SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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ULYANA CHUVASHEVA, NEERU SCHULZE-SINGH, JAMES MCKEE,

Plaintiff,

- v -

HUDSON MERIDIAN CONSTRUCTION GROUP LLC,63RD & 3RD NYC LLC,63RD & 3RD DEVELOPMENT LLC,63 COMPANY LLC,DIGBY MANAGEMENT COMPANY LLC,RISING SUN CONSTRUCTION LLC D/B/A RSC CONSTRUCTION, REAL ESTATE INVERLAD DEVELOPMENT, LLC,REAL ESTATE INVERLAD USA MANAGEMENT, LLC,THIRD PALM LLC A/K/A THIRD PALM CAPITAL, DOMANI INSPECTION SERVICES, INC.,MANUEL GLAS AIA, WSP USA BUILDINGS INC, JOHN DOES 1 THROUGH 10,

Defendants.

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INDEX NO. 150984/2020

MOTION DATE 08/15/2024, 08/26/2024, 08/26/2024, 08/26/2024, 08/26/2024

MOTION SEQ. NO. 003 004 005 006 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 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, 217, 218, 219, 222, 226, 227, 236, 239, 251, 252, 253, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 369, 370, 378, 381, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 211, 212, 223, 228, 234, 240, 254, 255, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 365, 366, 373, 374, 376, 382, 386, 399

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 78, 79, 80, 81, 82, 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, 109, 110, 111, 215, 216, 224, 229, 235, 241, 367, 368, 377, 383, 387, 388, 398

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 156, 157, 158, 159, 160, 161, 162, 163, 164, 213, 214, 225, 230, 237, 242, 244, 245, 246, 247, 248, 249, 250, 256, 257, 258, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 371, 372, 375, 379, 384, 389, 390, 391, 392, 393

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 231, 238, 243, 259, 260, 261, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 380, 385, 394, 395, 396, 397

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

BACKGROUND

This action arises from an accident that took place on January 9, 2019, when a concrete masonry unit ("CMU") fell from a construction project at 1059 Third Avenue in Manhattan (the "project"), through the roof of the building located at 200 East 63rd Street (the "premises"), causing significant damage to several apartments therein.

In the within action plaintiffs, respectively tenants of apartments located at the premises, seek to recover damages for emotional injuries and damage to property stemming from the accident, which forced them to vacate their apartments.

63rd & 3rd NYC LLC ("63rd & 3rd") was the owner and developer of the project. 63rd & 3rd contracted with Manuel Glas Architects ("Manuel") to design the project, with Hudson Meridian Construction Group, LLC ("Hudson") to be the construction manager for the project, and with Domani Inspection Services, Inc. ("Domani") to conduct special inspections of, among other items, the exterior masonry work and the associated reinforcement. Manuel contracted with WSP to provide structural engineering services on the project. Hudson contracted with RSC Group LLC ("RSC") to perform masonry work on the project, including, but not limited to, the CMU walls.

63 Company LLC ("63 Company") was the owner of the premises, and Digby Management Company LLC ("Digby") was the property manager.

PENDING MOTIONS

On August 5, 2024, defendant WSP USA ("WSP") moved for an order pursuant to CPLR § 3212 granting it summary judgment dismissing the re-amended complaint, and all claims and cross claims asserted against it. (Mot. Seq. 3).

On August 2, 2024, Domani moved for an order pursuant to CPLR § 3212 granting it summary judgment dismissing plaintiff's complaint and all cross claims, dismissing the third party complaint and any and all cross claims asserted against it, dismissing plaintiff's complaint and the third-party complaint, pursuant to CPLR 3211(a)(7), for failure to state a cause of action, and granting judgment to Domani declaring its entitlement to indemnity and defense from co-defendant 63rd & 3rd and third-party defendant Hudson. (Mot. Seq. 4).

On August 5, 2024, 63 Company LLC and Digby moved for an order pursuant to CPLR § 3212 granting them summary judgment dismissing all claims, cross claims and counter claims as to them, granting them summary judgment as to 63rd & 3rd on their claims for contractual indemnification and breach of contract, and against Hudson for common law indemnification. (Mot. Seq. 5).

On August 5, 2024, defendant Manuel moved for an order pursuant to CPLR § 3211(a) dismissing all claims and cross claims against it, and pursuant to CPLR § 3212 granting it summary judgment. (Mot. Seq. 6).

On August 5, 2024, defendants 63rd & 3rd, and 63rd & 3rd Development LLC (collectively, "63rd and 3rd") and Hudson moved for an order pursuant to CPLR § 3212 granting it summary judgment on the issue of contractual indemnification against RSC. (Mot. Seq. 7).

The motions are consolidated herein and determined as set forth below.

RELEVANT PROCEDURAL HISTORY

By decision and order dated February 3, 2024, the Court consolidated the within action with the following actions: (i) 63rd & 3rd NYC LLC v. RSC Group LLC (Index No.657421/2019) ("the 63rd Action"); (ii) Technology Insurance Company Inc. on its own and on behalf of Digby Management Co. LLC and 63 Company LLC v. Hudson Meridian Construction Group, LLC, et al (Index No. 152882/2020) ("the Technology Action"); and (iii) Steven Jones v Hudson Meridian Construction Group LLC (Index No. 152534/2019) ("the Jones Action") for purposes of discovery and all pre-trial purposes.

By decision and order dated September 19, 2024, the Court denied the motion of plaintiffs in the within action to consolidate the pending motions of the within action with those of the related cases. However, as there is a good deal of overlap as to the subject matter and parties involved in the respective motions, the Court is issuing the decisions on the respective motions concurrently for the purposes of clarity and consistency.

ALLEGED FACTS

Relevant Project Background

On September 1, 2016, Hudson entered a contract with 63rd and 3rd to provide construction management services for the project ("Hudson contract"). On August 11, 2017, RSC entered a subcontract with Hudson to perform masonry work for the project ("RSC subcontract"). On August 27, 2018, Manuel entered a contract with 63rd and 3rd to be the architect for the project. ("Manuel contract"). On May 5, 2014, entered a contract with Manuel to provide structural engineering services on the project ("WSP contract"). On June 22, 2016, Domani entered a contract with 63rd and 3rd to provide special inspection services on the project ("Domani Contract"). On September 23, 2016, 63 Company entered a "License to Enter and

Indemnity Agreement" with 63rd and 3rd granting it access to the premises to safeguard it during the duration of the project ("License Agreement").

On or about July 26, 2017, WSP filed drawings titled S-968 and S-969 with the New York City Department of Buildings ("DOB"), which diagramed and addressed the forces imposed by and on the CMU walls, the structural capacity of the CMU walls and the associated CMU wall reinforcement on the project. The S-968 drawing was complemented by the CMU Masonry Notes contained on WSP FO-001, which included requirements for temporary bracing during the erection of the walls.

On March 7, 2018, Richard McLaren of Hudson emailed Pradeep Naga of WSP asking, at the behest of Domani, whether it approved of installing doweled epoxy rebar for CMUs at a depth of 4-6 inches. Naga responded, "Yes, Drill and Epoxy is fine. Please ask them to have a minimum of 6 drill. NO REBAR to be harmed while drilling. Use HY-200 epoxy glue. Make sure the hole is properly cleaned and wire brushed per the product installation guide before applying epoxy glue."

On October 22, 2018, Domani conducted a site inspection of the 21st Floor. The inspection noted that 6-inch CMU were being used, in deviation from the S-968 document which called for 8-inch CMU.

The Incident

On January 9, 2019, at approximately 8:30 pm, a CMU pier, containing CMU units, grout, and rebar, fell from the north façade of the 25th floor of the project. The exact cause of this is disputed by the parties. The falling objects crashed through the roof of the building, going through the protection that had been installed on the roof.

In apartment 6D, occupied by Jones, the ceiling collapsed, filling every room with debris, significantly damaging the interior of the apartment, except for the bathroom where he had been showering at the time of the incident, and filling the apartment with black dust. He was trapped in the apartment until he was rescued by firefighters.

Apartment 4C, occupied by Ulyana Chuvasheva, apartment 3C, occupied by Neeru Shulze-Singh, apartment 6C, occupied by James McKee, and apartment 2D, occupied by Jennifer Salzer (collectively, Chuvasheva plaintiffs), also sustained damages.

The Aftermath

After the accident, the DOB issued a partial vacate order to the premises. Jones and Chuvasheva plaintiffs were all displaced from their respective apartments. Hudson offered to relocate the displaced tenants in hotel rooms until the vacate order was lifted. All Chuvasheva plaintiffs accepted this offer, while Jones did not. They were not charged rent while they were displaced from their apartments, except that rent-stabilized tenants were required to pay $1 per month, and the hotel rooms were paid for by Hudson.

On January 10. 2019, the DOB issued a stop work order on the project. DOB officer Phyo Win cited Hudson for code violations for “failure to safeguard all persons and property” and cited Domani for “failure to perform special inspection duties” specifically its failure to cite the non-conformance of the CMU wall thickness to construction documents in its special inspection reports. Win, at a subsequent deposition, noted that the CMU walls were not built in conformance with the contract documents, including that 6” CMU were used as opposed to 8” CMU, and mandated that all previously constructed CMU walls be temporarily braced. The stop work order remained in effect for approximately six months.

Also on January 10, 2019, a walkthrough visual observation of the 24th and 25th floors of the project was conducted by Yujia Zhai of WSP, Manuel Glas of Manuel, and Vytas Sipas of Hudson Meridian. The report, written by Zhai, noted that "6 [inch] CMU were installed on this floor with more than 10 ft. clear floor-to-floor height. According to design document S-968, 8 [inch] CMU shall be installed." He also observed that at the location where the fallen pier used to be, only two rebar anchors were drilled, as opposed to the minimum of three called for in the design document, and that one of the holes was round and clean without trace of epoxy. The report advised that the remaining partially finished CMU wall be either temporarily braced or safely demolished.

On or about June 7, 2019, approximately five months after the incident, 63 Company and Digby were notified that the vacate order was lifted, and the displaced tenants were notified shortly thereafter. Jones elected to terminate his lease early and was permitted to do so without penalty.

Expert Reports

63rd & 3rd's expert James McLoughlin, a civil/structural engineer, opines that the accident occurred when wind gusts caused an unsecured CMU panel on the 25th floor of the building to tip to the west and fall on the adjacent building. He notes that weather reports from the date of the accident indicate that there were gusts between 30-40 MPH on the ground level, but that they likely did not exceed the design wind load of 98 MPH at the height of the 25th floor. He identifies multiple construction defects deviating from the original plans, including that 6-inch CMU blocks were used as opposed to 8-inch, using incorrect number and spacing of dowels; that either no epoxy was installed, or it did not properly bond; and that despite reports of inclement weather, no cold weather blankets or temporary bracing were used to safeguard the

wall. He opines that these defects and deviations left the CMU wall not properly secured, causing it to come loose, and places responsibility on RSC.

RSC's expert Martin Fradua, a professional engineer, opines that flaws in Manuel and WSP's masonry pier design used in the north façade wall system were the primary cause of the accident. He claims that they improperly approved the use a post-installed drilled in adhesive anchor in lieu of the cast-in-place anchor and failed to provide sufficient detail or instruction for their installation. He also claims that there was a discrepancy between WSP's design calling for 8-inch CMUs and Manuel's drawings showing 6-inch CMUs in various exterior wall details, and that Domani brought this up to the design team but did not issue a non-conformance report, which he believes based on his experience they were likely advised against by one or more parties. He claims that the 6-inch cmu design is inferior in strength and stiffness compared to the 8-inch cmu pier of the original design. He opines that the weather conditions around the time of the accident did not necessitate the use external bracing or cold weather procedures, and notes that RSC was not advised to do so by any party. He also claims that Hudson was required by statute to place horizontal safety netting systems that must extend out 10 feet from the building façade during construction, but that there was no such netting at the 25th floor.

Manuel's expert Robert Murray, a professional engineer, opines that the defects highlighted in the various post incident reports stem from construction means and methods, which Manuel did not control, and which in several cases deviated from Manuel's design. He assigns blame to RSC for improperly implementing Manuel's designs, and to WSP and Domani for failing to properly conduct inspections.

WSP's expert Benjamin Cornelius, a professional engineer, opines that WSP's CMU designs complied with accepted engineering standards, and that the substitution of drilled-in

dowels for embedded dowels relative to the bottom anchors of CMU walls is commonplace and as designed would not adversely affect the safety of the CMU wall. He also assigns blame for the accident to RSC for its deviations as to CMU block size, space and size the vertical rebar and dowels, proper use of epoxy, and failure to brace or shore the incomplete CMU wall.

DISCUSSION

Summary Judgment Standard

Summary judgment is a drastic remedy reserved for those cases where there is no doubt as to the existence of material and triable issues of fact. *Sillman v Twentieth Century–Fox Film Corp.*, 3 NY2d 395, 404 (1957).

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. CPLR 3212(b); *Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 (2019). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." *Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 (2016), quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 (1988).

In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." *O'Brien v Port Auth. of New York and New Jersey*, 29 NY3d 27, 37 (2017).

Claims against Manuel

Contentions

Manuel seeks dismissal of plaintiff's claims against it, contending that it had no involvement in the use of six-inch CMUs, nor in any of the other alleged causes of the accident, and had no responsibility to supervise or control RSC's work. It argues that it owed no duty to plaintiff.

In opposition, plaintiffs contend that Manuel's designs contained insufficient specifications, constituting gross negligence, and that that they failed to properly supervise and inspect the work to ensure their designs were properly implemented. They argue that there are exceptions to all three *Espinal* factors, and that Manuel violated Building Codes. They argue it would be "extremely unjust" to not hold them liable in light of plaintiffs' serious damages, and that they have unclean hands.

In separate opposition, RSC argues that there were defects in Manuel's design which proximately caused the accident, citing its expert report.

In reply, Manuel argues that its inspection role under the contract was limited and does not give rise to liability, and that other parties were obligated to conduct inspections under the contract and New York City Administrative Code.

Contractual duty to plaintiff

Here, the Manuel Contract contained the following clauses relating to its inspection and oversight obligations:

> § 3.6.2.1. The Architect shall visit the site at intervals appropriate to the stage of construction, or as otherwise required in Section 4.2.3, to become generally familiar with the progress and quality of the portion of the Work completed, and to determine, in general, if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to

> check the quality or quantity of the Work. On the basis of the site visits, the Architect shall keep the Owner reasonably informed about the progress and quality of the portion of the Work;
>
> § 3.6.2.2. The Architect has the authority to reject Work that does not conforming to the Contract Documents. Whenever the Architect considers it necessary or advisable, the Architect shall have the authority to require inspection or testing of the Work in accordance with the provisions of the Contract Documents, whether or not the Work is fabricated, installed or completed

From their plain meaning, these provisions impose upon Manuel, at minimum, a limited inspection obligation with respect to conformance to its designs, albeit a vaguely defined one, as well as the authority to reject nonconforming work. Manuel's position is that § 3.6.1.2 of the Manuel contract, which states in relevant part that

> "The Architect shall not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, nor shall the Architect be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect shall be responsible for the Architect's negligent acts or omissions, but shall not have control over or charge of, and shall not be responsible for, acts or omissions of the Contractor or of any other persons or entities performing portions of the Work."

disclaims any responsibility for improper implementation of its designs. However, nothing in this provision explicitly abrogates Manuel's inspection obligations, nor its authority related to conformance with its designs.

Manuel's principal testified that he would review masonry inspection reports for nonconformance, and as it is uncontroverted that Domani had flagged that RSC was using 6-inch CMUs in nonconformance with Manuel's design over two months prior to the accident. Additionally, multiple experts cite the nonconforming CMU size as a cause of the accident. Thus, there are at minimum triable issues of fact as to whether Manuel properly performed its supervisory obligations pursuant to the contract, and whether that caused the accident.

Contractual obligations are insufficient to impose tort liability on non-contracting third parties, unless: (1) the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) the plaintiff detrimentally relies on the continued performance of the contracting party's duties; or (3) the contracting party has entirely displaced the other party's duty to maintain the premises safely. *See Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136, 140 (2002).[1]

There is no evidence that plaintiff had actual knowledge as to the existence of the Manuel contract, thus he cannot be said to have detrimentally relied on Manuel's performance. *Aiello v Burns Intern. Sec. Services Corp.*, 110 AD3d 234 (1st Dept 2013). Nor is there any evidence or argument that Manuel displaced all other parties' duty to maintain the premises in safe condition. Thus, the second and third *Espinal* prongs are inapplicable here.

To establish liability under the first *Espinal* prong, a plaintiff must show that a party "affirmatively created or exacerbated any unsafe condition." *Welliver v T-C The Colorodo LLC*, 2025 N.Y. Slip Op. 03030 (1st Dept 2025); *see Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d253 (2007). "[M]erely in withholding a benefit ... where inaction is at most a refusal to become an instrument for good" is insufficient to establish direct liability. *Church v Callanan Indus.*, 99 NY2d 104, 112 (2002) (internal citations omitted). Failure to properly inspect or correct a dangerous condition has been found to be insufficient to establish liability under this prong. *Maldonado v Liberty Elevator Corp.*, 213 AD3d 493 (1st Dept 2023); *Medinas v MILT Holdings LLC*, 131 AD3d 121 (1st Dept 2015).

However, to the extent an architect or engineer's construction drawings were relied on by a contractor, and are found to have been negligently created, the creator of those drawings may

[1] Plaintiffs' assertion that *Espinal* is inapplicable to claims involving gross negligence is without support. *See New York University v Turner Const. Co.*, 206 AD3d 536 (1st Dept 2022).

be found to have launched a force or instrument of harm. *Cf. 492 Kings Realty, LLC v 506 Kings, LLC*, 105 AD3d 991 (2d Dept 2013) (*architect did not launch instrument of harm where document was clearly not intended to be used as construction drawing*); *Davies v Ferentini*, 79 AD3d 528 (1st Dept 2010) (*engineer's construction drawings did not launch instrument of harm where it was entirely subject to other parties direction and control*). Here, Sipas testified that the architectural drawings, prepared by Manuel called for 6 -inch CMU's to be used, and that he believed the discrepancy with the structural engineering documents was not addressed until after the accident. As multiple experts cite the CMU size discrepancy as a cause of the accident, there remain issues of fact as to whether Manuel launched the force or instrument of harm that caused plaintiff's accident.

Statutory liability to plaintiff

The violation of a specific duty under a local building code may constitute evidence of a contractor's negligence, although it does not constitute negligence *per se*. *Elliot v City of New York*, 95 NY2d 730 (2001); *see Jainsinghani v One Vanderbilt Owner, LLC*, 162 AD3d 603 (1st Dept 2018) (*issues of fact as to contractor's negligence where violation of building code requiring contractors to safeguard personnel and property resulted in sign falling on pedestrian*); *cf. 87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540 (1st Dept 2014) (*granting summary judgment on building code claim against party who did not cause excavation within meaning of code, but denying to other party where issue of fact remained as to whether their design and methodology caused excavation*).

NYC Administrative Code Section BC 1704, pertains to special inspections and tests. Specifically § 1704.1.1.1(2), places responsibility on the design professional of record[2] to "respond to special inspector reports of uncorrected discrepancies and shall approve remedial measures."

Here, it is undisputed that Domani had flagged the CMU size discrepancy in the 10/22/18 Masonry Inspection Report. And, as multiple experts opine that the CMU size discrepancy was a cause of the accident, there remain issues of fact as to whether Manuel's failure to respond to and correct this discrepancy, pursuant to their duties under the building code, was a proximate cause of plaintiff's accident.

Thus, Manuel's motion for summary judgment is denied as to plaintiff's claims based on alleged Building Code violations.

Third-Party and Cross Claims Against Manuel

"To establish a claim for common-law indemnification, the party seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability, but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the cause of the accident." *Mikelatos v Theofilaktidis*, 105 AD3d 822 (2d Dept 2013); *see Padron v Granite Broadway Development LLC*, 209 AD3d 536 (1st Dept 2022) (*dismissing common law indemnity and contribution claims against party that proved it was free of negligence*). Manuel's sole argument for dismissal of all common law indemnity and contribution claims against it is that it was not negligent. As triable issues of fact remain as to that point, that portion of their motion is denied.

[2] Plaintiff in the Jones action asserts that this provision applies to both Manuel, as architect and WSP, as structural engineer even though it is not clear that both can be the "design professional of record" under the building code. However, neither party disputes their characterization as such.

Manuel also seeks dismissal claims against it for and failure to procure insurance, contending that its contract with Manuel does not require it to indemnify or procure insurance for any party. Absent opposition to this portion of Manuel's motion, the claims are dismissed.

Claims against WSP

Contentions

WSP seeks dismissal of plaintiffs' complaint against it, arguing that it bears no responsibility for causing the accident. It contends that it did not deviate from generally accepted engineering principles in providing structural design and specifications pertaining to the CMU walls and their associated reinforcement, citing its expert report, and argues that the sole cause proximate cause of the accident was RSC's deviations from those specifications.

In opposition, plaintiffs contend that WSP's designs contained defects, constituting gross negligence, and that that they failed to properly supervise and inspect the work to ensure their designs were properly implemented, especially when alerted to discrepancies. They argue WSP violated Building Code and could not contract away their duties thereunder. They argue it would be "extremely unjust" to not hold them liable in light of plaintiffs' serious damages, and that they have unclean hands.

In separate opposition, RSC argues that issues with WSP's designs were the proximate cause of the accident. It contends that WSP failed to provide drawings and details for exterior masonry pier reinforcement, only for the interior wall section, and that RSC relied on those designs it was provided.

In its partial opposition to WSP's motion, 63rd defendants concur that RSC's deviations constituted the sole proximate cause of the accident, citing its expert report as well as WSP's Hudson's respective expert reports.

In reply, WSP contends that RSC's expert report is unsupported by any design calculations or engineering guidelines or requirements that were violated. It argues that Domani, not it, bore responsibility to inspect the CMU walls.

Duty to Plaintiff

Similar to Manuel, there is no evidence that plaintiff knew of and relied on the existence of the WSP subcontract, or that WSP displaced all other parties' duty to maintain the premises in safe condition.

As to analysis under the first *Espinal* prong as stated above, as stated above an inspection obligation alone is insufficient to establish liability, but negligent design may. Here, RSC, in citing Fradua's expert report, raises a triable issue of fact as to whether WSP's decision and process of approving drilled in dowels, in deviation with the design documents, was negligent. While WSP disputes the credibility and accuracy of Fradua's report, that is an issue best left to the ultimate trier of fact. *See Latini v Barwell*, 181 AD3d 1305 (4th Dept 2020); *Cokeng v Ogden Cap Properties, LLC*, 104 AD3d 550 (1st Dept 2013).

Further, as with Manuel, plaintiff raises triable issues of fact as to whether WSP failed to perform its responsibilities as design professional of record pursuant to NYC Administrative Code Section BC 1704. WSP does not contest this argument in its motion papers.

Thus, there remain issues of fact as to WSP's negligence.

Third-Party and Cross Claims against WSP

As there remain issues of fact as to WSP's negligence, the portion of its motion seeking summary judgment dismissing common law indemnity and contribution claims against it is denied.

WSP also seeks dismissal of all cross claims and third-party claims against it for contractual indemnity and failure to procure insurance, contending that its contract with Manuel does not require it to indemnify or procure insurance for any party. Absent opposition to this portion of WSP's motion, the claims are dismissed.

Claims against Domani

Contentions

Domani Seeks dismissal of Plaintiff's claims against it, arguing that as it did not install the CMU walls, it did not launch a force or instrument of harm, it cannot be found liable for plaintiff's injuries.

Plaintiffs argue that the failure of Domani to inspect, warn, and ensure that the CMU was made safe resulted in the instrument of harm being launched and caused the accident, and further that the other *Espinal* exceptions are applicable. They argue that it had a duty as special inspector pursuant to contract and NYC Building code to report construction discrepancies, and that its negligence in doing so was a proximate cause of the accident. They argue Domani was grossly negligent, and it would be "extremely unjust" to not hold them liable in light of plaintiffs' serious damages, and that they have unclean hands.

RSC concurs that Domani's failure to properly conduct inspections caused the accident, and that Domani violated the Building Code.

Domani contends that its role as an inspector on the project was limited pursuant to the contract, and that any contention that it departed from any standards or caused the accident is unsubstantiated.

Duty to Plaintiff

As with Manuel and WSP, there is no evidence that plaintiff knew of and relied on the existence of the WSP subcontract, or that WSP displaced all other parties' duty to maintain the premises in safe condition.

As stated above, an inspection obligation alone is insufficient to establish liability under the first *Espinal* prong. As it is uncontroverted that Domani's role on the project was limited to conducting special inspections, the first *Espinal* prong cannot apply to Domani. Thus, Domani owed no duty to plaintiff pursuant to the Domani contract.

§ 1704.1.1.2 of the Building Code places responsibilities on Special Inspection Agencies, including, as is pertinent here:

> 4. Inspection. The special inspection agency shall observe work subject to special inspection to confirm that the work that is the subject of the special inspection is in compliance with the approved construction documents; with the approved shop drawings, where provided; and with the special inspection requirements of this code and department rules and regulations.
>
> 6. Reports. The special inspection agency shall prepare reports of its inspections and tests, and such reports shall indicate that work inspected was or was not performed in conformance with approved construction documents.
>
> 6.2. Discrepancies. Discrepancies shall be brought to the immediate attention of the contractor and, when applicable, to the attention of the superintendent of construction, for correction. The discrepancies shall also be brought to the attention of the owner, and the registered design professional of record in a timely manner to allow for correction of the discrepancies.

Here, multiple witnesses and experts have noted areas where the CMU work did not conform to the construction documents and have cited those discrepancies as having caused the accident. Thus, there remain issues of fact as to Domani's negligence.

Third-Party and Cross Claims against Domani

As there remain issues of fact as to Domani's negligence, the portion of its motion seeking summary judgment dismissing common law indemnity and contribution claims against it is denied.

Domani also seeks dismissal of all cross claims and third-party claims against it for contractual indemnity, contending that the Domani contract does not require it to indemnify any party. Absent opposition to this portion of Domani's motion, the claim is dismissed.

Claims against 63 Company and Digby

Contentions

63 Company and Digby seek dismissal of plaintiff's claims against them, contending that it is undisputed that they bear no responsibility for the CMU wall that caused the accident. They argue it had no duty to relocate plaintiff or pay relocation costs as it was not at fault. They contend that 63rd and 3rd assumed all responsibility to protect the building from any consequences of the construction project pursuant to the license agreement between them. They argue any issues caused by plaintiffs' relocation were not caused by them.

In opposition, plaintiffs contend that 63 Company and Digby had an obligation to properly safeguard the roof from construction debris, and the license agreement with 63rd and 3rd does not absolve them from their duty to plaintiffs. They raise issues with the duration with which they were displaced from their apartments, as well as the accommodations they were provided arguing that 63 Company and Digby "injected themselves into the relocation." They argue 63 Company and Digby was grossly negligent, and it would be "extremely unjust" to not hold them liable in light of plaintiffs' serious damages, and that they have unclean hands.

In reply, 63 Company and Digby argue that there can be no liability since it did not cause the accident, and that the license agreement merely gave 63rd and 3rd access to the building so that it could perform its duty to safeguard the building from its construction activities pursuant to the NY Administrative Code.

Liability to Plaintiffs

A landlord has a duty to maintain its premises "in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" *Kellman v 45 Tiemann Assoc.*, 87 NY2d 871, 872 (1995). However, be held liable for a dangerous or defective premises condition, they must have either created the condition or had actual or constructive notice of it. *Rooney v George Hardy St. Francis Apartments, LLC*, 181 AD3d 493 (1st Dept 2020).

63 Company and Digby meet their *prima facie* burden by establishing that they are not liable for plaintiff's accident. It is undisputed that 63 Company and Digby did not create the condition that caused the accident, nor can they be charged with actual or constructive notice that a concrete wall from an adjacent building would fall.

In opposition, plaintiffs contend that they owed a duty to properly safeguard the building against falling objects. However, NY Administrative Code Section 3309.10 places the burden of protecting the roof of a building neighboring a construction project on those "causing such work" where, as here, the party causing the work has been granted a license to enter and inspect the adjoining building in accordance with the requirements of Section 3309.2. As it is undisputed that Hudson was granted such access, and absent any evidence or authority that 63 Company and Digby had any additional duty with regard to safeguarding the premises from falling construction debris, that cannot form a basis for liability.

As to plaintiff's claims based on the sufficiency of their lodging while displaced, it is uncontroverted that Hudson, not 63 Company and Digby, was the party that undertook responsibility for providing that housing while plaintiffs were forcibly relocated. Additionally, plaintiffs cite no authority for their contention that a landlord owes a duty to expedite the process of removing the vacate order.

Thus, absent a basis to hold 63 Company and Digby liable to plaintiff, plaintiff's claims against them are dismissed.

63rd & 3rd and Hudson's Contractual Indemnification claims against RSC

63rd & 3rd and Hudson seek summary judgment on their contractual indemnity claim against RSC, contending that the accident clearly arose out of RSC's work on the project, and thus it is required to indemnify, defend and hold them harmless pursuant to the RSC subcontract. They argue that the indemnification clause does not violate General Obligations Law § 5-322.1, as it is limited to the extent permitted by law.

In opposition, RSC contends that the accident arose out of the acts and omissions of other parties, including the designs of Manuel and WSP, the supervision by Hudson, and the inspections of Domani. and did not arise out of its work. It argues that it would be premature to award summary judgment as to indemnification or defense absent a finding that the accident arose out of its work. It argues that the indemnification clause violates GOL § 5-322.1 by exempting 63rd & 3rd and Hudson from their own negligence.

In reply, 63rd & 3rd and Hudson that Hudson did not control the means and methods of RSC's work.

The RSC subcontract contained the following indemnity provision, which reads in pertinent part:

> 20.1 To the fullest extent permitted by applicable law, the Subcontractor shall assume entire responsibility and liability for all damages… and injury of any nature… to persons and property, including intangible property, arising out of, or in any manner relating to, the execution of the work, and the Subcontractor agrees, at its own expense, to defend (if requested by Contractor or Owner), indemnify and hold harmless Contractor, the Owner, and anyone for whose acts they may be liable… (collectively, the Indemnitees), from all demands, claims, causes of action… losses, costs and expenses, including reasonable counsel fees, asserted against any of the Indemnitees, arising out of, or in any manner relating to, the execution of the work… (provided that the violation arises out of or is in any way connected with the Subcontractor's performance or lack of performance of the work under the Subcontract)… The Subcontractor shall maintain, at all times, insurance, in the amount set forth in Article 19...

As it is uncontroverted that the accident was caused by a falling CMU pier, and that RSC was the party responsible for performing CMU work on the project, it is clear that the accident arose out of its work, thus falling within the language of the indemnity provision.

As the indemnity provision contains a savings clause limiting any indemnification to the extent permitted by law, does not violate General Obligations Law § 5–322.1. *Radeljic v Certified of N.Y. Inc.*, 161 AD3d 588 (1st Dept 2018).

However, "a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor." *Shea v Bloomberg, L.P.*, 124 AD.3d 621, 622 (2nd. Dept 2015); General Obligations Law § 5–322.1); *see Travalja v 135 West 52nd Street Owner LLC*, 232 AD3d 503 (1st Dept 2024). Here, plaintiff's negligence claims against 63rd & 3rd and Hudson remain, they are not moving for summary judgment dismissing this claim and their sole contention in support of their lack of negligence, asserted in a conclusory way for the first time in reply, is that Hudson did not supervise RSC's work. Thus, their motion for summary judgment on their contractual indemnity claim against RSC is premature absent a finding that they were free from negligence.

63 Company and Digby's Claims against Hudson and 63rd and 3rd

63 Company and Digby seek summary judgment on their contractual defense indemnity claim, against 63rd and 3rd, arguing that the terms of the license agreement are clear and unambiguous, and they are free from negligence. Additionally, they seek summary judgment on their breach of contract claim for failure to procure insurance, contending that License agreement required 63rd and 3rd to procure $1,000,000 primary coverage each occurrence and $10,000,000 umbrella excess liability, but that it has never responded to their tender letters. They also seek summary judgment on their common law indemnity claim against Hudson, arguing that all damages in this case arise out of the actions or inactions of Hudson and its subcontractors.

Hudson and 63rd and 3rd argue that it was RSC's conduct, not its own, that caused the accident, and thus Hudson does not owe common law indemnity to 63 Company and Digby and that they in turn should be owed indemnity from RSC.

The License agreement contains an indemnification provision, which provides, in pertinent part:

> 9. Indemnification. (a) Generally. To the fullest extent permitted by law, Developer shall indemnify, protect, defend, and hold harmless Owner… and their respective… employees, architects, consultants and agents… from and against all liability, claims, actions, demands, damages, losses, and expenses, including, but not limited to, reasonable attorney's and engineer's fees (collectively "Claims"), arising out of or resulting from, in whole or in part, any act or omission in the performance of the Work or any event, loss, accident, damage or injury on or resulting from Owner's Property or any breach of this License, in each case by or caused by Developer or any of Developer's workers or anyone directly or indirectly employed by any of them or anyone for whose acts any of them maybe liable, except to the extent caused by the negligence or willful misconduct of one or more of the Indemnified Persons. The parties agree that all of the indemnification provisions in this Section shall apply regardless of whether a Claim arose from Developer's or Developer's workers' negligence (active or passive), their nonnegligent acts or any other cause. All of the indemnification provisions in this Section shall apply and may be enforced to the fullest extent permitted by law…

Here, 63 Company and Digby have established they are free from negligence, and 63rd and 3rd does not substantively dispute the portions of 63 Company and Digby's motion that seeks summary judgment on their contractual indemnity and failure to procure insurance claims. Thus, absent opposition, those portions of their motion are granted.

To establish a claim for common-law indemnification, "a party must prove not only that it was not negligent, but also that the proposed indemnitor's actual negligence contributed to the accident, or, in the absence of any negligence, that the indemnitor had the authority to direct, supervise, and control the work giving rise to the injury." *Mohan v Atlantic Court, LLC*, 134 AD3d 1075, 1079 (2d Dept 2015).

Here, while 63 Company and Digby have established that they are free of negligence, there remain issues of fact as to Hudson and its subcontractors' negligence. Thus, the portion of 63 Company and Digby's motion seeking summary judgment on their claim for common law indemnity is denied.

Manuel's Claims against RSC for Indemnity and Contribution and Breach of Contract for Failure to Procure Insurance

Manuel contends that RSC, in its subcontract with Hudson, agreed to indemnify it and name it as additional insured.

RSC contends that as they were not in privity with Manuel, and as the indemnity provision, and as neither Hudson nor 63rd and 3rd requested that it provide indemnity for Manuel, which was a condition precedent, they are not required to defend or indemnify Manuel. It also argues the clause is unenforceable on GOL § 5-322.1 grounds, contending that it is free from negligence and Manuel is not.

Manuel notes that Hudson and 63rd and 3rd fail to oppose the portion of the motion granting it defense and indemnity against RSC.

The indemnity provision of the RSC subcontract, as set forth more fully above, requires RSC to "to defend (if requested by Contractor or Owner), indemnify and hold harmless Contractor, the Owner, and anyone for whose acts they may be liable, and their respective… employees, architects… from all demands, claims, causes of action…"

Here, it is undisputed that Hudson and 63rd did not request that RSC indemnify Manuel, which was a condition precedent in the contract. Additionally, there remain questions of fact as to Manuel's negligence, which would preclude indemnity. Thus, this portion of Manuel's motion is denied.

Domani's Contractual Defense and Indemnity Claims against 63rd and 3rd and Hudson

Domani seeks summary judgment on its indemnity and defense claims from 63rd and 3rd, arguing that it is clearly required pursuant to the Domani contract. It also contends that it is owed defense and indemnity from Hudson pursuant to the Hudson contract, contending that it was 63rd and 3rd's agent, and Hudson agreed to indemnify 63rd and 3rds' agents.

Hudson and 63rd and 3rd argue that summary judgment is inappropriate as issues of fact remain as to Domani's negligence. They also contend that the accident did not arise out of any act or omission by 63rd and 3rd, and that Domani was only its agent for a limited purpose which is not relevant here.

Here, as there remain issues of fact as to Domani's negligence, summary judgment on their contractual indemnity and defense claims is premature.

As for Domani's agency argument, the Domani contract specifies that it was to act as 63rd and 3rd's agent "but only with respect to the procurement and management of services

provided by a New York City licensed concrete testing lab that will be performing all the New York City Building Code required concrete testing in the field and in the lab." As that part of the contract is not at issue here, the indemnity provision in the Hudson contract does not cover Domani.

CONCLUSION

Accordingly, it is hereby:

ORDERED that WSP's motion for summary judgment (mot. seq. 3) is granted, to the extent that all claims against it for contractual indemnity and breach of contract for failure to procure insurance are dismissed, and is otherwise denied; and it is further

ORDERED that Domani's motion for summary judgment (mot. seq. 4) is granted, to the extent that all contractual indemnity claims against it are dismissed, and is otherwise denied, and it is further

ORDERED that 63 Company and Digby's motion for summary judgment (mot. seq. 5) is granted to the extent that plaintiff's claims are dismissed against it, and summary judgment is granted on its contractual indemnity and breach of contract claims against 63rd and 3rd and is otherwise denied, and it is further

ORDERED that Manuel's motion for summary judgment (mot. seq. 6) is granted, to the extent that all claims against it for breach of contract for failure to procure insurance are dismissed, and is otherwise denied; and it is further

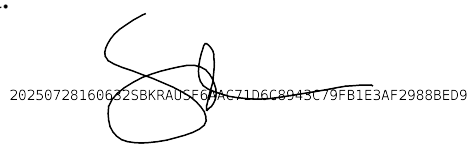
ORDERED that 63rd & 3rd and Hudson's motion for summary judgment (mot. seq. 7) is denied; and it is further

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

ORDERED that, within 20 days from entry of this order, defendants shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk 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);].

This constitutes the decision and order of this court.



7/28/2025
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**