

21 Park Place NY L.P. v ABN Realty LLC

2023 NY Slip Op 30877(U)

March 22, 2023

Supreme Court, New York County

Docket Number: Index No. 655358/2018

Judge: Barry Ostrager

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. BARRY R. OSTRAGER, PART IAS 61EF
Justice

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21 PARK PLACE NY L.P.,

Plaintiff,

- v -

ABN REALTY LLC, BM OF NY CONSTRUCTION CORP., CALABRESE ASSOCIATES, INC., GACE CONSULTING ENGINEERS, URS CORPORATION, JW INSPECTION SERVICES, AECOM, ENVIRONMENTAL BULKHEADING CORP., JOSEPH MALLOZZI PE, DPC NEW YORK, INC., DANCO WORLDWIDE CONSULTANTS INC., ROGUSKI LAND SURVEYING, PC, VIBRATECH INC., DOMANI CONSULTING INC., ISMAEL LEYVA ARCHITECT, P.C., JOHN DOES INDIVIDUALS 1-10, and JOHN DOE CORPORATE ENTITIES 1-10,

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|-------------------------|-------------|
| INDEX NO. | 655358/2018 |
| MOTION DATE | |
| MOTION SEQ. NOS. | 004 |

**DECISION AND ORDER
ON MOTION**

Defendants.

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BM OF NY CONSTRUCTION CORP.,

Third-Party Plaintiff,

- v -

COW BAY SPRINKLER CORP. d/b/a COW BAY CONTRACTING, and COW BAY CONTRACTING INC., and CREATIVE LANDSCAPING BY COW BAY, INC., and JOSEPH D'ALONZO, d/b/a COW BAY CONTRACTING INC., and AUGUSTINO D'ALONZO, d/b/a COW BAY CONTRACTING INC., and SEVERUD ASSOCIATES CONSULTING ENGINEERS, P.C.

Third-Party Defendants.

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HON. BARRY R. OSTRAGER

Before the Court is a motion by Third-Party Defendant Severud Associates Consulting Engineers, P.C. (“Severud”) for an order, pursuant to CPLR 3211(a)(7), dismissing the claims asserted in the Third-Party Complaint by Defendant/Third-Party Plaintiff BM of NY Construction Corp. (“BMNY”) against Severud (NYSCEF Doc. No. 310). Severud also seeks to dismiss all crossclaims asserted against it by various other parties to the action. In light of the

Answer filed by Severud (NYSCEF Doc. No. 312), Severud asks the Court to treat the motion as one for summary judgment pursuant to 3212 should the Court determine that CPLR 3211 is not applicable. For the reasons that follow, the motion is granted in part and denied in part.

Plaintiff in this action, 21 Park Place NY L.P., seeks to recover compensation for alleged damage to its property at 21 Park Place, NY, NY, and loss of business revenue purportedly caused by demolition and excavation work at the neighboring building located at 19 Park Place. Plaintiff claims, among other things, that the professionals who prepared the underpinning and support of excavation (“SOE”) plans and/or the construction companies involved in the excavation, underpinning and SOE work at 19 Park Place improperly performed the work, thereby causing damage to Plaintiff’s neighboring building at 21 Park Place and the building’s partial collapse in December 2018. (See January 14, 2022 Decision and Order). Plaintiff named BMNY as a defendant in its original 2018 Complaint (NYSCEF Doc. No. 1), alleging that BMNY’s negligent work as the general construction contractor at 19 Park Place contributed to Plaintiff’s damages at 21 Park Place (NYSCEF Doc. No. 308).

BMNY filed a Third-Party Complaint on March 23, 2021, alleging that various parties, including Severud, were liable to BMNY for contribution and/or indemnification on the ground that Severud’s negligence had caused, in whole or in part, some of the damages Plaintiff was seeking to recover from BMNY (NYSCEF Doc. No. 149). Crossclaims were filed against Severud for common law contribution and indemnification by Defendants AECOM and URS Corporation (which also claimed contractual indemnification) (NYSCEF Doc. No. 315), by Defendant ABN Realty LLC (“ABN”, NYCEF Doc. No. 317), by Defendant Vibra-Tech Inc. (NYSCEF Doc. No. 326), by Third-Party Defendant Cow Bay Sprinkler Corp. (NYSCEF Doc. No. 313), and by Second Third-Party Defendant Darrell Alvarez & Associates, the shoring contractor (NYSCEF Doc. No. 321).

BMNY actively participated in this action until its counsel was relieved on June 16, 2022 based on BMNY’s failure to pay legal fees after the insurer ceased funding the litigation (NYSCEF Doc. No. 263). BMNY has not retained new counsel nor participated in this action since that time. Severud served this motion by mail on BMNY (NYSCEF Doc. No. 324), but BMNY has not submitted any opposition papers. However, both Defendant Vibra-Tech and Defendant ABN have opposed the motion (NYSCEF Doc. Nos. 327-338 and 343-351).

In support of its motion to dismiss the claims by BMNY against Severud, Severud notes that Plaintiff’s claim against BMNY is rooted in negligence. Specifically, Severud points to

Plaintiff's allegation in the Complaint that "damage to Plaintiff's property by Defendants [including BMNY] took place during the construction of the 21-story condominium apartment building at 19 Park Place. The damage culminated when the subject building partially collapsed on December 21, 2018." BMNY then impleaded Severud, alleging causes of action in its Third-Party Complaint for indemnification and contribution, claiming that Severud "is or may be liable to . . . [BMNY] for all or part of the plaintiff's claim against . . . [BMNY]." CPLR 1007.

However, Severud argues that no claim is stated for contribution or indemnification because Severud never performed any work at or for the 19 Park Place property at any point in time. Instead, Severud was retained by *Plaintiff* as structural engineers to prepare plans for certain proposed work to be performed at *Plaintiff's 21 Park Place* property. Specifically, the July 1, 2018 contract between Plaintiff and Severud (NYSCEF Doc. No. 323) states that Severud was retained by Plaintiff "to provide structural engineering design services" for the renovation of the building then existing at 21 Park Place.

Pointing to the examination before trial of Muhammad T. Rahal, the Severud employee involved in the work, Severud argues that the focus of its work was 21 Park Place and that any work involving 19 Park Place was minimal, consisting primarily of matters such as document review. However, Severud concedes that Rahal did perform a walk through of the 19 Park Place building and meet with the Department of Buildings ("DOB") regarding some structural concerns with the walls at 19 Park Place related to his work at 21 Park Place. Nevertheless, Severud insists it never had a relationship with BMNY, contractual or otherwise, and never owed BMNY a duty. Therefore, no basis for common law contribution or indemnification exists. Nor does BMNY have standing to assert a claim against Severud for breach of contract and contractual contribution and indemnification, Severud argues, as it is undisputed that BMNY was not a party to the contract between Plaintiff and Severud.

Severud also argues that all crossclaims asserted against it must be dismissed for failure to state a cause of action or for lack of standing. Based on the same reasoning discussed above, Severud argues that these crossclaims lack merit because Severud was under no duty related to the 19 Park Place Property and performed no excavation, underpinning or construction work of any nature there. Nor did Severud breach any duties related to the 21 Park Place property, contractual or otherwise, that could serve as the basis for any crossclaim, and at no time has Plaintiff asserted any direct claim against Severud in this action.

Vibra-Tech has opposed the motion, whether the Court applies the 3211 or the 3212 standard, arguing that even if the Court dismisses BMNY's claims against Severud, Severud must remain in the case based on the various crossclaims. Vibra-Tech also vigorously disputes Severud's assertion that Severud never performed any work at or for the 19 Park Place property, pointing to various emails and documents which indicate that Severud's representative Rahal visited the site, gave his opinion on the bearing walls, and met with or communicated with various professionals, including the DOB (NYSCEF Doc. Nos. 332-337). Therefore, Vibra-Tech argues that the dismissal of its crossclaims while discovery is ongoing is premature. For similar reasons, Vibra-Tech insists it has standing to oppose Severud's motion to dismiss BMNY's claims, as any findings related to the dismissal of BMNY's claims against Severud could potentially impact the viability of Vibra-Tech's crossclaims involving damages allegedly caused by the role Severud played in ensuring the structural integrity of the building at 21 Park Place.

ABN's opposition is similar, asserting that it is "ABN's position that the work, including that of Severud, being performed at 21 Park Place caused the alleged damages." (NYSCEF Doc. No. 343, ¶10). Like Vibra-Tech, ABN points to depositions and various documents and emphasizes in particular that Severud worked with the shoring contractor Darrell Alvarez. ABN further argues that summary judgment is premature based on outstanding discovery and that, at a minimum, questions of fact preclude dismissal of BMNY's direct claims against Severud, as well as the crossclaims.

In its Reply, Severud argues that Vibra-Tech has no standing to oppose the branch of Severud's motion seeking dismissal of BMNY's claims because Severud is not a party to the third-party action. Severud also discusses various documents presented by Vibra-Tech with its opposition and construes them differently and, not surprisingly, in a manner more favorable to Severud. Finally, Severud argues that Vibra-Tech overlooks the point that Plaintiff's Complaint is premised on negligent excavation and underpinning work at 19 Park Place, which work Severud did not perform, and also overlooks that Severud owed no duty to perform any task related to 19 Park Place, having been retained by Plaintiff pursuant to a contract for work at 21 Park Place. Although Severud's Reply does not address ABN's arguments due to the timing of ABN's opposition, it is fair to assume the arguments would be similar.

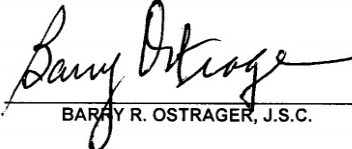
Having reviewed the competing papers and arguments, the Court grants Severud's motion to dismiss the crossclaims asserted by Defendants AECOM and URS Corporation and those asserted by Third-Party Defendant Cow Bay Sprinkler Corp. and by Second Third-Party

Defendant Darrell Alvarez & Associates as those entities have not opposed the motion or indicated any intent to pursue their crossclaims. However, the Court denies dismissal of the crossclaims asserted by Defendant ABN Realty LLC and by Defendant Vibra-Tech Inc. based on triable issues of fact. Although Severud’s contract with Plaintiff was for structural engineering work at 21 Park Place, the evidence submitted by ABN and Vibra-Tech – and even some of the evidence submitted by Severud – indicates that Severud’s work was related at least to some degree to structural issues arising from the work at 19 Park Place. Therefore, Severud is not entitled to dismissal of the crossclaims at this time while discovery is still ongoing.

For similar reasons, the Court denies Severud’s motion to dismiss the direct claims asserted against it by Third-Party Plaintiff BMNY. Although BMNY has not opposed the motion, Severud must still establish its entitlement to the requested relief, which it has failed to do based on issues of fact related to Severud’s apparent involvement, at least to some degree, with issues related to the 19 Park Place construction. Therefore, discovery should continue with Severud as a party to the case, without prejudice to a dispositive motion after the Note of Issue.

The Note of Issue deadline presently is July 3, 2023, and a jury trial was tentatively scheduled for November 1, 2023, but cannot proceed in light of continuing discovery and motion practice (see NYSCEF Doc. No. 304). All counsel shall appear at the status conference scheduled for June 6, 2023 at 10:00 a.m. via Microsoft Teams. A revised Joint Appearance Sheet shall be efiled by May 1, 2023 that also includes contact information for BMNY. Severud shall serve BMNY with a copy of this Decision by mail.

Dated: March 22, 2023


 BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

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| <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION |
| <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | DENIED |
| <input type="checkbox"/> | SETTLE ORDER | <input checked="" type="checkbox"/> | GRANTED IN PART |
| <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | SUBMIT ORDER |
| | | <input type="checkbox"/> | FIDUCIARY APPOINTMENT |
| | | <input type="checkbox"/> | REFERENCE |
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APPLICATION:

CHECK IF APPROPRIATE: