

**Marchhart v 434 Broadway Prop. Invs. III, LLC**

2023 NY Slip Op 33577(U)

October 13, 2023

Supreme Court, New York County

Docket Number: Index No. 152837/2019

Judge: James d'Auguste

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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. James d'Auguste

**PART 55**

*Justice*

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**INDEX NO.** 152837/2019

ANDREA MARCHHART,

**MOTION DATE** \_\_\_\_\_

Plaintiff,

**MOTION SEQ. NO.** 004

- v -

434 BROADWAY PROPERTY INVESTORS III,  
LLC,CUSHMAN & WAKEFIELD REALTY OF MANHATTAN,  
LLC,CANY ARCHITECTURE & ENGINEERING, DPC,CANY  
TECHNICAL SERVICES, LLC,RALLY RESTORATION  
CORP., THORNTON TOMASETTI, INC, CONSULTING  
ASSOCIATES OF NY, INC.,

**DECISION + ORDER ON  
MOTION**

Defendants.

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434 BROADWAY PROPERTY INVESTORS III, LLC,

Third-Party  
Index No. 595819/2019

Third-Party Plaintiff,

-against-

COLE NYC, LLC, COLE NYC, INC.

Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 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, 110, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 131, 132

were read on this motion to/for SUMMARY JUDGMENT

According to the verified amended complaint (amended complaint) (NYSCEF Doc. No. 60), on February 16, 2018, plaintiff's decedent Richard Marchhart was walking on the sidewalk in the vicinity of 434 Broadway in Manhattan when a steel stair tread fell from seven stories above and struck him on the head. Mr. Marchhart was rushed to the hospital but died of his injuries the following day.

Plaintiff decedent's widow, Andrea Marchhart, commenced this wrongful death action on March 18, 2019, both individually and as representative for Mr. Marchhart's estate and all surviving beneficiaries. Defendants include the building owner, 434 Broadway Property Investors III, LLC (Broadway Properties), and the managing agent, Cushman & Wakefield Realty of Manhattan, LLC (Cushman). The amended complaint also asserts claims against CANY Architecture & Engineering, D.P.C. (CANY Architecture), CANY Technical Services, LLC (CANY Technical) (collectively, CANY), and Consulting Associates of NY Inc. (Consulting Associates). According to the amended complaint, these parties worked at the site, performing inspections, maintenance, and repair work between 2013-2015, and on the date of the deadly accident. Indeed, on the date of the accident, CANY and Consulting Associates employees allegedly were on the fire escape. The amended complaint further asserts that on April 9, 2014, defendant Rally Restoration Corp. (Rally) contracted with Broadway Property to perform construction work at the property, and that this included work on the fire escape.

In addition, the amended complaint names Thornton Tomasetti, Inc. (Thornton) as a defendant. According to the amended complaint, "[s]ome years prior to February 16, 2018, [Thornton] entered into a written contract with the then-owner of the building located on the premises . . . to perform engineering, consulting, maintenance and repair work on certain portions of the premises . . . including, but not limited to, the subject fire escape" (NYSCEF Doc. No. 60, ¶ 68).<sup>1</sup> Based on the above, the amended complaint sets forth the tenth cause of action, for negligence and wrongful death, against Thornton.

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<sup>1</sup> The amended complaint states that Rally worked on the fire escape between February 21, 2013, and July 5, 2013, and that Rally had a non-delegable duty with respect to this work and the condition of the fire escape. It is not clear whether this allegation contained in the amended complaint was meant to refer to Rally or to Thornton.

By notice dated April 12, 2022, plaintiff informed the Court that the case has been settled as against Broadway Properties, Cushman, CANY Architecture & Engineering, D.P.C. (CANY Architecture), CANY Technical Services, LLC (CANY Technical) (collectively, CANY), and Consulting Associates of NY Inc. (Consulting Associates). This leaves only Rally and Thornton as defendants (NYSCEF Doc. No. 109).<sup>2</sup>

Currently, the Court considers motion sequence number 004, Thornton's motion for summary judgment dismissing plaintiff's claims against it. Initially, some background is helpful. Local Law 11 of 1998 (Local Law 11), which also is referred to as the Façade Safety & Inspection Program [FISP] (NYC Construction Codes §§ 28-302 *et. seq.* and Rules of the City of New York [RCNY] §§ 103-04),<sup>3</sup> states that, for safety purposes, the façades of buildings over six stories high must be inspected by a professional every five years – and the owners must promptly repair any unsafe conditions that are discovered (*Blumenfeld v Stable 49, Ltd.*, 62 Misc 3d 1208 [A], 2018 NY Slip Op 51958 [U], n 6 [Sup Ct, NY County 2018]; *see* Local Law No. 11 § 27-129 [a]). The fire escape is considered an appurtenance of the building, and therefore any inspection must address the safety of the fire escape (*see* 1 RCNY 103-04 [a] [definitions]; *see Nunez v 38 Sickles St. Corp.*, 269 A.D.2d 127, 128 [1st Dep't 2000]). When the inspection is complete, the inspector prepares a report that, in writing, certifies the results of its examination as 1) safe, 2) unsafe, or 3) “safe with a repair and maintenance program” (SWARMP). The third category “means that something is currently safe but could potentially become unsafe within the five-year cycle unless it's repaired” (NYSCEF Doc. No. 106 [Kornfeld Dep], p 80 lines 10-12).

<sup>2</sup> The caption has been amended to reflect that the partial-settlement rendered academic Broadway Properties third-party claims.

<sup>3</sup> The guidelines were updated as of February 2020, after the accident occurred.

The safety inspection and the reporting requirement are divided into cycles. Thornton performed the Cycle 7 façade inspection. Robert Kornfeld Jr., an architect at Thornton, concluded the inspection on February 7, 2013.<sup>4</sup> Thornton provided its report shortly thereafter, around February 15, 2013 (*see* NYSCEF Doc. No. 96 [Thornton’s report]).<sup>5</sup> The report notes that Andrew Katz, P.E., of Andrew Katz Engineers, conducted the Cycle 6 report on August 6, 2007, and that Katz’s 2007 report stated the building was safe and no repairs were necessary. It states that Kornfeld conducted a visual examination of “all viewable façades” with high-powered binoculars, and that he performed two close-up inspections “of full-height . . . representative drops . . .” along the Howard Street façade from both the scaffolding that had been installed for this purpose and the fire escape (*id.*, \*8 [F] [1]; *see* NYSCEF Doc. No. 106, p 46 lines 10-18). Under the version of the local law then in effect, Kornfeld explained at deposition, a FISP inspection only required one drop and a close-up visual inspection of the façade, but he and his team performed the extra drop (*see* NYSCEF Doc. No. 106, p 52 lines 13-17).

With respect to the fire escapes, the Thornton report noted that the “[t]erra cotta edge of a string course at the 7th Floor, South Elevation is cracked and spalled where it was notched to accommodate the metal fire escape bracket. The bracket at this location is corroded” (NYSCEF Doc. No. 96, \*9 [G] [5]). It further stated that the “[c]orroding steel fire escape brackets are

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<sup>4</sup> Prior to the issuance of the Thornton report, nonparty IVI Assessment Services had performed a walk-through inspection of the building in connection with its potential sale (NYSCEF Doc. No. 97). The IVI report stated:

The fire escape appeared to be in satisfactory condition with some isolated corrosion observed. Due to normal wear all surfaces should be wire brushed, primed, and the entire system coated with a rust inhibitive paint over the term of the reserves (*id.*, \*22).

<sup>5</sup> Kornfeld, an architect, is a “qualified exterior wall inspector” (QEWI) and thus qualified to perform the inspection (NYSCEF Doc. No. 106, p. 40 lines 17-25).

causing the masonry to crack and spall” (*id.*, \*11). Thornton’s report did not categorize the condition as SWARMP or unsafe (NYSCEF Doc. No. 90 [CANY’s 434 Broadway Fire Escape Overview dated 4/22/2018], \*4; *see* NYSCEF Doc. No. 105, [Marks Dep], p 429 lines 1-8).<sup>6</sup>

The building owner hired CANY to perform the Cycle 7 FISP maintenance and repair work (NYSCEF Doc. No. 93). CANY reviewed the Cycle 6 and 7C FISC reports and the IVI report (NYSCEF Doc. No. 90, \*4), and it “prepared a Building Enclosure Repair and Maintenance Recommendations and Cost Estimate Report dated October 7, 2013” (*id.*, \*5).<sup>7</sup> CANY determined that the fire escape needed a more thorough inspection and required remedial work that far exceeded the assessments of IVI and TT. “Fire escape repairs were included, and comprised full paint-removal, close-up inspection, isolated welding repairs, priming and painting” (NYSCEF Doc. No. 89, \*1; *see* NYSCEF Doc. No. 98, \*1).

Rally executed this work pursuant to a contract with CANY. It completed the work on the fire escape around January 2015. According to Alex Martin, a Rally foreman who worked at the property, Rally performed the work that “was marked by CANY” (NYSCEF Doc. No. 102, p 35 lines 17-18).<sup>8</sup> CANY signed off on the project on December 9, 2015, and the Department of Buildings (DOB) accepted the project report (NYSCEF Doc. No. 89, \*2). Thornton points to a Handrail and Guard Assemblies Statement Letter dated January 26, 2015, in which CANY

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<sup>6</sup> The Court notes that CANY made both statements after the fatal accident at issue here had occurred.

<sup>7</sup> Thornton notes that CANY was required to perform a subsequent inspection in response to a May 5, 2014, Department of Buildings (DOB) memo (NYSCEF Doc. No. 108, \*4 [citing NYSCEF Doc. No. 90, \*9]).

<sup>8</sup> Thornton contends that, undisputedly, neither CANY nor Rally looked at Thornton’s report in connection with the repairs. However, it relies on deposition testimony from Rally’s witness, Alex Martin, who stated that Rally did not rely on documents from Thornton (*see* NYSCEF Doc. No. 102, p 178 line 22 – p 179 line 7). Thornton submits no evidence indicating that CANY did not look at Thornton’s report.

changed the status of the handrail and guard assemblies to safe and indicated that this status included the structural stability of the fire escapes (NYSCEF Doc. No. 108, \*4 [citing NYSCEF Doc. No. 90, \*9]).

In 2017, CANY submitted its proposed scope of work for the next FISP cycle, Cycle 8. As part of its preparation, CANY stated it would “[r]eview all available reports, drawings, maintenance documents and other data pertinent to the building façade” (NYSCEF Doc. No. 104, \*2). During the inspection, CANY’s inspectors found problems with the safety of the fire escape. According to CANY inspector Elyse Marks, “by nature of the fact that the fire escape even needed repairs at all means that it was not safe. At the very least it would be SWARMP” (NYSCEF Doc. No. 105 [Marks Dep], p 426 lines 7-12). The FISP Cycle 8 work was underway when the accident that killed plaintiff decedent occurred.

Now, the Court turns to Thornton’s motion for summary judgment. First, Thornton contends that its actions in connection with the FISP inspection were not negligent. It notes that Kornfeld went beyond the minimum requirement, performing a drop to inspect two rather than one façade walls. It states that Thornton satisfied its obligations under Local Law 11 by performing a visual inspection and basing its assessment on the inspection and the drops. According to Thornton, the architect who assesses the condition is not responsible for whether, and in what manner, the owner implements its recommendations, as the recommendations are distinct from an actual design plan. It quotes the Kornfeld deposition, which states that Thornton’s “recommendations [were] general. They’re not the same as an actual design. Someone has to – has to go to that location and actually, you know, prepare a design document. This is not a specification for a repair. It’s a general concept of what repair is required” (NYSCEF Doc. No. 106, lines 3-9).

Citing *Espinal v Melville Snow Contrs.* (98 N.Y.2d 136, 140 [2002]), Thornton argues that there is no basis for holding Thornton liable to a third party. Thornton contends that, even if there had been a negligent inspection – which it denies – a negligent inspection would not make the building “less safe than it was beforehand” (*Stiver v Good & Fair Carting & Moving, Inc.*, 9 N.Y.3d 253, 257 [2007] [in context of claim against motor vehicle inspection company that claimed the car in question was in good and safe condition]). Thus, it did not launch an instrument of harm (*Espinal*, 98 N.Y.2d at 140). In addition, Thornton states that plaintiff cannot argue reliance, as plaintiff decedent did not rely to his detriment on Thornton’s Cycle 7 inspection report (*see Vasquez v Port Auth. of N.Y. & N.J.*, 100 A.D.3d 442, 442 [1st Dep’t 2012]). Finally on this point, Thornton argues that it did not have complete and total authority to maintain or to repair the façade.

Among other cases, Thornton cites *PNY III, LLC v Axis Design Group Intern., LLC* (2015 NY Slip Op 32167 [U] [Sup Ct, NY County 2015], *appeal dismissed* 148 A.D.3d 550 [1st Dep’t 2017]), in which the Court concluded that the Local Law 11 inspectors owed no duty to the owner of a nearby building. Among other things, the Court relied on the facts that inspectors lacked the authority to repair or maintain the building it had inspected, and that the issuance of the inspection report was not “a force or instrumentality of harm” (*id.*, \*3 [internal quotation marks and citation omitted]). As Thornton points out, the Court (Wooten, J.) dismissed a related case against the same inspector for the same reason (*United Church Ins. Assn. v Axis Design Group Intern., LLC*, 2015 NY Slip Op 32164 [U] [Sup Ct, NY County 2015]).

Further, Thornton notes that IVI Assessment Services evaluated the building when it was sold, and that the building owner later retained CANY to prepare the plans and contract out the repair and maintenance work. Rally performed the repair work pursuant to CANY’s directions,

and five years lapsed between Thornton's inspection and the deadly accident. Thus, the subsequent activity supersedes Thornton's inspection. For these reasons, as well, Thornton argues that plaintiff cannot show that its actions caused or contributed to the tragic accident at issue here. Indeed, Thornton contends that plaintiff cannot show that an unsafe condition existed at the time of the inspection, as there were no reported incidents during the intervening years.

In opposition, plaintiff notes the importance of the Local Law 11 inspections. The inspector, plaintiff points out, must certify the façade and its elements as safe, unsafe, or SWARMP. Citing *Espinal* (98 N.Y.2d at 140), plaintiff suggests that Thornton is liable because under its contract with the building owner it assumed "comprehensive and exclusive control" of the façade (NYSCEF Doc. No. 124, \*11). Plaintiff additionally argues that Thornton negligently performed the inspection and did not include the fire escape's unsafe condition in its report. Had Thornton done so, plaintiff states, the fire escape repairs may have occurred earlier and prevented the accident. Thornton's reply reiterates that, notwithstanding plaintiff's arguments to the contrary, the intervening inspections relieve it of liability even if it had some legal responsibility (NYSCEF Doc. No. 128, \*12 [citing *Jones v Saint Rita's R.C. Church*, 187 A.D.3d 727, 729 [2d Dep't 2020]).

After carefully considering the parties' arguments, the Court concludes that the claims against Thornton are required to be dismissed. *Espinal* (89 N.Y.2d at 140), upon which both parties rely, states that the party to a contract only assumes a duty of care to other persons if 1) the contracting party "launches a force or instrument of harm" [internal quotation marks, citation, and internal brackets omitted]), 2) the injured plaintiff detrimentally relied on the contracting party, or 3) the contracting party completely assumed the prior duties and responsibilities of the other party to the contract. As Thornton notes, the performance of an

inspection and issuance of a report do not launch an instrument of harm within the meaning of the law, especially because Thornton's duties, in this instance, ended with the report, and it had no power to make any changes to the building. Thus, its actions did not launch an instrument of harm (*see Medinas v MILT Holdings LLC*, 131 A.D.3d 121, 126-127 [1st Dep't 2015]). Indeed, as Thornton indicates, it was CANY that created the repair and maintenance plan upon which Rally ultimately relied when it made its repairs to the façade (*see Bass v LT 424 LLC*, 2023 NY Slip Op 32041 [U], \* 17-18 [Sup Ct, NY County 2023] [issue of fact found where contractor did rely on movant's inspection report]).

Moreover, contrary to plaintiff's contentions, Thornton did not assume complete and total responsibility for the façade when it performed the inspection. As Thornton attests, any repair work was done based on CANY's directives. Hence, there is no issue of fact as to reliance (compare to *All Am. Moving & Stor., Inc. v Andrews*, 96 A.D.3d 674, 675 [1st Dep't 2012] [finding that the "admitted failure to inspect the sprinkler system for months before the fire, despite its contractual obligation . . . , and evidence of its failure to report to the owner and the fire department that it had found the sprinkler system shut off on several inspections" created issues of fact as to detrimental reliance]). Plaintiff's additional arguments, which the Court has considered, even if they are not directly discussed here, do not persuade the Court that Thornton has any liability in this matter.

Thornton also moves to dismiss all crossclaims asserted against it. The Court notes that the only remaining defendant, Rally, has crossclaims against Thornton. However, Rally has not submitted any opposition to Thornton's application. Accordingly, this prong of the motion is granted without opposition.

Additionally, the Court rejects plaintiff’s argument that Thornton’s failure to submit a separate statement of material facts in connection with the motion is a fatal defect that mandates denial of the motion. For one thing, the memorandum of law includes a statement of facts. Although the attorney who created the document is not the party with knowledge, the statement of facts in the memorandum relies on documents in the NYSCEF file for all statements. In addition, in response to plaintiff’s argument, Thornton submitted a separate statement of facts (NYSCEF Doc. No. 126).

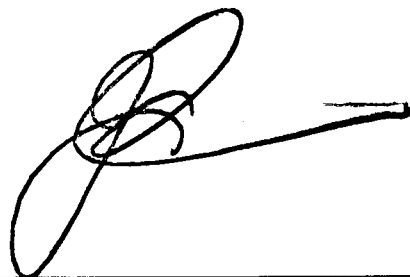
Accordingly, it is

ORDERED that the motion is granted and the action and all cross claims against Thornton are severed and dismissed; and it is further

ORDERED that the third-party complaint is severed and dismissed as moot; and it is further

ORDERED that plaintiff shall submit a copy of this order to the motion support and trial support clerks, who are directed to amend the caption to reflect the dismissal of Thornton in the main action and of the third-party complaint in its entirety. All further papers shall use the amended caption.

This constitutes the decision of the Court.



10/13/2023  
DATE

James d’Auguste, J.S.C.

CHECK ONE:

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

APPLICATION:

CHECK IF APPROPRIATE: