

Moskowitz v Tishman Constr. Corp.

2025 NY Slip Op 30563(U)

February 14, 2025

Supreme Court, New York County

Docket Number: Index No. 651310/2020

Judge: Debra A. James

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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. DEBRA A. JAMES

PART 59

Justice

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ROBERT MOSKOWITZ, as Trustee of the MOSKOWITZ
CHILDREN IRREVOCABLE TRUST,

Plaintiff,

INDEX NO. 651310/2020

MOTION DATE 01/08/2025

MOTION SEQ. NO. 001 002

- v -

TISHMAN CONSTRUCTION CORPORATION d/b/a AECON
TISHMAN and URBAN FOUNDATION ENGINEERING LLC,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68

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

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of plaintiff for summary judgment is granted (motion sequence number 002) with regard to liability on the first cause of action alleging strict liability against defendants; and it is further

ORDERED that to the extent that it seeks partial summary judgment of liability on its sixth cause of action for attorneys' fees, the motion of plaintiff is denied, as attorneys' fees are not a separate cause of action but a measure of damages (see

LaPorta v Alacra, Inc, 142 AD3d 851, 853 [1st Dept 2016]); and it further

ORDERED that the motion of plaintiff to strike the answer of defendants for failure to comply with discovery demands (motion sequence number 001) is denied; and it is further

ORDERED, that pursuant to 22 NYCRR § 208.9(i), counsel are directed to post on NYSCEF a joint proposed preliminary discovery conference order or competing proposed preliminary discovery conference order(s) at least two days before March 13, 2025, on which date counsel shall appear via Microsoft Teams, unless such appearance be waived (upon joint request sent to IAS Part 59 Clerk at SFC-Part59-Clerk@nycourts.gov) by the Court; and it is further

ORDERED that counsel shall refrain from posting on NYSCEF discovery demands and responses to discovery demands, except for demands for bills of particulars or responses thereto (same constitute amplifications of the pleadings), as such postings unnecessarily and improperly clutter the docket, and same should be exchanged among counsel only as per Article 31 of the CPLR.

DECISION

The court concurs with plaintiff as to the admissibility of entries on the Department of Buildings website that show that the New York City Environmental Control Board sustained violations against defendant Tishman Construction Corporation (hereinafter "Tishman") with respect to excavations that

adjoined plaintiff's property. See Gibson v U'SAgain Holdings, LLC, 167 AD3d 536, 537 (1st Dept 2018). This court likewise agrees with plaintiff that the pre and post construction survey reports are admissible pursuant to CPLR § 4549. See Moskowitz v Tory Burch LLC, 161 AD3d 525, 526 (2018)

Upon such evidence, along with (1) the affidavit of Robert Moskowitz, who possessed personal knowledge of the condition of plaintiff trust's building (see Moskowitz v Tory Burch LLC, supra, at 526) and (2) the affidavit of the agent of non-party owner of the project on which defendant Tishman was owner's construction manager, as part of such owner's petition for bankruptcy, plaintiff has prima facie established its entitlement to a partial summary judgment of liability on its first cause of action (strict liability) against defendants Tishman under New York City Building Code § 3309.4. Defendants have not proffered any affidavit or other evidence that raises an issue of fact with respect to such claim, and therefore plaintiff is entitled to partial summary judgment of liability against defendants Tishman and Urban Foundation Engineering, LLC, the latter which company performed the excavation and foundation work. See DFAWEAST, LLC v Friedland Props Inc, 211 AD3d 462 (1st Dept 2022) and Moskowitz, supra.

As for plaintiff's motion to strike the answer of defendants for their failure to comply with its discovery demands, 22 NYCRR § 208.9(i) provides, in pertinent part:

"Preliminary conference

Motions in actions to which this section is applicable made before the preliminary conference is held may be denied or marked off the calendar unless good cause is shown why such relief is warranted before that time."

Plaintiff has failed to assert any good cause for relief from the requirement that a preliminary conference be held.

Debra A. James

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2/14/2025

DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE