

**350 E. Houston St., LLC v Travelers Indem. Co. of
Am.**

2024 NY Slip Op 33728(U)

October 10, 2024

Supreme Court, New York County

Docket Number: Index No. 650450/2018

Judge: Verna L. Saunders

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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. VERNA L. SAUNDERS, JSC

PART 36

Justice

-----X

INDEX NO. 650450/2018

350 EAST HOUSTON STREET, LLC and BERKELEY
INSURANCE COMPANY,

MOTION SEQ. NO. 008

Plaintiffs,

- v -

TRAVELERS INDEMNITY COMPANY OF AMERICA,
TEMPLE INSURANCE COMPANY, COPPS FOUNDATIONS,
INC, and PETERSON GEOTECHNICAL CONSTRUCTION
LLC,

**DECISION + ORDER ON
MOTION**

Defendants.

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COPPS FOUNDATIONS, INC,

Third-Party Plaintiff,

Third-Party
Index No. 595847/2019

-against-

NOBLE CONSTRUCTION GROUP, LLC,

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 296, 312, 315, 318, 321, 343, 351, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 376, 446, 447

were read on this motion to/for

SUMMARY JUDGMENT¹

The underlying facts of this case are set forth in detail in the decision and order of this court dated October 9, 2018, deciding Mot. Seq. 001, which, among other things, dismissed the complaint as against defendant Axis Insurance Company (NYSCEF Doc. No. 77, *decision and order on Mot. Seq. 001*). Therefore, familiarity with all the underlying facts is presumed and same shall not be repeated here.

Copps moves this court, pursuant to CPLR 3212, for an order dismissing the seventh cause of action alleging negligence and dismissing all cross-claims for purported negligence (NYSCEF Doc. No. 249, *notice of motion*). Copps contends that it is entitled to summary judgment because, insofar as it performed no actual physical work at the subject site, it cannot be held liable for damages sustained at the adjoining property located at 249 East Second Street, New York, NY 10009 ("249 Property"). According to Copps, the micropile installation causing damage to the 249 Property was specified by the owner's engineer, JZN ENGINEERING ("JZN"), conducted by defendant PETERSON ("Peterson"), and supervised by third-party

¹ This motion is decided together with Mot. Seqs. 007; 009; 010; and 011.

defendant NOBLE CONSTRUCTION GROUP LLC (“Noble”), and there is no proof of any negligent act or omission of behalf of Copps to sustain a claim of negligence against it.

Copps claims that its role in the project was one of “oversight and monitoring” and that it subcontracted with Peterson, a more experienced entity to perform the work pertaining to the support of excavation and foundation piles. Copps maintains that it neither controlled the means or methods of the work performed by Peterson, nor did it have any control over Peterson’s decisions regarding the support of excavation and micropiles, which were directed by Noble. Insofar as there are no viable claims of negligence against Copps, it contends that summary judgment is warranted (NYSCEF Doc. No. 251, *memorandum of law*).

In support of its motion, Copps relies on the deposition testimony of plaintiff’s witness, Kevin Tartaglione, the Senior Vice President of BLDG Management, Co., Inc. (“BLDG”), a real estate company which develops properties. Tartaglione confirmed that the owner’s representative specifically retained JZN to perform a ground condition investigation to determine the quality of the soil and determine where the rock was encountered, to aid in the design of the foundation. He further testified that Peterson was managed and supervised by Noble (NYSCEF Doc. No. 259-260, *Tartaglione EBT*).

Jason Weinberger, testifying at a deposition on behalf of Copps, indicated that Peterson was retained to perform the micropiling at the project, due to its drilling expertise, and that Copps had no experience with micropiles. Weinberger also stated that Copps had no equipment on site and that it had not performed any tasks on site (NYSCEF Doc. Nos. 263-264, *Weinberger EBT*). Murray Velichko also testified on behalf of Copps, stating that Peterson held itself out to be an expert in the field of drilling, micropile drilling, and geotechnical construction, and that when Copps was awarded the contract, the parties agreed to reduce Copps’ price by \$100,000.00 because Peterson was to do the work, given that, unlike Copps, they were a known entity (NYSCEF Doc. No. 265, *Weinberger EBT*). Copps also proffers the deposition testimony of its witness Kendall Fahey, who testified that Peterson had represented experience with the micropile installation and that Copps had no experience with the design and installation of micropiles. While it did have the presence of a supervisor on site, i.e., Mark Meunier, Fahey maintained that the site supervisor was tasked simply with overseeing and monitoring Peterson’s work and not to provide technical insight or troubleshoot (NYSCEF Doc. No. 266, *Fahey EBT*). Andrew Peterson on behalf of Peterson testified at his deposition that it was not Peterson’s job to evaluate the quality of the rock and, furthermore, he indicated that Copps did not provide any direction to the drill rig operator on how to drill the hole (NYSCEF Doc. No. 267, *Peterson EBT*).

Copps also relies on the deposition testimony of Noble’s witnesses, Charles Becker and Matthew Izzo, who testified that Noble was responsible for supervising the work and ensuring that it was performed in accordance with the documentation, documents, and drawings issued by the construction professionals (NYSCEF Doc. Nos. 269-270, *Becker and Izzo EBTs*). Copps further relies on the expert report of its expert, Joseph G. Engels, P.E., to argue that no negligent

act or omission was found as against Copps. According to Engels, Copps lacked culpability because it did not have the expertise to determine the cause and seriousness of the issue that arose during the micropile installations performed and it did not supervise or control Peterson's means and methods for installation of micropiles. He further opines that Copps notified Noble about issues Peterson was experiencing during the installation of the micropiles, but Houston's representative rejected the attempt to remediate these concerns (NYSCEF Doc. No. 272, *Engels' expert disclosure*).

Plaintiff opposes the motion, arguing that Copps attempts to minimize its role at the site by claiming that it did not cause or create the events that produced the incident. Instead, plaintiff argues that the micropile installation was a "joint effort" between Peterson and Copps, and that Copps directly supervised Peterson's work, at times even directing Peterson on how to proceed when problems arose during the installation of micropile and the dewatering system for the site. It references a note from Meunier in the daily field reports, who indicated concern over the water problem, indicating "water on site is becoming a real problem." (NYSCEF Doc. No. 373, *Daily Field Reports*). Plaintiff also references testimony from Peterson's witness that it reported to Copps from "start to finish" and that work could not be conducted unless a representative was present on site. (NYSCEF Doc. Nos. 266-267). Given Copps' supervisory role at the site and its on-site representative's concerns throughout the micropile installation operations, plaintiff maintains Copps was negligent. Plaintiff further represents that its expert, Francis J. Arland, P.E., reported that there is specific evidence of Copps' negligence, i.e., that Copps did not employ a procedure to obtain project borings and should have identified the criteria to determine the depth of Class 1C rock, and that the Daily Field Reports prepared by Copps did not describe the criteria or procedure used to establish that the drill casing was seated one foot into Class 1C rock as required. (NYSCEF Doc. No. 369, *Arland's expert's report*.)

In reply, Copps contends that the competent evidence shows that the incident arose out of the negligent acts or omissions of Peterson, Noble, and JZN, and not in any manner by Copps. The work, claims Copps, was performed by Peterson under the express direct supervision and management of Noble and the inspection obligations of JZN. Copps maintains that there is no evidence to demonstrate that it did anything other than observe and monitor the micropiling while it was being directly supervised by Noble and inspected by JZN. Copps references the findings in Arland's report, to argue that it confirms Peterson was responsible for the damage, which is unrefuted by plaintiff's expert. Copps also submits the affidavit of Keith van Sise, who affirmed that prior to the stop order, a meeting was held with the project's owners, BLDG, JZN, and Noble, to discuss whether the Projects' owner should conduct a soil boring to determine the quality of the bedrock at the project (NYSCEF Doc. No. 447, *van Sise affidavit*).

The Court may determine a claim for negligence when there is "(1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately therefrom." (*Pasternack v Lab'y Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016], quoting *Solomon v City of New York*, 66 NY2d 1026, 1027 [1985].)

Here, this court finds that triable issues of fact preclude summary judgment. While this court recognizes the general rule that “a party is not liable for the negligent acts of independent contractors” (*Chainani v Board of Education of the City of New York*, 87 NY2d 370, 639 [1995]; see *Rosenberg v Equitable Life Assurance Society of the United States*, 79 N.Y.2d, 663, 668 [1992]), where there is a triable issue of fact as to whether a party directed or controlled the work alleged to cause injury, summary judgment is not warranted (see *905 5th Assocs., Inc. v Weintraub*, 85 AD3d 667, 668 [1st Dep’t 2011]). This court finds that issues of fact as to whether Copps role was purely supervisory in nature and/or whether its actions/omissions are a proximate cause of the damage sustained at the adjoining property. Arland opines that “[i]f Copps, the foundation contractor, or Peterson had made borings, ground conditions could have been identified prior to pile installation, the depth to Class 1C rock determined, and pile installation means and methods selected that would have prevented settlement of the adjacent building at 249 East Second Street.” (NSYCEF Doc. No. 369). He further opined that “daily field reports (DFRs) prepared by Peterson, Copps, and Noble do not describe the criteria or procedure used to establish that the drill casing was seated one ft. into Class 1C rock as required by the contract documents and Peterson’s/FNA’s submittal before drilling of the rock socket.” Moreover, while this court notes Copps’ assertion that its presence at the site was solely supervisory and that it deferred to Peterson’s expertise for all matters relating to the drilling performed at the site, the affidavit of van Sise, submitted by Copps in reply, raises an issue of fact as to Copps’ involvement in the methods employed at the site. Van Sise avers that “Copps and Peterson likewise presented alternative methods of drilling and securing the Projects’ micropiles given the depth and quality of the bedrock.” As such, summary judgment is denied. Therefore, it is hereby

ORDERED that the motion of COPPS FOUNDATIONS, INC, pursuant to CPLR 3212, is denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiffs shall serve a copy of this decision and order with notice of entry upon all parties; and it is further

ORDERED that the caption shall be amended in accordance with the decision and order on Mot. Seq. 010.

This constitutes the decision and order of this court.

October 10, 2024


 HON. VERNA L. SAUNDERS, JSC

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