J&D II Realty LLC v 3417 KH Partners, LLC
2025 NY Slip Op 33544(U)
September 19, 2025
Supreme Court, Kings County
Docket Number: Index No. 512600/2017
Judge: Carolyn E. Wade

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 19 day of September, 2025

PRESENT: HON. CAROLYN E. WADE, JSC

SUPREME COURT OF THE
STATE OF NEW YORK COUNTY OF KINGS

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J & D II REALTY LLC,

Plaintiff,

-against-

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.,

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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DECISION and ORDER

Motion Seq. 11

Defendant, GEI Consultant, Inc. ("GEI"), moves (Mot. Seq. 11) for an Order, pursuant to CPLR § 3212, granting Summary Judgment dismissing the Amended Complaint of Plaintiff, J&D II Realty LLC; granting Summary Judgment on GEI's cross-claims for contractual indemnification

against Defendant, 3417 KH PARTNERS, LLC ("3417 KH"), and Defendant, VOLMAR CONSTRUCTION INC. ("Volmar"); and granting Summary Judgment in favor of GEI dismissing all third-party claims and cross-claims brought by Co-Defendants.

Upon a reading of the foregoing papers, and all other papers and proceedings in this action, and after oral argument, Mot. Seq. 11 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 GEI Consultants, Inc., P.C. ("GEI"), as well as 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.

On August 4, 2014, the Department of Buildings ("DOB") ordered that Plaintiff's building (the "building") be partially evacuated and issued a Stop Work Order ("SWO") concerning the construction project (NYSECF Doc. No. 259, ¶ 11). GEI was retained by 3417 KH and Volmar to prepare a "structural design of the ***required*** repairs of the building" (NYSCEF Doc. No. 259, ¶ 17-27 and Doc Nos. 234, 235, and 240) (emphasis added). GEI did not perform any services in connection with the underlying project until August 25, 2024 (NYSCEF Doc. No. 259, ¶ 17), which was ***after*** the building sustained damage.

Plaintiff hired its own structural engineer, Leonid Krupnik, P.E. ("Krupnik"), to serve as its representative and to approve GEI's structural repair design, as well as to observe the work being performed by contractors (NYSCEF Doc. No. 259, ¶ 21-25; Doc. No. 236, pp. 52, 110, 120-

121). By October 21, 2014, Krupnik reviewed and approved GEI's structural repair design, along with the repair work performed by others, and requested the DOB lift the SWO. (NYSCEF Doc. No. 259, ¶ 25; Doc. Nos. 238, 239). GEI's design work accomplished its intended goal (and contractual obligation of "***required*** repairs"), which was the lifting of the SWO and the reoccupying of the building (NYSCEF Doc. No. 236, pp. 116-118; Doc. No. 239).

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. *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 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.*

It is well-settled that in order to establish liability for negligence against a professional engineer, such as GEI, Plaintiff must demonstrate the following: "(1) the existence of a duty on Defendant's part as to Plaintiff; (2) a breach of this duty; and (3) injury to the Plaintiff as a result thereof." *Rodriguez v Budget Rent-A-Car Sys., Inc.*, 44 A.D.3d 216 (1st Dept 2007).

Here, Plaintiff failed to meet any of the required elements. Plaintiff failed to demonstrate that GEI owed a duty of care to Plaintiff. In fact, no direct relationship exists between Plaintiff and GEI, nor could it be said that Plaintiff is a third-party beneficiary to the agreement between GEI and 3417 KH or Volmar.

In connection with design professionals, such as GEI, duty means a relationship in privity with the professional (or, at the very least, one approaching privity) in order to be able to maintain

a negligence claim. *Ossining Union Free School Dist. v. Anderson LaRocca Anderson*, 73 N.Y.2d 417 (1989); *Jacobs v. Kay*, 50 A.D.3d 526 (1st Dept 2008).

It is a well-established principle that a simple breach of contract is not to be considered a tort, unless a legal duty independent of the contract itself has been violated." *Clark-Fitzpatrick Inc. v. LIRR Co.*, 70 N.Y.2d 382 (1987). This independent legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract. *Id.*; see also *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136 (2002) ("[a] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party.") Indeed, this Court recently granted a similar motion for Summary Judgment filed by Third-Party Defendant Vibranalysis, Inc. (Motion Seq. No. 13), finding that Vibranalysis was not in privity with any other party and did not owe any party a duty of care. (NYSCEF Doc. No. 369).

Here, the record unequivocally establishes that GEI lacked any contractual relationship with Plaintiff. Indeed, the record is also equally clear that Plaintiff retained, and relied upon, its own professional engineer, Krupnik, to review and approve the GEI design repairs. In fact, Krupnik's approval was a pre-requisite before the DOB would permit the repairs to proceed and the SWO to be lifted. Thus, it simply cannot be said that Plaintiff relied on GEI to perform its services, as Plaintiff relied on its own engineer, Krupnik, at all times.

Under New York law, "unless the alleged act of malpractice falls within the competence of a lay jury to evaluate, it is incumbent upon the Plaintiff to present expert testimony in support of the allegations to establish a prime facie case of malpractice." *Keane v. Sloan-Kettering Institute for Cancer Research*, 96 A.D.2d 505 (2nd Dept 1983). Additionally, in order to support a claim of negligence against a professional engineer, such as GEI, Plaintiff is required to put forth expert testimony that GEI deviated from accepted professional standards of engineers in the New York

area. *Jones v. City of New York*, 32 A.D.3d 706 (1st Dept 2006) (holding that a Defendant is entitled to Summary Judgment if Plaintiff's expert fails to identify any specific industry standard upon which he relied).

Nowhere in this litigation has any party established the applicable accepted industry standards for engineers, such as GEI, nor has any party offered any expert report or testimony that GEI's conduct fell below those accepted industry standards. Indeed, the evidence in this action clearly establishes that GEI did not cause or contribute to the damage to Plaintiff's building, as it did not perform any services until ***after*** the building allegedly sustained damage and the SWO was issued. Moreover, all of GEI's remediation design plans were reviewed and approved by Plaintiff's engineer, Krupnik. Contrary to the contentions of Plaintiff and Volmar, an engineering professional is not required to submit an expert affidavit to establish its prima facie entitlement to Summary Judgment[1].

Plaintiff also cannot demonstrate that GEI was a proximate cause of the damage to Plaintiff's building. It is undisputed that the damage took place before GEI was retained to perform any services concerning the construction project. Even if GEI somehow performed its services improperly (which is vigorously denied, and is proven by the fact that Plaintiff's own engineer approved the repairs), Plaintiff would be placed in the same position absent GEI's conduct.

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[1] In opposition, Plaintiff argues that "[Defendant GEI] failed to annex any expert affidavit by an engineer..." (NYSCEF Doc. No. 299 ¶ 2). Similarly, Defendant Volmar argues that "Defendant GEI has most curiously failed, without explanation, to bother to offer admissible evidence by an Expert Affidavit by a retained engineer..." (NYSCEF Doc. No. 339). However, these arguments are without merit. Rather, "the guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror." *De Long v. Erie Cnty.*, 60 N.Y.2d 296 (1983). Further, "absent inability or incompetence of jurors, on basis of their day-to-day experience and observation, to comprehend the issues and to evaluate the evidence, the opinions of experts, which intrude on the province of the jury to draw inferences and conclusions, are both unnecessary and improper." *Kulak v. Nationwide Mut. Ins. Co.*, 40 N.Y.2d 140 (1976).

Accordingly, based upon the foregoing, GEI's Motion for an Order, pursuant to CPLR § 3212, granting Summary Judgment is **GRANTED**; and it is hereby

ORDERED that GEI is granted an Order of Summary Judgment dismissing Plaintiff's First (Negligence) and Fifth (Professional Negligence) Causes of Action against GEI, as GEI did not owe Plaintiff a duty of care, did not breach the required standard of care, and did not proximately cause any of Plaintiff's injuries; and it is further

ORDERED that GEI is granted an Order of Summary Judgment dismissing Plaintiff's Second (Violation of Law), Third (Private Nuisance), Fourth (Duty to Adjoining Property), and Sixth (Violation of Building Code § 3309.4) Causes of Action against GEI. Most notably, Plaintiff did not oppose dismissal of these claims in its opposition papers. Moreover, these claims are either inapplicable to GEI as a professional engineer, duplicative of other causes of action, or otherwise fail to state a cause of action; and it is further

ORDERED that GEI is granted an Order of Summary Judgment against Defendants 3417 KH and Volmar on its cross-claim(s) for contractual indemnification, which requires both 3417 KH and Volmar to indemnify, defend, and hold GEI harmless for its work on the construction project (NYSCEF Doc. No. 235, ¶8(a) and 240, ¶8(a), respectively). With respect to Volmar, the Court finds that the indemnification provision is unambiguous and enforceable. *Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co.*, 89 N.Y.2d 786, 794 (1997). With respect to 3417 KH, 3417 KH did not oppose GEI's motion and, in fact, Theodore Kakoyiannis, 3417 KH's managing member, testified that 3417 KH was required to indemnify GEI for its work on the Project (NYSCEF Doc. No. 226, pp. 63-64); and it is further

ORDERED that GEI is granted an Order of Summary Judgment dismissing all third-party claims and cross-claims for common law indemnification, contribution, contractual indemnification, negligence, and failure to procure insurance brought by co-Defendants.

This constitutes the Decision and Order of the Court.

ENTER:

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

Hon. Carolyn E. Wade
Supreme Court Justice