY stated he could not remember if there was a contract, but he said there might have been a “fist bump” memorializing the agreement. He stated BRICOLAGE “always disclaimed excavation work”. He also stated he didn’t know if anything was in writing on this job. No contract between the ARMORY and BRICOLAGE was submitted.

PULASKI stated that BRICOLAGE’s duties were limited to designing the superstructure plans, the layout of parking spaces and obtaining certain permits and a certificate of occupancy. PULASKI denied that BRICOLAGE had any involvement with the excavation or any underpinning work, and he states that BRICOLAGE had no control over the means or methods of construction.

PULASKI also stated in his affidavit that BRICOALGE initially prepared drawings for a building which were never used because the LoCICEROs decided to include two levels of below ground parking. PULASKI further stated that the LoCICEROs hired SANCHEZ to re-design the foundation and plans for the project, including the underground parking. PULASKI states BRICOLAGE did not work on any plans for the deeper foundation. The drawings that BRICOALGE prepared for the initial building were not submitted.

BRICOLAGE relies on *87 Chambers, LLC v 77 Reade LLC*, 122 AD3d 540, 998 NYS2d 15 (1<sup>st</sup> Dept 2014), a case in which the Appellate Division First Department

reversed the lower court, finding that the architect did not “cause excavation” merely by designing the proposed building, which included a cellar and sub cellar, and by its general knowledge that some excavation was to take place on the project. The terms of the contract between the owner and the architect in *87 Chambers LLC* did not include responsibility for the excavation phase of the project and it provided that the architect did not control the means and methods of construction.

The BRICOLAGE Defendants also cite *American Security Ins Co v Church of God of St Albans*, 131 AD3d 903, 19 NYS3d 247 (2<sup>nd</sup> Dept 2015), in which the Court found that the architect was not a person who made the decision to excavate, nor was he a contractor who carried out the physical excavation work. Similar to the facts in *87 Chambers LLC*, the contract between the architect and owner did not include responsibility for the excavation and provided that the architect did not have control of the means and methods of construction.

Plaintiffs argue that in addition to filing plans, BRICOLAGE signed and filed two TR-1 forms assuming responsibility for conducting a subgrade inspection to ensure compliance with Administrative Code section 27-723.

Section 27-723 requires that the inspection be made after the excavation and immediately prior to the construction of the footings for the building. The excavation was still ongoing in May of 2007 and was not completed until sometime in June 2007.

However, LOUIS SANCHEZ had taken over responsibility for the subgrade inspection when he filed the TR-1 dated August 14, 2006. By the time the excavation

was complete some ten months later, LOUIS SANCHEZ, not the BRICOLAGE Defendants, was responsible for the subgrade inspection.

In this case, unlike in *87 Chambers, LLC v 77 Reade LLC*, 122 AD3d 540, 998 NYS2d 15 (1<sup>st</sup> Dept 2014) and *American Sec Ins Co v Church of St Albans*, 131 AD3d 903, 19 NYS3d 247 (2<sup>nd</sup> Dept 2015), BRICOLAGE's involvement went beyond filing plans for a new building. Additionally, BRICOLAGE met with DOB officials to lift stop work orders.

RADUSKY stated that they were the architects of record and “embroiled in this whole mess”, in reference to the project. He admitted that BRICOLAGE served as the “point man” with the Department of Buildings to resolve stop work orders, and that BRICOLAGE continued to push the project along despite his opinion that the contractors performing the excavation were not qualified to do the work. RADUSKY stated in his EBT, “in order for me to get out of this morass, I would have to continue to file to get out of this mess, unless I would withdraw altogether, but the Building Department wouldn't have allowed me to withdraw altogether unless [the owners] hired a new architect”.

RADUSKY's testimony as well as an e-mail from RADUSKY to Demerara Engineering, the engineer hired to replace SANCHEZ ASSOCIATES, indicate that BRICOLAGE also was involved in revising plans in response to the DOB stop work orders related to the excavation. The March 16, 2007 email from Timothy Lynch, Principal Engineer at DOB, that RADUSKY forwarded to Demerara, provided a list of outstanding items, including a revision to the shoring plan showing the use of pipe section horizontal braces detailed sequence of operation for the piles which were just

completed, a request for a detailed sequence of general excavation and shoring, a request for a sign off on all piles and grade beams when completed, and a request for the latest monitoring report of movement at 1504 8<sup>th</sup> Avenue.

Where an engineer takes responsibility for methods and safety precautions of an excavation in response to stop work order, they are parties that cause an excavation to be made. *Vitale v RLD Group, Ltd*, 52 Misc3d 1213(A) (Sup Ct Queens Cty 2016).

In *Vitale*, the Court found that the engineers were contractually bound to supervise the project, and that they revised the excavation plans in response to a stop work order. The Court declined to dismiss claims against them pursuant to Administrative Code section 28-3309.4 (the successor regulation to section 27-1031(b)), stating they assumed responsibility for the excavation as they had control over and were responsible for the methodology employed and the safety precautions taken during the excavation process.

Further, although the Court in *87 Chambers LLC v 77 Reade LLC*, 122 AD3d 540, 998 NYS2d 15 (1<sup>st</sup> Dept 2014), let the architects out of the case, the Court held in *Weidlinger Assoc Inc*, the engineers in the case. The Court reasoned that there was a question of fact as to whether the engineer “substantially contributed to the design and methodology employed during the excavation process and therefore was a “person” who “cause[d] and excavation” within the meaning of section 3309.4 (formerly 27-1031(b)(1)).

Here, although there was no written contract submitted setting forth the terms of its work, BRICOLAGE acknowledges it acted as the “point person” for ARMORY with

the Department of Buildings to resolve stop work orders that had been issued because of the damage to the adjoining properties caused by the excavation.

RADUSKY acknowledged that they knew that there were issues with the manner in which the excavation was proceeding and believed that the contractor performing the work was not competent to do so.

Although it is not clear from the papers submitted what their role was in getting the stop work orders lifted, BRICOLAGE admitted it intervened with the DOB to lift the stop work orders which were issued because the excavation was causing damage to the adjoining properties.

Therefore, there remain questions of fact as to what role BRICOLAGE had in getting the stop work orders lifted. These questions are sufficient to raise a question of fact as to whether BRICOLAGE was a party who caused the excavation to be made within the meaning of section 27-1031(b). Therefore, neither the Plaintiffs nor BRICOLAGE are entitled to summary judgment.

STRIMLING Plaintiffs' motion against SANCHEZ

The STRIMLING Plaintiffs seek summary judgment against SANCHEZ ASSOCIATES, based upon their involvement with the excavation.

It is not disputed that SANCHEZ ASSOCIATES was hired as an engineer on the project.

Both LoCICEROs testified that HERTZBERG and LOUIS SANCHEZ were the engineers on the project and were hired to perform all of the engineering work, obtain the TR-1s and permits, and to monitor the work as it progressed. LORENZO LoCICERO testified that HERTZBERG went to the job site regularly during the excavation and attended the construction meetings.

JACK LoCICERO further stated that SANCHEZ ASSOCIATES attended meetings with the Department of Buildings to resolve stop work orders issued during the excavation.

The Plaintiffs also submit documents in support of their claim that the SANCHEZ Defendants caused excavation on the project.

The Plaintiffs submit TR-1 forms signed by LOUIS SANCHEZ, dated September 23, 2004 and June 14, 2006.

The TR-1 form dated September 23, 2004 was signed by LOUIS SANCHEZ, with his stamp affixed. It states that SANCHEZ “will perform the required inspections and tests” related to underpinning, section 27-724 of the Administrative Code of the City of New York”. He also indicated responsibility for the final inspection.

The TR-1 form dated June 14, 2006 was also signed by LOUIS SANCHEZ, with his stamp affixed. It stated that LOUIS SANCHEZ “will perform the required inspections and tests” of the pilings pursuant to section 27-721 of the Administrative Code of the City of New York, of the subgrade pursuant to section 27-723, of the underpinning of the sides of the excavation pursuant to section 27-724, of the shoring

and bracing pursuant to section 27-1010, and of the stability of adjoining structures, 1RCNY 16-01.

Section 27-724 of the Administrative Code governs inspection of foundations, specifically construction required for, or affecting, the support of adjacent properties or building. The section reads,

“Except in cases where a proposed excavation will extend less than ten feet below the legally established grade, all underpinning operations and the construction and excavation of temporary or permanent cofferdams, caissons, bracing or other constructions required for the support of adjacent properties or buildings shall be subject to controlled inspection. The details of underpinning, cofferdams, caissons, bracing or other constructions required for the support of adjacent properties or buildings shall be *shown on the plans* or prepared in the form of shop or detail drawings and *shall be approved by the architect or engineer who prepared the plans*. (Emphasis added.)”

On April 20, 2007, the DOB issued a notice of violation and hearing, naming LOUIS SANCHEZ, finding that the structural foundation plans were inadequate. Also on April 20, 2007, the Department of Buildings issued a notice of violation and hearing, naming ABRAHAM HERTZBERG, finding that the structural foundation plans were inadequate. The notices of violation and hearing stated,

“structural foundation plans are inadequate in that plans are not complete and of sufficient clarity to indicate the nature and extent of proposed sheet, shoring, bracing and tangent pile wall for +/- 30' deep excavation. The size, height and location of adj. exist. Structures on exp 2 (1502&1504 8<sup>th</sup> ave) are not provided and or shown inaccurately. The drawings do not show the different conditions along wall adj. bldg 1504 8<sup>th</sup> avenue. Ref to appln#301987161. Note: the tangent pile wall excavation yielded causing the partial collapse of rear wall of 1504 8<sup>th</sup> ave (and 100% removal after) and foundation settlement of 1502 8<sup>th</sup> ave, 1506 8<sup>th</sup> ave. Revise NB foundation drawings to upgrade structural design for tangent pile wall design and its bracing. File amended plans as a PAA w/DOB for approval and obtain all permits”.

Neither HERTZBERG nor LOUIS SANCHEZ, who are both now deceased, provided any testimony to contest the evidence that they were the engineers on the project and responsible for supervising the excavation. SANCHEZ ASSOCIATES was precluded from giving any testimony at the time of trial by Court Order dated August 8, 2016.

In its opposition to the motion, the SANCHEZ Defendants' attorneys argue that they are not subject to strict liability under 27-1031(b), relying on *American Security Ins Co v Church of God of St Albans*, 131 AD3d 903, 19 NYS3d 247 (2<sup>nd</sup> Dept 2015). In *American Security*, the Appellate Division dismissed an action against an architect based on the successor regulation to section 27-1031(b). The Court found that the architect showed he was neither the person who made the decision to excavate, nor was he the contractor who carried out the physical excavation work.

However, in this case, it is uncontested that the SANCHEZ Defendants designed the excavation plans, and that they were specifically tasked with monitoring the excavation. LOUIS SANCHEZ also signed off on the TR-1 forms, which obligated them to perform controlled inspections of the excavation and the underpinning.

Excavation, particularly in a dense urban setting, is a complicated process. The City requires plans to protect adjoining properties, as well as to protect the public, to be submitted by a design professional before a contractor is permitted to commence the physical excavation. Additionally, the City requires a qualified design professional to inspect the various stages of the excavation, including the underpinning, and certify that the various stages are completed properly. It is primarily the design professionals that the City relies upon to ensure the excavation is done properly.

The DOB's purpose in requiring a professional to perform controlled inspections is to ensure the professional signs off on, and takes responsibility for, his determination that the work has been conducted properly and in accordance with the approved plans, as well as in accordance with the building code. Therefore, the performance of the inspections is as much a part of the actual excavation process as is the act of physically removing earth.

Plaintiffs have made a prima facie showing that the SANCHEZ Defendants caused excavation within the meaning of 27-1031(b)(1) and the SANCHEZ Defendants have failed to offer any evidence to raise a question of fact. Therefore, Plaintiffs motions for summary judgment against the SANCHEZ Defendants should be granted.

Plaintiffs motions against Defendants based upon negligence

Plaintiffs also moved for summary judgment on their claims for negligence.

As discussed above, it is uncontested that the excavation of the site and the shoring and bracing of the adjacent properties was inadequate and caused the soil of the Plaintiffs' property to move. As excavation is an inherently dangerous operation, the ARMORY Defendants are vicariously liable as the owners of the property for the negligence of the contractors it hired to do the excavation.

The SANCHEZ Defendants had a duty under the Administrative Code to ensure the excavation and underpinning were performed in a safe and proper manner, in accordance with the plans and the Administrative Code. As discussed above, the

underpinning was not sufficient to prevent subsidence of the adjoining properties. The SANCHEZ Defendants failed to ensure the underpinning was installed properly.

Therefore, Plaintiffs are entitled to summary judgment as to liability against the ARMORY Defendants and the SANCHEZ Defendants on the negligence causes of action.

While DP/JAFCO, XINGJIAN, IMMOBILARIA and the BRICOLAGE Defendants may have been negligent during the excavation process, it is unclear at this time what role each played, and if they performed their work negligently. Therefore, unlike their strict liability claims, Plaintiffs are not entitled to summary judgment on their negligence claims against them at this time.

#### NEW HAMPSHIRE's cross motion for summary judgment

NEW HAMPSHIRE cross moves for summary judgment arguing that as a subrogee of Plaintiff 1504 Realty LLC, ("1504"), NEW HAMPSHIRE is entitled by operation of law to the right of recovery of 1504 against the Defendants. NEW HAMPSHIRE argues that it has the right to recover the total sum of its payments to 1504, which was \$860,000 which it alleges was for damages proximately caused by the Defendants' conduct.

NEW HAMPSHIRE states that it did not move previously for summary judgment as discovery was outstanding but it now seeks to cross move with its co-Plaintiffs for summary judgment pursuant to section 27-1031(b) of the New York Administrative Code. While it failed to annex the pleadings to its motion, pursuant to an Order of this Court dated May 4, 2017, NEW HAMPSHIRE was given time to submit the pleadings.

XINGJIAN opposes the cross motion, arguing that it did not cause excavation to be made, and therefore, none of the Plaintiffs, including NEW HAMPSHIRE, is entitled to summary judgment against it.

ARMORY opposes the cross motion, and refers to the defenses it raised in opposition to the other Plaintiffs' motions, and they join XINGJIAN in its opposition.

The SANCHEZ Defendants oppose NEW HAMPSHIRE's motion, arguing that NEW HAMPSHIRE neither alleges any grounds for the motion, nor does it mention the Defendants against whom it seeks summary judgment. The SANCHEZ Defendants further oppose the motion substantively by asserting that they are not subject to strict liability, as they were not a party that caused excavation.

IMMOBILARIA opposes the cross motion, arguing that it was not involved in the project until after the excavation was complete, and therefore it was not a party that caused excavation.

DP/JAFCO opposes the cross motion, arguing that NEW HAMPSHIRE fails to annex any pleadings to its motion. DP/JAFCO further argues that it is not named as a Defendant in NEW HAMPSHIRE's complaint, and therefore NEW HAMPSHIRE cannot seek judgment against it. Finally, DP/JAFCO argues that even were the Court permits NEW HAMPSHIRE to rely on the STRIMLING Plaintiffs' motion for summary judgment, DP/JAFCO's work did not cause the damage alleged by the Plaintiffs.

As discussed above, Plaintiff 1504 is entitled to summary judgment against the ARMORY Defendants, the SANCHEZ Defendants, and IMMOBILARIA, pursuant to Administrative Code section 27-1031(b), but not against the BRICOLAGE Defendants

and XINGJIAN. Therefore, NEW HAMPSHIRE as subrogee of Plaintiff 1504 is entitled to summary judgment against these same Defendants.

As a separate matter, NEW HAMPSHIRE is not entitled to summary judgment against DP/JAFCO as the complaint of February 6, 2009 did not name DP/JAFCO as a party. This is so even though the Court, as discussed below, is permitting NEW HAMPSHIRE to amend its complaint, because issue has not been joined and DP/JAFCO has not yet had an opportunity to answer the amended complaint.

NEW HAMPSHIRE's cross motion to amend its complaint

NEW HAMPSHIRE cross moves to amend its complaint to add DP/JAFCO as a Defendant as NEW HAMPSHIRE's summons and complaint of February 6, 2009 failed to name DP/JAFCO.

DP/JAFCO argues that the cross motion to amend is improper as NEW HAMPSHIRE failed to annex DP/JAFCO's answer, or the answers of any other defendants, to its motion papers. It also argues that NEW HAMPSHIRE fails to make any substantive argument against DP/JAFCO to justify the grant of amending the pleadings, nor does it annex any proofs in support of its seeking to amend the complaint against DP/JAFCO.

CPLR 3025(b), provides that "[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any

motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.”

NEW HAMPSHIRE annexed to its motion its initial summons and complaint, and its proposed amended summons and complaint, which are the documents at issue in the motion.

DP/JAFCO cannot be said to be prejudiced by this motion as they have been involved in this action for over ten years, and NEW HAMPSHIRE is not alleging any cause of action based on new facts or transactions.

Therefore, NEW HAMPSHIRE’s motion to amend its summons and complaint to add DIAMOND POINT and JAFCO as new parties should be granted.

WHEREFORE, Plaintiff GEORGITSI’s motion for Summary Judgment is granted as to the ARMORY Defendants; is granted as to its claims pursuant to section 27-1031(b) against IMMOBILAIRIA, and denied as to its negligence claims against IMMOBILARIA, and denied as to XINGJIAN; the STRIMLING Plaintiffs’ motions for summary judgment is granted as to the ARMORY Defendants, the SANCHEZ Defendants and IMMOBILARIA, and is granted a to its claims pursuant to Administrative Code section 27-1031(b) against DP/JAFCO and denied as to its negligence claims against DP/JAFCO, and denied as to XINGJIAN; XINGJIAN’s motion for summary judgment dismissing the complaint and all cross claims against it is denied; the STRIMLING Plaintiffs’ motion for summary judgment against the

BRICOLAGE Defendants is denied; Plaintiff GEORGITSI's motion for summary judgment against the BRICOLAGE Defendants is denied; the BRICOLAGE Defendants motion for summary judgment dismissing the complaint against them is denied; NEW HAMPSHIRE's motion for summary judgment against the Defendants is granted as to the ARMORY Defendants, the SANCHEZ Defendants and IMMOBILARIA, and denied as to XINGJIAN, DP/JAFCO and the BRICOLAGE Defendants; and NEW HAMPSHIRE's motion to amend the complaint is granted, and it is hereby

ORDERED that Plaintiff GEORGITSI is granted summary judgment against Defendants ARMORY PLAZA, INC., ARMORY HEIGHTS, LLC, JACK LOCICERO, LORENZO LOCICERO, and IMMOBILIARIA BUILDERS CORP., as to liability for any and all damage caused by the excavation, and it is further

ORDERED that Plaintiffs ARTHUR STRIMLING, LISA SEGAL, TIMOTHY PIETRZAK, CATHERINE SHANNON, BORIS GILZON, MARTIN ZOLTOWSKI, 1504 REALTY LLC, and MEMORIAL BAPTIST CHURCH OF BROOKLYN are granted summary judgment against Defendants ARMORY PLAZA, INC., ARMORY HEIGHTS, LLC, JACK LOCICERO, LORENZO LOCICERO, SANCHEZ ASSOCIATES, P.C., LOUIS SANCHEZ, ABRAHAM HERTZBERG, IMMOBILIARIA BUILDERS CORP., DIAMOND POINT EXCAVATING CORP., d/b/a DIAMOND POINT EXCAVATION CORP., and JAFCO GROUP, INC. as to liability for any damage caused by the excavation, and it is further

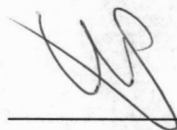
ORDERED that Plaintiff NEW HAMPSHIRE INSURANCE COMPANY is granted summary judgment against Defendants ARMORY PLAZA, INC., ARMORY HEIGHTS, LLC, JACK LOCICERO, LORENZO LOCICERO, SANCHEZ ASSOCIATES, P.C., LOUIS SANCHEZ, ABRAHAM HERTZBERG and IMMOBILIARIA BUILDERS CORP. as to

liability for any damage suffered by Plaintiff 1504 REALTY LLC as a result of the excavation not to exceed \$860,000, and it is further

ORDERED that Plaintiff NEW HAMPSHIRE INSURANCE COMPANY is granted leave to amend its complaint. Plaintiff NEW HAMPSHIRE INSURANCE COMPANY shall serve and file its amended complaint 20 days from notice of entry of this Order.

This constitutes the decision and Order of this Court.

ENTER,



J S C

HON. WAYNE P. SAIITTA  
J.S.C.

2018 FEB 26 AM 8:23

KINGS COUNTY CLERK  
FILED