

Gross v ABN Realty LLC
2019 NY Slip Op 32840(U)
September 27, 2019
Supreme Court, New York County
Docket Number: 153081/2016
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

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LEWIS GROSS,

Plaintiff,

- v -

ABN REALTY LLC, ISMAEL LEYVA ARCHITECT, P.C., BM OF NY CONSTRUCTION CORP., CALABRESE ASSOCIATES, INC., JW INSPECTION SERVICES, LLC, URS CORPORATION, LEVIATHAN CONSTRUCTION MANAGEMENT SERVICES, LLC, GACE CONSULTING ENGINEERS, D.P.C., SITE SAFETY LLC, MRC II CONTRACTING, INC., TOTAL SAFETY CONSULTING, L.L.C., HOMELAND SAFETY CONSULTANTS, INC., ENVIRONMENTAL BULKHEADING CORP., DOMANI INSPECTION SERVICES, INC., JOSEPH MALLOZZI, P.E.

Defendants.

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INDEX NO. 153081/2016
MOTION DATE
MOTION SEQ. NO. 013 014 015 016

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 013) 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 437, 438, 439, 440, 441, 443, 444, 445, 446, 447, 448

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 014) 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 401, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 442

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

The following e-filed documents, listed by NYSCEF document number (Motion 015) 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 413, 414, 415, 416, 417, 418, 419, 420, 421, 432, 436

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 016) 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 449, 451, 452, 453

were read on this motion to/for PARTIAL SUMMARY JUDGMENT

Motion sequence 13, 14, 15, and 16 are consolidated for disposition. In motion sequence 13, defendant Domani Inspection Services, Inc.'s motion for summary judgment is granted. In

motion sequence 14, defendant URS Corporation's motion for summary judgment is granted. In motion sequence 15, defendant GACE Consulting Engineers' motion for summary judgment is also granted. In motion sequence 16, plaintiff's motion for summary judgment is denied.

Background

This case arises from a construction project at 19 Park Place in Manhattan. Defendant ABN Realty LLC ("ABN") owns the property located at 19 Park Place. Plaintiff occupies an office in the adjacent property located at 17 Park Place and claims that ABN's construction project caused mold to infiltrate his premises, resulting in various damages. He alleges that as a result of the excavation done during the construction, water leaked onto his property and caused mold to develop. Plaintiff brings a cause of action against ABN for general negligence and a violation of the New York City Administrative Code. Additionally, plaintiff asserts a general negligence claim against defendants Domani Inspection Services, Inc, URS Corporation, and GACE Consulting Engineers. He also asserts a cause of action against URS Corporation for a violation of the Administrative Code.

Defendant ABN asserts cross-claims against its three co-defendants for contribution, common-law indemnification, and contractual indemnification.¹ Domani Inspection Services, Inc., URS Corporation, and GACE Consulting Engineers move for summary judgment against plaintiff and ABN, each alleging that their involvement in the construction project did not cause the damages that plaintiff alleges.

¹ ABN asserts cross-claims against all named defendants, but at this time, the Court only addresses the cross-claims made against Domani Inspection Services, Inc, URS Corporation, and GACE Consulting Engineers because only those co-defendants submitted motions for summary judgment.

Discussion

To be entitled to the remedy of summary judgment, the moving party “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 from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Motion Sequence 13, 14, 15

Domani Inspection Services, Inc, URS Corporation, and GACE Consulting Engineers’ motions for summary judgment against plaintiff and ABN are granted.² Although these defendants were involved in the construction project, the Court does not find that their work was related to

² The Court notes that plaintiff did not offer opposition to any of the summary judgment motions by defendants; only ABN offered opposition.

the actual excavation or underpinning on the project site which allegedly caused the damage resulting in mold.

In motion sequence 13, Domani claims that nothing it did was related to excavation. It states that its role in the project was to perform inspections mandated by the Department of Buildings so that ABN could gain a certificate of occupancy for the construction. Additionally, Domani performed a photographic survey of the adjacent property to have a record of what the building looked like pre-construction. Nothing in the record indicates that Domani was involved in excavation. In fact, pursuant to the contract between Domani and ABN, Domani was to serve as a "Consultant in connection [with] Inspection Services" (NYSCEF Doc. No. 338 at pg.1). There is no mention of excavation services in the contract. Although ABN insists that Domani's inspection services could have impacted the excavation, it does not point to any facts which would indicate so. Performing inspections and taking photographs does not equate to excavation work or even close to it. Domani's motion for summary judgment is granted.

In motion sequence 14, URS Corporation seeks summary judgement on the general negligence claim and the claim for violation of the New York City Administrative Code. With respect to the general negligence claim, URS contends that it was hired to perform geotechnical investigations, which are unrelated to the excavation that caused the property damage. URS also designed an underpinning system for the construction project and conducted soil testing in 2008 to determine if the soil was appropriate for the project. In opposition, ABN insists that URS's involvement in designing the underpinning system and the taking of soil samples is related to excavation and therefore, URS could be held responsible for the excavation.

The Court is not convinced by ABN's logic. The soil samples URS took were back in 2008. The alleged damage to the property took place in 2013. The act of gathering soil samples five years

prior to when the supposed damage due to the excavation occurred is not enough to create an issue of fact regarding URS's negligence. ABN also failed to show that designing the underpinning system is related to the excavation that allegedly caused the mold. It has not been shown that there were any flaws with the design of the underpinning system. Nor has it been shown that the underpinning system, as designed, caused a flaw in the excavation which resulted in mold.

In regard to the claim for violation of the Administrative Code, URS insists that it cannot be held strictly liable under the Code because it was not the owner of the project or a contractor. New York City Administrative Code § 3309.4 places an obligation on the person who performs soil or foundation work to protect adjacent structures from damage. URS relies on *87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540, 541, 998 NYS.2d (1st Dept 2014), wherein the Court held that the architect for a construction project could not be held strictly liable under § 3309.4 for excavation damage because it was "neither the owner of the 77 Reade Street property nor the contractor who performed the excavation" (*id.*).

New York City Administrative Code § 3309.9 states, "Where the waterproof integrity of an adjoining wall or building has been impaired due to construction or demolition operations, the person causing the construction or demolition operations shall, at his or her own expense, provide all necessary measures to permanently waterproof the adjoining wall or building..." Again, URS did not perform the actual construction or demolition work. ABN claims that because URS made recommendations regarding the foundation and underpinning design, it should be held strictly liable for damages.

URS performed design, consultation, and investigative work. The Court does not find that it performed any work that would cause it to be held strictly liable under the Administrative Code.

It was not the owner or contractor, nor did it perform construction or excavation. It cannot be held strictly liable for the consequences of such work if it never did the work in the first place.

In motion sequence 15, GACE Consulting Engineers seeks summary judgment on the negligence and indemnification claims. GACE maintains that it was the structural engineer for the project and that its contract with ABN specifically excluded work related to underpinning, shoring, and excavation. Upon reviewing the contract, it is clear the GACE was excluded from performing such work (NYSCEF Doc. No. 387 at pg.9). The negligence and indemnification claims are dismissed in light of the documentary evidence which shows the scope of GACE's work on the project.

Motion Sequence 16

In motion sequence 16, plaintiff moves for summary judgment against ABN. Plaintiff moved for summary judgment previously, which the court denied (Motion Sequence 10), reasoning that plaintiff failed to establish that the mold in the property was caused by the lack of waterproofing in ABN's building (NYSECF Doc. No. 318). In support of its second motion for summary judgment on the same issue, plaintiff points to an expert witness report submitted by URS's expert witness, which states that the water intrusion was likely caused by a lack of waterproofing (NYSCEF Doc. No. 366 at pg.10). In further support of his claim, plaintiff emphasizes his sworn affidavit in which he states that there was never mold in his property prior to the commencement of the construction project in 2013 (NYSCEF Doc. No. 399). In opposition, ABN claims that plaintiff's motion is essentially a motion to renew and reargue and should be denied because the time to have brought this motion has passed. ABN also claims that plaintiff has not presented any substantively new information since the last summary judgment motion was heard.

The motion for summary judgment is denied. Plaintiff still has not conclusively established that the mold was caused by a lack of waterproofing by ABN. ABN still maintains that waterproofing was done. During depositions, Chun Ka Luk, one of ABN's managing members was asked: "Would it be correct to say that the waterproofing was done in 2014?" Mr. Luk responded with a "Yes" (NYSCEF Doc. No. 218 at pg.108). He was further asked, "So you don't know that it [the walls of 19 Park Place] was actually waterproofed. You just know that some unidentified person told you it was waterproofed, correct?" Again, Mr. Luk answered: "Yes" (*id.*). Plaintiff claims that the walls were not waterproofed and ABN claims that it was told that they were. An issue of fact exists with respect to whether or not waterproofing was done. Neither party has conclusively established whether waterproofing was or was not done and whether the lack of waterproofing caused the damage. A jury must make a determination on this issue. Plaintiff's motion for summary judgment is denied.

Summary

Plaintiff and ABN cannot just claim that any entity that was involved in the construction project was also involved in the excavation that led to the water damage, which supposedly caused the mold. Neither party presented any evidence that would show that either Domani, URS, or GACE's activities relating to the construction caused the damage. Because causation was not shown, the negligence, strict liability, and indemnification claims against these defendants are dismissed. Furthermore, plaintiff failed to show that no issue of fact exists regarding ABN's role in the waterproofing of lack thereof.

Accordingly, it is hereby

ORDERED that in motion sequence 13, Domani Inspection Services, Inc's motion for summary judgment is granted. All claims and cross-claims against this defendant are hereby severed and dismissed and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that in motion sequence 14, URS Corporation's motion for summary judgment is granted. All claims and cross-claims against URS Corporation are hereby severed and dismissed and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that in motion sequence 15, GACE Consulting Engineers' motion for summary judgment is granted. All claims and cross-claims against URS Corporation are hereby severed and dismissed and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that in motion sequence 16, plaintiff's motion for summary judgment is denied.

9/27/19

DATE

HON. ARLENE P. BLUTH

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE