

Tapper v 116 India St. Villa LLC
2020 NY Slip Op 35322(U)
September 30, 2020
Supreme Court, Kings County
Docket Number: Index No. 522967/2018
Judge: Carolyn E. Wade
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At Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the 30th day of September 2020

**PRESENT:
HON. CAROLYN E. WADE,**

Justice

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MARIUS TAPPER and TERRI ABPLANALP TAPPER,

Plaintiffs,

Index No. 522967/2018

-against-

Seq 4

DECISION and ORDER

116 INDIA STREET VILLA LLC, M REMODELING CORP., RAFI MANOR a/k/a RAFAEL MANOR, DAVID SAPAN, HADAS HAKMON, ANTHONY CUCICH, R.A. d/b/a ANTHONY CUCICH ARCHITECT, SM STUDIO INC., ABC INC./CORP./LLC/ LP/PARTNERS 1-9, and JOHN/JANE DOES 1-50,

Defendants.

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Recitation, as required by CPLR '2219(a), of the papers considered in the review of plaintiffs' motion for partial summary judgment on liability:

Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	1
Cross-Motion and Affidavits/Affirmations.....	
Answering Affidavits/Affirmations.....	2,3
Reply Affidavits/Affirmations.....	4,5
Memorandum of Law.....	6

Upon the foregoing papers and after oral argument, plaintiffs MARIUS TAPPER and TERRI ABPLANALP TAPPER (“Plaintiffs”) move for partial summary judgment against defendant 116 India Street Villa LLC on the issue of liability.

The underlying action was commenced by Plaintiffs against defendants 116 India Street Villa LLC (“116 India”); M Remodeling Corp., Rafi Manor a/k/a Rafael Manor, David Sapan (collectively, “M Remodeling Defendants”), Hadas Hakmon, Anthony Cucich, R.A. d/b/a Anthony Cucich Architect (“Cucich”), and SM Studio Inc. (collectively, “Defendants”), for property damage to Plaintiffs’ building located at 118 India Street, Brooklyn, NY 11222, allegedly caused by Defendants’ construction project on adjacent premises located at 116 India Street, Brooklyn, New York (“Construction Site”). Pursuant to a limited license agreement, dated August 18, 2016, Plaintiffs granted 116 India and M Remodeling Corp. access to certain parts of their property to perform excavation. The instant motion ensued.

In support of their motion, Plaintiffs argue that they are entitled to partial summary judgment against 116 India on their second cause of action for strict liability pursuant to Section 28-3309.4 of the New York City Administrative Code (“Section 3309.4”) because their adversary violated the code by damaging their property during excavation. To buttress their averments, Plaintiffs submit affidavits from their structural engineers, Wiktor Wasilewski, P.E., Joseph V. Lieber, P.E. and Tony D. Canale, P.E. (Tapper aff, Exhibit “15 - 17”), who opine that the property damage can be attributed to the excavation, and the failure to provide lateral support. Plaintiffs also refer to an August 2018 inspection report prepared by Vibranalysis, Inc. (Fraser aff, Exhibit “21”), which documents certain cracks in the brick façade of Plaintiffs’ Building that were not present when it prepared the May 2016 Preconstruction Survey.

In opposition, 116 India contends that the excavation was properly completed with adequate protection as indicated in the "Support of Excavation" plan (Misk aff, exhibit "A"). It submits the affidavit of Thomas Petracca, P.E., who opines that the damage attributed to 116 India does not correlate with the amount of movement observed in Plaintiffs' building.

Cucich and M Remodeling Defendants separately join in opposition. They both argue that significant discovery remains outstanding, including document exchange relating to the construction activities at Plaintiffs' Building, site inspection, and party depositions. They also claim that third-party defendant Richmond Construction was the entity that performed the excavation at the construction site, and that it has neither appeared nor provided discovery in this action. They further assert that that Plaintiffs' building lacks a Certificate of Occupancy and has open building violations related to a stop work order, which remains in effect. Thus, Cucich and M Remodeling contend that an issue remains as to whether the condition of Plaintiffs' building was caused by their own operations.

In reply, Plaintiffs contend that Section 3309.4 imposes absolute liability regardless of the level of care used by the defendants. Their engineers opined that the damages to Plaintiffs' façade was caused by the excavation at 116 India's Construction Site. Plaintiffs argue that the plan for 116 India's support of excavation was dated November 10, 2016, which was several months after excavation began. They also contend that the physical condition of their building may be relevant to damages, but it does not prevent this Court from granting them summary judgment against 116 India on the issue of liability. Plaintiffs further assert that Defendants failed to demonstrate that any discovery would yield evidence necessary to oppose their instant motion.

"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 eliminate any material

issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Section 28-3309.4 of the New York City Administrative Code provides that:

“3309.4 Soil or Foundation Work Affecting Adjoining Property
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.”

This statute “imposes strict liability for excavation work that causes damage to adjoining property” (*211-12 N. Blvd. Corp. v LIC Contr., Inc.*, 2020 NY Slip Op 04134 [2d Dept July 22, 2020]; *Am. Sec. Ins. Co. v Church of God of St. Albans*, 131 AD3d 903, 905 [2d Dept 2015], quoting Section 3309.4; *see Yenem Corp. v 281 Broadway Holdings*, 18 NY3d 481, 489 [2012]).

In the instant case, defendants have raised triable issues of fact that preclude this Court from granting Plaintiffs’ motion for summary judgment. First, 116 India’s engineer expert, Thomas Petracca, P.E.’s opinion on the cause of the property damage¹ conflicts with those of

¹ Petracca aff, at 5-7: “The settlement reports provided by Vibranalysis Inc., the vibration monitoring contractor[,] indicate a negligible quantity of movement during construction of at most, .005 feet which is less than 1/16 of an inch of movement which is considered inconsequential. The rotation of an inch or so of the west wall of the plaintiff’s structure out of plumb, is well within the industry rule of thumb of keeping the center of the building wall line within the center third of the walls plumb position. The monitoring reports do not correlate with the extent of the damage that is alleged by the plaintiffs.”

Plaintiffs' engineers, Wiktor Wasilewski, P.E.², Joseph V. Lieber, P.E.³ and Tony D. Canale, P.E.⁴. Second, Cucich and M Remodeling Defendants indicated that a stop work order (Howansky aff, exhibit "A") exists at 118 India Street, which raises an issue of fact as to whether Plaintiffs' own operations caused the damage to their property. Plaintiffs have not directly addressed this concern in their reply papers.

Accordingly, based on the foregoing, it is hereby

ORDERED that plaintiffs MARIUS TAPPER and TERRI ABPLANALP TAPPER's motion for partial summary judgment against defendant 116 India Street Villa LLC, on the issue of liability, is **DENIED**.

This constitutes the Decision and Order of the court.



HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE

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ACTING SUPREME COURT JUSTICE

² Wasilewski aff at 10: "It is my professional opinion based on my personal inspection of the Plaintiffs' Building and the excavation work being performed at the Construction Site at the time of my inspection, that the damage to the Plaintiffs' Building, including the water infiltration sustained within the basement of Plaintiffs' Building, was directly and proximately caused by the Defendants' excavation work at the Construction Site."

³ Lieber aff, at 6: "Based on the January 25, 2019 inspection, it is my professional opinion with a reasonable degree of engineering certainty that Plaintiffs' Building is racking and has been forced out-of-plumb by the excavation undertaken on the Construction Site. It is also my professional opinion with a reasonable degree of engineering certainty that Plaintiffs' Building has been directly undermined by the excavation and foundation work performed on the Construction Site."

⁴ Tapper aff, exhibit "17": "The settlement was caused by movement or loss of ground experienced during the foundation excavation for 116 India Street."

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