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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

ALLSTATE INSURANCE COMPANY, etc.,
Plaintiff,

- against -

RAPOSO HOMES MANAGEMENT, LLC, etc.,
Defendants.

Index
No. 11928 2010

Motion
Date July 10, 2012

Motion
Cal. No. 3

Motion
Seq. No. 3

The following papers numbered 1 to 23 read on this motion by defendant Greg R., LLC (Greg R.), for an order granting it summary judgment dismissing plaintiff's complaint and any cross-claims against it; and on this cross motion by defendant Raposo Homes Management, LLC (Raposo), seeking similar relief.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-5
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This is an action by plaintiff, as subrogee of its insured, to recover damages alleged to have been sustained as a result of work performed by defendant Lona & Sons, Inc. (Lona), at the adjacent property, owned by Greg R. and managed by Raposo. According to the complaint, plaintiff alleges that, on or about July 31, 2008, defendants acted negligently and carelessly when they undertook "to design, install, hire, build, maintain, manage, control, demolish, renovate, construct, contract, and/or repair The Premises which caused vibrations,

movement, and/or ground shifting causing related damages" to the insured's property (subject premises).

In support of its motion, Greg R. contends that it can bear no liability to plaintiff for the damage caused to the subject premises since: (1) it cannot be held liable for the work performed by the independent contractor, Lona, nor do any of the exceptions to that rule apply; and (2) there was no affirmative act of negligence on the part of Greg R.

"The general rule is that a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts" (*Kleeman v Rheingold*, 81 NY2d 270, 273 [1993]; *see Calandrino v Town of Babylon*, 95 AD3d 1054 [2012]; *Lombardi v Alpine Overhead Doors, Inc.*, 92 AD3d 921 [2012]; *Langner v Primary Home Care Servs., Inc.*, 83 AD3d 1007 [2011]). There are, however, exceptions to the rule, to wit, whether the party: (1) is under a statutory duty to perform or control the work; (2) has contractually assumed a specific duty; (3) is under a duty to keep the premises safe; and (4) has assigned work to an independent contractor which the party knows or has reason to know is inherently dangerous (*Kleeman*, 81 NY2d at 274; *Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 668 [1992]).

Greg R. submits the deposition transcript of its sole owner, Octavio Raposo. Mr. Raposo testified, in relevant part: that Greg R. owns the premises – a freestanding two-story building consisting of three commercial stores and two apartments – abutting the subject premises; that Greg R. sought to build on its premises, inter alia, an underground garage, located below its yard; that Greg R. secured the necessary permits for the job; that the excavation depth was to be 10 feet; that construction commenced toward the end of 2007; that excavation was complete some time in 2008; that Greg R. did not hold any progress or safety meetings during the course of the project; that plaintiff's insured never advised Greg R. or Mr. Raposo that the subject premises were damaged; and that there is nothing connecting Greg R.'s property to the subject premises but, rather, that there is an inch and a half space for ventilation between the two properties.

Mr. Raposo also submits an affidavit in which he states: that he hired Lona as an independent contractor to excavate a portion of Greg R.'s property pursuant to a verbal agreement between the parties; that the agreement did not create a right or obligation for Greg R. to direct or control Lona's work, nor did Greg R. do so; that Greg R. did not perform any work relative to the property; that the work to be performed "was a standard, uncomplicated excavation project that did not involve any danger and carried no apparent risks"; that Lona has "an excellent reputation for its performance of excavation work; that

Greg R. has hired Lona on numerous occasions over a 20-year period; and that Lona has never caused damage to an adjacent property in the past.[1]

By virtue of the above submissions, Greg R. has established, prima facie, that Lona was hired as an independent contractor to perform the excavation work on its property. As to the first exception to the general rule, there is no indication that a property owner has a statutory obligation to perform excavation work, and Greg R. has highlighted the fact that plaintiff, in its verified bill of particulars, and two supplemental bill of particulars, did not allege any statutory violations. As to the second exception, the testimony and affidavit of Mr. Raposo make clear that Greg R. assumed no specific contractual duty.

As to the third exception, Greg R. argues that plaintiff does not allege that the damages resulted from an unsafe condition on the premises but, rather, from the work performed by Lona and that, in any event, "although a premises owner has a duty to maintain his premises in a reasonably safe condition to protect against personal injuries to persons upon his property, no such duty exists to protect against property damage of adjacent properties." While Greg R. is incorrect in its assertion that the law provides no duty to protect against property damages of abutting landowners (*see e.g. Pensabene v Incorporated Vil. of Valley Stream*, 202 AD2d 486 [1994]; 15 NYPrac, New York Law of Torts § 12:10), Greg R., nevertheless, demonstrated that it played no role in creating the unsafe condition which is alleged to have caused damage to the subject premises (*see id.*) and, thus, the third exception does not apply.

As to the fourth exception, the court notes that the First and Second Departments have taken different positions as to whether excavation is inherently dangerous (compare *Klein v Beta I LLC*, 10 AD3d 509 [1st Dept 2004] ["As noted by the Court of Appeals, excavation work adjacent to a thoroughfare obviously presents inherent dangers to those who must use the thoroughfare . . . The same could arguably be said about excavation work adjacent to an existing building"] with *Vaniglia v Northgate Homes*, 106 AD2d 384 [2d Dept 1984] [plaintiff must set forth facts that would demonstrate that an owner has notice of an inherent

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1. It is noted that, though Greg R. also submits the deposition transcript of Lona, by Joseph Minnici, same was not considered, as it is inadmissible. Greg R. served the transcript to the deponent for signature on April 4, 2012. The Demand for the Execution Page, in accordance with CPLR 3116 (a), provided that, "should defendant not respond to this Notice within the time prescribed by CPLR §3116 [to wit: 60 days], the within defendant shall rely upon the transcript as fully as though executed without correction at the time of trial and all other relevant times." The instant motion was served on April 17, 2012, only 13 days after serving the demand.

danger in the excavation procedure, or that the independent contractor is unqualified to do the work and that, "[W]here the danger arises merely because of the negligence of [an] independent contractor or his employees, which negligence is collateral to the work and which is not reasonably to be expected, the owner [general contractor] cannot be held liable to a third party" [citations omitted]). In the case at bar, Greg R. has demonstrated, prima facie, that plaintiff did not allege that the excavation work was reckless or dangerous, that Greg R. had no notice of any potential inherent danger in the excavation work, that Lona had an "excellent reputation" for excavation work, and had performed this type of work for Greg R. numerous times in the past with no damage to adjacent properties (*see Vaniglia*, 106 AD2d at 385).

As to the cross motion by Raposo, this defendant has also met its prima facie burden of establishing its entitlement to judgment as a matter of law, based upon the same legal premise as applied to Greg R. Moreover, Mr Raposo submits a separate affidavit in his capacity as sole member of Raposo, in which he states that Raposo had no involvement in the work which was being done on the premises owned by Greg R., and that Raposo did not retain Lona to do the excavation work.

In opposition to the motion, both plaintiff and Lona principally argue that Greg R. is subject to the duty imposed upon it by Administrative Code of the City of New York 28-3309.4, governing excavation or filling operations affecting adjoining property. Section 3309.4, which became effective July 1, 2008, provides:

> "Regardless of the excavation or fill depth, the person who causes an excavation or fill to be made shall, at all times and at his or her own expense, preserve and protect from damage any adjoining structures, provided such person is afforded a license in accordance with the requirements of Section 3309.2 to enter and inspect the adjoining buildings and property, and to perform such work thereon as may be necessary for such purpose. If the person who causes the excavation or fill is not afforded a license, such duty to preserve and protect the adjacent property shall devolve to the owner of such adjoining property, who shall be afforded a similar license with respect to the property where the excavation is to be made.
> No excavation work to a depth of 5 to 10 feet (1524 mm to 3048 mm) within 10 feet (3048 mm) of an adjacent building, or an excavation over 10 feet (3048 mm) anywhere on the site shall commence until the person causing an excavation to be made has documented the existing conditions of all adjacent buildings in a pre-construction survey."

Moreover, documentary evidence submitted in opposition suggests that Raposo was, indeed, involved in the project as a contractor and should, too, be liable pursuant to the Administrative Code.[2]

To the extent that Greg R. states in reply that neither plaintiff nor Lona can rely upon this statutory provision because it was never alleged in three bills of particulars and plaintiff has now filed a note of issue without having pleaded the above as a violation, same is without merit. A trial court generally has broad discretion to deem pleadings amended to conform to the proof, even absent a motion, provided there is no significant prejudice or surprise (*see Rizzo v Kay*, 79 AD3d 1001 [2010]; *Allstate Ins. Co. v Joseph*, 35 AD3d 730 [2006]). The preliminary question becomes, then, whether either plaintiff or Lona has submitted proof to allow the amendment, and the court must answer in the negative. Neither party has presented evidence that Greg R. or Raposo was afforded a license to inspect the subject premises, such that would require these defendants, in accordance with the statute, to preserve and protect the adjoining property from damage. As to the second paragraph of the Code, neither plaintiff nor Lona has submitted evidence that the excavation exceeded 10 feet, or that the work was within 10 feet of the subject premises. Since no proof is submitted to that effect, the court will not allow the amendment to include this section of the Administrative Code.

In light of this finding, the court need not address, as academic, the remaining contentions of the parties.

Accordingly, the respective motion and cross motion by defendant Greg R., LLC, and Raposo Homes Management, LLC, are granted, and the complaint is hereby dismissed against these defendants.

Dated: August 1, 2012

J.S.C.

2. Neither plaintiff nor Lona appear to oppose the motion or cross motion to the extent that those motions argue that there is no liability at common-law.