

**Rolf v Tribeca Dev. Partners LLC**

2019 NY Slip Op 31091(U)

April 11, 2019

Supreme Court, New York County

Docket Number: 153139/2015

Judge: Debra A. James

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM**

*Justice*

-----X

CHRISTOPHER ROLF,

Plaintiff,

- v -

TRIBECA DEVELOPMENT PARTNERS LLC, GOLD DEVELOPMENT, LLC, BECKER ENGINEERING, PC, WAYNE TURETT ARCHITECTS, P.C., d/b/a TURETT COLLABORATIVE ARCHITECTS, CURTIS&GINSBERG ARCHITECTS LLP, GACE CONSULTING ENGINEERS, P.C., URS ARCHITECTURE & ENGINEERING - NEW YORK, P.C., OTL ENTERPRISES, LLC, HUDSON MERIDIAN CONSTRUCTION GROUP LLC, RD2 CONSTRUCTION & DEMOLITION LLC, STEVEN SCHNALL, and ROMY GOLDMAN,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 118, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 138, 139, 140, 141, 142, 143, 145

were read on this motion to/for

SUMMARY JUDGMENT (AFTER JOINDER)

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of defendant OTL Enterprises, LLC, for summary judgment dismissing the complaint and the cross claims for indemnification and or contribution as to it is granted and the complaint and cross claims for indemnification and or contribution are dismissed in their entirety as against such defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of such defendant; 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 party 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.

#### DECISION

Defendant OTL Enterprises, LLC (OTL) moves for an order, pursuant to CPLR 3212 (b), granting summary judgment in its favor and dismissing the complaint and any cross claims against it.

#### Background

Plaintiff Christopher Rolf (Rolf) is the owner of a three-story brick masonry carriage house, located at 17 Leonard Street (17 Leonard), New York, New York. Plaintiff alleges that his building was damaged by a project constructing a nine-story condominium building located at 15 Leonard Street, and by the demolition and excavation that preceded the construction.

The complaint alleges that defendant Tribeca Development Partners LLC (Tribeca) owned the single-story building, located

at 15 Leonard Street (15 Leonard) before its demolition, as well as the nine-story condominium that was constructed at the site replacing it.

The additional defendants are architectural, engineering, and construction companies involved with the project, as well as two individuals, Steven Schnall (Schnall), allegedly the managing member of Tribeca, and Romy Goldman, allegedly the founder, president and member of defendant Gold Engineering, which allegedly worked as a co-developer with Tribeca in connection with the project.

The movant, OTL, is described in the complaint as the project's general contractor. According to OTL, however, OTL was only involved in the digging of test pits prior to the demolition, excavation and construction at the site, and performed no other work on the project.

OTL's motion is opposed by Rolf and the following defendants: Tribeca and Schnall, RD2 Construction & Demolition, LLC (RD2 Construction), Becker Engineering, P.C. (Becker), Wayne Turett, Architect d/b/a/ Turett Collaborative Architects (TCA), and Hudson Meridian Construction Group LLC (Hudson Meridian) (opposing defendants, and together with plaintiff, opposing parties).

### The Complaint

The complaint alleges that "the demolition, excavation, foundation and construction activities performed in connection with the Project, and work performed by Defendants at 17 Leonard Street in connection for the Project" caused physical damage to 17 Leonard. The complaint further alleges that in or about November 2011, plaintiff agreed to allow certain defendants to perform tests pits in the basement of plaintiff's building at 17 Leonard Street and to assess the condition of the party wall shared by 15 and 17 Leonard (the party wall). The complaint alleges little else about the digging of the test pits or the time period during which they were dug, though it does allege that in or about December 2011, Schnall and his engineers performed a site inspection of 17 Leonard for the purposes of recommending structural protections and modifications to the party wall in advance of the actual demolition, excavation and building. Rather, the bulk of the complaint is devoted to actions which took place in 2012 and 2013, after the digging of the test pits was completed.

According to the complaint, in or about April 2012, Rolf requested a copy of a proposal to repair the party wall. Then, in or about September 2012, Tribeca notified Rolf that defendants would begin excavation of 15 Leonard and would need to underpin the party wall. In preparation for the demolition

work, certain shoring work was done in order to protect 17 Leonard. The complaint alleges that 17 Leonard was damaged by the shoring work and that tenants were forced to leave the building. It further alleges that during the construction, defendants failed to adequately monitor the vibrations of the building and that severe vibrations resulted in structural damage to 17 Leonard.

According to the complaint, in November 2012, Rolf engaged RAND Engineering and Architecture, P.C. to assess the condition of 17 Leonard, and to provide Rolf with opinions regarding defendants' proposals to make repairs to 17 Leonard. Discussions and requests for proposals and drawings regarding the condition of, and plans to protect, the party wall continued between Rolf and Tribeca in the following months.

The complaint details problems that occurred during the demolition, excavation and construction of 15 Leonard, including the failure to install real time vibration monitors at 17 Leonard in accordance with construction documents and an access agreement entered into with Tribeca. The complaint alleges that, in or about February 25, 2013, plaintiff entered into an agreement with Tribeca and Schnall for the limited purposes of shoring and asbestos inspection/abatement, which provided indemnification of plaintiff, and repair by Tribeca, in connection with any damage caused by the project (the February

Access Agreement). The complaint makes allegations about shoring activities to be carried out at 17 Leonard to protect the building, and that the building was damaged as a result of the failure to perform sufficient shoring.

Plaintiff entered into a second access agreement on or about October 21, 2013 (the October Access Agreement) permitting defendants access to 17 Leonard for:

"the installation of expansion joints between 17 Leonard and the building being constructed on 15 Leonard; (2) the installation of the brick facade on the new building being constructed on 17 Leonard; (3) the installation of temporary roof, skylight and window protections; (4) the performance of certain roof patching and skylight repair work on the roof necessitated by the damage caused to the Third Floor Roof Deck (the 'Patch Improvement Work'); and (5) the installation of shoring work in the third story of 17 Leonard, as was supposed to happen pursuant to the February Access Agreement."

The complaint alleges a variety of additional actions and inactions by defendants that resulted in damage to 17 Leonard as well as a variety of violations issued by the Department of Buildings (DOB) in connection with the excavation and construction activities carried out in November and December 2013. According to the complaint, as a result of the damages to 17 Leonard, and DOB violations at the site, in and around January 2013, plaintiff undertook emergency stabilization measures at his own expense. The complaint further alleges that, because of negligence in the design and construction

project at 15 Leonard, plaintiff incurred substantial losses including loss and damage to personal property, expense of repair and remediation work, and diminution in the value of 17 Leonard Street.

Plaintiff asserts five causes of action in his complaint:

(1) strict liability pursuant to the Administrative Code of the City of New York (Administrative Code), title 28, ch 7, § 3309.4; (2) negligence; (3) breach of contract relating to the February and October Access Agreements; (4) trespass; and (5) breach of guarantee against Schnall.

#### Analysis

"It is well settled that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'"

Pullman v Silverman, 28 NY3d 1060, 1062 [2016], quoting Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985).

"Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action." Cabrera v Rodriguez,

72 AD3d 553, 553-554 (1st Dept 2010). However, "a hearsay affirmation by counsel alone does not satisfy this requirement." Zuckerman v City of New York, 49 NY2d 557, 560 (1980).

On a motion for summary judgment, "facts must be viewed in the light most favorable to the non-moving party." Schmidt v One N.Y. Plaza Co. LLC, 153 AD3d 427, 428 (1st Dept 2017) (internal quotation marks and citation omitted). Furthermore,

"Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just." CPLR 3212 (f).

However, "[a] grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence." 270 AD2d 156, 157 (1st Dept 2000); see Bailey v New York City Tr. Auth., also DaSilva v Haks Engrs., Architects & Land Surveyors, P.C., 125 AD3d 480, 482 (1st Dept 2015).

Moreover, "[t]he mere hope that further disclosure might uncover evidence likely to help [plaintiff's] case" provides no basis for postponing summary judgment. Maysek & Moran v Warburg & Co., 284 AD2d 203, 204 (1st Dept 2001).

First Cause of Action of Strict Liability under Administrative Code Section 3309.4.1

Section 3309.4.1 of the Administrative Code provides that:

"[t]he person causing the excavation shall support the vertical and lateral load of the adjoining structure by proper foundations, underpinning, or other equivalent means where the level of the foundations of the adjoining structure is at or above the level of the bottom of the new excavation."

See also Administrative Code § 3309.4.2:

"Support of party walls. Where a party wall will be affected by excavation, regardless of the depth, the person who causes the excavation to be made shall preserve such party wall at his or her own expense so that it shall be, and shall remain, in a safe condition".

OTL argues that plaintiff's strict liability claims, which are based upon section 3309 of the Administrative Code, govern excavation and do not apply to OTL, because it and its subcontractors were not engaged in excavation, but rather in the digging of test pits. According to OTL's professional engineer expert (PE), test pits are dug

"to allow [the contractor] to examine the foundation conditions" . . . Subsurface exploration is performed by making soil borings or digging exploratory pits . . . collecting samples of the earth materials exposed therein, and then performing laboratory tests on these samples to determine the types and characteristics of the materials encountered. . . These test pits are typically made only large enough for one person to descend and observe the subsurface conditions and then the test pit is backfilled, and the surface restored."

According to OTL's PE, Administrative Code § 3309.4, on which plaintiff bases his first cause of action, relates to 'excavation,' or

"larger-scale, continuous excavations that could produce a loss of lateral support or undermining of foundations. By design, test pits have a small area ('footprint'), only extend down to the bottom of the foundation, " "Saw cutting and hand digging test pits to evaluate existing foundation systems is not what NYC administrative code (§ 3309.4) refers to as 'excavation' ... [and] would not cause adverse effect on Plaintiff's existing foundation system."

According to OTL's construction manager, OTL's last day on the site was December 14, 2011, and it was not until September 2012 that Tribeca notified Rolf that excavation would begin and that it would be necessary to underpin the party wall.

Therefore, according to OTL, it and its contractors were not involved in excavation, and it did not owe a statutory duty to plaintiff under the Administrative Code to support his property, and the first cause of action must be dismissed. Citing 87 Chambers, LLC v 77 Reade, LLC (122 AD3d 540, 541 [1st Dept 2014]), OTL contends that, like the architectural firm that designed the proposed building at 77 Reade which included a cellar and sub-cellar, OTL "was not 'the person who cause[d] an excavation or fill to be made' within the meaning of that provision (§ 3309.4)."

Plaintiff Rolf and defendants RD2 Construction, Tribeca and Schnall, Hudson Meridian, Becker, and TCA oppose OTL's motion. However, none of the opposing parties submit any affidavits of persons with personal knowledge of the facts, or of persons with engineering expertise. Rather, the opposing parties rely solely

on the affirmations or their respective counsel, who argue, based upon the language of the Administrative Code, that section 3309.4 applies "whenever soil or foundation work occurs, regardless of such depth" and that the provision requires "the person who causes such to be made [to] at all times during the course of the work and at his or her own expense, preserve and protect from damage any adjoining structures". Administrative Code § 3309.4; see also Administrative Code § 3309.4.2 ("Where a party wall will be affected by excavation, regardless of the depth, the person who causes the excavation to be made shall preserve such party wall at his or her own expense so that it shall be, and shall remain, in a safe condition"). They further argue that the Administrative Code defines excavation as "[t]he removal of earth from its natural position; except for any incidental removal that occurs during the course of auguring, drilling, vibrating, or driving." Administrative Code § 3302.1. Thus, the opposing parties contend that digging test pits constitutes excavation and is covered by the strict liability requirements of the Administrative Code.

OTL's PE, however, contends in reply that chapter 33 of the Administrative Code, including the definition of excavation in section 3302.1, governs construction and demolition activities, and not the digging of test pits. See Administrative Code, Chap 33, SAFEGUARDS DURING CONSTRUCTION OR DEMOLITION § 3301.1 ("The

provisions of this chapter shall govern the conduct of all construction or demolition operations with regard to the safety of the public and property"). According to OTL's PE, test pits are covered by another part of the Administrative Code, specifically sections 1802, et seq, governing geotechnical investigations and material classifications. See Administrative Code, CHAPTER 18. SOILS AND FOUNDATIONS, § 1802.1 ("Geotechnical investigations shall be subject to special inspections in accordance with Sections 1704.7, 1704.8 and 1704.9 and be conducted in conformance with Sections 1802.2 through 1802.7"). OTL's PE explains that test pits are dug as part of subsurface exploration

"by making soil borings or digging exploratory pits commonly referred to as test pits (referred to as 'probes' in Daily Construction Reports for the project), collecting samples of the earth materials exposed therein, and then performing laboratory tests on these samples to determine the types and characteristics of the materials encountered."

The court concludes that, for the purpose of the Administrative Code, as OTL's engineer explains, the digging of test pits constitutes geotechnical investigation rather than excavation, thus the strict liability provision regarding construction and demolition activities contained in Chapter 33 do not apply to OTL, and the first cause of action is, therefore, dismissed as to OTL.

Second Cause of Action for Negligence

In his second cause of action, plaintiff alleges that “[i]n designing and undertaking demolition, excavation, and construction at 15 Leonard, defendants were obligated to exercise a duty of care toward neighboring property owners and owed statutory duties to protect adjoining property owners, including Rolf from incurring damages.” As stated, infra, “It is well established that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff.” Pulka v Edelman, 40 NY2d 781, 782 (1976). OTL’s work at the site was as a result of its contract with Tribeca, not Rolf, and its direct duty of care, which was contractual, was to Tribeca, not Rolf.

Again, OTL relies on 87 Chambers, LLC v 77 Reade, LLC (122 AD3d 540, 541 [1ST Dept 2014]), in which the Appellate Division, First Department ruled that an architectural firm that designed a proposed building was entitled to summary judgment because its “contractual obligations to the owner of the 77 Reade Street property do not give rise to tort liability in favor of [the owner of the neighboring property].” OTL argues that, as in 87 Chambers the contract between OTL and Tribeca did not impose any duties on OTL with respect to the demolition, excavation or construction phases of the project. See id. at 541.

However, even in the absence of a contractual duty to the injured party, a party "who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury." Espinal v Melville Snow Contractors, Inc., 98 NY2d 136, 141-42 (2002).

OTL argues, however, that pursuant to its contract with Tribeca, it was responsible for digging test pits, it was not "designing and undertaking excavation and construction" at the site. Furthermore, OTL's construction manager, states, without contradiction by the opposing parties, that OTL's work was completed many months before the demolition, excavation and construction phases of the project were begun, and that OTL was not present on the site after its work was completed on December 14, 2011. Furthermore, according to the construction manager, "[a]t no time during or after construction up until OTL was served with this law suit did anyone from the project notify OTL that there were any problems with the test pits that they dug at the direction of URS and on behalf of Tribeca." The test pits are discussed in the URS Geotechnical Evaluation submitted by plaintiff in opposition to OTL's Motion. That report, which contains photographs of the test pits and reports of the soil borings, indicates that 6 test pits were dug within 11 and 15 Leonard, and 5 within 17 Leonard and "[e]ach test pit was advanced to the bottom of the foundation or the maximum depth

that could be safely excavated.” The report mentions no problems with, or resulting from, the digging of the test pits.

OTL has, therefore, made out a prima facie case in support of its motion for summary judgment with respect to its lack of negligence.

The complaint fails to allege any actions with respect to the work that was carried out by OTL pursuant to its contract with Tribeca that, in fact, caused harm to its property. Nor do the opposing parties submit any affidavits of persons with direct knowledge of the project indicating that the work conducted by OTL actually caused any damage to 17 Leonard. Rather, based on the Daily Construction Reports (Daily Reports) during the test pit phase, the opposing parties argue that there are issues of fact which preclude summary judgment as to negligence. They first rely on the Daily Report of December 5 which notes “check conditions of west wall, try to figure why wall seems to be bellying in an S fashion” suggesting that the bellying may have been caused by the digging of the test pits.

The OTL construction manager, who was present on the site during the digging of the test pits, states that the “bellying” was noticed before the digging of the test pits had begun in the area of the party wall. He further states that the column on the Daily Report noting who carried out particular work indicates that the persons checking the condition of the wall

were the developer (Tribeca) and its engineers. He states that OTL was merely recording their discussions. In contrast, in the same Daily Report, an activity identifies OTL as the contractor for "meet with Tony Manzano, set up his men in 17 Leonard digging probes, meeting with Engineer and Romy, JC" and lists OTL's contractor, T-Zano as the contractor for "clean area, provide lighting, rienforce [sic] shoring probe holes, dig out to find bottom of footing in the 5 locations started by others, 4 men 1-6."

OTL's construction manager further states in his reply affidavit that "[t]he bellying in an S fashion condition of plaintiff's wall pre-existed OTL's performance of digging the test pits and I did not observe any changes to plaintiff's wall during the course of OTL's work on the project."

None of the opposing parties offer any evidence from parties present at the site suggesting that the digging of the test pits exacerbated the "bellying" condition in any way or that OTL had any responsibility to act with respect to the condition.

The opposing parties next point to the description of work in the Daily Report of December 7, 2011, "jack hammer cut slabs" arguing both that the report indicated that jackhammers, rather than shovels and saws, were used to dig the test pits, and raise

the question of whether vibrations associated with the use of the jackhammers could have caused damage to 17 Leonard.

In his reply affidavit, however, OTL's construction manager, who was present at the site during the digging of the test pits, states that the jackhammers were not used to dig the test pits, but to break up and remove the concrete slabs which were cut by the diamond saws. Regarding the reference to the "jack hammer cut slabs", he states:

"The process by which T-Zano dug test pit #2 adjacent to plaintiff's property was to saw cut the opening for the test pit 4' 6" by 5' 8". Once the slab of concrete was saw cut off of the ground and detached from the ground T-Zano would use a small jack hammer or chipping gun to break apart the concrete so it could be hauled off site and disposed of. The breaking up of the concrete was done to a detached piece of concrete and not directly into the ground. The remainder of the test pit was hand dug to a depth determined by the engineer of record, URS."

Finally, the opposing parties contend that the description of work in the December 5, 2011 Daily Report, which states in reference to the work of OTL's contractor, T-Zano, "reinforce shoringin [sic] probe holes", raises the question of whether that shoring damaged 17 Leonard.

OTL's construction manager indicates in his reply affidavit, however, that the reference to shoring in the December 5, 2011 Daily Report is unrelated to the protection of plaintiff's property, but rather "refers to ensuring the inside

of the test pit walls were shored so that the engineer and workers could safely go down into each test pit."

Moreover, the references in the complaint to shoring that allegedly caused damages to 17 Leonard specifically relate to shoring of 17 Leonard in or around April 2012 in preparation for demolition of the building located at 15 Leonard, and shoring work contemplated in and following the February 25, 2013 Access Agreement, not to shoring carried out in December 2011, more than one year earlier, in connection with the digging of test pits.

Finally, OTL's construction manager states "[a]t no time during the performance OTL'S work did anyone, the plaintiff, the plaintiff's representatives, the [Department of Buildings], the developer, the engineer of record, or anyone else complain about the work OTL performed."

The court will not speculate on why plaintiff and the objecting defendants failed to submit affidavits of anyone who was present at, and had personal knowledge of, the activities at the site, during the digging of the test pits or thereafter, despite the fact that at least some of the opposing parties were involved with activities at the site during OTL's work, as well as during the demolition, excavation and/or construction activities that took place at the site after OTL's work was completed. Given the affidavits and documents submitted by OTL

in support of its motion and in reply to the opposing parties' papers, describing the phase of the project involving the digging of the test pits, explaining the bellying of the party wall, the use of a jackhammer and the reference to "shoring" during the digging of test pits, the affidavits of opposing counsel merely arguing that they should be permitted to conduct discovery amount to little more than mere speculation and hope of uncovering evidence and are inadequate to raise issues of fact to defeat OTL's motion for summary judgment with respect to plaintiff's second of action for negligence.

Third Cause of Action for Breach of Contract

The third cause of action alleges breach of contract in connection with the February and October Access Agreements. The complaint alleges that

"[o]n or about February 25, 2013, [Tribeca] and Schnall, individually, entered into a partial license agreement with Rolf to enter 17 Leonard for the limited purposes of shoring and asbestos inspection/abatement in connection with Defendants' Project (February Access Agreement)."

According to the complaint, the October Access Agreement was entered into by Rolf and unspecified defendants on or about October 21, 2013 after defendants' demolition, excavation and foundation work had already begun, permitting access to 17 Leonard to enable defendants to carry out certain construction repairs.

To adequately allege a cause of action for breach of contract the complaint must allege "the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages." Hampshire Props. v BTA Bldg. & Developing, Inc., 122 AD3d 573, 573 (2d Dept 2014). Obviously, a cause of action for breach of contract will not lie against a defendant who was not a party to the contract. See La Potin v Lang Co., 30 AD2d 527, 528 (1st Dept 1968) (cause of action for breach of contract dismissed against individual defendant where corporate defendant was contracting party).

The complaint does not allege that OTL was a party to either the February or October Access Agreement. Moreover, and according to OTL construction manager's uncontradicted sworn statement, OTL's work on the site was completed by December 14, 2011, approximately 14 months before the February Access Agreement and 22 months before the October Access Agreement were executed.

The third cause of action for breach of contract shall, therefore, be dismissed as against OTL.

#### Fourth Cause of Action for Trespass

The complaint alleges that "defendants braced the excavation support system for the excavation of 15 Leonard on the foundation of the Party Wall and the south foundation of 17

Leonard, without Rolf's permission", that the bracing constitutes trespass, and that the trespass is ongoing.

According to the complaint, the bracing described in the fifth cause of action related to the demolition and excavation activities, which occurred after OTL's work digging test pits was completed, and there are no allegations that the bracing was in any way related to the digging of those test pits.

Furthermore, OTL's construction manager states that OTL was not involved in any work that did not involve the test pits.

Neither Rolf nor the opposing defendants offer any evidence that contradicts such sworn statement or that indicates that OTL was involved in any way with bracing of the party wall or the south foundation. Therefore, the fifth cause of action must be dismissed as to OTL.

#### Fifth Cause of Action for Breach of Guarantee

The fifth cause of action alleges that Schnall personally guaranteed Tribeca's performance of the February and October Access Agreements, and the cause of action is asserted against Schnall, personally. It must, therefore, be dismissed as to OTL.

#### Cross Claims for Indemnity/Contribution

In their answers, opposing defendants Tribeca, Becker, TCA, and Hudson Meridian assert cross claims for indemnification and/or contribution against OTL for damages caused by its

negligence or culpable conduct. OTL seeks dismissal of all claims for indemnification or contribution that have been made against it.

Although some of the codefendants' answers contain cross claims based on contract as well as common law, only Tribeca entered into any contract with OTL. Entitlement to contractual indemnification "requires a clear expression or implication, from the language and purpose of the agreement as well as the surrounding facts and circumstances, of an intention to indemnify." Martins v Little 40 Worth Assoc., Inc., 72 AD3d 483, 484 (1st Dept 2010).

The indemnification clause in the Purchase Order entered into by Tribeca and OTL states as follows, in pertinent part:

"The Sub-Contractor shall defend, indemnify and hold Owner harmless from and against any and all claims, loss, (including attorneys' fees and costs), damages, expense and liability resulting from injury and/or death of any person or damage to or loss of use of any property caused by or arising out of any grossly negligent or wrongful act, error, omission, breach of any statute, code or rule or breach of contract, arising directly from the operations of the Suppliers and Sub-Suppliers or anyone directly or indirectly employed by them or anyone for whose acts they may be liable. Such obligation shall not be construed to negate abridge or reduce other rights or obligations of Indemnity which would otherwise exist as to a party or person described in this paragraph."

OTL's construction manager contends that OTL never agreed to the indemnification provision in the Purchase Order with Tribeca. As Tribeca argues, however, OTL's construction manager

provides no basis for that assertion. In any case, the court notes that, in its memorandum in support of its motion for summary judgment, OTL does not rely on that argument. Rather it looks, as it must, to the language of the indemnification provision and argues that contractual negligence requires that any damages to Tribeca be caused by its "grossly negligent or wrongful act, error, omission, breach of any statute, code or rule or breach of contract". Since there is no evidence of any negligence or breach of the Administrative Code or breach of contract on the part of OTL, Tribeca's claim for contractual indemnification must be dismissed.

Tribeca contends that questions of fact relating to the digging of the test pits preclude a grant of summary judgment on its claim for contractual indemnification. However, Tribeca asserted those same questions of fact in opposing OTL's motion seeking summary judgment on plaintiff's negligence claim. In light of the dismissal of plaintiff's negligence claim and his claim pursuant to the Administrative Code, Tribeca's claim for contractual indemnification likewise fails.

Common-law indemnification requires proof of negligence by the proposed indemnitor. Martins v Little 40 Worth Assoc., Inc., 72 AD3d at 484; see also Colyer v K Mart Corp., 273 AD2d 809, 810 (4th Dept 2000) ("The obligation of common-law indemnification runs against those parties who, by virtue of

their direction and supervision over the injury-producing work, were actively at fault in bringing about the injury”).

OTL argues that, since it is free from negligence or violation of the Administrative Code in connection with the digging of the test pits, the claims for common-law indemnification of the opposing defendants must be dismissed.

As with Tribeca’s argument regarding contractual indemnification, the opposing defendants contend that questions of fact regarding OTL’s negligence preclude summary judgment. As the cause of action for negligence has been dismissed, the cross claims for common-law negligence fail on that same basis.

4/11/2019  
DATE

Debra A. James  
DEBRA A. JAMES, J.S.C.

CHECK ONE:  CASE DISPOSED  NON-FINAL DISPOSITION

GRANTED  DENIED  GRANTED IN PART  OTHER

APPLICATION:  SETTLE ORDER  SUBMIT ORDER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE