

Cullum v 122 Fifth Assoc., LLC
2026 NY Slip Op 31178(U)
March 23, 2026
Supreme Court, New York County
Docket Number: Index No. 159517/2023
Judge: Phaedra F. Perry-Bond
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PHAEDRA F. PERRY-BOND PART 35

Justice

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INDEX NO. 159517/2023

JOHN CULLUM, individually and JOHN C. CULLUM AND
ROGER S. HABER, as co-executors of the Estate of EMILY
FRANKEL, Deceased.

MOTION DATE 03/21/2025

MOTION SEQ. NO. 002

Plaintiff,

- v -

122 FIFTH ASSOCIATES, LLC, and 122 FIFTH
ASSOCIATES,

DECISION + ORDER ON
MOTION

Defendants.

-----X

122 FIFTH ASSOCIATES, LLC, 122 FIFTH ASSOCIATES

Third-Party
Index No. 595393/2025

Plaintiff,

-against-

LANGAN ENGINEERING, ENVIRONMENTAL, SURVEYING,
LANDSCAPE ARCHITECTURE AND GEOLOGY, D.P.C.

Defendant.

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122 FIFTH ASSOCIATES, LLC, 122 FIFTH ASSOCIATES

Second Third-Party
Index No. 595727/2025

Plaintiff,

-against-

PRECISE CONSTRUCTION CONTRACTING, INC., JZN
ENGINEERING, P.C.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51,
52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 70, 71, 72, 73, 74, 75, 79, 101

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

Upon the foregoing documents, Plaintiffs' motion for summary on the issue of liability is
granted. Defendants' cross motion to stay this motion pending further discovery is denied.

Plaintiff John Cullum owns the building located at 13 West 17th Street, New York, New York (the “Building”).¹ The Building, which was originally constructed around 1850-1851, is designated a landmark by the New York City Landmark Preservation Commission (“LPC”). Defendants own the properties located at 3-5-7 West 17th Street and 2 West 18th Street (collectively the “Project Site”). Defendants demolished the structure previously located at 7 West 17th Street and began construction on an 11-story luxury condominium building. During construction at the Project Site Plaintiffs’ Building was damaged, as evidenced by cracks, gaps, vibrations, and detached stairways, amongst other things. On January 21, 2021, the New York City Department of Buildings (“DOB”) issued a violation to Plaintiffs’ building due to the damage caused by Defendants. The violation specifically stated the Building was rendered noncompliant due to “vertical and horizontal cracks” from the “work at 7 West 17 Street” (*see* NYSCEF Doc. 53).

Plaintiffs claim Defendants never performed any preconstruction survey of Plaintiffs’ Building, never attempted to secure any license to enter Plaintiffs’ property to install protections and monitoring devices, and failed to comply with applicable laws requiring Defendants protect and monitor Plaintiffs’ property. As a result, Plaintiffs sued Defendants under numerous theories of liability, including negligence, strict liability under New York City Administrative Code § 3309.4, nuisance, and for injunctive relief. Plaintiffs now move for partial summary judgment on the issue of liability on their § 3309.4 claim.

Plaintiffs’ motion is supported by John Nakrosis, Jr., a licensed architect who opines that Defendants’ failure to monitor or protect Plaintiff’s building caused the damage at issue. Mr. Nakrosis reviewed Defendants’ construction protection plan (“CPP”) submitted to the DOB and LPC. In the CPP, Defendants acknowledge Plaintiffs’ Building is within a 90-foot radius of the

¹ The Building was also owned by Plaintiff’s wife, Emily Frankel, who passed away during the pendency of this lawsuit.

location where Defendants would engage in excavation, yet Defendants' concluded Plaintiffs' Building did not require protection measures during excavation and construction. According to Mr. Nakrosis, this constitutes a violation of DOB's technical policy and procedure notice # 10/88, which requires a monitoring program for any landmarked structure within ninety feet from a lot under development (*see* NYSCEF Doc. 49). Plaintiffs' motion is also supported by the affirmation of Rahul Ratakonda, a professional engineer who inspected the Building and opined that the Buildings' damage was caused by vibrations from Defendants' construction. Both Mr. Ratakonda and Mr. Nakrosis opine that Defendants' construction work and the failure to monitor and to protect Plaintiffs' Building constitutes a violation of § 3309.4.

Defendants oppose and cross move to stay this motion pending further discovery. Defendants' opposition is supported only by an attorney affirmation. Defendants argue the motion is premature and that Plaintiffs failed to meet their evidentiary burden, but Defendants offer no countervailing expert opinions, let alone any evidence in opposition.²

Plaintiffs' motion for summary judgment is granted. Plaintiffs met their *prima facie* burden of demonstrating a violation of § 3309.4 through the uncontroverted affirmations of John Cullum, Mr. Nakrosis, and Mr. Ratakonda, which are further buttressed by the DOB violation issued on January 21, 2021 which determined cracks in Plaintiffs' building formed as a result of Defendants' ongoing construction work. These undisputed facts, testimony, and expert opinions establish a violation of § 3309.4, which imposes strict liability on Defendants as excavators (*see Dfaweast, LLC v Friedland Properties Inc.*, 211 AD3d 462, 462 [1st Dept 2022] citing *Moskowitz v Tory Burch LLC*, 161 AD3d 525, 526 [1st Dept 2018]).

² Defendants submitted a sur-reply (NYSCEF Doc. 75) without leave of Court. Sur-replies are not permitted as of right and therefore the Court disregards this filing (*see Traders Co. v AST Sportswear, Inc.*, 31 AD3d 276 [1st Dept 2006]).

Defendants' opposition fails to raise any triable issue of fact (*see Verizon New York Inc. v De Boulevard, LLC*, 232 AD3d 560, 561-562 [1st Dept 2024]). The attorney affirmation is insufficient as it is purely hearsay and lacks any probative value (*see generally Beltre v Babu*, 32 AD3d 722 [1st Dept 2006]). Moreover, the attorney affirmation provides no basis or qualifications to contradict Plaintiffs' experts' opinions (*see also Marinelli v Shifrin*, 260 AD2d 227, 228-229 [1st Dept 1999] [opposition consisting solely of counsel's affirmation are insufficient to defeat a summary judgment motion]).

The argument that the motion is premature due to the need for discovery is likewise unavailing. An affidavit from someone with personal knowledge of the facts underlying the claim is required "to demonstrate that essential facts exist but cannot yet be stated." (*354 Chauncey Realty, LLC v Brownstone Agency, Inc.* 213 AD3d 544 [1st Dept 2023]). The attorney's non-probative and speculative opposition is insufficient to establish the existence of facts not yet uncovered but in the exclusive possession of the Plaintiff which would be required to oppose the motion (*see also Crimlis v City of New York*, 179 AD3d 575, 575-576 [1st Dept 2020]). This is especially the case since Defendants, as the entities who were engaged in construction, should have more than enough documents or individuals at their disposal to proffer some evidentiary proof contradicting Plaintiffs' claims. Yet, Defendants have not produced any evidence in opposition. Therefore, Plaintiffs' motion is granted and the cross motion to stay this motion pending further discovery is denied (*see also Yenem Corp. v 281 Broadway Holdings*, 18 NY3d 481, 491 [2012]).

Accordingly, it is hereby,

ORDERED that Plaintiffs' motion for summary judgment on the issue of liability is granted and Defendants' cross motion is denied; and it is further

ORDERED that the parties shall meet and confer immediately and submit a proposed status conference order to the Court via e-mail outlining the remaining necessary discovery to be completed, with proposed deadlines, but in no event shall the proposed order be submitted any later than April 21, 2026. If there is a serious discovery dispute requiring Court intervention, the parties shall notify the Court so that an in-person conference can be scheduled; and it is further

ORDERED that should the parties elect to engage in Court sponsored mediation rather than discovery, the parties shall notify the Court via e-mail so an order of referral to the Court's sponsored ADR program can be issued; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all active parties via NYSCEF.

This constitutes the Decision and Order of the Court.

3/23/26
DATE


HON. PHAEDRA F. PERRY-BOND, J.S.C.

CHECK ONE:

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

APPLICATION:

CHECK IF APPROPRIATE: