

**1049 Park Ave. Apts. Corp. v Greater N.Y. Mut. Ins.
Co.**

2011 NY Slip Op 32441(U)

September 7, 2011

Sup Ct, NY County

Docket Number: 103137/09

Judge: Doris Ling-Cohan

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

PRESENT: DORIS LING-COHAN
J.S.C.
Justice

PART 36

1049 Park Ave Apts Corp.

INDEX NO.

103137/2009

MOTION DATE

- v -

Greater New York Mutual Ins. Co.

MOTION SEQ. NO.

003

+ third-party action

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... <i>memo</i>	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>3</u>
Replying Affidavits _____	<u>4</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *to dismiss by third-party defendants Stephen V. DeSimeone, P.E. and S. DeSimeone Consulting Engineers, LLC is denied in accordance with the attached memorandum decision.*

(consolidated for disposition with motion seq No. 001B)

FILED

SEP 12 2011

Dated: 9-7-2011

NEW YORK COUNTY CLERK'S OFFICE

DORIS LING-COHAN J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
1049 PARK AVENUE APARTMENTS CORP.,

Plaintiff,

-against-

GREATER NEW YORK MUTUAL INSURANCE
COMPANY,

Defendant.
-----X

Index No. 103137/09

Motion Seq. No. 003 & 004

FILED

SEP 12 2011

DORIS LING-COHAN, J.:

NEW YORK
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Motion sequence numbers 003 and 004 are consolidated for disposition herein. In motion sequence number 003, third-party defendants Stephen V. DeSimone, P.E. and S. DeSimone Consulting Engineers, LLC (incorrectly sued as DeSimone Consulting Engineers) move to dismiss the Amended Third-Party Complaint against them, pursuant to CPLR 3211(a)(1) and (7), or, in the alternative, for summary judgment, pursuant to CPLR 3211(c). In motion sequence number 004, third-party defendant HLW International LLP ("HLW") also moves to dismiss the Amended Third-Party Complaint and all cross-claims against it, pursuant to CPLR 3211(a)(1) and (7), or, in the alternative, for summary judgment, pursuant to CPLR 3211(c).

Plaintiff 1049 Park Avenue Apartments Corporation commenced this action against defendant Greater New York Mutual Insurance Company ("Greater New York") to collect \$272,000, under an insurance policy issued by Greater New York, for property damages resulting to its building during construction activities at the adjacent building. Greater New York then commenced a third-party action, alleging that the claimed damages are the result of the negligence of third-party defendants – the adjacent property owner, its architects, engineer and contractors – to properly support plaintiff's building during demolition, excavation, and construction activities at 1055 Park Avenue, and further alleges negligent design and

construction of the shoring, bracing, and underpinning of plaintiff's building.

On a motion to dismiss, pursuant to CPLR 3211, the pleading is given a liberal construction and the facts alleged therein are accepted as true. *Leon v Martinez*, 84 NY2d 83, 87 (1994). The motion to dismiss will only be granted if, upon giving the non-moving party every favorable inference, the facts do not fit within any cognizable legal theory. *Id.* at 87-88. However, "factual claims that are contradicted by documentary evidence, are not entitled to such consideration." *CIBC Bank & Trust Co. (Cayman) Ltd. v Credit Lyonnais*, 270 AD2d 138, 138 (1st Dep't 2000). A party who seeks dismissal based on documentary evidence pursuant to CPLR 3211(a)(1) has "the burden of submitting documentary evidence that resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." *Epifani v Johnson*, 65 AD3d 224, 229 (2d Dep't 2009) (internal quotations omitted).

Motion Sequence Number 003

Third-party defendants Stephen V. DeSimone, P.E. and S. DeSimone Consulting Engineers, LLC (collectively, the "DeSimone Third-Party Defendants") now move to dismiss the Amended Third-Party Complaint against them, or, in the alternative, for summary judgment. The DeSimone Third-Party Defendants contend that they had no responsibility for the design or construction of the bracing, shoring or underpinning systems for the project. In support of such contention, the DeSimone Third-Party Defendants submit, as documentary evidence, their agreement with IGOC I Park LLC ("IGOC") to provide services for the project, which specifically excluded from their scope of services, the "design of shoring and underpinning systems for construction of the foundation system" and "structural engineering consultation related to any construction means or methods," unless otherwise agreed to, for additional compensation. DeSimone Aff, Exh 1-A. Further, the DeSimone Third-Party Defendants'

structural drawings for the project are also attached, which provided that the contractor would be solely responsible for the “safety of persons and property” and for the “shoring, bracing, and protection of existing and adjacent structures during construction.” DeSimone Aff, Exh 2.

In opposition, third-party plaintiff Greater New York first argues that since third-party defendant H. Thomas O’Hara Architect PLLC has filed for bankruptcy and a stay has been issued by the United States Bankruptcy Court, Southern District of New York, the within motion should not be decided. Second, Greater New York contends that the documentary evidence presented by movants does not “conclusively [dispose] of the plaintiff’s claim.” *Berardino v Ochlan*, 2 AD3d 556, 557 (2d Dep’t 2003). Greater New York argues that: “[e]ven if DeSimone did not have any involvement in the bracing, shoring or underpinning . . . , both its contract and the instant motion are silent as to whether it performed any engineering services with regard to the demolition and/or excavation of the Construction Premises.” Brief in Opp at 6. Moreover, Greater New York contends that the DeSimone Third-Party Defendants filed a permit application for excavation work during the time period in question. Greater New York asserts that further discovery is necessary to determine what services the DeSimone Third-Party Defendants performed, as well as the facts underlying the DeSimone Third-Party Defendants’ services related to excavation as reflected in the Department of Building records.

As to Greater New York’s first argument, the filing of bankruptcy by one defendant does not stay the entire action as against the other defendants who have not filed for bankruptcy. *See Centrust Servs., Inc. v Guterman*, 160 AD2d 416, 418 (1st Dep’t 1990). Thus, this Court is not barred from deciding the within motion with respect to movants, who are non-bankrupt parties. Moreover, pursuant to this Court’s Order entered July 1, 2010, the third-party action was “severed and stayed only as to the bankrupt third-party defendant H. Thomas O’Hara Architect

PLLC; the remainder of the third-party action shall continue.”

With regard to Greater New York’s second argument, while the contract for the project makes clear that the DeSimone Third-Party Defendants were not responsible for “bracing, shoring and underpinning,” it fails to conclusively establish that the DeSimone Third-Party Defendants had no part in the excavation and demolition of the project, which is a portion of the allegations in the third-party complaint. The Amended Third-Party Complaint alleges that the DeSimone Third-Party Defendants “performed engineering services with regard to the demolition, excavation and/or construction at the Construction Premises.” Am Third-Party Compl ¶¶ 24-25. The amended third-party complaint further alleges that the third-party defendants caused the loss:

in failing to use due care in the design, demolition, excavation and construction of the Construction Premises; in failing to use due care in designing and constructing the shoring, bracing and other aspects of protecting 1049 Park’s property during demolition, excavation and construction activities; in failing to use due care in designing and performing the demolition, excavation and construction on the Construction Premises

Id. ¶ 34. At this stage, on a pre-answer motion, it is premature to dismiss the DeSimone Third-Party Defendants from this action, prior to all discovery being complete, as there are allegations in the Amended Third-Party Complaint that have not been conclusively contradicted by the documentary evidence presented.

Moreover, upon review of the proposal for the project by the DeSimone Third-Party Defendants to IGOC, the breakdown of services to be performed by the DeSimone Third-Party Defendants includes “[c]onstruction administration,” to which the DeSimone Third-Party Defendants allocated \$11,000 of their fees. Stephen V. DeSimone Aff, Exh 2-A. It is unclear, at this point, what duties and obligations fall under the category of construction administration. It is

[* 6]
entirely possible that the DeSimone Third-Party Defendants did more than simply design the project, as they allege, and instead participated in the construction, excavation and/or demolition work at the project site, as is alleged in the Amended Third-Party Complaint. As stated above, at this stage, on a motion to dismiss, it is premature to grant dismissal.

Lastly, as to the DeSimone Third-Party Defendants' request to convert this motion to one for summary judgment, the Court declines to follow such course of action here. As the DeSimone Third-Party Defendants were not in privity of contract with third-party plaintiff, Greater New York would be unable to oppose the motion for summary judgment at this time, without discovery being completed wherein facts and evidence of the relationship and duties of the DeSimone Third-Party Defendants would come to light. As such, the DeSimone Third-Party Defendants' motion to dismiss is denied.

Motion Sequence Number 004

Third-party defendant HLW also moves to dismiss the Amended Third-Party Complaint against it, or, in the alternative, for summary judgment. HLW contends that it was retained by IGOC in 2006 to perform certain design services concerning the project. However, HLW alleges that before it completed those design services, and before construction began, IGOC terminated it from the project in January 2007. Further, HLW argues that the plans it prepared were incomplete and were not intended to be used for construction. HLW contends that IGOC retained another architectural firm to serve as the project's architect.

In support of its position, HLW relies on Theodore Hammer's affidavit, one of its managing partners, and the DeSimone Third-Party Defendants' proposal to IGOC for the project. In that proposal, dated February 25, 2007, the DeSimone Third Party Defendants stated that their "understanding of this project is based on architectural drawings received from H. Thomas

7] O'Hara Architects dated February 20, 2007" and further wrote that "[t]he architect for the project is H. Thomas O'Hara Architects." Timothy F. Hegarty Affirmation, Exh 2-A.

In opposition, third-party plaintiff contends that, according to the Department of Building records, HLW remained the architect of record on the project through August 27, 2007, approximately two months after damage allegedly occurred to plaintiff's building. Moreover, third-party plaintiff argues that facts as to whether movant's architectural services were used are currently unavailable to it, and can only be obtained through documentary and deposition discovery.

At this stage, the motion to dismiss is denied. The documentary evidence submitted by movant HLW does not "conclusively [establish]" that no cause of action exists on behalf of third-party plaintiff. *Epifani v Johnson*, 65 AD3d at 229. The supporting documentation essentially states that it was another party's understanding that the architect was H. Thomas O'Hara Architects. However, without any evidence that H. Thomas O'Hara Architects was, in fact, engaged to be the architect on the project prior to any of the loss occurring and movant being terminated, it is premature to dismiss movant at this time, especially in light of the fact that any such evidence is not in the hands of the non-movant, third-party plaintiff.¹ Although movant also submits its managing partner's affidavit, such is not properly considered on a motion to dismiss. *See Tsimerman v Janoff*, 40 AD3d 242, 242 (1st Dep't 2007); *see also* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10. Thus, the motion to dismiss by HLW is denied at this juncture. Further, HLW's request to convert this motion to one for summary judgment is inappropriate here, where third-party plaintiff lacks the ability to

¹ The Court notes that Greater New York requested that HLW provide it with documentation that it was no longer the architect on the project *before this motion was made*, to resolve this issue without motion practice, but HLW failed to provide any such evidence.

oppose a summary judgment motion brought by a party with whom it has no relationship without completing discovery first.

As to both motions, while the Court, at this time, denies movants' applications to dismiss the Amended Third-Party Complaint and any cross-claims against them, after the completion of discovery, and with supporting evidence, dismissal might be entirely appropriate, given the alleged facts and circumstances.

Accordingly, it is

ORDERED that the motion to dismiss (motion seq. no. 003) by third-party defendants Stephen V. DeSimone, P.E. and S. DeSimone Consulting Engineers, LLC (incorrectly sued as DeSimone Consulting Engineers²) is denied; and it is further

ORDERED that the motion to dismiss (motion seq. no. 004) by third-party defendant HLW International LLP is denied; and it is further

ORDERED that third-party defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that within 20 days of entry of this order, third-party plaintiff shall serve a copy of this order with notice of entry, upon all parties.

Dated: 9/7/11


DORIS LIN COHAN, J.E.C.
FILED

J:\Dismiss\1049 Park Avenue Apartments Corp, dismiss denied, complete discovery.wpd

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² Counsel shall ^{refer to} discuss a stipulation to amend as to the correct name, which shall provide for service to the County Clerk and Trial Support to amend the caption.

