

J&D II Realty LLC v 3417 KH Partners, LLC
2025 NY Slip Op 33511(U)
September 12, 2025
Supreme Court, Kings County
Docket Number: Index No. 512600/2017
Judge: Carolyn E. Wade
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At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 12th day of September, 2025

PRESENT: HON. CAROLYN E. WADE, JSC

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J & D II REALTY LLC,

Plaintiff,

Index: 512600/2017

-against-

DECISION and ORDER

3417 KH PARTNERS, LLC,
VOLMAR CONSTRUCTION INC.,
BOHEMIA CONCRETE CORP.,
GEI CONSULTANTS, INC., P.C.,
METRIC CONSULTING & INSPECTION, INC.,
SAMI HAJJAR, P.E.,
AVITZ ENGINEERING, PLLC,
STRUCTURAL CONSULTING SERVICES, P.C.,
THE MCGUIRE GROUP ARCHITECTS, P.C.,

Motion Seq. 8

Defendants,

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BOHEMIA CONCRETE CORP.,

Third-Party Plaintiff,

-against-

RGB GROUP, INC.,
METRIC CONSULTING AND INSPECTION,
and VIBRANALYSIS, INC.

Third-Party Defendants,

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Plaintiff, J & D II REALTY LLC, moves (Mot. Seq. 8) for an Order, pursuant to CPLR § 3212, granting Summary Judgment against Defendants, 3417 KH Partners, LLC, Volmar Construction Inc., and Defendant/Third-Party Plaintiff, Bohemia Concrete Corp., on the issue of

liability.¹ Upon a reading of the foregoing papers, and all other papers and proceedings in this action, and after oral argument, Mot. Seq. 8 is decided as follows:

STATEMENT OF FACTS

The underlying action was commenced by Plaintiff against Defendants 3417 KH Partners, LLC (“3417 KH”), Volmar Construction Inc. (“Volmar”), and Defendant/Third-Party Plaintiff Bohemia Concrete Corp. (“Bohemia”) for property damage to Plaintiff’s building, located at 3405 Kings Highway, Brooklyn, New York. Such property damage was allegedly caused by Defendants’ construction project on the adjoining premises, located at 3417 Kings Highway, Brooklyn, New York.

Plaintiff argues that they are entitled to partial Summary Judgment against Defendants 3417 KH (the owner of the adjoining property), Volmar (the general contractor and project manager), as well as Defendant/Third-Party Plaintiff Bohemia (the entity who performed excavation and underpinning) under the theory of strict liability. Plaintiff further argues that Defendants and Defendant/Third-Party Plaintiff violated Section 28-3309.4 of the NYC Administrative Code (“Section 3309.4”) by damaging Plaintiff’s property during the excavation.

ANALYSIS

The proponent of a Summary Judgment motion must make prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. See *Winegrad v. NYU Medical Center*, 64 N.Y.2d 851 (1985). The burden then shifts to the motion’s opponent to present evidentiary facts in admissible form

¹ It should be noted that Defendant/Third-Party Plaintiff, Bohemia Concrete Corp. (“Bohemia”), did not oppose Plaintiff’s motion.

sufficient to raise a genuine, triable issue of fact. *Id.* When there are no issues of material fact, the motion for Summary Judgment must be granted. *Id.*

Section 28-3309.4 of the New York City Administrative Code provides that:

“Whenever soil or foundation work occurs, regardless of depth of such, the person who causes such to be made shall, at all times during the course of such work and at his or her own expense, preserve and protect from damage any adjoining structures, including but not limited to footings and foundations, provided such person is afforded a license in accordance with the requirements of Section 3309.2 to enter and inspect the adjoining buildings and property, and to perform such work thereon as may be necessary for such purpose. If the person who causes the soil or foundation work is not afforded a license, such duty to preserve and protect the adjacent property shall devolve to the owner of such adjoining property, who shall be afforded a similar license with respect to the property where the soil or foundation work is to be made.”

This statute “imposes strict liability for excavation work that causes damage to adjoining property.” See *211-12 N Blvd. Corp. v. LIC Contr., Inc.*, 186 A.D.3d 69, 76 (2nd Dept. 2020); see also *American Sec. Ins. Co. v. Church of God of St. Albans*, 131 A.D.3d 903, 905 (2nd Dept. 2015) (“section 3309.4, like its predecessor Administrative Code § 27-1031(b)(1), does impose absolute liability upon the person who causes an excavation to be made” (internal quotation marks omitted)); *Moskowitz v. Tory Burch LLC*, 161 A.D.3d 525, 527 (1st Dept. 2018) (“the statute (section BC 3309.4) imposes strict liability”) (see *Yenem Corp. v. 281 Broadway Holdings*, 18 N.Y.3d 481 (2012)).

“The owner, general contractor, and contractor who physically perform an excavation are, as a matter of law, considered persons “who cause[d] [an] excavation” within the meaning of that provision (former Administrative Code § 27-1031[b][1]; See *Georgitsi v. Armory Plaza, Inc.*, 213 A.D.3d 641, 647 (2nd Dept. 2023); see also *American Sec. Ins. Co. v. Church of God of St. Albans*,

131 A.D.3d 903, 905 (2nd Dept. 2015); *87 Chambers, LLC v. 77 Reade, LLC*, 122 A.D.3d 540, 541 (1st Dept. 2014); *Coronet Props. Co. v. L/M Second Ave.*, 166 A.D.2d at 243 (1st Dept. 1990).

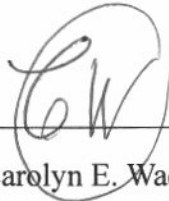
Here, the Court finds that Plaintiff made a prima facie showing of their entitlement to Summary Judgment, pursuant to Section 28-3309.4 of the New York City Administrative Code. Defendant 3417 KH is strictly liable, as it was the owner of the adjoining property where the excavation was performed. Defendant Volmar is strictly liable, as it was the general contractor who was hired by Defendant, 3417 KH, to oversee the construction and excavation of the adjoining property. Lastly, Defendant/Third-Party Plaintiff Bohemia is strictly liable, as it was hired by the general contractor and performed the excavation, underpinning, and support of excavation work at the adjoining the property, which proximately caused damage to Plaintiff’s building.

Accordingly, based upon the foregoing, it is hereby

ORDERED that Plaintiff J & D II REALTY’s motion for Summary Judgment on liability is **GRANTED** as against Defendants 3417 KH Partners, LLC, and Volmar Construction Inc., as well as Defendant/Third-Party Plaintiff Bohemia Concrete Corp.

This constitutes the Decision and Order of the Court.

ENTER:



Hon. Carolyn E. Wade, J.S.C.

**Hon. Carolyn E. Wade
Supreme Court Justice**

2025 SEP 18 A 9:33
KINGS COUNTY CLERK
FILED