

**227 Flatbush, LLC v KSK Constr. Group LLC**

2020 NY Slip Op 33904(U)

November 19, 2020

Supreme Court, Kings County

Docket Number: 515589/2017

Judge: Wayne P. Saitta

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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 360 Adams Street, Brooklyn, New York, on the 19th day of November, 2020.

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

Hon. Wayne P. Saitta, Justice.

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227 FLATBUSH, LLC and PINTCHIK ASSOCIATES LTD  
f/k/a NATHAN PINTCHIK, INC.,

Plaintiff,

Index No. 515589/2017

-against-

**DECISION AND ORDER**

KSK CONSTRUCTION GROUP LLC, and  
LODZ DEVELOPMENT, LLC

Defendants,

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Upon reading the Notice of Motion of LERNER, ARNOLD & WINSTON, LLP Attorneys for Plaintiffs, Jacob L. Levine Esq of counsel, the Affirmation of Jacob L. Levine dated October 2, 2019, the Affidavit of Michael Pintchik sworn to September 12, 2019, the Affidavit of Rudi O Sherbansky sworn to October 1, 2019, and the exhibits annexed thereto, Plaintiff's Memorandum of Law in Support dated October 2, 2019; the Affirmation in Opposition of Dean G Aronin Esq, of MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN, attorneys for Defendants dated November 6, 2019, and exhibits annexed thereto, Defendant's Memorandum in Opposition dated November 6, 2019, the Affidavit of Ulgur Aydin, P.E., sworn to October 25, 2019, and the exhibits annexed thereto; the Notice of Motion of Dean G Aronin Esq, of MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN, attorney for Defendants, dated October 28, 2019, the Affirmation of Dean G Aronin Esq., dated October 28, 2019, and the exhibits annexed

thereto, Defendant's Memorandum in Support dated October 28, 2019, the Affidavit of Michael Cronin sworn to on October 25, 2019, and the exhibits annexed thereto, the Affidavit of Ulgur Aydin sworn to October 25, 2019, and the exhibits annexed thereto; the Affirmation in Reply and in Opposition of Jacob L Levine Esq., dated March 5, 2020, and the exhibits annexed thereto; and after argument of counsel and due deliberation thereon, Plaintiff 227 FLATBUSH, LLC's motion is granted, Plaintiff PINTCHIK ASSOCIATES LTD's motion is denied and Defendants' motion is denied for the reasons forth below.

Plaintiffs have moved for partial summary judgment, as to liability, on their claims against Defendants pursuant to NYC Building Code section 3309.4 for damage caused to their buildings by Defendants' excavation of the adjoining property.

Defendants have raised two arguments in opposition. First, they claim that there is a question of fact whether their excavation damaged Plaintiffs' buildings. Second, they claim that they are not liable for damage to 229 Flatbush Avenue because they were not given a license to enter that property.

Defendants have moved to dismiss those portions of Plaintiffs' complaint which seek lost rental income, tenant reimbursements and additional insurance premiums.

### **Summary Judgment on liability for 227 FLATBUSH LLC**

Plaintiff 227 FLATBUSH, LLC is entitled to partial summary judgment as to liability because Defendants damaged Plaintiff's properites while excavating. Section 3309.4 of the Building Code of the City of New York imposes absolute liability on those who cause an excavation to be made that damages an adjoining property. (*Yenem Corp. v 281 Broadway Holdings*, 18 NY3d 481 [2012]; *Chan v. Begum*, 153 A.D.3d 1223, [2d Dept. 2017].)

Section 3309.4 of the Building Code Provides:

Whenever soil or foundation work occurs, regardless of the depth of such, the person who causes such to be made shall, at all times during the course of such work and at his or her own expense, preserve and protect from damage any adjoining structures, including but not limited to footings and foundations, provided such person is afforded a license in accordance with the requirements of Section 3309.2 to enter and inspect the adjoining buildings and property, and to perform such work thereon as may be necessary for such purpose. If the person who causes the soil or foundation work is not afforded a license, such duty to preserve and protect the adjacent property shall devolve to the owner of such adjoining property, who shall be afforded a similar license with respect to the property where the soil or foundation work is to be made.

The record establishes that there is no question that Defendant LODZ DEVELOPMENT, LLC, the owner of 215 Flatbush Avenue, and Defendant KSK CONSTRUCTION GROUP LLC, the contractor hired to construct a new building at 215 Flatbush Avenue, are persons who caused the evacuation to be made. There is also no question that the excavation damaged the adjoining properties at 227 Flatbush Avenue owned by Plaintiff 227 FLATBUSH LLC, and at 229 Flatbush Avenue owned by Plaintiff PINTCHIK ASSOCIATES LTD.

The Defendants made informal judicial admissions that their excavation damaged Plaintiffs' buildings in a separate action that the Defendant LODZ DEVELOPMENT LLC commenced against its insurers. In paragraphs 21 and 22 of its complaint against their insurers, LODZ DEVELOPMENT, LLC states:

"21. On or about June 22, 2016, the performance of the work at the Project site resulted in unexpected cracking and damage to adjoining property or properties located at 227 Flatbush Avenue, Brooklyn, NY 11217 and 229 Flatbush Avenue, Brooklyn, NY 11217 ("227 and 229 Flatbush Avenue") as well as to 231 Flatbush Avenue, 474 Dean Street and 476 Dean Street.

22. On or about June 24, 2016, Lodz and/or KSK, for the benefit of Lodz, as an urgent matter and to avoid collapse, further collapse, exacerbation of damage, structural failure and/or to mitigate further damage of the adjoining properties, including 227 and 229 Flatbush Avenue, and tenants entered into a contract with non-party Thornton Tomasetti, Inc. ("Thornton") and other contractors and/or vendors, suppliers, professionals and/or service providers for the design and implementation of the emergency remedial and repair work at the Premises and the adjoining properties." (NYSCEF Doc No 252).

In its answer to that complaint, KSK CONSTRUCTION GROUP, LLC admitted the truth of the allegations set forth in paragraphs 21 and 22 of the complaint. (NYSCEF Doc No 253).

Hilmi Ulgur Aydin, an engineer and a principal of KSK CONSTRUCTION stated in an affidavit submitted in that action that:

"5. On or about June 22, 2016, the performance of the work at the Project site resulted in unexpected cracking and damage to the adjoining property or properties located at 227 Flatbush Avenue, Brooklyn, NY 11217 and 229 Flatbush Avenue, Brooklyn, NY 11217 ("227 and 229 Flatbush Avenue Property").

6. Two days later, on or about June 24, 2016, Lodz and/or KSK, for the benefit of Lodz, as an urgent matter and to avoid further structure failure to 227 and 229 Flatbush Avenue and the adjoining properties, entered into a contract with plaintiff Thornton Tomasetti, Inc. ("Thornton")." (NYSCEF Doc No 254).

In addition to these admissions by Defendants, the Department of Buildings also issued violations against the defendant KSK CONSTRUCTION GROUP for damaging and failing to protect Plaintiffs' adjoining buildings in violation of section 3309.4

These violations, together with the admissions of Defendants and Aydin, are sufficient to make out a prima facie case for summary judgment as to liability.

Despite their admissions and the DOB violations, Defendants assert there is a question of fact as to whether the excavation by Defendants caused damage to the Plaintiffs' buildings and to that end they submit an affidavit by Michael Cronin, PE.

Cronin stated that in his opinion, the proximate cause of the damage to Plaintiffs' buildings can not be determined because there was no baseline determination or pre-construction reports of the condition of the buildings before the damage.

However, it was the responsibility of Defendants, not Plaintiffs, to document the existing conditions of all adjacent buildings in a pre-construction survey, pursuant to both section 3309.4.3 and their license agreement.

Cronin in his affidavit does not address the admissions by Defendants or those of Ulgar Aydin, who is also an engineer, that the excavation caused the damage. Nor does Cronin address the affidavit statements of Michael Pintchick and Wayne Bailey, that the adjoining buildings were in good condition until the excavation was dug.

While Defendants submit an affidavit of Aydin in opposition to Plaintiffs motion, Aydin does not disavow the statements that the excavation damaged Plaintiffs' buildings contained in the earlier affidavit submitted in Defendants' action against its insurers.

Cronin's affidavit is not sufficient to raise an issue of fact as to whether the excavation damaged the adjoining buildings in light of the admissions by Defendants, and by Aydin that the excavation damaged the buildings. Aydin, a professional engineer who was at the scene before and after the damage occurred, was in a position to make his determination that the excavation damaged the adjoining buildings based on personal observation.

The fact that there may be questions as to the extent of the damage does not preclude the granting of summary judgement where there is no question that the

excavation caused damage to the buildings. (*211-12 Northern Boulevard Corp., v LIC Contracting Inc.*, 186 AD3d 69 [2<sup>nd</sup> Dept 2020]; see *Yenem Corp. v 281 Broadway Holdings*, 18 NY3d 481 at 491[2012].)

The Second Department in *211-12 Northern Boulevard Corp.*, explained that:

“While the defendants dispute the extent of the damages that were caused by the excavation, ‘[t]he allegedly poor preexisting condition of the plaintiffs’ building does not factor into a proximate cause analysis under New York City Building Code § BC 3309.4, but merely raises an issue of fact as to damages” (*Id* at 82.)

The nature and extent of the damage caused by the excavation is a matter for the damages portion of the trial and at which Plaintiffs will bear the burden of proving the extent of the damage caused by the excavation.

### **License to enter 229 Flatbush**

While the excavation damaged both 227 and 229 Flatbush Ave, Plaintiff PINTCHIK ASSOCIATES LTD is not entitled to summary judgment pursuant to section 3309.4 because there is a question of fact as to whether it gave Defendants a license to access 229 Flatbush Avenue.

Defendants assert that they were not granted a license to enter 229 Flatbush Avenue until after the damage to the building occurred. Aydin states in his affidavit submitted in this case that Defendants were not granted a license until June 22, 2016, after the damage occurred.

Plaintiff has not produced a written license for 229 Flatbush, although there was a written license for 227 Flatbush Avenue, dated October 30, 2015.

Plaintiffs’ attorney submitted an affirmation in which he asserts that the license

agreement of October 30, 2015 covered both 227 and 229 Flatbush Avenue. However, the license is between KSK and Plaintiff 227 FLATBUSH, LLC, only. Plaintiff PINTCHIK ASSOCIATES LTD is not a party to the license. Further, the license lists only 227 Flatbush Avenue, Block 1135 Lot 9 as the premises to which access is being granted.

Plaintiff submitted no affidavit by anyone with knowledge attesting to access being granted to 229 Flatbush Avenue prior to the damage, or stating that Defendants never requested a separate license for 229 Flatbush Avenue.

Where it is clear that the party causing the excavation never requested a license, an adjoining property owner seeking summary judgment need not demonstrate that they granted a license to access their property. (*211-12 Northern Boulevard Corp., v LIC Contracting Inc.*, 186 AD3d 69 [2<sup>nd</sup> Dept 2020].)

In *211-12 Northern Boulevard Corp., v LIC Contracting Inc.*, the Appellate Division Second Dept. upheld an order which granted the plaintiff summary judgment on liability pursuant to Admin Code 3309.4, holding that where a Plaintiff shows that no request for a license was made, it need not demonstrate prima facie that it granted a license, in order to obtain summary judgment. *Id.*

However, on the papers presented here, it is not clear whether Defendants requested a separate license for 229 Flatbush Avenue or whether the license of October 30, 2015 was understood by the parties to cover both 227 and 229 Flatbush Avenue.

While it is unlikely, given the common ownership of the Plaintiffs entities, that they granted Defendants a license for 227 but refused one for 229, on a motion for summary judgment the court's function is one of issue-finding rather than issue determination. (*Martinez v 281 Broadway Holdings LLC.*, 183 AD3d 716 [2<sup>nd</sup> Dept 2020]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, [1957].) "It is not

the function of a court ... to make credibility determinations or findings of fact, but rather to identify material triable issues of fact” (*Martinez v 281 Broadway Holdings LLC.*, 183 AD3d 716 [2<sup>nd</sup> Dept 2020], *citing Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, [2012].)

It is Plaintiff’s burden to make out a prima facie case that either a license had been given or that no license had been requested. As Plaintiff PINTCHIK ASSOCIATES LTD has not done so, it is not entitled to summary judgment on its claims pursuant to Building Code section 3309.4.

### **Defendants motion to dismiss**

Defendants have moved for partial summary judgment dismissing Plaintiffs claims for loss of rental income, tenant reimbursements and commercial construction insurance premiums on two grounds. First, that it was not necessary to stop construction at 227 Flatbush Avenue or to vacate 229 Flatbush Avenue, and second, that the claims are speculative.

Defendants offer the affidavit of their engineer Cronin, who opined that there was no need to stop construction at 227 or to vacate 229. However, this opinion is undercut by the emergency shoring and stabilization measures which Defendants undertook after the damage, to ensure the buildings would not collapse.

In an affidavit submitted in Defendants’ action against their insurers, Aydin admitted that the buildings were in danger of collapse. Aydin stated:

“6. Two days later, on or about June 24, 2016, Lodz and/or KSK, for the benefit of Lodz, as an urgent matter and to avoid further structure failure to 227 and 229 Flatbush Avenue and the adjoining properties, entered into a contract with plaintiff Thornton Tomasetti, Inc. ("Thornton"). A copy of the contract with Thornton is at Exhibit B hereto.

7. The urgency in Thornton's hire is reflected in the fact that danger to the subject neighbor building was identified on June 22, 2016, and remedial measures were undertaken immediately. The special Project engineer, Thornton, was hired two days later on June 24th.

8. There was no thought given, other than saving the neighboring building from falling into the Project site excavation hole.

9. At the time, the full extent of the claims were unknown and unknowable. Urgency was required to secure the project site and the neighbors' sites from further collapse." (NYSCEF Doc No 254.)

Clearly, a trier of fact could conclude that it was necessary to halt renovation at 227 Flatbush and to vacate 229 Flatbush until the buildings were stabilized and no longer in danger of collapse.

### **Speculative Claims**

Similarly, Defendants have not demonstrated that these claims for lost rent, tenant reimbursements and increased premiums are speculative. In seeking summary judgment, Defendants must make out a prima facie case that Plaintiffs did not suffer these losses, they cannot simply point to gaps in Plaintiffs' proofs. (*River Ridge Living Center LLC v ADL Data Systems Inc.*, 98 AD3d 724 [2<sup>nd</sup> Dept 2012]; *Mennerich v Esposito*, 4 AD3d 399, [2<sup>nd</sup> Dept 2004].)

227 Flatbush Avenue was vacant at the time of the damage because Plaintiff 227 FLATBUSH, LLC had been renovating the building. One of Plaintiffs' claim is for lost rental income as a result of the delay in completing the renovation.

Michael Pintchik testified that Plaintiff could not resume the renovation work until April of 2019, a delay of approximately 2 <sup>3</sup>/<sub>4</sub> years.

Pintchik testified that Plaintiff had an agreement with a commercial tenant who would rent the commercial space once the renovation was complete and that they intended to rent the residential apartments when the renovation was complete.

Defendants have not presented prima facie evidence that the delay in finishing the renovation did not result in a delay in renting the building.

Similarly, Defendants' attacks on Plaintiffs' manner of calculating the amount of lost rent is not a sufficient basis to grant summary judgment. While Plaintiff will bear the burden at trial to demonstrate through admissible evidence the amount of rent lost, it is Defendants' burden in seeking summary judgment to demonstrate the Plaintiff did not suffer a loss in rent or that the amount of rent lost is not capable of measurement with reasonable certainty.

Both the length of the delay in construction caused by the damage to the buildings, as well as what rent might reasonably have been obtained in that period are matters that are susceptible to proof at trial. Rent, unlike some measures of lost profit, can be proven with reasonable certainty through use of rentals of comparable properties.

While Plaintiff has not produced comparable rentals, it is not its burden to do so in opposing a motion for summary judgment, unless the movant has made a prima facie showing that such lost rent is not determinable, which Defendants have not done.

A reasonable trier of fact could conclude that based on the damage to the building, that the renovation of 227 Flatbush was delayed, and that Plaintiff lost rental income as a result.

A reasonable trier of fact could also conclude that 229 Flatbush had to be vacated and as a result Plaintiff incurred temporary relocation related costs. The amounts that Plaintiff claims to have incurred for reimbursing tenants for hotels and for additional

insurance premiums are specific. The necessity or reasonableness of specific costs is a matter to be determined in the damages portion of the trial.

By reason of the foregoing, Defendants' motion should be denied.

WHEREFORE, it is hereby ORDERED, that Defendants' motion for summary judgment is denied; and it is further

ORDERED that Plaintiff, PINTCHIK ASSOCIATES LTD's motion for summary judgement is denied; and it is further

ORDERED, that Plaintiff 227 FLATBUSH, LLC, is granted parital summary judgment as to liability on its claims purusant to Building Code section 3309.4 against Defendants, KSK CONSTRUCTION GROUP LLC, and LODZ DEVELOPMENT, LLC and it is further

ORDERED, that the portion of Plaintiffs' motion for an immediate trial on damages is denied.

This Constitutes the decision and order of this Court.



JSC

**HON. WAYNE P. SAITTA  
J.S.C.**

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