

Tapper v 116 India St. Villa LLC
2021 NY Slip Op 31291(U)
March 31, 2021
Supreme Court, Kings County
Docket Number: 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 31st day of March 2021

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

Justice

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MARIUS TAPPER and TERRI ABPLANALP TAPPER,

Plaintiffs,

Index No. 522967/2018

-against-

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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KINGS COUNTY CLERK

Recitation, as required by CPLR §2219(a), of the papers considered in the review of plaintiffs' motion to reargue their 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.....	
Memorandum of Law.....	4

Upon the foregoing papers and after oral argument, plaintiffs MARIUS TAPPER and TERRI ABPLANALP TAPPER (“Plaintiffs”) move to reargue the Court’s decision, dated September 30, 2020, which denied their motion for partial summary judgment 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 (“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 the adjoining property. 116 India is the owner of the premises located at 116 India Street, Brooklyn, NY 11222 (the “Construction Site”).

On August 18, 2016, Plaintiffs entered into a license agreement with 116 India and defendant M Remodeling Corp. (the “License Agreement”) (Tapper aff, Exhibit “11”). The License Agreement granted 116 India and M Remodeling a limited license to access certain portions of Plaintiffs’ property in connection with the excavation of the Construction Site. On November 13, 2018, Plaintiffs commenced this action, seeking damages allegedly sustained by Plaintiffs’ building due to the excavation. By Decision and Order, dated September 30, 2020, this Court denied Plaintiffs’ motion for partial summary judgment on the issue of liability. The instant motion ensued.

In support of their motion, Plaintiffs contend that the affidavit of 116 India’s engineer expert, Thomas Petracca, P.E., is insufficient to raise a triable issue of fact. Particularly, they assert that Mr. Petracca’s affidavit does not attach or specify the documents upon which it is based, and that it is speculative and conclusory.

In opposition, 116 India, claims that Mr. Petracca's affidavit is premised on his review of pre-construction report and photographs, support of excavation drawings, and monitoring reports taken during the construction of 116 India Street, as well as his inspection of Plaintiffs' building on December 13, 2019. M Remodeling Defendants also joined in opposition, alleging that an issue of fact exists as to whether the Plaintiffs' own construction operations caused the claimed damage.

Plaintiffs, in reply, maintain that Mr. Petracca's affidavit is conclusory, and fails to specify the documents or reports upon which his opinion is based. They also argue that the allegation of the Plaintiffs' damage was caused by their own construction was made by the M Remodeling Defendants' counsel, but it is neither supported by an expert affidavit nor is it mentioned in Mr. Petracca's affidavit.

"A motion for leave to reargue 'shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion'" (*Ahmed v Pannone*, 116 AD3d 802, 805 [2d Dept 2014]). "While the determination to grant leave to reargue a motion lies within the sound discretion of the court, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" (*Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 [2d Dept 2011]).

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

"[w]henver soil or foundation work occurs, regardless of 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...”

This statute imposes strict or absolute liability upon a “‘person who causes’ an excavation to be made” (*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]).

Upon reargument, the Court finds that Plaintiffs have made out a *prima facie* case, pursuant to Section 3309.4 of the New York City Administrative Code, a strict liability statute, that their property was damaged by the excavation work carried out by 116 India. It is undisputed that 116 India performed excavation on the adjoining property after being granted a license to inspect and protect Plaintiffs’ property. Notably, Thomas Petracca, P.E., 116 India’s engineer expert, relied on the “Support of Excavation,” to prepare his expert affidavit, dated November 10, 2016, which is at least three months after the excavation commenced. Also, the “settlement reports” referenced in Mr. Petracca’s affidavit are missing. On the other hand, the affidavits of Wiktor Wasilewski, P.E., Joseph V. Lieber, P.E. and Tony D. Canale, P.E., as well as the inspection report of non-party Vibranalysis, Inc., show that Plaintiffs’ building suffered damage as a result of the excavation (see *211-12 N. Blvd. Corp. v LIC Contr., Inc.*, 2020 NY Slip Op 04134 [2d Dept July 22, 2020]; *Reiss v Professional Grade Constr. Group, Inc.*, 172 AD3d 1121, 1124 [2d Dept 2019]). In addition, defense counsel’s suggestion that Plaintiffs’ damages were caused by their own construction activities was not supported by an expert opinion. “In proving that defendant’s actions were a proximate cause of its damages, plaintiff is not required to exclude every other possible cause, but need only offer evidence from which proximate cause may be

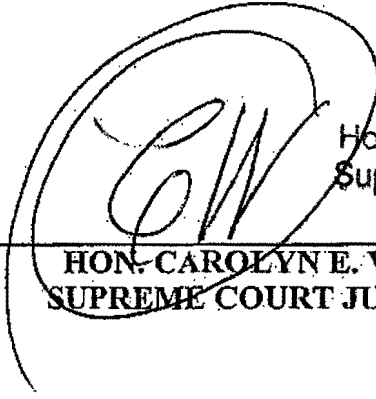
reasonably inferred" (*Marbilla, LLC v 143/145 Lexington LLC*, 2013 NY Slip Op 30898[U], *12 [Sup Ct, NY County 2013]);

Accordingly, based on the foregoing, it is hereby

ORDERED that plaintiffs MARIUS TAPPER and TERRI ABPLANALP TAPPER's motion to reargue is GRANTED, and, upon reargument, their underlying motion for partial summary judgment on liability is GRANTED. This Court's Decision and Order, dated September 30, 2020, is hereby vacated.

This constitutes the Decision and Order of the court.

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 Hon. Carolyn E. Wade
 Supreme Court Justice

HON. CAROLYNE E. WADE
SUPREME COURT JUSTICE