SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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INDEX NO. 151743/2013

MOTION DATE 06/03/2022, 05/13/2022

MOTION SEQ. NO. 003 004

7-11 EAST 13TH STREET TENANTS CORP., DAVID MASENHEIMER, JAMES MORGAN, ASAF YOGEV, BARBARA THOMPSON, SARAH THOMPSON, EVAN OPPENHEIMER, LIA LEVENSON, MATT ONER, DANIELLA VAN GENNEP, PETER NAKADA, DONALD WILMOTT, SEAN FARQUHARSON, JOHN DONAHUE, CHARLES STIMSON, ADAM SINGER, JAMES MCCARTHY, JOSHUA KESSLER, BETTINA MICHELI, PHILLIP LIU, EVAN REILLY, LESLEY SKILLEN, LAURENCE CANTOR, RICHARD MARTIN, PATRICIA WHITE, ROBERT ANGERT, SHANA SCHWARTZ, 7-11 EAST 13TH STREET CONDOMINIUM, HARLEYSVILLE WORCESTER INSURANCE COMPANY, AS SUBROGEE OF 7-11 EAST 13TH STREET TENANTS CORP., 7-11 EAST 13TH STREET CONDOMINIUM,

Plaintiffs,

- v -

THE NEW SCHOOL, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, THE DURST ORGANIZATION, INC.,URBAN FOUNDATION/ENGINEERING, LLC,DESIMONE CONSULTING ENGINEERS, SKIDMORE, OWINGS AND MERRILL, LLP, LANGAN ENGINEERING & ENVIRONMENTAL SERVICES INC.,

Defendants.

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DECISION + ORDER ON MOTION

THE NEW SCHOOL, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, THE DURST ORGANIZATION, INC., URBAN FOUNDATION/ENGINEERING, LLC

Plaintiffs,

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Defendants.

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Third-Party
Index No. 590971/2013

The following e-filed documents, listed by NYSCEF document number (Motion 003) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 165, 167, 168, 169, 171, 174, 175, 178, 179, 180, 181, 196, 199, 200, 201, 202, 203, 221, 222, 233, 235, 236

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 166, 170, 172, 176, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 197, 198, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 234

were read on this motion to/for JUDGMENT - SUMMARY.

BACKGROUND

This action arises from the design and construction of a new academic and dormitory space for The New School at 65 Fifth Avenue, New York, New York (the Project). The New School is the owner of the property in question. Durst Organization, Inc. (Durst) was the developer of the Project. Tishman Construction Group (Tishman) was the general contractor and construction manager for the Project. Tishman retained Urban Foundation/Engineering LLC (Urban) as the contractor for excavation and foundation work. DeSimone Consulting Engineers (DeSimone) was retained as the structural engineer. Skidmore, Owings, & Merrill, LLP (Skidmore) was the architect on the Project.

Langan Engineering & Environmental Services, Inc., now known as Langan Engineering, Environmental, Surveying, Landscape Architecture and Geology, D.P.C. (Langan) was retained by The New School to provide certain geotechnical and site civil services in connection with the Project, including: preparation of two geotechnical reports, provision of design foundation support for the external structural bracing of adjacent buildings prior to and during demolition of the old New School structure, preparation of a placeholder/permitting set of post-demolition underpinning and support of excavation (SOE) plans for obtaining a permit with the New York

City Department of Buildings (DOB), provision of vibrational – not optical - monitoring and general observation of the work performed by Urban and reporting the same to The New School.

PENDING MOTIONS

On March 1, 2022, Langan moved for summary judgment dismissing the claims asserted against it.

On April 8, 2022, defendants The New School, Durst, Tishman & Urban moved for an order:

> Granting defendants summary judgment on the plaintiffs' claims arising under § 23-3309.4 of the New York City Administrative Code; and
>
> Granting defendants partial summary judgment as against plaintiff 7-11 East 13th Street Condominium for all claims; and
>
> Granting defendants partial summary judgment as against all plaintiffs and dismissing all claims for damages to the common elements of the subject condominium; and
>
> Pursuant to CPLR §1021 dismissing the claims of plaintiff Barbara Thompson;
>
> Pursuant to CPLR § 3126 striking the claims of plaintiff EVAN REILLY for failure to appear for deposition, or alternatively, precluding him from offering evidence at trial;

On May 13, 2022, plaintiffs cross-moved for an order:

> Striking that part of the motion for partial summary judgment made by defendants that seeks summary judgment due to the alleged lack of capacity/standing of the Condominium, on the ground that each defendant waived this defense pursuant to CPLR 3211 (e); and
>
> Permitting the amendment of the caption in this action to revise the name of the Condominium so that it reads "The Board of Managers of the 7-11 East 13th Street Condominium;" and
>
> On behalf of named plaintiffs Barbara Thompson and Sarah Thompson, for an order permitting the substitution for them of the "Estate of Barbara Thompson, by its co-executors, Sarah Thompson, Stefan Thompson and Edward C. Kline," due to the death of plaintiff Barbara Thompson, and withdrawing the separate claim of plaintiff Sarah Thompson; and
>
> Permitting the amendment of the caption.

The motions are consolidated herein for determination and granted to the extent set forth below.

ALLEGED FACTS

The two buildings at issue in this action are located at 9 East 13th Street and 12 East 14th Street. They are adjacent to each other and span between East 13th Street and East 14th Street. 9 East 13th Street is separated from the New School building by another building not at issue in this lawsuit and located at 5 East 13th Street (the O'Hara building), which is immediately to the east of the New School building and to the west of 9 East 13th Street. Similarly, 12 East 14th Street is separated from the New School building by another building not at issue in this lawsuit and located at 10 East 14th Street which is immediately to the east of the New School building and to the west of 12 East 14th Street.

On September 9, 2013, the 7-11 East 13th Street Tenants Corp. (Tenants Corp), which is the owner and operator of residential units of the 7-11 East 13th Street Condominium (Condominium) and the individual unit owners, filed a complaint in Supreme Court, New York County, against the New School, Tishman, Durst, and Urban and Langan for damages to 9 East 13th Street and 12 East 14th Street and the individual apartments, resulting from the construction of the Project (Tenants' Action). Plaintiffs alleged: (1) injury to property pursuant to General Construction Law § 25-b; (2) violations of NYC Administrative Code Section 3309.4; (3) private nuisance; (4) trespass; and (5) negligence.

On September 9, 2013, the Tenants Corp., the Condominium and Harleysville Worcester Insurance Company (as subrogee of the Tenants Corp. and the Condominium) filed a complaint in Supreme Court, New York County, against the same defendants, alleging the same causes of action for damages to the same buildings (Subrogation Action).

Langan entered into a Master Consultant Agreement with The New School on July 9, 2009 and subsequent addendum agreements, which provided the scope of Langan's services on the Project (collectively "Langan Contract").

Urban contracted with Tishman on June 22, 2010 for design and construction services for the excavation and foundation of the Project (Urban Contract).

Langan had different roles during each of the two discrete phases of the Project: Phase 1 Pre-Demolition and Exterior Structural Bracing Phase with respect to the demolition of the old New School building and the exterior structural bracing of the O'Hara building; and Phase 2 Support of Excavation Phase following demolition of the old New School building to make way for the foundation of the new building.

Phase I occurred between March 2010 and August 2010 and involved the installation of exterior structural bracing to the O'Hara building for protection during the eventual demolition of the old New School building. DeSimone designed the exterior bracing and Langan designed the corresponding foundation support for the bracing and was the controlled inspector for the exterior structural bracing foundation elements that were installed at this time. When Langan signed on as the initial EOR and filed the TR-1 on April 7, 2010, as the entity responsible for the exterior structural bracing foundation (mini caissons and tie backs) and the pre-demolition underpinning (9" diameter jack piles), Langan asserts it was only intended by Tishman to be the initial placeholder to obtain the requisite building permits and that it was understood that Tishman would retain Urban to take over the responsibility as EOR. However, the DOB paperwork to effect the change from Langan to Urban as EOR responsible for the pre-demolition designs and inspection, never took place and Langan remained responsible for this work.

Consequently, Langan filed a TR-1 dated August 26, 2010 signifying that it completed the inspections.

Between September 2010 and December 2010, the old New School building was demolished by the demolition contractor. Langan had no role or duties and was not on site during that time frame.

Phase 2 occurred between January 2011 and November 2011 and involved underpinning and other support of excavation (SOE) activities. To reflect its status as the new EOR, Urban had filed a TR-1 on October 6, 2010 replacing Langan as the EOR. Shortly thereafter, Urban filed its own post-demolition underpinning and SOE drawings.

During Phase 2, Langan asserts its role was to observe on behalf of the owner and monitor the construction by Urban, and report on any issues observed. Pursuant to the Master Consultant Agreement, Langan was required to visit the site as requested by the owner in order to be familiar with the progress and the quality of the work and to keep The New School informed of the progress and quality of the work as well as to report any observed defects or deficiencies.

The means and methods utilized by Urban to perform the installations were uniquely Urban's responsibility over which Langan, had no say. The contract provided that Langan would not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the work, but that Langan would promptly inform The New School of any activities observed that were inconsistent with the requirements of the Contract Documents.

As part of Langan's services on the Project, it charted the movement of 5 East 13th Street and 9 East 13th Street based on the optical survey data prepared by an independent surveyor, Kowalik Surveying.

During Phase 1, the east wall of the O'Hara Building settled about 1/2 inch as of August 16, 2010. The optical survey point along the west wall of the 9 East 13th Street building was not established by Kowalik until August 23, 2010. Therefore, there is no evidence of any recorded settlement at 9 East 13th Street prior to that date. However, Langan asserts that for 9 East 13th Street as of that date would likely have been less because the O'Hara building is closer to the Project.

During Phase 2, Kowalik's survey data indicates that 9 East 13th Street settled 3 inches between July 2011 and November 2011, contemporaneously with the Project excavation performed by Urban. Langan asserts that it is undisputed that the overwhelming amount of recorded settlement at the 9 East 13th Street building occurred during Phase 2, when Urban, not Langan, was the EOR.

Langan prepared two geotechnical reports. The first report, dated May 30, 2008, evaluated the Project's subsurface conditions and developed recommendations for foundation design and construction. Langan also provided detailed recommendations for a foundation system, and support of below-grade walls and cellar slab as well as specific recommendations regarding underpinning and excavation support. Langan recommended a water-tight system with a secant pile wall.

After Urban and the New School felt that the secant wall recommended by Langan was too expensive, Urban suggested a soldier pile and lagging type system.

On February 12, 2010, Langan issued its second report. Langan opined on the merits of various approaches for underpinning the building and SOE for the New School site after demolition of the old New School building. Due to the geotechnical conditions and the high water levels detected, Langan stated that only if the contractor was able to properly control the water levels, was Urban's suggested soldier pile and lagging type system "feasible." However, Langan maintained that if the water levels could not be controlled by the contractor, a secant wall system should be used as a water-tight method to prevent complications from groundwater.

Tishman and Urban proceeded to implement their selection of a soldier pile and lagging type system. Langan prepared a permit or "placeholder" design for post-demolition underpinning for the building and SOE for filing with the DOB and NYC Transit that was consistent with Tishman and Urban's selection of a solder pile and lagging system. After October 6, 2010, when Urban replaced Langan as the EOR, it changed Langan's "placeholder" design and filed its own SOE design plan which became the operative SOE design at the site.

DISCUSSION

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851 (1985)*; Zuckerman v. City of New York,* 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital,* 68 NY2d 320, 324 [1986]).

However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial"

(*Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez,* 68 NY2d at 324). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso,* 50 AD3d 535,544 [1st Dept 2008]). "On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact" (*Martin v Citibank, N.A.,* 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong,* 2 AD3d 166,168 [1st Dept 2003] ["The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues"], *citing Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 404 [1957]).

Langan Is Not Liable Under NYC Administrative Code § 3309.4 because Langan was Neither the Owner Nor The Contractor That Performed The Excavation Work that Allegedly Damaged Plaintiffs' Buildings

NYC Administrative Code §3309.4 provides in relevant part:

> Whenever soil or foundation work occurs, regardless of the depth of such, work, 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 provision imposes an absolute obligation on the owner and contractor to preserve and protect adjacent property owners from injuries to their buildings during excavation activities. *See Moskowitz v. Tory Burch LLC*, 161 A.D.3d 525, 527 (1st Dep't 2018); *American Sec. Ins. Co. v. Church of God of St. Albans*, 131 A.D.3d 903, 905 (2d Dep't 2015).

Courts have been reluctant to hold design professionals strictly liable under the statute. In *87 Chambers LLC v. 77 Reade, LLC*, 122 A.D.3d 540, 541 (1st Dep't 2014) the court held that the architect was not strictly liable under Section 3309.4 where it "was neither the owner of [the

property] nor the contractor who performed the excavation." The court further held that the architect's "designs for the proposed building, which included a cellar and a subcellar" and its knowledge that the excavation would take place did not raise an issue of fact as to whether the architect "cause[d] an excavation within the meaning of section 3309.4." *Id*. In *American Security Ins. Co. v. Church of God of St. Albans*, 131 A.D.3d 903, 904 (2d Dep't 2015), an architect had "prepared plans for the excavation and construction of the new church building, which plans also called for excavating part of the adjacent property . . . and included drawings for the underpinning that was to go beneath the building on the adjacent property." The architect moved for summary judgment and the court held that the architect "could not be held liable pursuant to that section [§ 3309.4.] [because] he was neither the person who made the decision to excavate nor the contractor who carried out the physical excavation work." *Id*. at 905.

Langan is not subject to strict liability under Section 3309.4 because Langan was not the owner nor the contractor responsible for performing the excavation work. The New School owned the Project, Tishman was the construction manager and Urban was the contractor responsible for performing the excavation and foundation work at each phase of the Project.

Tishman and/or Urban made the decision to and performed the excavation on the Project. Moreover, Langan's designs for underpinning and SOE were superseded by Urban's own design by the time the actual SOE, excavation and foundation work was performed. With regard to the SOE, excavation and foundation work, Langan did not have control over the means and methods of the work itself, nor the responsibility to ensure that it was being performed correctly. Therefore, Langan is not subject to strict liability under Section 3309.4 and plaintiffs' cause of action should be dismissed against Langan.

Langan Cannot be Held Liable for Negligence because it Did Not Breach the Applicable Standard of Care and Its Professional

Services Were Not the Proximate Cause of the Alleged Damages

It is well settled that in order to set forth a *prima facie* case of negligence, a plaintiff must establish: (1) the existence of a duty on a defendant's part to the plaintiff; (2) a breach of this duty; and (3) injury to plaintiff as a result of the breach. *Akins v. Glens Falls City School, Dist.*, 53 N.Y.2d 325, 333 (1981); *Murray v. New York City Hous. Auth.*, 269 A.D.2d 288, 289 (1st Dep't 2000); *Engelhart v. County of Orange*, 16 A.D.3d 369, 371 (2d Dept. 2005). Absent a duty of care, there is no breach and no liability. See Engelhart, 16 A.D.3d at 371.

There are three situations where a contracting party may have assumed a duty of care to third persons and may be potentially liable in tort: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launches a force or instrument of harm"; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely. *See Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 140 (2002).

In *87 Chambers LLC, supra*, the court dismissed the negligence claim against the architect because its contractual duties to the property owner did not give rise to tort liability to plaintiffs, who allegedly suffered property damage due to excavation activities on the adjacent property. 122 A.D.3d at 540 (*citing Espinal*, 98 N.Y.2d 138-140). The court held, "[the architect's] contract with the owner did not specifically impose any duties with respect to the excavation phase of the project and expressly stated that [the architect] did not have control over, and was not responsible for, the construction means and methods or the safety precautions taken in connection with the work." *Id.* at 541. The court found that the architect's involvement in discussions about means and methods for excavation and responsibilities to monitor compliance

with the contract documents "[did] not raise an issue of fact as to whether it entirely displaced the owner's duty to maintain the premises." *Id.*

Langan's contractual duties to The New School did not replace The New School's duties to protect Plaintiffs' property or create a duty of care to Plaintiffs. Langan was retained by The New School to provide certain geotechnical engineering consulting services. While Langan prepared the initial "placeholder" post-demolition phase SOE and underpinning design drawings, its design was adopted and altered by Urban when Urban assumed exclusive responsibility as Engineer of Record and signed and filed the TR-1 with the DOB dated October 6, 2010. Langan's contract with The New School explicitly relieved Langan of any responsibility for Urban's means and methods. Langan did not have the authority to supervise the work, the power to stop the work or control the activities of the contractors.

Plaintiffs do not allege a factual basis for the negligence claim against Langan. Plaintiffs do not allege that Langan launched a force or instrument of harm on plaintiffs' property or that plaintiffs detrimentally relied on the continued performance of Langan's services. Nor did Langan displace The New School's or other parties' duty to maintain the premises safely. Plaintiffs fail to identify any duty Langan owed them.

Langan was not the EOR nor responsible for any design or construction during the Phase 2 Post Demolition activities when the vast majority of settlement at 9 East 13th Street occurred. As a matter of law, Langan had no duty to plaintiffs and there is no evidence that any services Langan provided during that period deviated from the applicable standard of care or breached any duty which may be found. Summary judgment should be granted with respect to all claims for any damage to plaintiffs' buildings that occurred on or after October 6, 2010, when Urban became the EOR and controlled inspector, as well as the foundation and excavation contractor,

and assumed responsibility for the design, inspection and installation of the SOE and underpinning.

Langan Cannot Be Held Liable for Trespass or Private Nuisance Because Its Conduct Does Not Satisfy the Standard of Intentional Conduct Necessary to Sustain These Causes of Action

The elements of a cause of action sounding in trespass are an intentional entry onto the land of another without justification or permission (*see Carlson v. Zimmerman,* 63 A.D.3d 772, 773; *Woodhull v. Town of Riverhead,* 46 A.D.3d 802, 804). Intent is defined as intending the act which produces the unlawful intrusion, where the intrusion is an immediate or inevitable consequence of that act (*see Phillips v. Sun Oil Co.,* 307 N.Y. 328, 331).

> The elements of a private nuisance cause of action are an interference (1) substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act" (*Aristides v. Foster,* 73 A.D.3d 1105, 1106, 901 N.Y.S.2d 688; *see Copart Indus. v. Consolidated Edison Co. of N.Y.,* 41 N.Y.2d at 568, 394 N.Y.S.2d 169, 362 N.E.2d 968; *Donnelly v. Nicotra,* 55 A.D.3d 868, 868–869, 867 N.Y.S.2d 118).

Broxmeyer v. United Cap. Corp., 79 A.D.3d 780, 782 (2010).

> A cause of action alleging private nuisance is distinguishable from a cause of action alleging trespass in that trespass involves the invasion of the plaintiff's interest in the exclusive possession of its land, while a private nuisance involves the invasion of the plaintiff's right to the use and enjoyment of its land (*see Bloomingdales, Inc. v. New York City Tr. Auth.,* 13 N.Y.3d 61, 886 N.Y.S.2d 663, 915 N.E.2d 608; *Copart Indus. v. Consolidated Edison Co. of N.Y.,* 41 N.Y.2d 564, 570, 394 N.Y.S.2d 169, 362 N.E.2d 968). A private nuisance does not require any intrusion onto the plaintiff's property (*see JP Morgan Chase Bank v. Whitmore,* 41 A.D.3d 433, 838 N.Y.S.2d 142).

Volunteer Fire Ass'n of Tappan, Inc. v. Cnty. of Rockland, 101 A.D.3d 853, 856 (2012).

There is no evidence that Langan committed an affirmative act of intentional intrusion into plaintiffs' interest in the possession of their property. There is no evidence that Langan committed an intentional act that resulted in a substantial interference in plaintiffs' rights and enjoyment with their property.

Moreover, plaintiff has withdrawn its claim of Tresspass.

Langan Cannot Be Held Liable for A Violation Of General Construction Law 26-B Because the Provision Does Not Confer A Private Right Of Action

General Construction Law § 25-b defines, "'Injury to property' as an actionable act, whereby the estate of another is lessened, other than a personal injury, or the breach of a contract." The purpose of this provision is to define the phrase "injury to property" and not serve as a stand-alone cause of action. *See Blue Diamond Group Corp. v. Klin Constr. Group, Inc*. 2010 N.Y. Slip. Op. 32539(U); *Lam Platt St. Hotel LLC v. Golden Pearl Constr. LLC*, 2018 N.Y. Slip Op. 33018(U).

The Court of Appeals has referenced the provision only in the context of providing a definition for the phrase "injury to property" for the interpretation of other statutes. *See Roslyn Union Free School Dist. v. Barkan*, 16 N.Y.3d 643, 648-49, n. 5 (2011); *Board of Educ. v. Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d 21, 29, n. 2 (1987)

The Affidavit of Peter Deming Does Not Warrant A Different Result

Plaintiffs' primary opposition to Langan's motion is based on the affidavit of Peter Deming and his annexed report. Mr. Deming's opinions about the cause of plaintiffs' alleged damage are centered on the Phase 2 activities at the Project; namely, the post-demolition excavation activities at which time Langan was not the Engineer of Record: "[T]he construction of The New School required significant excavation through unstable soils below the water table, thus necessitating a plan to support the property at 5 E. 13th St. [the O'Hara Building] and also to protect the property at 7–11 E. 13th Street, 4 which was in the zone of influence of the excavation." Deming Aff., ¶ 5. 14.

Mr. Deming asserts that Langan "devised an underpinning plan and developed a conceptual design for the excavation bracing required by the New School construction project,"

"laid out and approved a soldier–pile and lagging bracing system," and, "Langan's original bracing [i.e., underpinning and support of excavation] recommendation was being followed." See Deming Aff. at ¶¶ 6,8 and 11.

However, it remains factually undisputed that Urban filed the TR–1 with the DOB replacing Langan as the Engineer-of-Record in October 2016 - before any post demolition excavation or underpinning commenced. It also remains factually undisputed that Urban replaced Langan's temporary permit/placeholder design with its own superseding support of excavation and underpinning design which it then filed with the DOB which then became the operative SOE design at the site.

Plaintiffs have admitted that it was Urban's superseding underpinning and SOE design that was implemented at the Project.

Mr. Deming's statement that "Langan reviewed contractor submittals, and inspected the groundwater control, underpinning, and bracing work as the excavation progressed," is unsupported by reference to any facts in the Record. See Deming Aff. at ¶ 8.

Mr. Deming states that "Langan … had contractual responsibility for on–site inspection of the excavation work [by Urban]…" See Deming Aff. at ¶ 11. However, this statement is unsupported by any reference to any contract document or other factual evidence. He cited to no provision in any Langan contract imposing any inspection duties on Langan for any portion of Phase 2 of the Project. Langan established that it was retained merely to observe the work performed by others but expressly was not required to make exhaustive or continuous inspections to check the quality of work being done.

Contrary to Mr. Deming's assertion, Langan did not have a duty to require changes to the excavation support system designed and implemented by Urban. Langan had no authority to

stop Urban's work. The most it could do was advise the New School if an issue arose with that work based upon its periodic observations.

The report attached to Mr. Deming's affidavit reviews the underlying construction and contains Mr. Deming's opinion regarding its causative relationship "to the damages." In the section entitled "Cause Opinion," Mr. Deming never asserted or opined that Langan Engineering was responsible for the damage, and, many of his statements there are at odds with his Affidavit. For example, he noted, with apparent approval, Langan's opinion in its February 2010 Geotechnical Report that "a soldier pile with timber lagging system would be feasible if groundwater was properly controlled." Report,§ 2B at p.1.

He conceded that the "construction difficulties, seepage erosion and ground movement experienced" as a result of the east wall excavation "would have been improved if the soils east of the east wall have been effectively dewatered as recommended in the [Langan] May 2008 geotechnical report." Report,§ 2D at p.1. 26. He further quoted the Langan 2008 Report which "identified the challenge of dewatering fine-grained soil deposits" and "recommends [to the New School] engaging a professional specializing in groundwater collection to design the [dewatering] system." Report, § 6A at pp. 4-5. And, he conceded, "the contractor developed a dewatering plan in January, 2011" and that "The jacked soldier pile with lagging system, rakers, dewatering and construction sequence/methods were determined by the Contractor." Report,§ 7B(1) at p.7 and § 6 C at pp. 5-6.

The court finds that Mr. Deming's opinion "that the actions and inactions of Langan Engineering were a causative factor in the damage sustained at 7–11 E. 13th St., is unsupported by the facts in the record.

Based on the foregoing, Langan's motion for summary judgment and dismissal of the complaint against it is granted.

MOTION SEQ NO 4

The request to strike the claims of Evan Reilly pursuant to CPLR §3126 is denied as moot, pursuant to the stipulation of discontinuance filed by the parties as to Mr. Reilly's claims.

Similarly, the motion for partial summary judgment on the trespass claim is granted without opposition and said claim is dismissed.

Substitution of the Co-Executors of Plaintiff Barbara Thompson's Estate Does Not Prejudice Defendants and is Granted

The motion to dismiss the claims of Barbara Thompson is denied and the cross-motion for an order substituting the Estate of Barbara Thompson, by its co-executors Sarah Thompson, Stefan Thompson and Edward Kline is granted.

"A motion for substitution may be made by the successors or representatives of a party or by any party…within a reasonable time." N.Y. C.P.L.R. 1021 (McKinney's). As held by the Appellate Division, First Department " … the strong public policy of this State is to dispose of matters on the merits (*Noriega v. Presbyterian Hosp. in City of N.Y.,* 305 A.D.2d 220, 221 [2003]). Accordingly, a motion to substitute a party after a lengthy delay should be granted absent a showing of prejudice by the defendant (*Schwartz v. Montefiore Hosp. & Med. Ctr.,* 305 A.D.2d 174, 176 [2003])." *Peters v. City of New York Health & Hosps. Corp.*, 48 A.D.3d 329 (2008).

In this action, the court finds that defendants have suffered no prejudice as a result of any delay in the substitution. One of the executors, Sarah Thompson, has been a plaintiff in this action in her individual capacity since its commencement and she was deposed in this action, regarding the claim of her deceased mother. Having fully deposed Sarah Thompson on the claim

of her deceased mother, defendants do not face any undue prejudice from the substitution of the co-executors of the Estate of Barbara Thompson at this post note of issue stage of the litigation. Additionally, plaintiffs' cross-motion to withdraw the individual claims of Sarah Thompson is granted without opposition.

Administrative Code § 23-3309.4 does Apply to Plaintiff's Real Property

Administrative Code §23-3309.4 provides:

> 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.

Defendants move for summary judgment based on their argument that because plaintiff's property is not directly next to the Project, the protections of the code do not extend to the damages plaintiffs suffered from defendants' excavations.

However, a review of the statutory history and intent of this provision establishes that plaintiff's property can be considered to be covered by the protections of the code. The code provision uses the words adjoining and adjacent. In the first case to address this issue the Appellate Division, Second Department held "… the word contemplates nearness, but with intervening spaces, as between houses; and when we are contemplating a local city provision, designed to apply to city lots, with contiguous buildings, it seems entirely proper that we should hold that any wall is contiguous which is near enough to be disturbed by the excavation." *Baxter*

v. York Realty Co., 128 A.D. 79, 80–81 (App. Div. 1908), aff'd, 198 N.Y. 521, 92 N.E. 1078 (1910). As indicated in the citation, this holding was affirmed by the Court of Appeals.

> The ordinance is an extension of the common-law doctrine of lateral support of land in its natural state to land burdened with buildings and improvements, and should be construed in the light of the principles governing rights and liabilities arising under the common-law doctrine. Under the common law, liability for injury to lateral support of land was not restricted to damage inflicted upon land of an adjoining owner, but included injury to any land within the natural zone of support (Birmingham v. Allen, L. R. 6 Ch. Div. 284; Murray v. Pannaci, 64 N. J. Eq. 147, 154, 53 Atl. 595), and might be enforced against an owner, his agent or licensee, or any other person by whom the injury was caused (Gilmore v. Driscoll, 122 Mass. 199, 23 Am. Rep. 312).

Gordon v. Auto. Club of Am., 180 A.D. 927 (App. Div. 1917).

In another case where it was alleged that excavation for the building of 100 Centre Street caused damage to a building across the Street on White Street, the court rejected the defendants' argument that adjoining had to be construed as touching. The court held the legislative intent was clearly to protect any premises that was likely to be damaged by the excavation concluding:

> A restriction of the foregoing provision of the Administrative Code to premises touching the premises of the excavated area would be inconsistent with the obvious intention of the Code to protect all property in the vicinity of deep excavations from injury. Brooklyn Heights R. Co. v. City of Brooklyn, City Ct. Brooklyn, 18 N.Y.S. 876.
>
> It would be unrealistic, therefore, to hold that plaintiff has no recourse to § C26–385.0 because its buildings are separated by a 50 foot public thoroughfare from the City's premises. The important public policy underlying the imposition of absolute liability, by statute, in extrahazardous activities, such as excavating more than 10 feet below street level, would be frustrated by the literal and restrictive interpretation suggested by the defendants. See Prosser, Torts, Chapter 10. In another, somewhat related context, it was said (Homac Corporation v. Sun Oil Co., 137 Misc. 551, 553, 244 N.Y.S. 51, 54, affirmed 233 App.Div. 890, 251 N.Y.S. 877; Id., 258 N.Y. 462, 180 N.E. 172):
>
> 'The words, 'abutting', 'adjoining', 'contiguous', in tort cases, are not intended to be used in their ordinary sense, namely, that the properties must actually touch each other.
>
> *Victor A. Harder Realty & Const. Co. v. City of New York*, 64 N.Y.S.2d 310, 319 (Sup. Ct. 1946)

More recently in *Pardi v. Barone* [257 A.D.2d 42, 44 (1999)] the Appellate Division, Third Department considered "… whether private property 'adjoins' a public sidewalk within the meaning of section 228-18 where …. there is a narrow, municipally owned strip of land which is part of the municipal right-of-way between the private property boundary line and the improved public sidewalk." The Court held in pertinent part:

> Notably, the ordinance itself provides no definition of the terms "abutting" or "adjoining" and makes no reference to, or incorporation of, such definitions. A review of various dictionary definitions, commonly understood meanings and common-law definitions of these terms reveals that, although they are often in other contexts viewed as synonymous with touching, these terms are readily and genuinely susceptible of more than one meaning, i.e., they may be interpreted as requiring actual touching or as encompassing merely close, adjacent or proximate (*see, e.g., Matter of Schneider v Rockefeller,* 31 NY2d 420, 429; *Matter of Common Council v Town of Johnstown,* 37 AD2d 459, 460, *revd on other grounds* 32 NY2d 1; *Baxter v York Realty Co.,* 128 App Div 79, 80, *affd* 198 NY 521; Black's Law Dictionary 41 [6th ed 1990]; Webster's Third New International Dictionary 8, 26, 27 [1993 ed]).* Indeed, there exists no single plain or clearly accepted meaning for these terms and, thus, they are ambiguous and require interpretation.
>
> It is our foremost duty in resolving such a statutory ambiguity to ascertain and give effect to the legislative intent and objective underlying this ordinance (*see,* McKinney's Cons Laws of NY, Book 1, Statutes § 92, at 176-182; *see also,* McKinney's Cons Laws of NY, Book 1, Statutes §§ 95, 96). While we must do so in the absence of any direct proof regarding the legislative intent, we have no difficulty in doing so, as we perceive the intent to be fairly evident and obvious.
>
> …..
>
> …. literally interpreting the terms "adjoining" and "abutting" *in this context* as requiring touching would render the ordinance partially and substantially ineffective and would produce a result clearly not intended, and we decline to adopt such a construction (*see, Matter of Wilson v Board of Educ.,* 39 AD2d 965, 967, *mod on other grounds* 32 NY2d 636; *see also,* McKinney's Cons Laws of NY, Book 1, Statutes §§ 111, 112, 144, at 291-294; § 341, at 499-501).

It is well settled that the statutory intent behind the provision is to shift the risk of injury from the landowner injured by the excavation to the party causing the excavation. That purpose would

not be served here, were the court to adopt defendants' restrictive interpretation of the word adjoining.

Based on the foregoing, defendants' motion for summary judgment on this claim is denied.

Defendants Have Waived the Defense of Lack of Standing

Although defendants did not include lack of standing in the answer or any pre-answer motion, they now seek summary judgment on this claim.

Under CPLR §3211(e), the affirmative defense that "the party asserting the cause of action has not legal capacity to sue… is waived unless raised either by such motion [a pre-answer motion to dismiss] or in the responsive pleading." Waiver of the affirmative defense precludes raising the defense at the summary judgment stage. *See Baffour v. Calenda*, 67 Misc. 3d 127(A), 126 N.Y.S.3d 299 (1st Dept. 2020) ("We affirm the denial of defendant's motion for summary judgment dismissing the complaint…We conclude that defendant waived the defense of lack of jurisdiction by failing to properly assert it in his prior CPLR 3211 motion."); *Charles Offset Co. v. Hobart-McIntosh Paper Co.*, 192 A.D.2d 419, 419 (1st Dept. 1993).

This waiver is applicable whether the parties characterize the alleged corporate deficiencies as one of lack of capacity or standing. "In our view, defendant Evans's objection to plaintiff's status is properly understood as questioning legal capacity, not standing. Clearly, the basis of Evans's objection is plaintiff's *status* as a non-existent corporation, whose identity ceased to exist upon its merger into the surviving corporation. Objections to the status of a corporate plaintiff have been interpreted by courts as being based on legal capacity to sue (*see Westside Fed. Sav. & Loan Assn. v. Fitzgerald,* 136 A.D.2d 699, 524 N.Y.S.2d 54 [1988] [where absorbed

corporation ceased to exist as an independent jural entity, it lacked capacity to commence lawsuit])." *Sec. Pac. Nat. Bank v. Evans*, 31 A.D.3d 278, 279 (2006).

Contrary to the arguments of defendants, it is well settled that their failure to raise this defense as required by CPLR §3211(e) waived their right to assert it at all subsequent phases of the litigation (*JP Morgan Chase Bank, N.A. v Strands Hair Studio, LLC* 84 AD3d 1173 (2011).

Based on the foregoing defendants' motion for summary judgment based on lack of standing is denied.

CONCLUSION

WHEREFORE it is hereby:

ORDERED that Langan's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's cause of action for trespass is dismissed; and it is further

ORDERED that claims of Sarah Thompson individually are withdrawn; and it is further

ORDERED that that Sarah Thompson, Stefan Thompson and Edward C. Kline , as executors of the estate of Barbara Thompson, deceased, be substituted as plaintiff in the above-entitled action in the place and stead of the plaintiff, Barbara Thompson, without prejudice to any proceedings heretofore had herein; and it is further

ORDERED that all papers, pleadings, and proceedings in the above-entitled action be amended by substituting the names of Sarah Thompson, Stefan Thompson and Edward C. Kline, as executors of the estate of Barbara Thompson, deceased, as plaintiff in the place and stead of said decedent, without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that the caption herein be amended to revise the name of the condominium as "The Board of Managers of The 7-11 East 13th Street Condominium;" and it is further

ORDERED that the new caption shall read:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------X
7-11 EAST 13TH STREET TENANTS CORP., THE BOARD OF MANAGERS OF THE 7-11 EAST 13TH STREET CONDOMINIUM, HARLEYSVILLE WORCESTER INSURANCE COMPANY, AS SUBROGEE OF 7-11 EAST 13TH STREET CONDOMINIUM, DAVID MASENHEIMER, JAMES MORGAN, ASAF YOGEV, EVAN OPPENHEIMER, LIA LEVENSON, MATT ONER, DANIELLA VAN GENNEP, PETER NAKADA, DONALD WILMOTT, SEAN FARQUHARSON, JOHN DONAHUE, CHARLES STIMSON, ADAM SINGER, JAMES MCCARTHY, JOSHUA KESSLER, BETTINA MICHELI, PHILLIP LIU, LESLEY SKILLEN, LAURENCE CANTOR, RICHARD MARTIN, PATRICIA WHITE, ROBERT ANGERT, SHANA SCHWARTZ, and THE ESTATE OF BARBARA JEAN THOMPSON, by its co-executors SARAH THOMPSON, STEFAN THOMPSON and EDWARD C. KLINE,

Plaintiffs,

-against-

THE NEW SCHOOL, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, THE DURST ORGANIZATION, INC., URBAN FOUNDATION/ENGINEERING, LLC, DESIMONE CONSULTING ENGINEERS, SKIDMORE, OWINGS AND MERRILL, LLP,

Defendants.
----------X

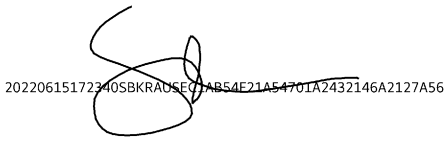
ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on*

Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.



6/15/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE