

<b>Crotona 1967 Corp. v Procida Constr. Corp.</b>
2019 NY Slip Op 32130(U)
May 15, 2019
Supreme Court, Bronx County
Docket Number: 27067/2015E
Judge: Ruben Franco
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX - IAS PART 26

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CROTONA 1967 CORP.

Index No. 27067/2015E

Plaintiff,

-against-

**MEMORANDUM  
DECISION/ORDER**

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

Defendants.

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**Rubén Franco, J.:**

In this property damage action, plaintiff moves for summary judgment pursuant to CPLR 3212. Plaintiff alleges that its property was damaged because defendant Procida Construction Corp. (Procida) failed to protect plaintiff’s property while it performed construction work on an adjoining property, involving excavation, foundation operations, and underpinnings and shoring (New York City Administrative Code §§ 27-1029, 27-1031 [b] [1], and 27-1032), for which plaintiff seeks an award of damages. Procida cross-moves to dismiss the Complaint pursuant to CPLR 3211.

The court has gleaned the following facts from the pleadings and the documents submitted by the parties in connection with the instant motion: Plaintiff is the owner of the building located at 300-318 West 231st Street, in Bronx County (“318”), immediately adjacent to 322 West 231<sup>st</sup> Street (“322”), which was the subject of a construction project, which has been completed. A Work Permit Application to the Department of Buildings shows that Procida was the general contractor for the construction work at 322. Plaintiff alleges that during the construction work,

Procida, or one of its subcontractors, undertook excavation and pile driving activities that caused damage to 318.

Plaintiff and plaintiff's tenant, Famous Formaggio Pizzeria, which has a separate action against Procida (*Famous Formaggio Pizzeria, LLC v Procida Constr. Corp.*, 59 Misc 3d 661 [Sup Ct, Bronx County 2018]), complained to Procida, which attempted to fix the damage, but failed.

Plaintiff submits a report from professional engineer Roberta Lynne Levine ("Levine") in which she concludes: "It is clear that the pile driving inflicted damage upon 300 [318].... Had the buildings been adequately monitored, any damage would have been observed in a timely manner, and appropriate measures taken to mitigate the damages." StructureTech NY sent a proposed agreement to Procida regarding "Shoring to building at 318 West 213st Street" indicating the scope of work to be done, including to shore up the building damage that occurred during piling excavation. This document is not signed by Procida.

Procida submits an affidavit from Richard Rendos ("Rendos"), the Senior Project Manager for Procida Construction Corp. NY ("Procida NY"), which is not a party to this action. Rendos explains that pile driving, and excavation are separate and distinct activities, and that Procida was not performing any excavation work at the relevant times. Procida alleges it was not the "person" which caused the work to be performed, and that the culpable parties appear in plaintiff's own expert report. That report does not suggest that Procida designed the methods or processes of the pile driving work. A contractor called Intercoastal Foundations and Shoring ("Intercoastal") actually conducted the pile driving, another contractor, Yoles Engineering, monitored and approved it, Langan Engineering performed the soil borings, and Perkins Eastman Architects provided the plan for the pile driving installation.

Rendos claims that plaintiff has sued the wrong party because the entity that was actually involved with this project was Procida NY, which had a contract with International Leadership Charter School (“International”), and acted as a construction manager, not a general contractor. Prior to Procida’s involvement, the site owner, International, retained a company to perform pre-construction surveys and to install crack monitors to adjacent properties. Rendos claims that Procida never performed work outside of “coordinating” during the pile driving work. Rendos refutes that the submissions annexed to plaintiff’s papers are admissions or proof that Procida caused any of the damage to the premises.

Procida explains that no depositions have been conducted and that questions of fact might be resolved during discovery, particularly depositions of non-parties. Procida does not dispute that New York City Administrative Code § 3309.4 is a strict liability statute, however, it argues that the statute does not apply to Procida. It distinguishes between pile driving, which allegedly caused the damage to plaintiff’s property, and excavation. Additionally, Procida contends that discovery is needed with respect to damages, including to determine whether plaintiff’s estimate for repairs considered the age of plaintiff’s building and pre-existing conditions. Mario Procida, CEO and president of Procida, submitted an affidavit wherein he states that Procida was not involved in the project in any capacity, claiming that Procida does not appear in the construction documents.

In opposition to Procida’s cross-motion and in further support of its motion for summary judgment, plaintiff argues that it never claimed that Procida itself performed the pile driving. Plaintiff’s claim is that Procida was the general contractor on the project and, consequently, is liable and responsible for the actions of the subcontractor who performed the pile driving and damaged plaintiff’s building. Plaintiff notes that the sued Procida entity, Procida Construction

Corp., does appear on documents, such as the Work Permit Application from the New York City Department of Buildings, as the general contractor and construction superintendent for the 322 project. Procida NY does not appear on that document. As the general contractor, Procida was responsible for maintaining the safety of the job site and the adjoining properties. Plaintiff believes that it is disingenuous for Procida to claim that Rendos' employer, Procida NY, was the general contractor. Furthermore, most of the remediation documentation lists Procida as the client. Plaintiff refutes Procida's characterization of the various documents that were annexed to its initial moving papers.

Plaintiff posits that the evidence establishes that Procida was the party that caused the work to be done that resulted in the damage to its property, and that it thereafter hired contractors to repair the damage. Plaintiff contends that there are no issues of material fact and that it is entitled to summary judgment on the issue of Procida's liability.

A party moving for summary judgment must show prima facie an entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Friends of Thayer Lake LLC v Brown.*, 27 NY3d 1039, 1043 [2016]; *Pokoik v Pokoik*, 115 AD3d 428 [1<sup>st</sup> Dept 2014]; CPLR 3212 [b]). The inability to make such a demonstration must lead to denial of the motion, no matter how inadequate the opposition papers may be (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Santiago v Filstein*, 35 AD3d 184, 186 [1<sup>st</sup> Dept 2006]). To defeat summary judgment, the party opposing the motion must show that there is a material question(s) of fact that requires a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1<sup>st</sup> Dept 2013]; *see Hoover v New Holland N. Am., Inc.*, 23 NY3d 41, 56 [2014]). The party moving for summary judgment has the initial burden on the motion (*see Gammons v City of New York*, 24 NY3d 562,

569 [2014]; *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 137-138 [1<sup>st</sup> Dept 2012]; *Jaroslawicz v Prestige Caterers*, 292 AD2d 232, 233 [1<sup>st</sup> Dept 2002]).

The parties engage in much discussion regarding the strict liability standard established by New York City Administrative Code § 3309.4 whenever soil or foundation work is done, however, the court finds that it is premature to establish the statute's applicability to the facts of this case inasmuch as the court determines that defendant Procida has shown the existence of material questions of fact regarding its role in causing the damage to plaintiff's structure, defeating summary judgment.

Procida has raised issues of fact as to whether it was the entity that performed the soil or foundation work at issue. Rendos claims that "there was no excavation" and "no Procida entity managed, designed, handled or controlled the pile driving activity." He also asserts that a prior construction manager made the decision to use driven piles, as opposed to drilled piles, for this project. Rendos states that when Procida was contracted as the project construction manager, all plans and specifications relating to the pile installation had already been prepared by design teams of contractors Perkins Eastman and Langan Engineering. He also claims that another trade contractor, Intercoastal, was independently responsible for all procedures and protocols relating to the installation work. Yet another contractor, Macia Consulting Enterprises, was directly retained by site owner, International, and was responsible for supervising the pile driving. Rendos further notes that plaintiff's own expert report referenced these other nonparty entities who handled the pile driving exclusive of any direction from a "Procida" entity. It is unclear whether Procida was the entity that made the decision to perform that work (*see American Sec. Ins. Co. v Church of*

*God of St. Albans*, 131 AD3d at 905; *Coronet Props. Co. v L/M Second Ave.*, 166 AD2d 242 [1<sup>st</sup> Dept 1990]).

The fact that Procida may have arranged for post-incident repairs does not conclusively resolve the issue. While Rendos was allegedly employed by Procida NY and not Procida, plaintiff does not submit evidence that it lacked knowledge of this and other facts and circumstances surrounding Procida's involvement in this project.

Procida's cross motion to dismiss is denied. Procida contends that plaintiff has sued the wrong Procida entity, claiming that Procida and Procida NY are separate and distinct. The allegation that it is not the proper entity to sue is belied by the initial Work Permit Application listing Procida as the permit applicant and general contractor. This permit and other post-incident documentation indicate that Procida may have used these two entities interchangeably throughout the course of this construction project.

Accordingly, it is

ORDERED, that plaintiff's motion for summary judgment is denied, and it is further

ORDERED, that defendant Procida's cross motion to dismiss is denied.

The foregoing constitutes the Decision and Order of the court.

Dated: May 15, 2019



Rubén Franco, J.S.C.

**HON. RUBÉN FRANCO**