

11 Essex St. Corp. v 7 Essex St., L.L.C.

2011 NY Slip Op 33438(U)

December 15, 2011

Sup Ct, NY County

Docket Number: 110019/04

Judge: Emily Jane Goodman

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EMILY JANE GOODMAN

PRESENT: _____

PART 17

Index Number : 110019/2004

11 ESSEX STREET CORP.

vs

7 ESSEX STREET LLC.

Sequence Number : 002

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided per attached

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

FILED

DEC 16 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12/15/11

EMILY JANE GOODMAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X
11 ESSEX STREET CORP.,

Plaintiff,

-against-

Index No. 600176/04

TOWER INSURANCE COMPANY OF NEW YORK,

Defendant.

-----X
11 ESSEX STREET CORP.,

Plaintiff,

-against-

Index No. 110019/04

7 ESSEX STREET, L.L.C., c/o VESTA
DEVELOPMENT GROUP, DESIMONE CONSULTING
ENGINEERS, JEFFREY M. BROWN ASSOCIATES,
INC., BERZAK GOLD, P.C., and BIG APPLE
WRECKING AND CONSTRUCTION CORP.,

Motion Sequence
Number 002 and
Related Cross
Motions

Defendants.

-----X

And Other Third Party Actions

-----X

EMILY JANE GOODMAN, J.S.C.:

FILED

DEC 16 2011

NEW YORK
COUNTY CLERK'S OFFICE

This decision addresses the motion of plaintiff 11 Essex Street Corp. (11 Essex) (motion sequence number 002), and the cross motions of defendants Danna Construction Corp. (Danna) and Berzak Gold P.C. (Berzak). In its motion, 11 Essex seeks partial summary judgment, pursuant to CPLR 3212, on the issue of liability (the 11 Essex Motion) against 7 Essex Street, LLC (7 Essex), DeSimone Consulting Engineers (DeSimone), Jeffrey M. Brown Associates, Inc. (JMB) and Berzak. In turn, the cross

motions of Danna and Berzak seek summary judgment dismissing all claims and cross claims as against each of them.

11 Essex has informed the parties and this court that it would withdraw the 11 Essex Motion, without prejudice. It is the position of 11 Essex that its withdrawal of the 11 Essex Motion rendered the relief requested by Berzak in its cross motion moot. In opposition, and perhaps concerned about the timeliness of its cross motion, Berzak argues that its cross motion is not moot, and that this court should consider its cross motion along with the cross motions of other co-defendants in this action.

For the reasons set forth herein, the reliefs sought in the cross motions of Berzak and Danna are denied.

Pertinent Factual Background

The instant motion and cross motions are among a myriad of pleadings that have been filed in these complex matters, which involve multi-party litigations arising out of a construction project that allegedly caused damages to an adjoining building. Because the background information for these matters have been discussed in prior decisions of this court, familiarity with such information is assumed and will not be repeated, except for the pertinent facts summarized herein.

In 2004, 11 Essex, the owner of the building located at 11 Essex Street (Building 11), commenced various actions against Tower Insurance Company of New York (11 Essex's insurer), 7 Essex

* 4]

(the owner of the properties located next to Building 11) and certain professionals retained for the construction project. In such actions, 11 Essex sought to recover damages to Building 11 that were allegedly caused by the activities conducted by the professionals at the construction site owned by 7 Essex (the 7 Essex Site). The construction project, started in 2001, involved the demolition of several old buildings owned by 7 Essex, and the construction of a new condominium building, at the 7 Essex Site.

In connection with the project, 7 Essex retained JMB as construction manager and Franke Gottsegen Cox (FGC) as architect. While FGC hired DeSimone to serve as structural engineer, JMB contracted with Big Apple Wrecking and Construction Corp. (Big Apple) to perform selective demolition work; Big Apple then subcontracted with Safeway Environmental Corp. (Safeway) to perform such work. JMB also contracted with Danna to perform excavation and foundation work, and Danna subcontracted with Berzak to design the underpinning for Building 11, when the demolition work was substantially finished.

Certain professionals for the project (such as FGC, JMB, DeSimone and Danna) determined that underpinning was required, when they discovered, on or about January 14, 2002, that Building 11's basement slab had been improperly lowered, which allegedly compromised its structural integrity. Berzak asserts that it was not informed by the other professionals of such a condition, when

it designed the underpinning for Building 11. As the installed underpinning did not provide for lateral support, it allegedly contributed to the damages of Building 11. It is also alleged that in the summer of 2001, 11 Essex illegally excavated and lowered the basement slab to increase the height of the crawl space, without filing the appropriate site plans and obtaining the approvals of the New York City Department of Buildings (DOB). The excavation allegedly caused Building 11 not to be wholly connected to its foundation, which undermined its stability.

Applicable Legal Standard

In stating the standards for granting or denying a summary judgment motion, the Court of Appeals noted in *Alvarez v Prospect Hosp.* (68 NY2d 320, 324 [1986]):

As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such ... showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [internal citations omitted].

The courts scrutinize the facts and circumstances of each case to determine whether summary judgment relief may be granted. *Andre v Pomeroy*, 35 NY2d 361, 364 (1974) (because entry of summary judgment "deprives the litigant of his day in court[,] it is

considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues"); *People v Grasso*, 50 AD3d 535, 544 (1st Dept 2008) (in considering a motion for summary judgment, "all of the evidence must be viewed in the light most favorable to the opponent of the motion"). However, allegations unsupported by competent evidence are insufficient to defeat a summary judgment motion. *Alvarez*, 68 NY2d at 324-25.

Discussion

I. The 11 Essex Motion (Motion Sequence No. 002)

As noted above, the 11 Essex Motion has been withdrawn by 11 Essex. The withdrawal was apparently influenced by the appellate court's decision in *Yenem Corp. v 281 Broadway Holdings* (76 AD3d 225 [1st Dept 2010]), which held that a violation of a municipal ordinance governing excavation work, specifically section 27-1031 of the Administrative Code of the City of New York, does not impose absolute liability. That decision has been appealed to the Court of Appeals, which has granted the City of New York leave to file a brief amicus curiae. *Yenem*, 16 NY3d 855 (2011). Because the 11 Essex Motion has been withdrawn, this court need not determine the relief requested therein nor the oppositions thereto, particularly where the reliefs requested in the related cross motions are denied, as explained below.

II. The Danna Cross Motion and Oppositions

Relying on the affirmation of its counsel, Kevin Horbatiuk,

Danna argues that all claims and cross claims against it should be dismissed via summary judgment. In support of such argument, Danna asserts that: (1) 11 Essex has not sued Danna directly, and that Danna was impleaded into these actions because of the cross claims asserted by JMB and Big Apple;¹ (2) there is no evidence that Danna, as JMB's subcontractor, performed its work in a manner that would have caused or contributed to Building 11's damages; (3) if the claimed damages to Building 11 were caused by negligently prepared plans or designs, there is no evidence that Danna did anything other than perform its work in conformity with the plans and designs prepared by other professionals, including Berzak, who designed the underpinning for Building 11; (4) no one complained of Danna's performance, which was supervised by JMB and inspected by Berzak; and (5) all claims for contribution, indemnification and apportionment of liability against Danna should be dismissed because there is no evidence that Danna was negligent in its performance. Horbatiuk Affirmation, ¶¶ 9-27.

Danna's motion was opposed by 11 Essex, 7 Essex, JMB, DeSimone, Berzak, Big Apple and Casino. The opponents assert that (1) Danna was contractually responsible for all excavation

¹ Casino Development Group (Casino) also commenced a third-party action against Danna for contribution and indemnification. Pursuant to an order of this court, dated September 7, 2010, Casino's summary judgment motion seeking dismissal of all claims against it was granted, because the motion was unopposed, and there was no evidence that Casino performed work at the site.

and foundation work, including the provision of shoring, bracing and other protections to maintain the integrity of structures adjacent to the 7 Essex Site, including Building 11; (2) before commencing excavation, Danna removed the perimeter foundation walls that were left behind by Big Apple-Safeway's demolition, and after removing such walls, Danna discovered on January 14, 2002, while performing excavation, that a portion of Building 11's foundation had no footing and only a rubble slab, which condition undermined its stability; (3) on January 15, 2002, FGC prepared a diagram that depicted the condition affecting Building 11, and despite having received a copy of the diagram and knowing the condition affecting Building 11, Danna did not inform Berzak of such condition when it hired Berzak to design the underpinning for Building 11; and (5) Danna's excavation caused or aggravated Building 11's damages, as the building was already structurally compromised due to the improper work previously performed by 11 Essex in lowering its basement slab.

Based on the foregoing, summary judgment in favor of Danna is unwarranted. Among other things, Danna does not dispute the assertion that it received a copy of the FGC-prepared diagram, knew of the condition affecting Building 11 but failed to provide such information to Berzak, which caused and/or contributed to Berzak's failure to design lateral support for Building 11. This raises an issue as to whether Danna was negligent. The fact that

Danna performed the underpinning according to Berzak's design and that no one complained of Danna's performance is of no moment, inasmuch as the design was faulty due to Danna's alleged failure to timely convey critical information to Berzak. Also, various experts retained by the other professionals, as well as the DOB inspector, have attributed faulty excavation and underpinning as the causes that contributed to Building 11's damages, and Danna was retained to perform excavation and underpinning duties. Even if Danna did not owe any direct duty to plaintiff 11 Essex, as argued by Danna, it is still potentially liable to the other co-defendants for indemnification and/or contribution, if it is established that the negligence of the professionals involved in the construction project, including Danna, caused or contributed to Building 11's damages. See *Raquest v Braun*, 90 NY2d 177, 182 (1997) (it is a "well-established principle that a defendant may seek contribution from a third party even if the injured plaintiff has no direct right of recovery against that party").

Thus, Danna's motion seeking summary judgment dismissing all claims and cross claims asserted against it is denied.²

² Danna's additional argument, that the opponents failed to produce "evidentiary proof in admissible form," has no merit. As a movant for summary judgment, Danna must first make a prima facie showing of its entitlement to summary judgment by tendering sufficient evidence to show the absence of material disputed issues of fact. Because Danna has failed to make a prima facie showing, it is irrelevant whether the opponents produced evidentiary proof in admissible form. *Alvarez*, 68 NY2d at 324.

III. The Berzak Cross Motion and Oppositions

By notice of motion dated September 2, 2010, Berzak seeks summary judgment dismissing all claims and cross claims asserted against it. The motion is opposed by 7 Essex, 11 Essex, JMB, DeSimone, Big Apple and Safeway. As a threshold matter, the opponents argue that Berzak's motion should be denied because it is untimely.

Pursuant to the conference order of the court, dated January 5, 2006, all dispositive motions, including summary judgment motions, were required to be filed within 45 days after the filing of the note of issue. The note of issue in this action was filed by 11 Essex on or about May 9, 2010, which meant that all dispositive motions must have been made on or before June 24, 2010. Berzak's motion was made on September 2, 2010, which was more than two months after the deadline. While Berzak does not dispute that its cross motion is untimely, it requests that the court consider its motion, because Berzak raises the same issues as other defendants, and that no party would be prejudiced.

CPLR 3212 (a) provides, in relevant part, that "[a]ny party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made ... except with leave of court on good cause shown." The Court of Appeals, in *Brill v City of New York* (2 NY3d 648, 652 [2004]), interpreted the statute as

follows: "'good cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion - a satisfactory explanation for the untimeliness - rather than simply permitting meritorious, nonprejudicial filings, however tardy." Accord *Miceli v State Farm Mut. Auto. Ins. Co.* (3 NY3d 725, 726 [2004]) ("statutory time frames - like court-ordered time frames [see *Kihl v Pfeffer*, 94 NY2d 118 (1999)] - are not options, they are requirements, to be taken seriously by the parties").

The *Brill* and *Miceli* decisions did not deal with cross motions for summary judgment. However, the Appellate Division, First Department, has ruled on this issue, without specifically addressing the "good cause" factor. In *Conklin v Triborough Bridge & Tunnel Auth.* (49 AD3d 320, 321 [1st Dept 2008]), the First Department held that an "untimely cross motion was not improperly considered, since it sought relief on the same issues as were raised in defendants' timely motion." See also *Lapin v Atlantic Realty Apts. Co., LLC* (48 AD3d 337, 337 [1st Dept 2008]) ("marginally untimely cross motion for summary judgment was properly considered ... because it raised nearly identical issues ... as asserted in [another party's] timely motion"). Here, the record indicates that JMB, Danna, Big Apple and Safeway timely filed cross motions seeking summary judgment dismissing all claims and cross claims against each of them. The arguments raised in such cross motions are similar or closely related to

those raised by Berzak. Therefore, it is not improper for this court to also consider Berzak's cross motion, despite its untimeliness. Also, the fact that the 11 Essex Motion has been withdrawn does not render Berzak's cross motion moot or academic.

In support of summary dismissal of all claims and cross claims against it, Berzak argues: (1) the damages to Building 11 were not caused by Berzak's acts or omissions, but rather by 11 Essex's illegal and dangerous lowering of the building's basement slab; (2) based on the opinion of Berzak's own expert, Martin Fradua, the illegal work performed on Building 11, coupled with 11 Essex's failure to disclose this condition, was the proximate cause of the damages sustained by Building 11; (3) even if the wrongful acts of 11 Essex were not the exclusive cause of damages, subsequent actions taken by the various professionals involved in the construction project, prior to Berzak's retention in mid to late January 2002 to design the underpinning for Building 11, could have caused further damages to Building 11; (4) Berzak was not informed by the other professionals of the dangerous condition affecting Building 11, and based on the site plans of DeSimone and FGC, Berzak conducted an external visual inspection of Building 11 before it designed the underpinning; and (5) Berzak was the last entity retained to design the underpinning, long after underpinning should have been considered and installed, and Berzak should not be made a scapegoat for

being the last entity who worked on the construction project. Faley Affirmation,³ dated September 2, 2010, ¶¶ 7-15, 21-34.

On the other hand, the opponents to Berzak's motion contend that: (1) Berzak, by its president Stuart Gold, claimed to have reviewed the FGC's drawings, but stated that he did not see the FGC diagram which depicted the lowered basement slab of Building 11, even though he also stated that part of the process was to coordinate with all professionals involved in the project; (2) Gold testified that he was aware that Building 11 was about 80-100 years old and had a rubble (loose stones instead of concrete or cinder-block) foundation,⁴ but he did not ask to see any plans in connection with the construction of Building 11, conduct any research at the DOB regarding any renovations done by 11 Essex, or make any attempt to ascertain Building 11's foundation and interior condition; (3) Berzak performed its own analysis and determined that shoring and lateral support for Building 11 were unnecessary; and (4) there are material issues as to whether Berzak was negligent in failing to conduct a proper due diligence when designing the underpinning system for Building 11.⁵

³ Kevin Faley is counsel for Berzak.

⁴ Deposition testimony of Stuart Gold, September 5, 2005, at 76-79, 87 (discussing, inter alia, a geo-technical report that analyzed soil conditions affecting Building 11).

⁵ The opponents also attack the admissibility of Fradua's affidavit, arguing that his opinions are speculative because he did not even examine Building 11, in person. In reply, Berzak

In light of the foregoing, there is a disputed issue as to whether Berzak was negligent in not conducting a more thorough due diligence, before designing the underpinning for Building 11. Also, even if the record does not appear to conflict with Berzak's assertion that it was not informed about the condition affecting Building 11 (i.e., the lower basement slab), there are issues of fact as to whether Berzak, as a professional retained to design the underpinning system, should have independently verified all factors affecting Building 11 before developing an appropriate system, particularly in light of the age of Building 11 and its rubble foundation, which were adverse factors known to Berzak. Notably, even Berzak itself acknowledges in its motion that there were many factors that could have caused damages to Building 11, which raise material issues and preclude a grant of summary judgment in its favor.

Conclusion

Accordingly, based on all of the foregoing, it is hereby ORDERED that, the motion by plaintiff 11 Essex Corp. seeking partial summary judgment on the issue of liability against certain defendants (motion sequence number 002) is denied, without prejudice, as it has been withdrawn; and it is further

contends that Fradua has extensive experience in the industry, and that in connection with his affidavit, he consulted with his partner, Ben Lavon, an engineer who inspected the 7 Essex Site on April 21, 2009. Berzak contends that the Fradua affidavit is entitled to be considered a competent professional opinion.

ORDERED that the related cross motion by Danna Construction Corp., seeking summary judgment dismissing all claims and cross claims asserted against it, is denied; and it is further

ORDERED that the related cross motion by Berzak Gold, P.C., seeking summary judgment dismissing all claims and cross claims asserted against it, is denied.

This constitutes the Decision and Order of the court.

Dated: December 15, 2011

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED

DEC 16 2011

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