Lend Lease (US) Constr. LMB Inc. v Zurich Am. Ins. Co.
2015 NY Slip Op 30039(U)
January 15, 2015
Supreme Court, New York County
Docket Number: 158438/2013
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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LEND LEASE (US) CONSTRUCTION LMB INC. and EXTELL WEST 57th STREET, LLC,

Plaintiffs,

Index No. 158438/2013

- against -

DECISION/ORDER

ZURICH AMERICAN INSURANCE COMPANY, ACE AMERICAN INSURANCE COMPANY, XL INSURANCE AMERICAN, INC., TRAVELERS EXCESS AND SURPLUS LINES COMPANY, and AXIS SURPLUS INSURANCE COMPANY,

Mot. Seq. 1, 2

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Defendants.

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This is an insurance coverage action. Plaintiffs, Lend Lease (US) Construction LBM Inc. ("Lend Lease"), and Extell West 57th Street, LLC ("Extell"), are seeking a determination that they are entitled to coverage under a builder's risk policy (the "Builder's Risk Policy" or "Policy") issued defendants, Zurich American Insurance Company ("Zurich"), Ace American Insurance Company ("Ace"), XL Insurance America, Inc. ("XL"), Travelers Excess and Surplus Lines Company ("Travelers"), and Axis Surplus Insurance Company ("Axis") ("collectively, Defendant Insurers" or "Defendants") for damages to a building under construction located at 157 West 57th Street, New York, New York, known as the One57 Building ("the Building") sustained on October 29, 2012 from Super Storm Sandy. The Building was under construction to become a seventy-four (74) floor mixed-use hotel and residential building ("the Project"). Extell is the developer and owner of the Property and Project. Lend Lease is the Construction Manager for the Project pursuant to a contract between Extell and Lend Lease. The damages sustained in the storm relate to the dislodgement and partial destruction of the tower crane ("Tower Crane") that had been built in connection with the Project, and other damages and delays to the Project.

On October 30, 2012, Extell provided written notice to Defendant Insurers of its claim for damages and costs caused from Super Storm Sandy under the Policy. Thereafter, Extell provided the itemization of costs and losses incurred by Extell to Defendant Insurers and notified them of anticipated future claims and losses including a claim under the Delay in Completion Coverage endorsement to the Policy. By letter dated March 7, 2013, Lend Lease and Extell sought coverage from Defendant Insurers for the damages sustained at the Project. Defendants denied coverage on the grounds that the Tower Crane is not Covered Property within the meaning of the Builder's Risk Policy, and the Policy's exclusion for "contractor's tools, machinery, plant and equipment" precludes coverage for the claims asserted by Lend Lease and Extell. On September 16, 2013, Lend Lease and Extell filed the present lawsuit for breach of contract and a declaratory judgment as to coverage under the Policy.

Under Mot. Seq. 1, Extell moves for an Order pursuant to CPLR 3001 and 3212 for a declaratory judgment pursuant to Count Four of the Amended Complaint for breach of contract for Defendants' wrongful disclaimer of coverage under the Policy for Extell's damages to the Tower Crane, and limiting discovery and further proceedings to the amount of damages due to Extell under the Policy. Extell submits the attorney affirmation of Richard J. Lambert, the affidavit of Charles Loskant, Senior Vice President, Construction Management, of Extell Development and a Project Manager for Extell, and the affidavit of David Rothstein, the Executive Vice President of Construction for Extell. Annexed as exhibits to Lambert's affirmation are the following: Plaintiffs' Amended Answer, Defendants' Answer to Amended Complaint, Pinnacle Contract, Pinnacle Scope of Work, Zurich Policy, Travelers Policy, Axis Policy, XL Policy, Ace Policy, National Hurricane Center Printout for Sandy, an e-mail from Aon, Extell's insurance broker, with a list of Project hard costs, Tower Crane Photographs, Defendant Insurers' March 7, 2013 Disclaimer Letter, the Original Summons and Complaint, and Project Drawings for the Tower Crane.

Under Mot. Seq. 2, Lend Lease moves for an Order pursuant to CPLR 3001and 3212 for a (1) declaratory judgment that the Defendants are required to provide coverage to Lend Lease under the Builder's Risk Policy for the damages set forth in the Complaint; (2) judgment on the issue of liability for breach of contract for Defendants' wrongful disclaimer of coverage under the Builder's Risk Policy; and (3) an Order limiting discovery and further proceedings to the amount of damages due to Lend Lease under the Builder's Risk Policy. Lend Lease

submits the attorney affirmation of Jillian G. Ackerman, which incorporates by reference the facts set forth in Lambert's affirmation. [1]

In opposition to the motions filed by Extell and Lend Lease, Defendants, Zurich American Insurance Company, Ace American Insurance Company, XL Insurance America, Inc., Travelers Excess and Surplus Lines Company, and Axis Surplus Insurance Company cross move for an Order, pursuant to CPLR 3212, granting Defendants summary judgment dismissing Extell and Lend Lease's Amended Complaint, or in the alternative, pursuant to CPLR 3212(f) denying Extell and Lend Lease's motion for summary judgment and directing that discovery proceed.

In opposition to the motions and in support of their cross motions, Defendants submit the attorney affirmation of Mark S. Katz, which submits the following exhibits: Extell and Lend Lease's Amended Complaint, Defendants' Answer to the Amended Complaint, Zurich Policy, Pinnacle Contract, and Sublease of Equipment and Indemnification between Pinnacle, as sublessors, to Post Road Iron Works, Inc., as sublessee Inc. relating to the "Favo Tower Crane-Model 440-D – serial #998- CD #2830" commencing on September 17, 2012. Defendants also submit copies of the Complaint filed in Pinnacle Industries II, LLC, and Pinnacle Industries III LLC, against Defendants under Index No. 159737/2013, Defendants' Notice for Discovery and Inspection, dated December 2, 2013 ("Defendants Notice"), served on Plaintiffs, Extell's response to Defendants' Notice dated February 3, 2014, Lend Lease's responses to Defendants' Notice dated January 17, 2014, Defendants' deficiency letter with respect to Extell's response dated February 10, 2014, Extell's letter dated February 26, 2014 responding to Defendants' February 10, 2014 letter, and e-mails from Mark Katz regarding the scheduling of depositions. Defendants also submit the

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[1] Lend Lease is an Additional Named Insured under the Policy. The Declarations of the Policy state that the Additional Named Insureds to the Policy include, "All owners, all contractors and subcontractors of every tier, and tenants at the project location, except as named in A. above, as required by any contract, subcontract, or oral agreement for the INSURED PROJECT*, and then only as their respective interests may appear are recognized as Additional Named Insureds hereunder..." The CM Agreement states that Extell would establish an insurance program covering Lend Lease in relation to the Project, and Lend Lease is therefore an Additional Named Insured on the Policy.

affidavit of Lisa Enloe, a principal with Held Enloe & Associates, LLC, a company that provides construction consulting services.

Extell is the developer and owner of the Project. Lend Lease is the Construction Manager for the Project pursuant to a contract between Extell and Lend Lease ("CM Agreement"). Pursuant to the CM Agreement, Lend Lease is responsible for the construction of the Project in accordance with the applicable plans and specifications and is required to establish an insurance program "covering the Construction Manager and Subcontractors of every tier providing labor at the Project Site ...".

In connection with the Project, Lend Lease, acting as agent for Extell, entered into a Trade Contract with Pinnacle Industries II, LLC ("Pinnacle") for the "Superstructure Contract" work for the Project ("Pinnacle Contract"). The Pinnacle Contract requires that, "[u]pon completion of concrete operations, and in addition to other time periods requested by the Construction Manager, [Pinnacle] will make [the Tower Crane] available for use by other trades."

The Pinnacle Contract was subsequently assigned from Extell to Lend Lease pursuant to the CM Agreement. The Pinnacle Contract included the construction of two tower cranes; tower crane designated as "Crane 2" is the Tower Crane at issue in this case.

Exhibit B to the Pinnacle Contract, entitled "Scope of Work", which states in relevant part:

> 2. The Work of this Contractor [Pinnacle] shall be to furnish and install all Superstructure Concrete work, as required, and as indicated in the Contract Documents, including, but not limited to the following
>
> ***
>
> g. Diesel fuel towers cranes, all cherry pickers, and assist cranes, concrete pumps, and other heavy equipment required for the erection of the building. Crane locations, loads, pads etc. must be coordinated with the Construction Manager. The first crane (Crane 1) will be located in the south east side of the site near sidewalk grade and the second crane (Crane 2) will be located on the south west side of the project founded on the 20th floor slab. Exact crane locations, lay outs and structural supports required are to be designed by a licensed New York professional engineer (NYS PE) to meet all NYC, DOB, NYC DOT, OSHA and the Construction Manager criteria. The NYS

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> PE, working directly for the Contractor, shall provide signed and sealed drawings and calculations required by governing authorities and must submit them to said governing authorities to approval and permitting.
>
> Contractor also includes all shoring, structural elements, tie beams and additional reinforcing required for a safe support system for each crane. The Crane 1 is to be supported on a crane pad on footings designed by this Contractor's NYS PE and furnished by the foundation contractor. The Crane 2 is to be supported by a reinforced slab on the 20th floor, included in this Contract, and associated supporting elements as required. Each design must be approved by the structural engineer and any subsequent proposed modifications or additional loads shall be submitted to the structural engineer for approval within one week of award of the Contract to minimize impact to the progress of the foundation work. Any modifications or changes must be accepted by the NYS PE and incorporated into the design. If any crane supplied requires additional modifications to the structure then Contractor shall include these costs in this Contract.

In his affirmation submitted in support of Extell's motion for summary judgment, Loskant states that the Tower Crane "was designed and constructed to be integrated into the Building structure during the construction process, with several components remaining a permanent part of the Building." Loskant further states:

> The Tower Crane included a "Base" which was located on the 20th floor setback of the Building and was bolted to a large pad or foundation (also known as the "Pedestal") of reinforced concrete constructed to support the massive size and weight of the entire structure, as well as the loads that the Tower Crane would be picking up to construct the Building. The Base was strengthened and stabilized by adding beams, and enlarging and/or reinforcing existing beams, that were permanently cast into the floor slab on the 20th floor setback and plates cast into shear walls connected by threaded roots. To provide for increased stability to the entire Tower Crane, the "Mast" consisting of 54 sections, was fastened or tied to the structural floor slabs at regular intervals (every seven floors). The ties required of the Tower Crane included, among other things, (a) the "turntable" or "rubella" which provided the Crane with the capability to rotate as necessary, (b) the working arm or "Boom" used to physically lift and move various items

necessary to the construction of the Building, (c) various necessary counterweights, (d) the diesel driven winch pack, and (e) a cab from where the necessary movements of the Tower Crane were controlled. On October 29, 2012, the Tower Crane was approximately 750 feet tall and rose from its Base on the 20th floor setback, which is approximately 246 feet above street level. Several components of the Tower Crane will permanently remain part of the Building following the completion of construction, including: (a) the additional beams, and the modified and reinforced beams, cast into the slab on the 20th floor and (b) the reinforcement of the floor slabs at the tie locations. These design elements would not have been part of the Building but for the installation and erection of the Tower Crane during construction. In sum, the Tower Crane was a custom-designed "temporary structure" integrated into the Building structure for purposes of construction of the Project. Some of the parts of the Tower Crane were designed to remain a permanent part of the Building and other parts were designed to be removed at the end of the Project.

The Builder's Risk Policy

Extell procured a Builder's Risk Policy in the amount of $700,000,000 based on the estimated construction costs for the Project. The Builder's Risk Policy consists of five separate policies issued by each of the Defendants, each covering a percentage portion (quota share) of the $700,000,000 collective Policy. [Zurich, 50% ($350,000,000); Travelers Excess and Surplus Lines Company, 17.14% ($120,000,000); Axis Surplus Insurance Company, 14.29% ($100,000,000); XL Insurance American, Inc., 14.2857% ($100,000,000); and Ace American Insurance Company, 4.2857% ($30,000,000).

The provisions of these policies at issue are identical for each of the Defendants. For its motion for summary judgment, Extell referenced upon the provisions of the Zurich Policy, which the Court will rely upon.

The Zurich Policy

Pursuant to the Declarations section of the Builder's Risk Policy, Extell is the "Named Insured." The "Policy Term" is August 1, 2010 to July 31, 2014. The "Insured Project" is the seventy-four floor mixed-use hotel and residential building located at 157 West 57th Street, New York, New York.

The Declarations section of the Builder's Risk Policy states in relevant part:

7. LIMIT OF LIABILITY

Policy Limit of Liability

The Company shall not be liable for more than $700,000 in any one OCCURRENCE* subject to the following Sublimits of Liability and Annual Aggregate Limits of Liability:

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C. Annual Aggregate Limits of Liability

The maximum amount the Company for loss or damage in any one OCCURRENCE*, and/or in the aggregate annually for loss or damage from all OCCURRENCES*, shall not exceed the following amounts:

***

(3) $700,000,000 by the peril of NAMED STORM*;

***

9. ESTIMATED TOTAL PROJECT VALUE* OF INSURED PROJECT* AT THE POLICY EFFECTIVE DATE

The estimated TOTAL PROJECT VALUE* declared to the Company by the first Named Insured at the policy effective date:

A. $700,000,000 Total Value of All Covered Property, LANDSCAPING MATERIALS*, all labor costs that will be expended in the INSURED PROJECT*, site general conditions, construction management fees, and contractor's profit and overhead; plus site general conditions, construction management fees and contractor's profit and overhead, all as stated in the DECLARATIONS.

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D. $700,000,000 Estimated TOTAL PROJECT VALUE* of the INSURED PROJECT* at Policy effective date equal to sum of A., B., and C. above.

Section I of the Builder's Risk Policy, "Coverage and Exclusions" states in relevant part:

1. <u>INSURED AGREEMENT</u>

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A. Coverage
This Policy, subject to the terms, exclusions, limitations and conditions contained herein or endorsed hereto, insures against all risks of direct physical loss of or damage to Coverage Property while at the risk of the location of the INSURED PROJECT* and occurring during the Policy Term.

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2. COVERED PROPERTY

Covered Property means the Insured's interest in the following, unless otherwise excluded:

A. PROPERTY UNDER CONSTRUCTION* and
B. TEMPORARY WORKS (emphasis added)

3. PROPERTY EXCLUDED

This Policy does not insure against loss or damage to:

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C. **Contractor's tools, machinery and equipment including spare parts and accessories, whether owned, loaned, borrowed, hired or leased, and property of a similar nature not destined to become a permanent part of the INSURED PROJECT*, unless specifically endorsed to the Policy.** (emphasis added).

The Builder's Risk Policy, Section III- Definitions and Employees, defines the following terms:

6. NAMED STORM

Named Storm means wind, wind gusts, hail, rain, tornadoes, or been named by the National Hurricane Center (NHC) or the Central Pacific Hurricane Center (CPHC) or any comparable worldwide equivalent beginning when such organization issues a watch or warning and ending 72 hours after the termination of the watch or warning; however, NAMED STORM* does not include loss or damage caused by FLOOD* related to or resulting from a NAMED STORM.*

10. TEMPORARY WORKS

All scaffolding (including scaffolding erection costs), formwork, falsework, shoring, fences and temporary buildings or structures, including office and job site trailers, all incidental to the project, the value of which has been included in the estimated TOTAL PROJECT VALUE* of the INSURED PROJECT* declared by the NAMED INSURED. (emphasis added)

11. TOTAL PROJECT VALUE

The total value of PROPERTY UNDER CONSTRUCTION*, TEMPORARY WORKS*, existing structures (when endorsed to the Policy) and LANDSCAPING MATERIALS*, plus labor costs that will be expended in the INSURED PROJECT*, plus site general conditions, construction management fees, and contractor's profit and overhead, all as stated in the Declarations.

12. TOTAL PROJECT VALUE IN PLACE

The TOTAL PROJECT VALUE* that has already been constructed, erected or installed (including existing structures, if covered by this policy) plus Covered Property that is waiting to be constructed, erected, or installed, all while at the location of the INSURED PROJECT* immediately prior to the loss or damage.

The first issue raised in the motions is whether the Tower Crane is "Covered Property" as "Temporary Works" under the Policy. The second issue is whether or not the "Contractor's tools, machinery, plant and equipment" exclusion applies.

Extell contends that pursuant to the terms of the Policy, the Tower Crane is "Covered Property" and is not subject to the exclusion provision. Extell contends that since the Tower Crane was a custom designed and built 750-foot tower crane, the installation and assembly of which was integrated into the Building structure for purposes of construction of the Project, with several components of the Tower Crane remaining a permanent part of the Building, the Tower Crane is a "temporary structure" under the TEMPORARY WORKS coverage provision of the Policy, and cannot be considered "Contractor's tools, machinery, plant and equipment." Extell further contends that even if the Tower Crane constituted "Contractor's tools, machinery, plant and equipment," the exclusion provision does not apply to the Tower Crane because: "(1) the specific coverage provision, TEMPORARY WORKS, controls over the general exclusion as a matter of law; (2) Application of the exclusion provision to the Tower Crane and the other items listed in the TEMPORARY WORKS provision would render the TEMPORARY WORKS provision without force and effect (illusory) which would be directly

contrary to the established case law; and (3) Any ambiguities created by the coverage and exclusion provisions in the Policy are to be construed against Defendant Insurers and in favor of coverage to Extell as a matter of law."[2]

Lend Lease contends that the damages incurred by Lend Lease as a result of Super Storm Sandy are covered under the Policy because they arise from an Occurrence, the loss impacted Covered Property, and the Tower Crane was included in the total project value. Lend Lease further contends that the exclusion for "contractor's tools, machinery, plant and equipment" that appears within the Policy does not apply to the loss suffered by Lend Lease as a result of Super Storm Sandy.

Defendants contend that the Tower Crane is excluded property under the Policy because it constitutes "contractor's tools, machinery plant and equipment included spare parts and accessories, whether owned, loaned borrowed, hired or leased, and property of a similar nature not destined to become a permanent part of the INSURED PROJECT*, unless specifically endorsed to the Policy." Defendants point out that the Tower Crane was provided to the Project by Pinnacle, and was made available to Pinnacle by a related company, Pinnacle Industries III, LLC, for the superstructure concrete work, that the Pinnacle Contract describes the Tower Crane as "heavy equipment," and the sublease agreement pursuant to which Post Road Iron Works, the steel contractor, was allowed to use the Tower Crane for its work at the Project refers to the Tower Crane exclusively as "equipment." Defendants argue that "[t]he description of the Tower Crane as 'equipment' in these agreements is consistent with the common understanding of what a tower crane is and the plain, ordinary, common sense meaning of the phrase 'contractor's machinery and equipment' as used in the 'property excluded' section of the Policy necessarily includes the Tower Crane."

Defendants also contend that the Tower Crane was not intended to become a permanent part of the Insured Project, as the Pinnacle Contract provides that the

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[2] Extell states that as part of the $700,000,000 "TOTAL PROJECT VALUE" declared by Extell to Defendant Insurers at the Policy effective date, Extell included the estimated cost of the "Superstructure Concrete" in the amount of $89,000,000 which was work to be performed by Pinnacle. (See Affidavit of David Rothstein, Executive Vice President of Construction for Extell).

Tower Crane is to be removed from the project. See Pinnacle Contract ("After removal of the [Tower Crane], Contractor shall come back and fill in temporary openings with framed concrete, including rebar, splices, and/or special connection details, keyways, etc." Defendants further contend that the Tower Crane was not specifically endorsed to the Policy, and there is no such endorsement to the Policy.

Defendants further contend that the Tower Crane is not covered under the Policy as a "temporary work" because it is not "scaffolding, formwork, falsework, shoring or fencing" and does not "qualify as a temporary building or structure" such as an office trailer or job site trailer. Thus, Defendants contend that it is not relevant whether its value was included in the estimated "total project value" of the insured project and even it were considered, Defendants argue that the value of the Tower Crane has not been included in the estimated total project value. Defendants argue that Rothstein's affidavit is insufficient because it shows only that the value of the Pinnacle Contract was included in the estimated Total Project value, and not that the value of the Tower Crane was included in that contract as reported to the Insurers. Defendants argue that the inclusion of the rental cost of the Tower Crane in the Pinnacle Contract demonstrates that the value of the actual Tower Crane was not part of the estimated Total Project Value.

Defendants further contend that Extell's motion should be denied in accordance with CPLR 3212(f) because it was filed before providing any documents in response to Defendants' document demands and before any depositions were taken. Specifically, Defendants contend that they "have been deprived of the opportunity to take discovery concerning three keys issues that are central to these motions: (1) whether the 'value' of the crane is included in the TOTAL PROJECT VALUE as declared to the Insurers, which is necessary in order for any property to be considered a covered Temporary Works; (2) whether the crane was destined to become a permanent part of the project, which is central to the applicability of the Contractor's machinery and equipment exclusion; and (3) whether Pinnacle or its 'related company' from which it rented the crane, has insurance covering the crane."

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of

counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

CPLR §3212(f) provides that, "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just."

"[O]ur analysis begins with the well-established principles governing the interpretation of insurance contracts, which provide that the unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning, and that the interpretation of such provisions is a question of law for the courts." *Broad Street, LLC v. Gulf Insurance Company,* 832 N.Y.S.2d 1 [1st Dept. 2006].

"A court, no matter how well-intentioned, cannot create policy terms by implication or rewrite an insurance contract. Nor should a court disregard the provisions of an insurance contract which are clear and unequivocal or accord a policy a strained construction merely because that interpretation is possible." *Bretton v. Mutual of Omaha Ins. Co.*, 110 A.D. 2d 46, 49 [1st Dept 1985]. Rather, "[a]n insurer is entitled to have its contract of insurance enforced in accordance with its provisions and without a construction contrary to its express terms." *Bretton*, 110 A.D. 2d at 49.

"[W]henever an insurer wishes to exclude certain coverage, it must do so in clear and unmistakable language. *Seaboard Surety Company v. The Gillette Company*, 486 NYS2d 873, 876 [1984]. "Any such exclusions or exceptions from policy coverage must be specific and clear in order to be enforced. They are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction." (*Id.)* "Indeed, before an insurance company is permitted to avoid policy coverage, it must satisfy the burden which it bears of establishing that the exclusions or exemptions apply in the particular case and they are subject to no other reasonable interpretation. (*Id.)*

Plaintiffs' motions and Defendants' motion for summary judgment are denied. Among other issues of fact is whether the Tower Crane was intended to

become a permanent part of the Project, which is relevant to the applicability of the Contractor's machinery and equipment exclusion. In addition, Defendants are entitled to take discovery.

Wherefore, it is hereby,

ORDERED that plaintiff Extell West 57th Street, LLC's motion for summary judgment is denied (Mot. Seq. 1); and it is further

ORDERED that Defendants' cross motion for summary judgment is denied (Mot. Seq. 1); and it further

ORDERED plaintiff Lend Lease (US) Construction LMB Inc.'s motion for summary judgment is denied (Mot. Seq. 2); and it is further

ORDERED that Defendants' cross motion for summary judgment is denied (Mot. Seq. 2).

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: JANUARY 15, 2015

EILEEN A. RAKOWER, J.S.C.

HON. EILEEN A. RAKOWER