

**CMS, Risk Mgt. Holdings, LLC v Skyline Eng'g,  
L.L.C.**

2016 NY Slip Op 32317(U)

November 22, 2016

Supreme Court, New York County

Docket Number: 521112/2015

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ  
*Justice*

PART 13

CMS, RISK MANAGEMENT HOLDINGS, LLC and  
COMPLETE PROPERTIES, INC.,  
Plaintiffs,  
-against-

INDEX NO. 653112/2015  
MOTION DATE 10/05/2016  
MOTION SEQ. NO. 004  
MOTION CAL. NO. \_\_\_\_\_

SKYLINE ENGINEERING, L.L.C., RGB GROUP INC.,  
EUROCRAFT CONTRACTING, LLC, DUBINSKY  
CONSULTING ENGINEER, P.C., ELIEZER DUBINSKY,  
P.C., AVISHAY I. MAZOR, P.E., JOHN C. BECKER, P.E.,  
BECKER ENGINEERING, P.C., CARL STEIN, R.A.,  
ELEMENTAL ARCHITECTURE, LLC, 132W26 OWNER LLC,  
PARAMOUNT BUILDERS CONTRACTING CORP., AGL  
INDUSTRIES INC., CPG CONSTRUCTION &  
CEVELOPMENT LI CORP., and CPG CONSTRUCTION &  
DEVELOPMENT, CORP.,  
Defendants.

The following papers, numbered 1 to \_\_ were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 6
Answering Affidavits — Exhibits _____	7- 8; 9 - 10; 11 - 12; 13
Replying Affidavits _____	14 - 16

Cross-Motion:  Yes  No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Eliezer Dubinsky, P.E., and Dubinsky Consulting Engineer, P.C.'s (herein "movants") motion for summary judgment is denied.

Plaintiffs commenced this action for property damage alleged to have occurred to the building owned by Plaintiff Complete Properties, Inc., located at 128 W. 26<sup>th</sup> Street, New York, New York (herein "Building 128" or "the premises"). The Complaint alleges negligence and violations of the New York City Building Code (herein "the Building Code") in construction work conducted at 132 W. 26<sup>th</sup> Street (herein "Lot 132"), which caused an alleged already leaning building located at 130 W. 26<sup>th</sup> St. (herein "Building 130") to lose support and lean even further, causing damage to Building 128. (Mot. Exh. A).

Specifically as to the movants, the Complaint alleges, among other things, that the movants were engaged directly, or indirectly, by Defendant 132W26 Owner LLC (herein "132W26") to provide engineering services for the construction work at Lot 132, including foundation and structural work, that movants were the applicant of record for the structural and foundation work permits issued, and that movants permitted, allowed and/or were otherwise complicit in causing Plaintiffs' damages. (Mot. Exh. A). The Complaint further alleges that plans were not properly followed, that the damages to the premises were first discovered around March 2014, that the Defendants failed to abate the conditions, and that improper underpinning, shoring, sheeting and underlying soil work were all performed improperly, all contributing to Plaintiffs' damages. (Id). Issue was joined, and the parties have proceeded with some discovery.

Movants now make this motion for an Order for summary judgment pursuant to CPLR §3212, dismissing the Complaint and any cross-claims against it.

Movants contend that they were retained by 132W26 as a structural engineer, that the scope of the work was limited to designing the structure that was to be built on Lot 132, that their contract did not include any excavation, sheeting, shoring or underpinning work, that movants prepared the building design plans, and did not design, review, or approve any excavation, sheeting, shoring or underpinning plans. That movants did not supervise or perform any excavation, sheeting, shoring, or underpinning work, they were not responsible for any safety precautions, and they did not control the means or methods of how the work was performed. Movants also contend that they did not have a regular presence at the project site, and they did not enter into any contracts with any other parties other than the contract entered into with 132W26.

Movants argue that a person who makes the decision to excavate, and/or the contractor who carries out the excavation is the person who caused an excavation to be made, and is held absolutely liable for damages to adjoining property. That movants are not liable because they did not cause an excavation to be made, they are not the owners of the premises, and they did not exercise supervision or control over the work. Movants argue that for all these reasons the claims should be dismissed, and that the cross-claims should be dismissed because they did not owe a duty to any other party.

Plaintiffs, and Defendants 132W26, Paramount Builders Contracting Corp. (herein "Paramount"), and RGB Group Inc. (herein "RGB") oppose the motion pursuant to CPLR 3212(f), arguing that the motion should be denied because discovery has not been fully conducted, information they need to oppose such a motion are in movants' hands because discovery has not fully commenced, and there remain issues of fact.

Plaintiffs also include their expert affidavit by Mr. Paul J. Angelides, PE., P.C. (See Plaintiffs' Aff. In Opp.). Mr. Angelides states that movants' obligations and the exact work they performed is unclear and difficult to ascertain without the necessary and adequate discovery, and that without reviewing movants' drawings/plans, and knowing what the other Defendants' duties were, it is unclear if the movants are at fault. (Id.).

Defendant Paramount contends that movants, as the structural engineer of record, have not responded to its discovery demands, including its complete project file relating to its engineering services. That only movants would have the knowledge of the scope, nature and quality of the engineering services they provided, and that due to the lack of this discovery and the lack of the other defendants' project files, Paramount's consultants cannot definitively determine whether movants' structural engineering services caused or contributed to the alleged lateral movement of Building 128.

Paramount also contends that the Complaint alleges that the Defendants' construction activities were improperly performed, such as proper plans were not made, which contributed to damaging Building 128. Paramount argues that movants' motion does not establish that the plans they prepared, reviewed or approved did not contribute to causing the damage. That movants assume the damage was caused by improper excavation, underpinning sheeting or shoring, but do not provide any expert affidavit in support of this assumption. That movants merely assert that they did not perform any work/services relating to the underpinning, excavation, sheeting or shoring, but that this does not establish that movants' plans were properly made, that they are free from liability in causing or contributing to the allegations in the Complaint, or that any legal defenses bar any recovery against movants.

Paramount argues that there remain questions of fact as to whether or not there were flaws in movants' structural design drawings for Lot 132, as indicated in a letter to the Department of Buildings (herein "DOB") from Building 130's engineering firm, by failing to consider Building 130's pre-existing lean (Paramount Aff. In Opp. Exh. C). That further expert investigations and inspections of the other Defendants' project files is needed to determine whether or not movants' structural designs, including the foundation design, contributed to Plaintiffs' damages. That movants were involved in designing the foundation, as well as addressing issues where field conditions required plan amendments, and approving work in progress as indicated in the daily reports that raise an issue of fact as to whether movants' designs (including foundation designs) caused or contributed to the damages. (Id. at Exh. D).

Paramount also argues that Eliezer Dubinsky P.E.'s Affidavit, attached to the motion which attests to movants not designing, reviewing or approving any excavation, sheeting, shoring or underpinning plans, is in contradiction with Structural Drawing S-103.00. (Id. at Exh. E P 3). That the drawing depicts proposed sheeting/shoring on the west, south, and north lot lines, but none on the east lot line

that is adjacent to Building 130. That based on this drawing there is a question of fact as to movants' involvement in the preparation, review and/or approval of the design, or the lack thereof, of sheeting/shoring on the east properly line, and if these designs contributed to the damages. That this same structural drawing provides a "Note to Contractor" which states that all sheeting/shoring details are only proposed details, and that the contractor must retain a sheeting/shoring subcontractor/engineer to prepare drawings which are to be reviewed by the engineer of record. (Id.). That movants were the structural engineer of record, that the excavation engineer (Avishay I. Mazor, P.E.) was retained to prepare the underpinning, bracing, sheeting and shoring, that pursuant to Mazor's letter and drawings no shoring/bracing was necessary, and that this decision is reflected in the revised notes on sheet SOE-001.01 which was reviewed by movants. (Id. at Exh. F).

Defendant 132W26 contends that pursuant to its contract with the movants, it is contractually indemnified as to any damages arising out of movants work (132W26 Aff. In Opp. Exh. H), and that there is no proof that 132W26's liability, if any, is anything other than vicarious due to its contractors or design professional's negligence, thereby barring dismissal of its common-law indemnification claims. 132W26 also argues that there remain questions of fact requiring discovery into whether movants negligently reviewed/stamped Mazor's letter and failed to advise of any deficiencies, whether movants negligently performed its scope of work, and that if it were negligent in performing its work, then they are not entitled to summary judgment.

Movants argue that they have complied with discovery (Reply Aff. Exh. A), that they attached the contract, change orders, and plans to the motion, and that there is no additional discovery needed. Movants contend that Paramount has failed to demonstrate that additional discovery would uncover any evidence to defeat this motion, and that any information regarding excavation/underpinning would be in Paramount's possession as it was the general contractor on the project. Movants also argue that the opposition papers have not contraverted the fact that the movants did not cause the excavation to be made, and there is no outstanding discovery that would change this fact. That the Complaint's allegations are clearly based on negligent underpinning causing the damages, and that it is clear that persons other than movants performed such excavation/underpinning, and therefore they cannot be held liable. Further, any cross-claims for contractual indemnification cannot survive because as a matter of law movants cannot be held liable, and as property owner 132W26 could have its own liability negate any common law indemnity claim.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. (Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in

admissible form, sufficient to require a trial of material factual issues (Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp., 77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341 [1966]; Sillman v. 20<sup>th</sup> Century-Fox Film Corp., 3 N.Y. 2d 395, 165 N.Y.S. 2d 498, 144 N.E. 2d 387 [1957]; Epstein v. Scally, 99 A.D. 2d 713, 472 N.Y.S. 2d 318 [1984]. Summary Judgment is “issue finding” not “issue determination” (Sillman, supra; Epstein, supra). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve (Brunetti, v. Musallam, 11 A.D. 3d 280, 783 N.Y.S. 2d 347 [1st Dept. 2004]).


A party that is neither the owner of the property, nor the contractor who performed the excavation, is not “the person who caused an excavation or fill to be made within the meaning of Administrative Code 3309.4.” (87 Chambers, LLC v. 77 Reade, LLC, 122 A.D.3d 540, 998 N.Y.S.2d 15 [1<sup>st</sup> Dept. 2014]). Designs for a proposed building that include a cellar and subcellar, and even knowledge that some excavation will take place, does not raise an issue of fact as to whether a party “caused an excavation.” (Id.). A contract that does not specifically impose duties regarding the excavation phase, and that does not expressly state a party having control over, or being responsible for, the construction means and methods or the safety precautions taken in connection with the work performed does not give rise to a negligence claim. (Id.). However, a movant is not entitled to summary judgment dismissing a claim under code 3309 where there are issues of fact as to whether a party substantially contributed to the design and methodology employed during the excavation process and therefore was a “person” who “caused an excavation” within the meaning of section 3309.4. (Id.). Further, admissible evidence submitted in opposition suggesting that a party assumed responsibilities related to the excavation and recommended excavation design changes that were adopted, and caused damage to a plaintiff, raise an issue of fact. (Id., see also Espinal v. Melville Snow Contrs., 98 N.Y.2d 136, 773 N.E.2d 485, 746 N.Y.S.2d 120 [2002]). A defendant who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury. (See Espinal, 98 N.Y.2d at 142).

Defendant Paramount has not established its right to summary judgment as there remain issues of fact. Questions remains as to whether Paramount’s structural design plans contained any flaws that may have contributed to the exacerbation of Building 130’s existing lean, and in turn contributing to Plaintiffs’ damages.

Accordingly, it is ORDERED, that Defendant Paramount Builders Contracting Corp.'s motion for summary judgment dismissing the Complaint and all cross-claims against it, is denied.

ENTER:

Dated: November 22, 2016

  
\_\_\_\_\_  
MANUEL J. MENDEZ

J.S.C.

**MANUEL J. MENDEZ**  
**J.S.C.**

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST                       REFERENCE