

Aschheim v 381 W. End Ave. LLC

2022 NY Slip Op 31036(U)

March 28, 2022

Supreme Court, New York County

Docket Number: Index No. 651894/2019

Judge: Louis L. Nock

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

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DEBORAH S. ASCHHEIM and ROBERT A. WEISS,

Plaintiffs,

- v -

381 WEST END AVENUE LLC, JM DIEBOLD (a/k/a JUAN MARIA DIEBOLD a/k/a JUAN MARIA NAVEJA DIEBOLD), and BELINDA KAMM (a/k/a BELINDA M. KAMM DIEBOLD), jointly and individually,

Defendants.

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381 WEST END AVENUE LLC, JM DIEBOLD (a/k/a JUAN MARIA DIEBOLD a/k/a JUAN MARIA NAVEJA DIEBOLD), and BELINDA KAMM (a/k/a BELINDA M. KAMM DIEBOLD), jointly and individually,

Third-Party Plaintiffs,

-against-

DYNAMIC RECONSTRUCTION CORP.,

Third-Party Defendant.

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INDEX NO. 651894/2019

09/17/2020,
10/12/2020,
10/22/2020,
10/27/2020,
09/24/2021

MOTION DATE

MOTION SEQ. NO. 001 002 003
004 005

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595539/2019

The following e-filed documents, listed by NYSCEF document number (Motion 001) 43, 44, 45, 46, 47, 48, 49, 50, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 152, 154, 155, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 183, and 184

were read on this motion to AMEND CAPTION/PLEADINGS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, and 151

were read on this motion for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 150, and 185

were read on this motion for ORDER OF ATTACHMENT

The following e-filed documents, listed by NYSCEF document number (Motion 004) 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 153, 156, 157, 174, 175, 176, 177, 178, 179, 180, 181, and 182

were read on this motion for

SUMMARY JUDGMENT (AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 005) 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, and 210

were read on this motion for

DISCOVERY

LOUIS L. NOCK, J.

Upon the foregoing documents, it is ordered that the above-noted motions are consolidated for disposition and determined as follows.

FACTUAL BACKGROUND¹

Plaintiffs have been the owners of 383 West End Avenue, New York, New York 10024 (“383 WEA”) since April 1994. On or about November 7, 2017, Defendant 381 WEA LLC became the owner of 381 West End Avenue, New York, New York 10024 (“381 WEA”). Defendants DIEBOLD and KAMM are the members of 381 WEA LLC.² 381 WEA is adjacent to 383 WEA. 381 WEA and 383 WEA are historic brownstone residences on the Upper West Side of Manhattan.

On or about November 8, 2017, following the purchase of 381 WEA, Defendant DIEBOLD initiated at meeting at Plaintiffs’ home at 383 WEA and told Plaintiffs that Defendants would be undertaking a complete renovation and expansion of 381 WEA that would impact 383 WEA. He requested that Plaintiffs evaluate the plans for the 381 WEA project and consider a license agreement with Defendant 381 WEA LLC for certain aspects of the 381 WEA project to proceed, including without limitation the underpinning of 383 WEA, erection of scaffolding and other protective structures on the 383 WEA site and for such other additional

¹ The facts are recited as alleged in the complaint, subject to proof.

² The complaint asserts that by virtue of same, said defendants “became the beneficial owners of 381 WEA” (Complaint ¶ 11).

items might arise during the review of the plan and the negotiations of the license agreement, and during the course of the 381 WEA project. At the November 8, 2017 meeting, Defendant DIEBOLD requested that Plaintiffs engage professionals to assist them in evaluating the plans for the 381 WEA project and consider a license agreement for the 381 WEA project. At the November 8, 2017 meeting, Defendant DIEBOLD stated that Defendants would assume full liability for the costs, fees and expenses of Plaintiffs' professionals – lawyer, engineer and architect (collectively, “Professionals”) – engaged by Plaintiffs to assist them in their evaluation of the plans for the 381 WEA project and impact of the 381 WEA project on their property at 383 WEA (all costs, fees and expenses of Professional being collectively, the “Expenses”) on condition that Plaintiffs entered into a license agreement with Defendants. At the November 8, 2017 meeting, Defendant DIEBOLD stated that Defendants were anxious to proceed quickly with the 381 WEA project. Within hours of the November 8, 2017 meeting, Defendant DIEBOLD sent Plaintiffs an email stating “As I said, please let me know if I can do anything to be a better neighbor.”

Following the November 8, 2017 meeting, Defendant DIEBOLD identified BAXT INGUI ARCHITECTS, PC (“BAXT INGUI”), MICHAEL INGUI (“INGUI”), MARC FABRIS (“FABRIS”) as the architect and project manager for the 381 WEA Project. On February 20, 2018, Defendant 381 WEA LLC and DIEBOLD invited Plaintiffs to “meet the architect and see the house.” Between February 20 and March 8, 2018 Plaintiffs and Defendant DIEBOLD, FABRIS and INGUI had telephone conversations about the Project. Defendant DIEBOLD, and FABRIS and INGUI, permitted Plaintiffs' architect, Ira Streitfeld, to participate in those conversations. On or about February 27, 2018, Defendants 381 WEA LLC and DIEBOLD invited Plaintiffs and their architect, Ira Streitfeld, to meet at 381 WEA with Defendant

DIEBOLD, INGUI and FABRIS for an on-site review of the plans for the 381 WEA project. At the February 27, 2018 meeting, Defendants presented the plans for the 381 WEA project to Plaintiffs. At the February 27, 2018 meeting, Defendant DIEBOLD told Plaintiffs and their Professionals that INGUI, FABRIS and BAX INGUI were authorized to act on behalf of Defendants 381 WEA, DIEBOLD and KAMM. Following the February 27, 2018 meeting, Defendant DIEBOLD identified ROBINSON BROG LEINWAND GREENE GENOVESE & GLUCK, P.C. (“ROBINSON BROG”) and DAVID ABRAMOVITZ, ESQ. (of ROBINSON BROG) as Defendants’ attorneys for the 381 WEA project. On March 1, 2018 at 1:45 PM, Plaintiff ASCHHEIM sent an email to Defendants that identified items for consideration relating to the 381 WEA project: which included: “Lastly, but for your project we would not be engaging Mr. Streitfeld at this time. This is a massive project that will take at least 2-1/2 years and will require a lot of involvement and vigilance on our part. We are going to need to devote time and resources to living with your project. We understand that it is customary in projects like this for the neighbors in your position to pay for the architects, engineers and lawyers that we must now engage to address your project. We would expect the same from you and that you will pay for the fees of these professionals.” On March 1, 2018, Defendant DIEBOLD replied at 6:34 PM: “We have discussed every item and have set a course in motion to address them, but it will take several days to cover some of the items you brought up. . . .” Shortly thereafter, Defendant DIEBOLD told Plaintiffs that Defendants would assume full liability for the Expenses and reimburse Plaintiffs for the Expenses if Plaintiffs would evaluate the plans for the 381 WEA project and consider a license agreement for those aspects of the 381 WEA project requiring one. On March 23, 2018, Defendant DIEBOLD wrote to Plaintiffs “I wanted to let you both know

that the contractor would like to start demolition and so forth a week from Monday. Can you wrap up the license agreement prior to this please. . . ?”

On and after March 23, 2018, Mr. Abramovitz provided draft license agreements to Plaintiffs and their lawyers. On or about March 24, 2018, Defendants commenced certain demolition and other construction-related activities at 383 WEA. Defendants and INGUI, FABRIS and BAXT INGUI did not provide Plaintiff or the Professionals with sufficient information about the work to be or being done for Plaintiffs to evaluate the activities or provide any consent or licenses. On April 11, 2018, Plaintiffs’ lawyer, Jeffrey K. Levin, wrote to Mr. Abramovitz at 5:49 PM: “My client has a bit of a “chicken and egg” problem. Your client has agreed conceptually to pay the costs of my client’s legal and engineering costs. However, that agreement is in the License Agreement, which is of course not yet fully negotiated. In order to finalize the Agreement, she needs to actually retain the engineer and get him started, but they are reluctant to do so and agree to pay the engineer’s fees without knowing their expenses will be covered. . . . I’d like to suggest that your client post a sum of money as an initial good faith deposit towards the expenses of my client that we know have been or will be incurred. My suggestion would be \$10,000. Let me know your thoughts.” On April 11, 2018, Mr. Abramovitz replied at 7:04 PM: “Typical issue. I will discuss with my client. Unlikely that will agree to put money in escrow, but I anticipate they will authorize me to represent that they will pay the fees within reason. Along those lines, I typically request that we be provided with the engineer’s scope and fee proposal, so we know what it is my client is being asked to commit to paying. Assuming, as I do, that the proposal is typical and within the usual range of fees, I do not expect a problem getting authority.”

On or about April 17, 2018, Plaintiffs through their attorney, Jeffrey K. Levin, provided their engineer's and architect's scope and fee proposal to Mr. Abramovitz, along with discussion points relating to the method of reimbursing Plaintiffs for Expenses and escrow. Shortly thereafter, Plaintiffs' lawyer, Jeffrey K. Levin, reported that Mr. Abramovitz had notified him that he (Mr. Abramovitz) was authorized to represent to Plaintiffs that Defendants agreed to pay the fees and expenses of the Professionals. Over the course of several months from November 2017 to January 2019, Plaintiffs engaged Professionals and so advised Defendants through their lawyer. Plaintiff engaged Professionals as follows:

Legal: LeClair Ryan (Jeffrey Levin, Esq.): November 2017 – July 2018
Anderson Kill (Andrew Freedland, Esq.): July 2018 – Present
Architect: Riverside Architects (Ira Streitfeld): Nov. 2017 to July 2018
Ayon Studio (Angel Ayon): July 2018 – Present
Engineer: LERA (Benjamin Cornelius): March 2018 – Present

Over the course of several months from March 24, 2018, there were extensive demolition and construction activities at 383 WEA. Defendants did not provide Plaintiff or the Professionals with sufficient information about the work to be or being done for Plaintiffs to evaluate the activities or provide any consent or licenses. Over the course of several months from April 2018 to July 2018, Mr. Abramovitz submitted to Plaintiffs updated plans for the 381 WEA project and updated drafts of the license agreements for the 381 WEA project and directed Plaintiffs to review them. Over the course of several months from April 2018 to July 2018, Plaintiffs reviewed the updated plans for the 381 WEA project and updated drafts of the license agreements for the 381 WEA project with the Professionals. Over the course of several months from April 2018 to July 2018, Plaintiffs and the Professionals provided comments to the plans for the 381 WEA project and updated drafts of the license agreements for the 381 WEA project to Mr. Abramovitz, along with updated reports on the Expenses which they had incurred.

On or about July 11, 2018, Defendants DIEBOLD and KAMM invited Plaintiffs to meet and discuss the 381 WEA project. During that meeting, Defendants DIEBOLD and KAMM and Plaintiffs reviewed the plans for the 381 WEA Project and the Expenses incurred to date by Plaintiffs for their Professionals. Defendants repeated their agreement to assume full liability for the Expenses and reimburse Plaintiffs for the Expenses. During the July 11, 2018 meeting, Defendants DIEBOLD and KAMM also stated that they were establishing and funding an escrow account from which the Expenses would be reimbursed to Plaintiffs if Plaintiffs documented all Expenses and submitted the supporting documentation to Defendants. Plaintiffs agreed to document the Expenses. Following the July 11, 2018 meeting, Defendant DIEBOLD identified CARTER LEDYARD & MILBURN LLP (“CARTER LEDYARD”) and KAREN MEARA, ESQ. (of CARTER LEDYARD) as Defendants’ attorneys for the 381 WEA project, replacing ROBINSON BROG and Mr. Abramovitz. From July 2018 to January 2019, Ms. Meara submitted to Plaintiffs updated plans for the 381 WEA project and updated drafts of the license agreements for the 381 WEA project and directed Plaintiffs to review them. During that same period, Plaintiffs reviewed the updated plans for the 381 WEA project and updated drafts of the license agreements for the 381 WEA project with the Professionals. During that same period, Plaintiffs and the Professionals also provided Ms. Meara with comments to the plans for the 381 WEA project and the draft license agreements, along with updated reports on the Expenses which they had incurred. On August 17, 2018, Ms. Meara wrote to Plaintiff’s lawyer, Andrew Freedland, at 3:35 PM: “Regarding the invoices for professional fees, thank you for sending those along. As discussed and reflected in the draft licensing agreement, our client is prepared to cover reasonable and necessary professional fees for purposes such as negotiation of the license agreement, review of protection plans, and monitoring during construction. Our

clients are not willing to pay, nor should they, for expenses incurred as part of your clients' efforts to block Community Board and Landmarks approval of the project, or any similar future efforts (the "obstruction efforts"). The amounts reflected in the invoices strike us as quite high for a matter of this scale – particularly given that we do not yet have a license agreement. Moreover, they clearly include charges associated with the obstruction efforts, and lack the detail necessary to differentiate between such charges and the reasonable and necessary charges our client is willing to pay for. In the interest of avoiding protracted debate on the sufficiency of the contents of invoices and whether particular charges were reasonable and necessary, we propose to pay a flat fee of \$15,000 for professional services, with a carve out as proposed in section 10(b) of the draft license agreement to protect your clients in certain circumstances that would necessitate additional professional services."

On August 20, 2018, Plaintiffs' lawyer, Andrew Freedland, replied to Ms. Meara and wrote "Any agreement between 381 and 383 is going to require that 381 bear all expenses with respect to reviewing the proposed license agreement and the plans for the work to be undertaken by 381, especially, those portions of the work which will have a direct impact on the 383 property. Your client's failure to address the Easement directly with my client caused my client to make presentations to the Department of Buildings and the Landmarks Preservation Commission. Had your predecessor returned the phone calls of Mr. Levin, this matter would probably be in a different place. We are willing to concede that your client will not be responsible for the payment of the invoices of Patterson & Aschheim; however, all other bills and invoices to date must be paid. In addition, 381 should set up an escrow in the amount of \$25,000.00 to cover future expenses that 383 will incur prior to the execution of a license agreement between the parties. There is no reason for 383 to bear the cost of experts to review

plans and agreements while we wait for an agreement to be signed for reimbursement. Moving forward will be contingent on this arrangement. A flat fee of \$15,000.00 is not reasonable with respect to the scope of work you are proposing – a multiyear renovation which will significantly impact the ability of my client to enjoy their home. I also note that on April 25, 2018 your client's prior counsel authorized the engineer for 383 to commence their work at the expense of 381.”

On September 14, 2018, Ms. Meara wrote an email to Plaintiffs’ attorney, Andrew Freedland, at 4:21 PM: “As I indicated in my recent letter, our client recognizes that your clients have incurred and will incur some reasonable and necessary expenses associated with 381’s project, like hiring an attorney to negotiate a license agreement and an engineer to review protection plans. While the total sums involved and the sufficiency of the documentation are still subject to debate, as a show of good faith our client would like to make an immediate payment of \$15,000 towards these expenses, and my firm is holding funds in escrow for that purpose. Please let me know where to direct payment.”

By September 14, 2018, Plaintiffs had incurred more than \$30,000 in Expenses. On or after September 14, 2018, Plaintiffs provided Ms. Meara with documentation relating to the Expenses and requested reimbursement. Ms. Meara did not convey from Defendants to Plaintiffs the promised \$15,000 payment. Over the course of several months from March 2018 to January 2019, demolition was conducted at 381 WEA. Over the course of several months from June 2018 to January 2019, concurrently with the demolition, Plaintiffs observed mice inside 383 WEA, attributable to displacement cause by the demolition. Plaintiffs reported the matter to Defendants, but Defendants failed to address the problem. Plaintiffs engaged an

exterminator to address the problem caused by the demolition at 381 WEA. To date, Plaintiffs have incurred expenses for extermination services.

On or about March 14 and March 20, 2018, FABRIS, INGUI and BAXT INGUI conducted a pre-construction inspection and survey of 383 WEA on behalf of Defendants. In or about June, 2018, Plaintiffs reported to Defendants, and to FABRIS and INGUI that they had painted and plastered 383 WEA and that the March 20, 2018 preconstruction survey was no longer accurate. Plaintiffs invited FABRIS, INGUI, BAXT INGUI, and Defendants to return to 383 WEA to reinspect 383 WEA. On several occasions from June 2018 to January 2019, Plaintiffs invited Defendants to reinspect 383 WEA. On or about July 16, 2018, Defendant DIEBOLD abruptly cancelled the scheduled inspection. To date, Defendants have not returned to 383 WEA to reinspect the property. In or about September 2018, Defendants and Ms. Meara notified Plaintiffs that demolition would resume at 381 WEA, including roof and exterior demolition. Plaintiffs requested information relating to the planned work, but Defendants' failed to respond to that request. Plaintiffs did not consent to any of the planned work.

In or about September 2018, Plaintiffs observed that construction personnel under the direction of Defendants, FABRIS, INGUI and BAXT INGUI resumed demolition work on the 381 WEA property, including work on the roof of 381. Plaintiffs observed that the construction personnel were working on the common wall between 381 WEA and 383 WEA. Plaintiffs observed during those activities that an air conditioning duct and coping stones and protective materials on the common wall between 381 WEA and 383 WEA had been removed without Plaintiffs' consent. Plaintiffs reported this to Defendants and Ms. Meara. Shortly after the roof work, in or about October 2018, Plaintiffs observed cracks in interior walls of 383 WEA below the common wall between 381 WEA and 383 WEA that did not previously exist. Plaintiffs

notified Defendants and FABRIS, INGUI and BAXT INGUI and demanded that they repair the interior walls in 383 WEA so impacted and restore the common wall to its proper and protected condition. In or about October 2018, Plaintiffs reported to Defendants and Ms. Meara that they had observed the unauthorized removal of the air conditioning duct, coping stones and protective materials on the common wall between 381 WEA and 383 WEA, and demanded that Defendants, FABRIS, INGUI and BAXT INGUI restore the common wall to its proper and protected condition. From September 2018 to present, none of Defendants, FABRIS, INGUI and BAXT INGUI have restored or repaired the common wall between 381 WEA and 383 WEA. From September 2018 to present, none of Defendants, FABRIS, INGUI and BAXT INGUI have restored, repaired or repainted the damaged interior walls at 383 WEA.

Finally, on or about January 18, 2019, Ms. Meara advised Plaintiffs' attorney, Andrew Freedland, that Defendants had abandoned their plans for the 381 WEA project, abandoned the proposed license agreement, and were putting 381 WEA on the market for sale.

Plaintiffs allege that they have incurred more than \$54,000 in Expenses to date for professional services rendered by the Professionals during the period from November 2017 through January 2019 relating to the review of the plans for the 381 WEA project and consideration of a license agreement for the 381 WEA project. It is further alleged that Plaintiffs have sustained property damage of an unspecified amount relating to mice in 383 WEA caused by demolition at 381 WEA which was performed at Defendants' direction without the consent of Plaintiffs. It is further alleged that Plaintiffs have sustained property damage of an unspecified amount relating to Defendants' unauthorized demolition work on the 381 WEA property, and unauthorized removal of the air conditioning duct, coping stones and protective materials on the common wall between 381 WEA and 383 WEA.

On or about January 22, 2019, Plaintiff submitted another written demand for reimbursement by Defendants of Expenses incurred by Plaintiffs for Professionals relating to the 381 WEA project. It is alleged that as of the date hereof, Defendants have failed to reimburse Plaintiff.

THE PLEADINGS

Plaintiffs commenced this action by filing of a summons and complaint on April 1, 2019. Defendants filed an answer on April 30, 2019. The complaint asserts causes of action seeking a judgment in the principal sum of \$54,000 to compensate Plaintiffs for their Expenses and in an undetermined principal sum to compensate Plaintiffs for the property damage alleged to have been caused by Defendants. Thereafter, Defendants commenced the third-party action by summons and third-party complaint on June 20, 2019 against DYNAMIC RECONSTRUCTION CORP. ("DYNAMIC"), alleging that DYNAMIC "controlled," "maintained," and "supervised" the work at the subject premises, and asserting claims for indemnification, contribution, and failure to procure insurance. DYNAMIC filed an answer to the third-party complaint on July 29, 2019, amending that on August 16, 2019.

THE MOTIONS

On September 17, 2020, Plaintiffs moved to amend their complaint (motion seq. no. 001), seeking to add one, Deborah Anne Diebold Naveja (defendant DIEBOLD's mother) as a defendant, who is alleged to be a member of 381 WEA LLC, and seeking to add DYNAMIC as a defendant in the case-in-chief. DYNAMIC cross-moved to dismiss Plaintiffs' claims "for property damage."

On October 12, 2020, Plaintiffs moved (motion seq. no. 002) for an order compelling Defendants' production of trust agreements "relating to (1) the Juan Maria Naveja Diebold

Revocable Trust, and (2) the Deborah Diebold de Naveja Descendants Trust.” That motion was withdrawn by stipulation filed November 9, 2020 (the “Stipulation to Withdraw”) (NYSCEF Doc. No. 154). Thus, this motion is denied, as withdrawn.

On October 20, 2020, Plaintiffs moved (motion seq. no. 003) for an order of attachment for the placing by Defendants of the sum of \$70,608.98 into escrow, or the posting of a bond securing such sum, and for a temporary restraining order prohibiting the sale of 381 WEA, pending the disposition of this action. On October 23, 2020, DYNAMIC cross-moved for sanctions against Plaintiffs. That motion and cross-motion were withdrawn by the Stipulation to Withdraw. Thus, that motion and cross-motion are denied, as withdrawn.

On October 26, 2020, DYNAMIC moved (motion seq. no. 004) for summary judgment dismissing the third-party complaint.

Finally, on September 24, 2021, Plaintiffs moved (motion seq. no. 005) for an order compelling the examination of Mr. Abramovitz and his production of documents pursuant to a non-party subpoena.

DISCUSSION

Motion Sequence No. 001 (Motion to Amend the Complaint;
Cross-Motion to Dismiss Plaintiffs’ Claims for “Property Damage”)

DYNAMIC opposes the Plaintiffs’ motion to add it as a defendant in their case-in-chief (in the aftermath of the third-party complaint alleging responsibility on DYNAMIC’s part) by submitting an affidavit from DYNAMIC’s president, Dariusz Chrzastek, which essentially denies the allegation of the third-party complaint that DYNAMIC controlled, maintained, and/or supervised the work lying at the heart of this case (*see*, NYSCEF Doc. No. 101). Notably, though, Mr. Chrzastek, at the very least, acknowledges that DYNAMIC was in contract negotiations with BAXT INGUI to perform demolition work at the worksite (*see, id.*, ¶¶ 5-7).

He later acknowledges that DYNAMIC performed the removal of the roof air conditioning unit that is a subject of Plaintiffs' claims (*see, id.*, ¶¶ 13, 18). Moreover, photographs submitted by Mr. Chrzastek (NYSCEF Doc. Nos. 110-13), intended to prove that DYNAMIC did not manipulate the coping stones that are a subject of Plaintiffs' claims, bear no date/time stamps and, therefore, may be subject to contradiction at trial or may require testimonial elucidation at trial. Although Mr. Chrzastek asserts that DYNAMIC subcontracted demolition work to a different entity – Rose Demolition & Carting (*id.*, ¶ 14) (which seems to contradict his earlier implication that DYNAMIC never entered into a demolition contract with BAXT INGUI) – that does not conclusively demonstrate that DYNAMIC was in no way involved in the work, either directly or in a supervisory capacity (as the third-party complaint alleges).

Plaintiffs, in their motion to amend, and in their proposed amended complaint, have alleged (commensurate with the third-party action's theoretical basis), that DYNAMIC performed demolition-related work which gave rise to problems lying at the crux of this case.

CPLR 3025 (b) provides that “[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court” CPLR 1003 further provides that “[p]arties may be added at any stage of the action by leave of court” Moreover, courts shall “freely give[]” leave to amend or supplement a complaint “upon such terms as may be just” (CPLR 3025 [b]; *Murray v City of N.Y.*, 43 NY2d 400 [1977], *rearg dismissed* 45 NY2d 966 [1978]; *Marks v Macchiarola*, 221 AD2d 217, 218 (1st Dept 1995) [“Leave to amend ‘shall be freely given’ ‘at any time’”]).

Plaintiffs' proposed addition of a direct cause of action against DYNAMIC – although it is, right now, a third-party defendant – is obviously designed to consolidate any and all possible parties who might be responsible for the property damage alleged by the Plaintiffs in this action.

Importantly, Plaintiffs are not adding a cause of action that was not previously asserted in the original complaint. Under the Legislature's policy for liberal amendment of pleadings, this court sees no reason to preclude Plaintiffs from proceeding with their requested amendment.

Plaintiffs will serve their amended summons and amended complaint on newly named defendant DYNAMIC no later than ten days from the date of filing hereof. Because DYNAMIC has already appeared in this action, through the third-party action, and is and has been represented by counsel, the court will permit such service to be effected by NYSCEF filing. Plaintiff will serve its amended summons and amended complaint on newly named defendant Deborah Anne Diebold de Naveja, who appears not to have participated yet in this action, by way of the service of process requirements of the CPLR no later than twenty days from the date of filing hereof.

DYNAMIC's cross-motion to dismiss the claims asserted against it, and summary judgment motion dismissing said claims, are premised in large part on the attestations of the Chrzasek Affidavit, noted above. Because those attestations do not "utterly refute[]" Plaintiffs' allegations (*Goshen v Mutual Life Ins. Co.*, 98 NY2d 314, 326 [2002]), as discussed above, they cannot suffice to dismiss the claims at this stage of the litigation.

Insofar as DYNAMIC challenges the precise applicability of the rubric under which Plaintiffs' property damage claim is asserted against it ("Property Damage"), DYNAMIC will be reminded of the well settled principle that a claim is sustainable if, from a reading of the complaint, it can be ascertained that any cognizable cause of action has been stated, regardless of any lack of precision in its articulation (*see, e.g., Sheila C. v Povich*, 11 AD3d 120 [1st Dept 2004]; *Andre Strishak & Assocs., P.C. v Hewlett Packard Co.*, 300 AD2d 608 [2d Dept 2002]; *Collins v Telcoa Intl. Corp.*, 283 AD2d 128 [2d Dept 2001]).

Accordingly, DYNAMIC's cross-claim to dismiss the claim asserted against it is denied.

Motion Sequence No. 005 (Motion to Compel an Examination of David Abramovitz, Esq.)

Plaintiffs moves to compel compliance with a non-party subpoena served upon David Abramovitz, Esq., of the firm of Robinson Brog Leinwand Greene Genovese & Gluck, P.C., serving as counsel for the Defendants from November 2017 through July 2018 (as indicated in the Factual Background section of this decision, *supra*), for the purpose of taking his deposition in connection with matters related to this lawsuit. Plaintiffs assert that such a deposition is necessary to confirm whether Mr. Abramovitz was authorized by his clients – the Defendants – to bind the Defendants to an agreement to compensate Plaintiffs for their Expenses (*see*, Affidavit of Deborah S. Aschheim [NYSCEF Doc. No. 193]). Distinct of Mr. Abramovitz' opposition on grounds of privilege (*see*, Affirmation of David Abramovitz, Esq. [NYSCEF Doc. No. 208]), this court perceives of no necessity that could serve as a predicate for such an examination; nor for documents sought under the aforesaid subpoena (*see, e.g., Soho Generation of N.Y., Inc. v Tri-City Ins. Brokers, Inc.*, 236 AD2d 276 [1st Dept 1997] [requiring necessity]).

Plaintiffs deposed defendant DIEBOLD. He already confirmed during that testimony that "Defendants authorized ABRAMOVITZ to represent Defendants in connection with the WEA Project, including communications with representatives of Plaintiffs, such as Mr. Levin" (NYSCEF Doc. No. 193 ¶ 25).³ Plaintiffs openly acknowledge their awareness of those communications (*see*, NYSCEF Doc. No. 193 ¶ 16).

Plaintiffs' own complaint recounts that at the November 8, 2017 meeting, Defendant DIEBOLD stated that Defendants would assume full liability for the costs, fees and expenses of Plaintiffs' professionals – lawyer, engineer and architect (collectively, "Professionals") –

³ Jeffrey K. Levin, Esq. – Plaintiffs' counsel.

engaged by Plaintiffs to assist them in their evaluation of the plans for the 381 WEA project and impact of the 381 WEA project on their property at 383 WEA (all costs, fees and expenses of Professional being collectively, the “Expenses”) on condition that Plaintiffs entered into a license agreement with Defendants. Plaintiffs’ own complaint continues to recount that shortly after March 1, 2018, Defendant DIEBOLD told Plaintiffs that Defendants would assume full liability for the Expenses and reimburse Plaintiffs for the Expenses if Plaintiffs would evaluate the plans for the 381 WEA project and consider a license agreement for those aspects of the 381 WEA project requiring one. Plaintiffs’ own complaint further recounts that during a July 11, 2018 meeting, Defendants DIEBOLD and KAMM stated that they were establishing and funding an escrow account from which the Expenses would be reimbursed to Plaintiffs if Plaintiffs documented all Expenses and submitted the supporting documentation to Defendants.

As Plaintiffs’ own complaint further recounts, on August 17, 2018, Defendants’ substituted lawyers (CARTER LEDYARD and Karen Meara, Esq.) wrote to Plaintiff’s lawyer, Andrew Freedland: “Regarding the invoices for professional fees, thank you for sending those along. As discussed and reflected in the draft licensing agreement, our client is prepared to cover reasonable and necessary professional fees for purposes such as negotiation of the license agreement, review of protection plans, and monitoring during construction. Further with regard to said substituted lawyers, the complaint recounts that on September 14, 2018, Ms. Meara wrote an email to Plaintiffs’ attorney, Andrew Freedland: “As I indicated in my recent letter, our client recognizes that your clients have incurred and will incur some reasonable and necessary expenses associated with 381’s project, like hiring an attorney to negotiate a license agreement and an engineer to review protection plans.

Taking those allegations as true, it is inconceivable that Plaintiffs are unable to make any proffer of proof regarding Defendants' undertaking to assume responsibility for Expenses, as alleged, short of compelling Mr. Abramovitz to testify at deposition regarding same (*see, In re Stewart*, 156 AD2d 294, 294 [1st Dept 1989] [compelling a party's attorney to testify with regard to matters underlying the case can create "an inevitable 'chilling effect'" on the attorney-client relationship], *appeal dismissed* 75 NY2d 1005 [1990]).

As with deposition testimony, this court sees no necessity in compelling the production by Mr. Abramovitz of documents which Plaintiffs' own counsel has possession of, such as email communications between their counsel, Mr. Levin, and Mr. Abramovitz (*see, NYSCEF Doc. No. 193 ¶ 16*).

But more importantly, as a matter of law, parties are bound by their attorneys' agreements "even if the attorney lacked actual authority to enter into the" agreement because "he had apparent authority to do so" (*Anghel v Utica Mut. Ins. Co.*, 164 AD3d 1294, 1295 [2d Dept 2018]). Insofar as an attorney's exercise of apparent authority may have been incongruous with actual authority, that is a matter resting among and between the attorney and his or her principal – the client.⁴

Accordingly, the motion to enforce the Plaintiffs' non-party subpoena of David Abramovitz, Esq., is denied.

⁴ This court makes no determination in this case in such regard.

CONCLUSION

For all the foregoing reasons, it is

ORDERED that Plaintiffs' motion (motion seq. no. 001) to amend the complaint in the form filed as NYSCEF Doc. No. 45 is granted, and said amended complaint is deemed filed; and it is further

ORDERED that Plaintiffs will serve their amended summons and amended complaint on newly named defendant DYNAMIC by NYSCEF filing no later than ten days from the date of filing hereof; and it is further

ORDERED that Plaintiffs will serve their its amended summons and amended complaint on newly named defendant Deborah Anne Diebold Naveja by way of the service of process requirements of the CPLR no later than twenty days from the date of filing hereof; and it is further

ORDERED that Third-Party Defendant DYNAMIC's cross-motion to dismiss the claims asserted against it is denied; and it is further

ORDERED that Plaintiffs' motion (motion seq. no. 005) to enforce their non-party subpoena of David Abramovitz, Esq., is denied; and it is further

ORDERED that Plaintiffs' motion (motion seq. no. 002) for an order compelling Defendants' production of trust agreements "relating to (1) the Juan Maria Naveja Diebold Revocable Trust, and (2) the Deborah Diebold de Naveja Descendants Trust" is denied, as withdrawn; and it is further

ORDERED that Plaintiffs' motion (motion seq. no. 003) for an order of attachment for the placing by Defendants of the sum of \$70,608.98 into escrow, or the posting of a bond

securing such sum, and for a temporary restraining order prohibiting the sale of 381 WEA, pending the disposition of this action is denied, as withdrawn; and it is further

ORDERED that Third-Party Defendant DYNAMIC's cross-motion for sanctions against Plaintiffs is denied, as withdrawn; and it is further

ORDERED that Third-Party Defendant DYNAMIC's motion (motion seq. no. 004) for summary judgment dismissing the claims against it is denied; and it is further

ORDERED that the caption of the within case-in-chief (index No. 651894/2019) is hereby amended to read:

"-----X
 DEBORAH S. ASCHHEIM and ROBERT A. WEISS, :
 Plaintiffs, : Index No. 651894/2019
 -against- :
 381 WEST END AVENUE LLC, JM DIEBOLD :
 (a/k/a JUAN MARIA DIEBOLD a/k/a :
 JUAN MARIA NAVEJA DIEBOLD), and :
 BELINDA KAMM (a/k/a BELINDA M. KAMM :
 DIEBOLD), DEBORAH ANNE DIEBOLD NAVEJA, :
 and DYNAMIC RECONSTRUCTION CORP., jointly :
 and individually, :
 Defendants. :
 -----X"; and it is further

ORDERED that Plaintiffs will cause a copy of this order to be electronically served/filed with the Office of the Clerk of the County of New York; and it is further

ORDERED that, subject to the aforesaid service/filing with the Office of the Clerk of the County of New York, said Office is directed to note the above amended caption in its files.

This shall constitute the decision and order of the court.

ENTER:

Louis L. Nock

3/28/2022

DATE

LOUIS L. NOCK, 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