

Si Jie Mei, Inc. v ABN Realty LLC

2020 NY Slip Op 33916(U)

November 24, 2020

Supreme Court, New York County

Docket Number: 655207/2016

Judge: Barry Ostrager

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

-----X

SI JIE MEI, INC., MOTT & PRINCE MANAGEMENT, VERA SUNG, JILL SUNG, HEATHER SUNG, CHANTERELLE SUNG, and 18 MURRAY STREET CONDOMINIUM,

Plaintiffs,

- v -

ABN REALTY LLC, BM OF NY CONSTRUCTION CORP., CALABRESE ASSOCIATES, INC., GACE CONSULTING ENGINEERS, D.P.C., URS CORP., JW INSPECTION SERVICES. JIANXIONG WANG A/K/A LIANXIONG WANG, AECOM, ENVIRONMENTAL BULKHEADING CORP. A/K/A EBC CORP., JOSEPH MALLOZI PE, DPC NEW YORK, INC., DANCO WORLDWIDE CONSULTANTS INC., ROGUSKI LAND SURVEYING, PC, VIBRATECH INC., DOMANI CONSULTING INC., ISMAEL LEYVA ARCHITECT, P.C., JOHN DOE, JOHN DOE 2, XYZ CORP. and XYZ CORP. 2,

Defendants.

-----X

HON. BARRY R. OSTRAGER

INDEX NO.	655207/2016
MOTION DATE	
MOTION SEQ. NO.	013, 014, 015 and 016

DECISION + ORDER ON MOTIONS

The Court heard extensive oral argument on November 23, 2020 via Microsoft Teams on four motions in this heavily litigated action that has been pending for four years, with more than 1200 docket entries as of this date. Simply stated, plaintiffs in this action, the owners of the building at 18 Murray Street in lower Manhattan, seek compensation for damage allegedly caused to their building by excavation and construction work on the neighboring building site at 19 Park Place. As indicated in the Status Conference Order issued on November 23, 2020, the jury trial of this action was necessarily adjourned from January 4, 2021 to October 13, 2021 because of the suspension of jury trials due to the pandemic. This decision determines the four motions that were heard on November 23, 2020.

In the first motion (seq. 013), defendant Ismael Leyva Architect, P.C. (“ILA”) moves for summary judgment dismissing all claims against ILA. ILA also seeks sanctions against plaintiffs based on plaintiffs’ failure to discontinue this action voluntarily after they were presented with “proof” that ILA played a limited role in the work, that ILA’s work was properly performed, and that nothing that ILA did or failed to do caused plaintiffs’ damages. Plaintiffs oppose the motion, as do certain of ILA’s co-defendants. In this motion, and in its second motion (015), ILA also seeks to preclude any and all reports filed by plaintiff’s expert John D. Nakrosis, Jr., R.A., but most particularly the last report in which Nakrosis purportedly opined for the first time that ILA was negligent and responsible for plaintiffs’ damages. At least one of the co-defendants joins ILA in its motion to the extent it seeks to preclude as untimely any expert reports submitted by plaintiffs after the September 13, 2020 deadline set by the Court in July. Plaintiffs oppose the preclusion request and cross-move for sanctions against ILA, asserting that the key document on which Nakrosis relied to opine on ILA’s liability was not produced in discovery until after the September deadline.

The Court denies the motion by ILA for summary judgment dismissing all claims and cross-claims against it (013). The documents produced suggest that ILA’s role was potentially much broader than ILA claims. Further, the competing expert affidavits create triable issues of fact as to the liability of ILA and whether ILA’s acts and/or omissions were one of the causes of plaintiffs’ damages here. The Court also denies ILA’s request for sanctions against plaintiffs for declining to discontinue the case. Although the jury may ultimately find in ILA’s favor, plaintiffs’ claim is not frivolous and none of the other lawsuits involving ILA has a collateral estoppel effect mandating a discontinuance against ILA here.

The Court denies ILA’s request to preclude plaintiff’s expert report (seq. 013 and 015). Contrary to ILA’s claim, the report provides sufficient information about ILA’s acts and

omissions underlying the expert's opinion on liability. What is more, the last report was exchanged before the expert's deposition began, and the Court has allowed the deposition to continue. Therefore, although the final report was issued in October, a few weeks after the September discovery deadline, the delay was minimal in light of the ongoing litigation, and no party will be prejudiced because the expert will be deposed more fully before the January 31, 2021 extended deadline set by the Court on November 23 for the completion of discovery. The Court denies plaintiffs' request for sanctions against ILA, just as the Court denied ILA's request for sanctions against plaintiffs. None of the conduct rises to level of sanctions.¹

Somewhat related to these motions is the motion by defendant BM of NY Construction Corp. to vacate the Note of Issue, allow further expert discovery, and extend the time for dispositive motions (seq. 016). Although the Court sees no reason to vacate the Note of Issue, the motion is granted to the extent that the Court will extend through February 1, 2021 the time for the parties to complete all discovery, and the time for dispositive motions is extended to March 3, 2021 in connection with the Status Conference Order dated November 23, 2020. To the extent the Court in that Status Conference Order scheduled a further conference for January 31, 2021, that date is amended to provide for a conference on February 1, 2021 at 2:00 p.m.

The final motion to be addressed is the motion by defendant Vibratex Inc. for judgment on its cross-claim for contractual indemnification against co-defendant ABN Realty LLC (seq. 014). That motion was made by Order to Show Cause with a deadline of November 2, 2020 for opposition papers (NYSCEF Doc. No. 1007). It is undisputed that, as of November 18, 2020, ABN had not filed any opposition papers. When the Court contacted ABN to confirm that fact,

¹ In a further twist on this four-year old case, defendant ABN Realty LLC commenced a third-party action against plaintiffs' expert John D. Nakrosis, Jr., R.A., claiming that Mr. Nakrosis is not merely an expert but was involved in the work at issue and is liable for some of plaintiffs' claimed damages.

ABN asked for an extension of time, indicating that ABN wished to point out to the Court that Vibratex's contractual indemnification claim involved ABN's insurer, which was not a party to the action. Based on this exchange and Vibratex's opposition to the requested extension of time, the Court denied the extension but indicated that ABN could state its position on the record during the argument. At the argument, ABN raised an entirely new argument that the indemnification provision was void under the General Obligations Law because it was overly broad and violated public policy to the extent it could be construed to require ABN to indemnify Vibratex for Vibratex's negligence. Although during the argument the Court suggested a willingness to accept more papers, the Court now denies the motion without prejudice to renewal at some future date, if appropriate, in light of all the recent developments in this case and the anticipated completion of more discovery and additional dispositive motions.

Accordingly, it is hereby

ORDERED that the motion of BM of NY Construction Corp.(016) is granted in part to the extent of allowing additional discovery through February 1, 2021 and dispositive motions by March 3, 2021; and it is further

ORDERED that the motion by Vibratex Inc. for judgment on its cross-claim for contractual indemnification (014) is denied without prejudice; and it is further

ORDERED that the motions by Ismael Leyva Architect, P.C. for summary judgment, expert preclusion, and sanctions against plaintiffs, and plaintiffs' cross-motion for sanctions against ILA (seq. 013 and 015), are granted to the extent of allowing additional expert discovery but are otherwise denied in accordance with the terms of this Decision and the November 23, 2020 Status Conference Order; and it is further

ORDERED that all counsel shall appear for a status conference via Microsoft Teams on February 1, 2021 at 2:00 p.m. in connection with the newly scheduled October 13, 2021 jury trial.

Dated: November 24, 2020

Barry R. Ostrager

BARRY R. OSTRAGER, 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