

American Concrete Pumping, Inc. v Homem

2021 NY Slip Op 33409(U)

June 14, 2021

Supreme Court, Westchester County

Docket Number: Index No. 56658/2019

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT: STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

-----X
AMERICAN CONCRETE PUMPING, INC.,

Plaintiff,

-against-

ARMANDO HOMEM, ALDINA HOMEM,
HUDSON EFT LLC, MATTHEW A. NOVIELLO,
PE and VILLAGE OF OSSINING,

Defendants.

-----X
HUDSON EFT LLC,

Third-Party Plaintiff,

-against-

GAC BUILDERS LTD. and SHAWN'S LAWNS,
INC.,

Third-Party Defendants.

-----X
GAC BUILDERS LTD.,

Second Third-Party Plaintiff,

-against-

AMAZON CONCRETE INC. and SESI
CONSULTING ENGINEERS, PC,

Second Third-Party Defendants.

-----X
GAC BUILDERS LTD.,

Third Third-Party Plaintiff,

DECISION & ORDER

Index No: 56658/2019

Motion Sequence No. 13

-against-

BROOKER ENGINEERING, PLLC,

Third Third-Party Defendant.

-----X

SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X

PROGRESSIVE CASUALTY INSURANCE
COMPANY a/s/o AMERICAN CONCRETE
PUMPING, INC.,

Action No. 2
Index No. 60533/2019

Plaintiff,

-against-

ARMANDO HOMEM, ALDINA HOMEM,
HUDSON EFT, LLC, MATTHEW A. NOVIELLO,
PE and VILLAGE OF OSSINING,

Defendants.

-----X

SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X

DAIN BAIRD-ROGERS,

Action No. 3
Index No. 53190/2021

Plaintiff,

-against-

HUDSON EFT LLC and AZIMUTH
DEVELOPMENT GROUP, LLC,

Defendants.

-----X

[caption continued on next page]

SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
ARMANDO HOMEM and ALDINA HOMEM,

Action No. 4
Index No. 70674/2019

Plaintiffs,

-against-

HUDSON EFT, LLC,

Defendant.

-----X
SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
CONTINENTAL WESTERN INSURANCE
COMPANY a/s/o ARMANDO HOMEM and
ALDINA HOMEM,

Action No. 5
Index No. 56568/2020

Plaintiff,

-against-

HUDSON EFT, LLC and GAC BUILDERS LTD.,

Defendants.

-----X
The following papers (NYSCEF document nos. 371-373; 385-387; 409-432; 434-436; 444-445) were read on the motion by the defendant, Matthew A. Noviello, P.E., for an order dismissing the complaint insofar as asserts a cause of action against him pursuant to CPLR 3211 (a) (1), (a) (7), CPLR 3211 (c), and CPLR 3211 (h).

Motion Sequence No. 13

- Notice of Motion-Exhibits (A-B)-Amended Affirmation-Exhibits (C-D)
- Affirmation in Opposition (by third-party defendant, Shawn’s Lawns, Inc.)-Exhibit (A)
- Affirmation in Opposition (by plaintiff)-Exhibits (1-7)
- Affirmation in Opposition (by third third-party defendant, Brooker Engineering, PLLC)-Exhibits (A-C)-Memorandum of Law
- Affirmation in Response (by defendants, Armando Homem and Aldina Homem)
- Affirmation in Opposition (by second third-party defendant, SESI Consulting Engineers)
- Affirmation in Opposition (by defendant, Hudson EFT LLC)-Exhibit (1)

Affirmation in Opposition (by third-party defendant, GAC Builders LTD)-Exhibits (A-B)
Affirmation in Opposition (by second third-party defendant, Amazon Concrete Inc.)-
Exhibit (A)
Reply Affidavit by Noviello to Shawn's Lawns' Opposition-Exhibit (AA)
Reply Affidavit by Noviello to GAC Builders LTD's Opposition-Exhibit (BA)

Upon reading the foregoing papers, it is

ORDERED the motion is denied.

This matter arises out of the collapse of a retaining wall located at 60 Main Street, Ossining, New York (Premises). As relevant herein, Armando and Aldina Homem owned the Premises. Movant-defendant herein, Matthew Noviello, P.E., a licensed engineer, was hired to design the retaining wall on the Premises. American Concrete Pumping Inc. owned and operated a concrete business from the Premises. It is alleged that American Concrete also provided concrete-related services to construct the retaining wall. Hudson EFT owns the adjacent property located at 80 Main Street, Ossining, New York (Site). Hudson EFT hired GAC Builders Ltd. to construct a 25-unit apartment building upon its parcel. The retaining wall was installed on the Homem Premises due to a significant elevation differential between the Homem Premises and the Hudson EFT Site. On or around August 13, 2018, the retaining wall collapsed prompting the instant litigation.

Defendant, Matthew A. Noviello (Noviello), P.E., now moves pursuant to CPLR 3211 (a) (1), (a) (7), CPLR 3211 (c) and CPLR 3211 (h) for an order dismissing the complaint insofar as asserts a cause of action against him. For the reasons that follow, the motion is denied.

CPLR 3211 (a) (1)

This branch of the motion by Noviello to dismiss the complaint insofar as asserts a cause of action against him based upon documentary evidence pursuant to CPLR 3211 (a) (1) is denied.

Inasmuch as Noviello failed to raise this defense founded upon documentary evidence as one of the eleven asserted affirmative defenses raised in his answer, and the motion was not otherwise made before the answer was due (*see* CPLR 3211 [e]), Noviello waived his right to move pursuant to CPLR 3211 (a) (1) (*see Margolin v I M Kapco, Inc.*, 89 AD3d 690, 691 [2d Dept 2011]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 241-242 [2d Dept 2007]).

CPLR 3211 (a) (7)

This branch of the motion by Noviello to dismiss the complaint insofar as asserts a cause of action against him based upon a failure to state a cause of action pursuant to CPLR 3211 (a) (7) is denied.

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court is to afford the pleading a liberal construction, accept the alleged facts as true, afford the plaintiff the benefit of every possible favorable inference, and simply determine whether the alleged facts fit within any cognizable legal theory (*see* CPLR 3026; *Sarva v Self Help Community Servs., Inc.*, 73 AD3d 1155, 1155-56 [2d Dept 2010]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss [pursuant to CPLR 3211]” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Here, accepting the alleged facts as true, and affording the plaintiff the benefit of every possible favorable inference, the amended complaint states a cause of action for negligence against Noviello.

CPLR 3211 (c)

This branch of the motion by Noviello for summary dismissal of the complaint insofar as asserts a cause of action against him pursuant to CPLR 3211 (c) is denied.

Inasmuch as discovery remains ongoing, and it appears that no parties have yet been deposed, the court finds that it is premature to treat Noviello’s motion as one for summary judgment pursuant to CPLR 3211 (c). The papers submitted in opposition to the motion make it clear that the parties were not “deliberately charting a summary judgment course” (*Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988] [internal quotation marks omitted]; *see Jones v Rochdale Vil., Inc.*, 96 AD3d 1014, 1016 [2d Dept 2012]; *cf. O’Dette v Guzzardi*, 204 AD2d 291, 292 [2d Dept 1994]).

CPLR 3211 (h)

This branch of the motion by Noviello to dismiss the complaint insofar as asserts a cause of action against him pursuant to CPLR 3211 (h) is denied.

A motion to dismiss an action pursuant to CPLR 3211 (h) arising under CPLR 214-d “shall be granted unless the party responding to the motion demonstrates that a substantial basis in law exists to believe that the performance, conduct or omission complained of such licensed . . . engineer . . . was negligent and . . . a proximate cause of personal injury . . . complained of by the claimant” (CPLR 3211 [h]). “CPLR 3211(h) this imposes a heightened standard of review” (*Golby v N & P Engrs. & Land Surveyor, PLLC*, 185 AD3d 792, 793 [2d Dept 2020]). “A court reviewing the sufficiency of a complaint under CPLR

3211(h) must determine whether the claim alleged is supported by such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact” (*Schmitt v Spector*, 129 AD3d 1052, 1053 [2d Dept 2015] [internal quotation marks, brackets, and ellipses omitted]). The party opposing a CPLR 3211(h) motion “must adduce allegations and evidence that demonstrate the existence of triable issues of fact regarding the [engineer’s] negligence and proximate cause” (*Golby*, 185 AD3d at 794).

In opposition to this branch of the motion by Noviello to dismiss the complaint insofar as asserts a cause of action against him pursuant to CPLR 3211 (h), the heightened standard imposed by CPLR 3211 (h) was met with relevant proof including, among other things, the expert engineer affidavits proffered by the third-party defendants, Shawn’s Lawn’s Inc. and GAC Builders LTD, which raised triable issues of fact as to Noviello’s alleged negligence and proximate cause thereof which the court finds is not suitable for determination at this stage of the litigation (*see Golby*, 185 AD3d at 794; *Schmitt*, 129 AD3d at 1053; *Castle Vil. Owners Corp. v Greater N.Y. Mut. Ins. Co.*, 58 AD3d 178, 184 [1st Dept 2008]).

This matter is presently scheduled for a compliance conference on June 14, 2021, at 12:00 p.m. which shall be conducted virtually via Microsoft Teams.

E N T E R,

Dated: White Plains, New York
June 14, 2021

Joan B. Lefkowitz

Digitally signed by Joan B. Lefkowitz
DN: CN=Joan B. Lefkowitz, E=jl@nycourts.gov
Reason: I am the author of this document
Location: your signing location here
Date: 2021.06.14 10:19:24-0400
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HON. JOAN B. LEFKOWITZ, J.S.C.