Shah v 20 E. 64th St. LLC
2017 NY Slip Op 32028(U)
September 26, 2017
Supreme Court, New York County
Docket Number: 156305/15
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

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HEMANT SHAH and VARSHA SHAH,

Plaintiffs,

-against-

20 EAST 64TH STREET LLC, TRI-STAR CONSTRUCTION CORP., URBAN FOUNDATION/ENGINEERING, LLC, ABELOW SHERMAN ARCHITECTS LLC and RA CONSULTANTS LLC,

Defendants.

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DECISION/ORDER

Index No.: 156305/15

Motion seq. no.: 004-008

LYNN R. KOTLER, J.S.C.:

Plaintiff homeowners Hemant and Varsha Shah (plaintiffs or the Shahs) move (mot. seq. no. 004), pursuant to CPLR § 3212, for partial summary judgment on their first cause of action against all defendants for statutory strict liability, and their fifth cause of action against defendant 20 East 64th Street LLC (20 East) for contractual indemnification. Defendants 20 East (mot. seq. no. 005) and Tri-Star Construction Corp. (Tri-Star) (mot. seq. no. 006) move, pursuant to CPLR 3212, for partial summary judgment dismissing plaintiffs' second cause of action for negligence, third cause of action for nuisance, and sixth cause of action for trespass. Defendants RA Consultants LLC (RA) (mot seq. no. 007) and Abelow Sherman Architects LLC (Abelow Sherman) (mot. seq. no. 008) move, pursuant to CPLR 3212, for summary judgment dismissing the amended complaint against them in its entirety.

In addition, each of the moving defendants also moves for summary judgment dismissing all cross claims alleged against it, and for conditional summary judgment on various claims for indemnification and contribution, as set forth further below.

Motion sequence Nos. 004 through 008 are hereby consolidated for consideration and disposition in this single decision/order.

Issue has been joined as to all parties and the motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

Facts

The Parties

The Shahs own a landmarked home located at 22 East 64th Street, New York, NY (Shah aff dated 1/20/17, ¶ 3). 20 East owns the adjoining property, 20 East 64th Street, New York, NY (*id.*, ¶ 9). On July 8, 2013, 20 East retained Tri-Star as construction manager for a complete gut renovation of its property (the project) (Hymowitz aff dated 1/20/17, ¶¶ 7, 9). Pursuant to 20 East and Tri-Star's contract, Tri-Star agreed to "furnish efficient construction administration, management services and supervision; to furnish at all times an adequate supply of workers and materials; and to perform the work in an expeditious and economical manner" (Shah aff, exhibit E, AIA Form Contract, § 1.2). For any part of the project that Tri-Star would not ordinarily do itself, it would hire subcontractors (*id.*, § 2.3.2.1). Further, Tri-Star would hold meetings "to discuss such matters as procedures, progress, coordination, scheduling, and status of the work" (*id.*, § 2.3.2.4). 20 East states that it did not perform any of the work on the project, that it did not enter the Shahs' home, and that it was not present at the work site (Hymowitz aff, ¶¶ 27-30). Further, 20 East claims that it did not control Tri-Star's means and methods of construction, and that "Tri-Star exclusively supervised and controlled the [p]roject" (*id.*, ¶¶ 36, 38).

Abelow Sherman was the architect for the project (Shah aff, exhibit E, AIA Form Contract at 81; Abelow aff dated 1/26/17, ¶ 3). Pursuant to Abelow Sherman's contract with 20 East, Abelow Sherman was required to "monitor the progress and quality of the [p]roject," and "review the work of [Tri-Star] for conformance with" the plans and specifications for the project (Donato affirmation dated 1/26/17, exhibit H, Abelow Sherman agreement at 3). 20 East and Tri-Star state that they "did not perform any architectural services in connection with the project" and "did not direct or control Abelow [Sherman] as concerning the means and methods of the architectural services

performed in connection with the project" (Hymowitz aff, ¶¶ 20-21; Muessig aff dated 1/26/17, ¶¶ 17-18).

In addition, 20 East retained RA to conduct a geotechnical investigation "to obtain subsurface data at the site and provide recommendations for design and construction of foundations based on the data obtained" (Papp aff dated 1/26/17, exhibit B, RA contract at 2). In retaining RA, 20 East agreed to indemnify RA from all third-party claims "relating in whole or in part to [RA's] performance of services on the subject project" unless "the loss, judgment, cost or claim is caused by the sole negligence of [RA]" (*id.*, § 3.6). 20 East and Tri-Star state that they did not perform any geotechnical services related to the project, that they did not supervise RA's work, and that they did not direct or control RA's means and methods (Hymowitz aff, ¶¶ 31, 33, 37; Muessig aff, ¶¶ 20, 22).

On July 12, 2013, Tri-Star subcontracted with Urban Foundation/Engineering, LLC (Urban) to perform excavation and underpinning work on the project (Hymowitz aff, ¶¶ 22-23). Pursuant to the subcontract, Tri-Star was not to "give instructions or orders directly to [Urban's] employees . . . unless such persons are designated as authorized representatives of the subcontractor" (Shah aff, exhibit F, AIA Form Subcontract, § 3.2.2), and Urban was to supervise and direct its own work (*id.*, § 4.1.1). Further, Urban agreed to "take reasonable safety precautions with respect to performance of [the] subcontract, [to] comply with safety measures initiated by [Tri-Star] and with applicable laws, ordinances, rules, regulations and orders of public authorities for the safety of persons and property" (*id.*, § 4.3.1). Finally,

> To the fullest extent permitted by law, [Urban would] indemnify and hold harmless [20 East], [Tri-Star], [Abelow Sherman], . . . and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of [Urban's] work under [the] subcontract . . . but only to the extent caused by the negligent acts or omissions of [Urban] . . . anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. (*id.*, § 4.6.1).

20 East and Tri-Star state that they did not perform, supervise, or control the means and methods of any excavation work (Hymowitz aff, ¶¶ 30, 32, 36; Muessig aff, ¶¶ 14-15).

Prior to beginning the excavation and underpinning work on the project, 20 East entered into a License and Indemnity Agreement (License agreement) with the Shahs to provide access to their home "to inspect it and perform work purportedly to protect [their] home" (Shah aff, ¶ 21). Pursuant to the License agreement, the Shahs granted a temporary license for 20 East, Tri-Star, and their workers to enter the Shahs home to perform certain work, protective measures and repairs in preparation for the excavation (Shah aff, exhibit L, License agreement, § 1). Specifically, Tri-Star would install bracing and underpinning beneath the Shahs' home in order to protect it from the excavation (License agreement, ¶ 3; exhibit A, Scope of Work). Tri-Star would, during the construction, "take all necessary and proper measures to ensure the safety of the occupants of the Shah Property" (*id.*, ¶ 5). 20 East was required to "use reasonably diligent efforts to complete the Work and the Protective Measures and Repairs . . . in a timely manner and as expeditiously as possible" (*id.*, ¶ 13), and would be held responsible for any failure by Tri-Star or any of the subcontractors "to ensure the safety of the occupants of the Shah Property" (*id.*, ¶ 14). Finally, 20 East agreed to indemnify the Shahs

> from and against any and all causes of action, damages, claims [, etc.,] which may at any time be asserted against or incurred by Shah . . . arising from: (i) the Work and/or the Protective Measures and Repairs, (ii) any acts or omissions of [20 East] or its contractors . . . and (iii) [20 East's] breach of [the License agreement] (*id.*, ¶ 18).

<u>The Project</u>

RA performed a "subsurface investigation" and issued a report, dated August 24, 2012, detailing "what subsurface conditions were likely to be encountered during excavation," which contained a "recommendation for foundation design, construction and protection of the adjacent structures" (Papp aff dated 1/26/17, ¶ 8). In October 2012, Tri-Star, Urban, Abelow Sherman, and RA finalized plans for the excavation (Van Leeuwen aff dated 2/21/17, ¶ 8). Urban then prepared a

work proposal for Tri-Star, relying on the findings in RA's geotechnical investigation report (*id.*, ¶¶ 9-10). Discussions between Urban and RA regarding the plans, including the design of an alternate underpinning system, and a series of questions from RA's engineer, Walter Papp, continued through January 2013 (*id.*, ¶ 11; Papp aff, ¶¶ 12, 13). Ultimately, the plans were approved by the New York City Department of Buildings (DOB) (Van Leeuwen aff, ¶ 11). Further, following a meeting with Urban, RA, and the design engineer for the project on February 20, 2013, the head of the DOB's Forensic Unit notified the Landmarks Preservation Commission that "the proposed work is properly conceived and can be safely realized" (*id.*, ¶ 12). Papp avers that RA "made no further comments about Urban's design and had no responsibility for or involvement with the subsequent implementation of the design, or with any associated means or methods" (Papp aff, ¶ 16). RA's expert, Tasos Papathanasiou, states that, in his professional opinion, RA's work and efforts "conformed with the standard of care, skill and judgment usually exercised by a geotechnical engineer with respect to a project of this kind" (Papathanasiou aff dated 1/26/17, ¶¶ 12, 23).

Tri-Star then retained nonparty Bronzino Engineering, P.C. (Bronzino), "to serve as the special inspector for shoring and excavation and structural stability and fill[sic]-time onsite monitoring" Van Leeuwen aff, ¶ 15). Urban's project manager, David Van Leeuwen, avers that Bronzino and Tri-Star supervised Urban's work on a daily basis (*id.*, ¶¶ 15-16). RA's principal, Walter Papp, states that Bronzino also performed inspections "of support of excavation and underpinning installation at the site" required by the New York City Building Code (Papp aff, ¶ 10).

From August 13-14, 2013, and at the behest of Tri-Star, nonparty Vibranalysis, Inc. inspected the Shahs' home prior to construction (Shah aff, exhibit C, Pre-Construction inspection report). Vibranalysis installed six crack monitors to measure change in the existing cracks in various parts of the Shahs' home (*id.* at 34). In addition, "[h]orizontal and vertical benchmarks were set for settlement monitoring on August 31, 2013 (*id.* at 52). Overall, the inspection disclosed no existing damage to the Shah's home, other than minor cracks in the exterior (Shah aff, ¶ 7). Subsequently, Urban commenced the excavation below 20 East's house. Shah avers that the excavation "caused

extensive cracking . . . throughout [the] home. It also shifted the main entrance door[,] . . . interior door and window jambs, . . . and caused substantial cracking in external walls and the stone patio" (Shah aff, ¶ 19).

Plaintiffs' expert, Benjamin Cornelius, P.E., S.E., states that, in his professional opinion, "the damage was caused by excavation and shoring activities on the adjacent property at 20 East 64th Street and under 22 East 64th Street in connection therewith" (Cornelius aff dated 1/19/17, ¶ 2). Specifically, Cornelius avers that defendants' monitoring program did not comply with DOB procedures, and that the excavation "caused movements of [the Shahs'] home . . . that greatly exceeded the limits permitted by DOB" (*id.*, ¶ 4). In this regard, the DOB's Technical Policy and Procedure Notice # 10/88 provides for regular monitoring of movement, tilting, and existing cracks, and regular photographing of affected buildings, and that the "maximum permissible vertical and horizontal movement of adjacent buildings shall be one-quarter (1/4) inch" (*id.*, ¶ 9; *see also* exhibit B, DOB Technical Policy and Procedure Notice # 10/88, ¶¶ 5.1, 8.1, 8.1.2, 8.2, 8.2.1, 8.5.1). Cornelius avers that two of the monitoring points shifted an inch and close to half an inch, respectively (Cornelius aff, ¶ 10). Further, he states that the east wall of 20 East's home moved eleven/sixteenths of an inch; as the east wall abuts the Shahs' home, he concludes that the west wall of the Shahs' home would have moved far in excess of the one-quarter-inch limit (*id.*, ¶ 11). In addition, he claims that the documents defendants produced in discovery show that cracks and monitoring points were not measured with sufficient frequency (*id.*, ¶ 12). During an inspection of the Shahs' home, he observed cracking throughout the house, misaligned windows and doors, and cracking and settling of the exterior walls and back patio (*id.*, ¶ 17). He concludes that these damages were caused by "settlement of the west wall of [the Shahs'] home and of the soils beneath their patio, which was caused by defendants' excavation and shoring activities immediately west of and below plaintiffs' property" (*id.*, ¶ 18).

On November 21, 2014, the DOB issued Tri-Star a notice of violation for violating New York City Building Code [Administrative Code of City of NY tit 28, ch 7] § BC 3309.4 (Administrative Code § 3309.4 (Shah reply aff dated 2/28/17, exhibit B, certified copy of notice of violation).[1] Specifically, Tri-Star failed "to preserve and protect [the] adjoining structure affected by [its] excavation operation" (*id.* at 1). Numerous cracks were observed in the Shahs' home by a DOB inspector (*id.*). As a result, the DOB issued a stop work order for the excavation (*id.*). As part of the process of responding to the notice and getting the stop work order lifted, Van Leeuwen avers that he wrote a letter to the New York City Environmental Control Board, dated November 24, 2014, stating that the cracks noted in the notice "in no way jeopardize the safety of the structure" (Van Leeuwen aff, ¶ 17). Further, he wrote, "[a]ll necessary measures were taken to ensure the structural stability of the adjacent properties" (*id.*, ¶ 18).

On December 2, 2014, Tri-Star's project manager, Kevin Muessig, responded to the notice by affidavit, in which he admitted "the existence of the violation(s) charged" (Shah aff, exhibit H, Tri-Star affidavit dated 12/2/14, § 3). Prior to the hearing on the violation, Tri-Star signed a prehearing stipulation offer from the DOB, in which Muessig admitted that "the facts stated [in the notice] are true" (Shah aff, exhibit I, prehearing stipulation dated 1/8/15).

Shortly after the DOB issued the notice of violation, Bronzino notified Urban and Tri-Star that water was infiltrating the underpinning (Van Leeuwen aff, ¶ 18). Between December 11, 2014, and March 25, 2015, Van Leeuwen wrote to Muessig regarding the increasing water infiltration problems, which were found to be attributable to city water rather than natural ground water (*id.*, ¶¶ 19-22, 24). Van Leeuwen further avers that Tri-Star, RA, and Abelow Sherman were "well aware that water was entering our excavation[,] which caused us hardship beyond what could have been anticipated" (*id.*, ¶ 26). Finally, he states that Urban, Tri-Star, Abelow Sherman, and RA "all

[1] Defendants argue that the violation summary proffered by plaintiffs refers to Administrative Code § 2309.4, not 3309.4 (Shah aff, exhibit G, Environmental Control Board [ECB] violation summary). However, the certified copy of the notice of violation annexed to plaintiffs' reply papers clearly shows a violation of Administrative Code § 3309.4.

worked as a team over the life of the project to perform the work safely and according to the building code as necessary to protect adjoining structures" (*id.*, ¶ 27). By contrast, as stated above, Tri-Star and RA deny any responsibility for the excavation. Further, David Abelow, Abelow Sherman's principal, avers that Abelow Sherman did not "design, perform, direct, inspect or supervise any excavation and /or support of excavation activities on the [p]roject, including underpinning, sheeting, shoring or bracing of adjacent properties during excavation activities" (Abelow aff, ¶ 6).

The Instant Action

On June 24, 2015, plaintiffs commenced this action against defendant 20 East (NYSCEF Doc. No. 1, complaint dated 6/24/15). In addition, plaintiffs moved, by order to show cause, to enjoin 20 East and anyone acting on its behalf from further construction on the project within 10 feet of plaintiffs' property, and from entering plaintiffs' property at all (NYSCEF Doc. No. 14, order to show cause dated 6/24/15). On July 1, 2015, the court (Kenney, J.) held a hearing on the motion (NYSCEF Doc. No. 26, tr dated 7/1/15). Plaintiff Hemant Shah and Tri-Star's representative, Muessig, testified as witnesses (*id.*). On September 14, 2015, the court denied plaintiffs motion and vacated its temporary restraining order (NYSCEF Doc. No. 27, order dated 9/14/15).

On October 12, 2015, plaintiffs filed an amended complaint against all defendants (NYSCEF Doc. No. 28, amended complaint dated 10/12/15). The amended complaint asserts six causes of action: statutory strict liability against all defendants (first cause of action); negligence against all defendants (second cause of action); nuisance against all defendants (third cause of action); breach of contract against 20 East (fourth cause of action); contractual indemnification against 20 East (fifth cause of action); and trespass against 20 East and Tri-Star (sixth cause of action).

On November 3, 2015, Urban answered the amended complaint and asserted a cross claim against 20 East, Tri-Star, Abelow Sherman, and RA for common-law indemnification and contribution (NYSCEF Doc. No. 32, Urban answer dated 11/3/15). On December 11, 2015, RA answered

the complaint and asserted three cross claims: contractual indemnification against 20 East (first cross claim); common-law indemnification against all codefendants (second cross claim); and contribution against all codefendants (third cross claim) (NYSCEF Doc. No. 43, RA answer dated 12/11/15). The same day, Tri-Star answered the complaint and asserted six cross claims against Urban for common-law indemnification, contribution, contractual indemnification, failure to procure insurance, and insurance coverage (NYSCEF Doc. No. 44, Tri-Star answer dated 12/11/15). Tri-Star also separately asserted cross claims for contribution, common-law indemnification, and contractual indemnification against 20 East, Abelow Sherman, and RA (*id.*). On December 15, 2015, 20 East answered the complaint and asserted four cross claims against all codefendants: contribution (first cross claim), common-law indemnification (second cross claim), contractual indemnification (third cross claim); and failure to procure insurance (fourth cross claim) (NYSCEF Doc. No. 45, 20 East answer and consolidated demands dated 12/15/15). Finally, on December 17, 2015, Abelow Sherman answered the complaint and alleged three cross claims against all codefendants: contribution and/or indemnification (first cross claim); contractual indemnification (second cross claim); and failure to procure insurance (third cross claim).

A preliminary conference was held in this action on January 21, 2016 (Winterstein affirmation dated 1/25/17, exhibit F, preliminary conference order dated 1/21/16). The order provided that depositions be completed on or before June 30, 2016 (*id.* at 2). At a compliance conference on August 25, 2016, the court determined that defendants had not taken plaintiffs' depositions, and ordered that post-note of issue discovery was permitted, to be completed within 45 days of plaintiffs' deadline to file a note of issue on October 28, 2016 (Winterstein affirmation, exhibit G, compliance conference order dated 8/25/16 at 1-2).

On September 15, 2016, plaintiffs filed a note of issue and certificate of readiness for trail, stating that all necessary discovery was complete, save for post-note discovery as previously provided (Winterstein affirmation, exhibit H, note of issue dated 9/15/16 at 2). Shortly thereafter, Tri-Star moved to vacate the note of issue, and to extend defendants' time to file dispositive motions

(NYSCEF Doc. No. 119, notice of motion dated 9/30/15). 20 East then cross-moved for the same relief, as well as to compel all parties to complete discovery, and to stay the trial of this action until all discovery is completed (NYSCEF Doc. No. 128, notice of cross motion dated 10/4/16). On December 2, 2016, the court denied the motion and cross motion, holding that the court had adequately planned for post-note discovery, and further ordering the parties to complete discovery "forthwith" (NYSCEF Doc. No. 159, order dated 12/2/16). Subsequently, the parties filed the instant motions.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Preliminary Matters

Those branches of 20 East and Tri-Star's motions for partial summary judgment dismissing the third cause of action for nuisance are granted without opposition (NYSCEF Doc. No. 316, Roberts

affirmation dated 2/22/17, ¶ 3; NYSCEF Doc. No. 325, Roberts affirmation dated 2/22/17, ¶ 3). Similarly, plaintiffs do not oppose those branches of RA's and Abelow Sherman's motions for summary judgment dismissing the amended complaint against them in its entirety. Accordingly, those branches of RA's and Abelow Sherman's motions are granted. As the complaint is dismissed against RA and Abelow Sherman, they have no need of contractual indemnification, as there will not be a liability finding against them. Accordingly, those branches of RA and Abelow Sherman's motions for summary judgment on their cross claims for contractual indemnification are dismissed as moot.

As to the cross claims, the following branches of the consolidated motions are unopposed

1. 20 East's motion for summary judgment dismissing Tri-Star's cross claims for contribution, indemnification, and contractual indemnification, and Abelow Sherman's cross claims for contribution, indemnification, contractual indemnification, and failure to procure insurance;

2. Tri-Star's motion for summary judgment dismissing RA's cross claims for contribution and indemnification, and Abelow Sherman's cross claims for contribution, indemnification, contractual indemnification, and failure to procure insurance;

3. RA's motion for summary judgment dismissing 20 East's cross claims for contribution, indemnification, contractual indemnification, and failure to procure insurance; Tri-Star's cross claims for contribution, indemnification, and contractual indemnification; and Abelow Sherman's cross claims for contribution, indemnification, contractual indemnification, and failure to procure insurance;

4. Abelow Sherman's motion for summary judgment dismissing 20 East's cross claims for contribution, indemnification, contractual indemnification, and failure to procure insurance; Tri-Star's cross claims for contribution, indemnification, and contractual indemnification; and RA's cross claims for contribution and indemnification.

Accordingly, those branches of the consolidated motions are granted, and those cross claims are dismissed.

The remaining issues are currently before the court:

1. Plaintiffs' motion for summary judgment on their first and fifth causes of action (mot. seq. No. 004);

2. 20 East's motion for summary judgment dismissing the complaint's second and sixth causes of action and Urban and RA's cross claims, as well as summary judgment on its cross claims for contractual and common-law indemnification against Tri-Star and Urban (mot. seq. No. 005);

3. Tri-Star's motion for summary judgment dismissing the complaint's second and sixth

causes of action and 20 East and Urban's cross claims, as well as summary judgment on its cross claim for contractual indemnification against Urban (mot. seq. No. 006);

4. RA's motion for summary judgment dismissing Urban's cross claims (mot. seq. No. 007); and

5. Abelow Sherman's motion for summary judgment dismissing Urban's cross claims (mot. seq. No. 008).

The Shahs' Motion (Mot. Seq. No. 004)

Statutory Strict Liability (First Cause of Action)

In their first cause of action, plaintiffs assert that 20 East, Urban, and Tri-Star violated Administrative Code §§ 3309.1, 3309.4, and 3309.4.1 by failing to protect their home from damage during the excavation (amended complaint, ¶¶ 13-20).[2] Plaintiffs argue that they are entitled to summary judgment on this claim because Tri-Star admitted, in response to the notice of violation issued by the DOB, that the excavation had caused damage to the property. The damage to the house, plaintiffs state, is attested to in the unopposed affidavit of their expert, Cornelius.

In response, defendants make several arguments. Urban argues that the motion is premature, as no depositions have occurred, and post-deposition discovery is likely to be necessary. Further, Urban claims, the DOB notice of violation, responding affidavit, and pre-hearing stipulation (the DOB documents) relied on by plaintiffs are inadmissible hearsay, and, in any case, the record does not reflect that Urban failed to take all necessary precautions. 20 East and Tri-Star also argue that there are issues of fact as to their individual actions with respect to the excavation, precluding summary judgment. Tri-Star specifically points out that Cornelius' affidavit does not apportion liability among the defendants. Finally, Tri-Star also makes arguments similar to those of Urban with respect to necessary discovery and the admissibility of the documents relied on by plaintiffs.

[2] As stated above, RA's and Abelow Sherman's motions for summary judgment dismissing this claim are granted, as unopposed.

Generally speaking, properties and persons that adjoin construction sites "shall be protected from damage and injury during construction or demolition work" (Administrative Code § 3309.1). Administrative Code § 3309.4 provides that, "[w]henever soil or foundation work occurs, . . . the person who causes such to be made shall, at all times . . . and at his or her own expense, preserve and protect from damage any adjoining structures, including but not limited to footings and foundations." Further, "[t]he person causing the excavation shall support the vertical and lateral load of the adjoining structure by proper foundations, underpinning, or other equivalent means where the level of the foundations of the adjoining structure is at or above the level of the bottom of the new excavation" (Administrative Code § 3309.4.1).

Courts interpreting the predecessor statute to Administrative Code § 3309.4 have imposed strict liability on owners, general contractors, and excavation subcontractors who excavate a property in a manner that damages an adjacent property (*Yenem Corp. v 281 Broadway Holdings*, 18 NY3d 481, 490-491 [2012]; *Fagan v Pathe Indus., Inc.*, 274 App Div 703, 706 [1st Dept 1949] ["The general contractor also, in Diesel's position, is now held responsible for the discharge of this duty"]). Absolute liability applies regardless of the level of care used by the defendants; "[w]hen the facts bring the case within the statute, the duty and liability which the statute imposes is absolute and unqualified" (*Yenem Corp.*, 18 NY3d at 490 [internal quotation marks and citation omitted]).

Here, the record reflects that plaintiffs have made out a prima facie case that their home was damaged by the excavation work carried out by Urban, at 20 East's behest. It is undisputed that 20 East, through Tri-Star, retained Urban to conduct the excavation as part of the renovation of 20 East's property (*see* Shah aff, exhibit F, Urban excavation proposal at 1; Hymowitz aff, ¶¶ 7-8). The affidavits of Hemant Shah and Cornelius, plaintiffs' expert, as well as the pre-construction survey attached thereto, show that plaintiffs' home suffered damage as a result of the excavation. Specifically, Cornelius observed cracking throughout the house, misaligned windows and doors, and cracking and settling of the exterior walls and back patio (Cornelius aff, ¶ 17). Further Cornelius

concludes that these damages were caused by "settlement of the west wall of [the Shahs'] home and of the soils beneath their patio, which was caused by defendants' excavation and shoring activities immediately west of and below plaintiffs' property" (*id.*, ¶ 18). Indeed, Urban's engineer, Van Leeuwen, bolsters this position in his affidavit, where he avers that the water infiltrating the job site "may contribute to the settlements of the installed jacked piles" beneath the Shah's home (Van Leeuwen aff, ¶ 18).

In opposition, 20 East and Urban fail to raise a material issue of fact requiring trial. 20 East offers its own expert's opinion, that any damage to plaintiffs' house was not caused by the excavation. The expert's report, however, is not sworn to under penalty of perjury, and therefore does not constitute evidence in admissible form (*Accardo v Metro-North R.R.*, 103 AD3d 589, 589 [1st Dept 2013] ["The expert's report, submitted in support of defendant's motion, was unsworn, and thus, not in admissible form"]; *Marden v Maurice Villency, Inc.*, 29 AD3d 402, 403 [1st Dept 2006] ["Instead, they opposed the motion with the unsworn report of an interior designer. Since the contents of the report were not in admissible form, they were of no evidentiary value"]). Further, the court need not consider Urban's arguments regarding the admissibility of the notice of violation and accompanying documents, as plaintiffs' affidavits are sufficient to make out a prima facie case. Moreover, Urban's defense, that they undertook all necessary precautions to avoid damage, is irrelevant; the regulation imposes liability regardless of "the degree of care exercised" (*Yenem Corp.*, 18 NY3d at 490 [internal quotation marks and citations omitted]).

Finally, Urban argues that further discovery is needed in order to oppose plaintiffs' motion. Urban's argument, however, is entirely conclusory. CPLR 3212 (f) does provide that "the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had" if the nonmoving party shows that "facts essential to justify opposition may exist but cannot then be stated." However, Urban fails to "identify what information is in the exclusive control of plaintiff[s] that would raise a material issue of fact" (*Erkan v McDonald's Corp.*, 146 AD3d 466, 467 [1st Dept 2017]). A "claimed need for discovery without some evidentiary basis suggesting

that discovery may lead to relevant evidence is insufficient to avoid the grant of summary judgment" (*Cioe v Petrocelli Elec. Co., Inc.*, 33 AD3d 377, 378 [1st Dept 2006]). Indeed, as the issue here relates to Urban's liability for excavating below the level of plaintiffs' home, any relevant information would be in Urban's possession (*Avant v Cepin Livery Corp.*, 74 AD3d 533, 534 [1st Dept 2010] [internal citation omitted] ["depositions are not needed since the opponents of the motion had personal knowledge of the facts, and failed to meet their obligation of laying bare their proof and presenting evidence sufficient to raise a triable issue of fact"]). Moreover, Urban does not deny that it was the excavation subcontractor, and liability under Administrative Code § 3309.4 attaches regardless of Urban's "degree of care" (*Yenem Corp.*, 18 NY3d at 490 [internal quotation marks and citation omitted]). Thus, Urban fails to show that discovery would yield evidence necessary to oppose the motion that cannot now be stated.

Plaintiff has not, however, made out a prima facie case against Tri-Star. Liability under the Administrative Code extends to "the person who made the decision to excavate [and] the contractor who carried out the physical excavation work" (*American Sec. Ins. Co. v Church of God of St. Albans*, 131 AD3d 903, 905 [2d Dept 2015]). Here, those parties are 20 East and Urban, respectively. Plaintiffs do not offer any evidence that Tri-Star actually performed or supervised any of the excavation work, or that Tri-Star made the decision to excavate. Tri-Star was retained as construction manager, but plans for the project had already been commissioned from Abelow Sherman at 20 East's behest, including the plans for the excavation (Donato affirmation, exhibit H, Abelow Sherman agreement at 1). The documents proffered by plaintiffs do not state that Tri-Star was the entity that performed the work, and Tri-Star's response to the notice of violation indicates that Urban was the entity responsible for the excavation (Shah aff, exhibit H, Tri-Star affidavit dated 12/2/14, § 2). At best, the documents are probative of Tri-Star's admission that there was an excavation by Urban, and that plaintiffs' house was damaged. Nothing in any of the DOB documents attributes fault to Tri-Star. Administrative Code § 3309.4 is specific as to who may be liable, and upon this record, plaintiffs fail to raise an issue of fact as to whether Tri-Star "carried out the physical excavation

work" (*American Sec. Ins. Co.*, 131 AD3d at 905). To the extent that Tri-Star allegedly supervised some portion of Urban's excavation work, such supervision is not relevant to Tri-Star's potential liability under the Administrative Code.

Accordingly, that branch of plaintiffs' motion, which seeks partial summary judgment as to liability on the first cause of action for statutory strict liability, is granted against 20 East and Urban, but denied against Tri-Star.

Contractual Indemnification (Fifth Cause of Action)

For their fifth cause of action, plaintiffs seek contractual indemnification from 20 East, including attorneys' fees, arising from 20 East's breach of the License agreement, in failing to ensure that their home was safeguarded. 20 East argues that plaintiffs cannot seek indemnification for their own damages, as the indemnification provision is only meant to protect plaintiffs from third-party claims. Further, 20 East states that the License agreement provides that 20 East will repair any damages caused by its contractors, either directly or by paying for another party to do so (License agreement, ¶ 19), and that this provision is plaintiffs' exclusive remedy for damage to their house.

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.,* 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). To support a claim for attorneys' fees incurred in litigation between the parties to a contract, an indemnification clause must be "exclusively or unequivocally referable to claims between the parties themselves or support an inference that defendant promised to indemnify plaintiff for counsel fees in an action on the contract" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 492 [1989]).

Here, the plain language of the indemnification requires 20 East to indemnify plaintiffs from, inter alia, "damages . . . including reasonable attorneys' fees . . . incurred by Shah . . . arising from . . . (iii) [20 East]'s breach of any of its obligations under [the License agreement]" (License

agreement, ¶ 18). This language can only refer to a direct claim by plaintiffs against 20 East for damages, as the License agreement clearly states it covers expenses incurred by Shah based on 20 East's breach of the License agreement. Moreover, the repair provision provides that 20 East will "cause its contractors to promptly repair, or . . . compensate Shah (in advance of the performance of the work) for any . . . repairs . . . required as a result of damages caused by the [excavation]" (*id.*, ¶ 19). The License agreement, however, nowhere provides that this provision is plaintiffs' exclusive remedy. As such, plaintiffs are entitled to contractual indemnification. As plaintiffs' breach of contract claim, which is its fourth cause of action against 20 East, remains to be tried, such finding is conditional.

20 East's reliance on *Gotham Partners, L.P. v High Riv. Ltd. Partnership* (76 AD3d 203 [1st Dept 2010], *lv denied* 17 NY3d 713 [2011]) is unavailing. In *Gotham Partners*, the Appellate Division, First Department, reversed a ruling that the plaintiff was entitled to attorneys' fees on its direct claims against the defendant pursuant to an indemnification clause (*id.* at 206). Specifically, the court held that "[t]he quoted provision at issue here is simply not so unequivocally referable to a breach of contract claim by plaintiffs against High River" (*id.* at 207). The indemnification provision at issue there, however, explicitly provided that "such obligation of [High River] shall not arise out of the entry of the parties into this Agreement or any breach by [Gotham] of any of [its] representations, warranties, covenants or agreements hereunder" (*id.* at 205). Here, by contrast, the language of the indemnification provision explicitly provides for 20 East to indemnify plaintiffs based on 20 East's breach of the License agreement.

Accordingly, that branch of plaintiffs' motion, which seeks partial summary judgment as to liability on the fifth cause of action for contractual indemnification is granted conditionally, pending a finding of liability on plaintiffs' claim for breach of contract (fourth cause of action).

20 East's Motion (Mot. Seq. No. 005)

Negligence (Second Cause of Action)

For their second cause of action for negligence, to the extent asserted against 20 East, plaintiffs allege that 20 East owed them a duty to exercise reasonable care in protecting plaintiffs' property from damages caused by the excavation, which 20 East failed to do (amended complaint, ¶¶ 22-25). 20 East argues that it was a non-supervising owner, and had no control over, or part in conducting, the excavation. Thus, 20 East claims it cannot be liable. In opposition, plaintiffs argue that 20 East expressly assumed liability in the License agreement for its contractor's and subcontractors' work. Further, plaintiffs claim, 20 East is liable for its contractor's and subcontractors' actions because the excavation was inherently dangerous. Finally, plaintiffs' assert, 20 East violated Administrative Code § 3309.4, making them negligent per se.

"In order to prevail on a negligence claim, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016], *rearg denied* 28 NY3d 956 [2016] [internal quotation marks and citation omitted]). "As an adjacent land owner, [20 East] owed [plaintiffs] a duty to exercise reasonable care in the maintenance of its property to prevent foreseeable injury that might occur on the adjoining property" (*Associated Mut. Ins. Coop. v 198, LLC*, 78 AD3d 597, 597 [1st Dept 2010] [internal quotation marks and citation omitted). "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]). However, "where the employer . . . has assumed a specific duty by contract . . . [or] is under a duty to keep premises safe," an employer may be vicariously liable (*Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 668 [1992], *rearg dismissed* 82 NY2d 825 [1993]).

As an initial matter, to the extent that plaintiffs base this claim on defendants' violation of

Administrative Code § 3309.4, it is impermissibly duplicative of the first cause of action, as it arises from the same facts and seeks the same damages (*e.g. Soni v Pryor,* 102 AD3d 856, 858 [2d Dept 2013]). Beyond that, plaintiffs allege that 20 East failed to exercise reasonable care in overseeing the construction. 20 East points out that it had no active involvement with the excavation beyond hiring Tri-Star as the construction manager (Hymowitz Aff, ¶¶ 7-9). Specifically, 20 East's principal, Hymowitz, avers that 20 East did not perform, direct, or control any architectural services (*id.*, ¶¶ 20-21), construction (*id.*, ¶ 27), underpinning or excavation work (*id.*, ¶¶ 30, 32, 36), or geotechnical services as related to the project (*id.*, ¶¶ 31, 33, 37).

In response, however, plaintiffs correctly point out that, under the License agreement, 20 East agreed to be responsible for "the failure of [Tri-Star] and all other subcontractors . . . to take all necessary and proper measures" to safe guard plaintiffs' home (License agreement, ¶ 14). Moreover, as set forth above, 20 East had "a duty to exercise reasonable care in the maintenance of its property to prevent foreseeable injury that might occur on the adjoining property" (*Associated Mut. Ins. Coop.*, 78 AD3d at 597 [internal quotation marks and citation omitted]). Thus, 20 East may be "vicariously liable for the fault of the independent contractor because a legal duty is imposed on it which cannot be delegated," both by assuming such a duty under the License agreement, and as a neighboring landowner (*Rosenberg*, 79 NY2d at 668). As set forth further below, there are issues of fact in the record as to whether Tri-Star was negligent with respect to its conduct and participation in the excavation work. Moreover, while Urban sharply disputes that it was negligent, averring that it undertook all necessary safety precautions (Van Leeuwen aff, ¶ 17), plaintiffs' expert, Cornelius, states that the damage to plaintiffs' home was caused by the excavation (Cornelius aff, ¶ 18). Because issues of fact exist as to both Urban and Tri-Star's alleged negligence, 20 East may still be vicariously liable if either party is found negligent.

Accordingly, that branch of 20 East's motion for partial summary judgment dismissing the second cause of action for negligence is denied.

Trespass (Sixth Cause of Action)

For their sixth cause of action, plaintiffs assert that, though the License agreement has long since expired, the underpinning installed by Urban during the excavation remains under their property without their permission (amended complaint, ¶ 43). Thus, plaintiffs claim, 20 East and Tri-Star are continuously trespassing on their land (*id.*, ¶¶ 43-44). 20 East argues that the License agreement specifically contemplates the installation of underpinning, and it does not specify that the underpinning need be removed after construction is complete. Moreover, 20 East claims that the underpinning is currently supporting plaintiffs' home. In opposition, plaintiffs argue that the license agreement does not allow for any permanent installation on plaintiffs' property.

"Trespass is the invasion of a person's right to exclusive possession of his land, and includes the entry of a substance onto land" (*Berenger v 261 W. LLC*, 93 AD3d 175, 181 [1st Dept 2012] [internal citations omitted]). "Trespass does not require an intent to produce the damaging consequences, merely intent to perform the act that produces the unlawful invasion" (*id.*). "A license, within the context of real property law, grants the licensee a revocable non-assignable privilege to do one or more acts upon the land of the licensor, without granting possession of any interest therein" (*Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001]).

Here, the License agreement explicitly contemplates the installation of underpinning, which, by its nature, is permanent (License agreement, exhibit A, scope of work and foundation plans). Indeed, pursuant to the License agreement, plaintiffs had an opportunity to review and approve all "foundation and structural drawings" (*id.*, ¶ 2). Further, the License agreement does not provide that the protective measures installed as part of the excavation, outside of external scaffolding, must be removed after the License agreement expires (*id.*, ¶ 7). Finally, the License agreement contains a merger clause, providing that it is the "entire understanding between the parties relative to the

[w]ork . . . and may not be amended, supplemented or discharged except by an instrument in writing signed by both parties" (*id.*, ¶ 25). To the extent that plaintiffs believed that the underpinning was only temporary, such understanding is inadmissible to vary the terms of the License agreement (*e.g. West 63 Empire Assoc., LLC v Walker & Zanger, Inc.*, 107 AD3d 586, 586–87 [1st Dept 2013]).

The cases cited by plaintiffs in opposition are distinguishable. In two of them, the court denied a license issued pursuant to RPAPL 881,[3] because such license could not be issued for permanent encroachments (*see Matter of Tory Burch LLC v Moskowitz*, 146 AD3d 528, 529 [1st Dept 2017]; *Matter of Broadway Enters., Inc. v Lum*, 16 AD3d 413, 414 [2d Dept 2005]). In the third, the parties had come to an agreement on a pre-excavation inspection, but not on the installation of the underpinning (*Madison 96th Assoc., LLC v 17 E. 96th Owners Corp.*, 121 AD3d 605, 607 [1st Dept 2014]). The court held that, in the absence of the appellant's consent, the respondent did not have the right to install underpinning under the appellant's property, even if the installation was meant to comply with the predecessor to Administrative Code § 3309.4 (*id.* at 608). Here, by contrast, not only did the parties have an agreement, but it explicitly contemplated the installation of underpinning, as reflected in the plans. Accordingly, that branch of 20 East's motion for summary judgment dismissing the sixth cause of action for trespass is granted.

Urban's Cross Claim

Urban cross claims against 20 East for common-law indemnification and contribution. 20 East moves for summary judgment dismissing this cross claim because it was not actively negligent. Urban argues that there are issues of fact as to 20 East's alleged negligence, and further discovery is required to determine the extent of 20 East's negligence.

[3] "When an owner or lessee seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made by the owner or lessee without entering the premises of an adjoining owner or his lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may commence a special proceeding for a license so to enter" (RPAPL 881).

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]). "Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003], *lv dismissed* 100 NY2d 614 [2003] [internal quotation marks and citations omitted]).

As an initial matter, Urban's argument that more discovery is necessary is flawed. Urban itself admits, in its argument, that it has no idea if 20 East was ever informed of conditions at the job site that may have contributed to plaintiffs' damages, specifically, that city water was entering the job site (White affirmation dated 2/22/17, ¶¶ 23, 27-28). A party may not oppose summary judgment, or establish that discovery is necessary to oppose such a motion, with speculation or conjecture (*Morgan v New York Tel.*, 220 AD2d 728, 729 [2d Dept 1995]; *Kennerly v Campbell Chain Co., Campbell Chain Div. McGraw-Edison Co.*, 133 AD2d 669, 670 [2d Dept 1987] ["Mere hope that somehow the plaintiffs will uncover evidence that will prove their case, provides no basis, pursuant to CPLR 3212 (f), for postponing a decision on a summary judgment motion"]).

Having said that, however, issues of fact exist as to both Urban's alleged negligence and 20 East's potential vicarious liability, as set forth above. Accordingly, as negligence findings are required for both indemnification and contribution, 20 East is not entitled to summary judgment dismissing this cross claim (*Godoy*, 302 AD2d at 61; *Reilly v DiGiacomo & Son*, 261 AD2d 318, 318 [1st Dept 1999] ["The owners' cross motion was properly denied because, although no issues of fact exist as to the purely vicarious nature of their liability, their evidence does not establish, as a matter of law, that the general contractor was either negligent or exclusively supervised and controlled plaintiffs' work site"]), and that branch of 20 East's motion for summary judgment is denied.

RA's Cross Claims

RA cross claims for contractual indemnification, common-law indemnification, and contribution against 20 East. 20 East moves for summary judgment dismissing these cross claims on the grounds that 20 East was not actively negligent. As set forth above, the complaint against RA is dismissed. Therefore, RA is not entitled to indemnification or contribution, as there will be no finding of liability against it. Accordingly, that branch of 20 East's motion for summary judgment dismissing RA's cross claims is granted.

Common-Law Indemnification against Tri-Star and Urban

20 East asserts that it is entitled to conditional common-law indemnification against Urban and Tri-Star. Specifically, 20 East argues that it was not itself negligent; that it delegated responsibility for the excavation to Tri-Star and Urban; and that it did none of the work. In opposition, Tri-Star argues that it was not negligent, either. Urban argues that there are issues of fact as to 20 East's alleged negligence, and further discovery is required to determine the extent of 20 East's negligence.

A party may seek a conditional indemnification order prior to resolving the main action, so long as there are no issues of fact as to that party's active negligence (*Callan v Structure Tone, Inc.*, 52 AD3d 334, 335 [1st Dept 2008] ["While the parties incorporated saving language in the indemnification clause . . . , there are issues of fact as to the extent of defendant's liability for causing the worker's injury"]).

Urban's argument, that more discovery is needed, is unavailing for the reasons set forth above. Moreover, as set forth in relation to that branch of the motion for summary judgment dismissing plaintiffs' claim for negligence, 20 East will only be liable vicariously for negligence, and thus may seek conditional indemnification (*Callan*, 52 AD3d at 335). Accordingly, that branch of

20 East's motion for summary judgment on its cross claim against Tri-Star and Urban for conditional common-law indemnification is granted.

Contractual Indemnification against Urban

20 East asserts that it is entitled to conditional contractual indemnification from Urban, pursuant to the subcontract between Urban and Tri-Star. Pursuant to that contract, Urban agreed to indemnify 20 East, as owner, from any claims arising out of Urban's excavation work (Shah aff, exhibit F, AIA Form Subcontract, § 4.6.1). 20 East argues that, as it had no part in the excavation work, it can only be vicariously liable, and, therefore, is entitled to conditional contractual indemnification from Urban. In opposition, Urban argues that there are issues of fact as to 20 East's alleged negligence, and further discovery is required to determine the extent of 20 East's negligence.

Urban's argument, that more discovery is needed, suffers from the same flaw as with regard to 20 East's cross claim for common-law indemnification, and 20 East's remains only potential vicariously liable for negligence. Accordingly, that branch of 20 East's motion for summary judgment on its cross claim against Urban for conditional contractual indemnification is granted.

Tri-Star's Motion (Mot. Seq. No. 006)

Negligence (Second Cause of Action)

For their second cause of action for negligence, to the extent asserted against Tri-Star, plaintiffs assert that Tri-Star owed plaintiffs a duty of care, which it breached in its "conducting and/or participating in excavation work" (amended complaint, ¶¶ 22-23). Tri-Star argues that it had no part of the excavation work, and, therefore, cannot be liable for any of its codefendants' alleged negligence in excavating and conducting geotechnical testing beneath plaintiffs' house. In opposition, plaintiffs argue that Tri-Star controlled and directed all work on the site, and therefore cannot claim that it was not actively negligent. Finally, plaintiffs' assert, Tri-Star violated Administrative Code § 3309.4, making them negligent per se.

As with the negligence claim against 20 East, to the extent that plaintiffs base this claim on Tri-Star's violation of Administrative Code § 3309.4, it is impermissibly duplicative of the first cause of action, as it arises from the same facts and seeks the same damages (*e.g. Soni,* 102 AD3d at 858). That issue aside, Tri-Star has established prima facie that it was not negligent. Muessig, Tri-Star's project manager, avers that 20 East did not perform, direct, or control any architectural services (Muessig aff, ¶¶ 17-18), underpinning or excavation work (*id.*, ¶¶ 14-15, 23), or geotechnical services related to the project (*id.*, ¶¶ 20, 22). Further, pursuant to the subcontract between Tri-Star and Urban, Tri-Star was not to "give instructions or orders directly to [Urban's] employees . . . unless such persons are designated as authorized representatives of the subcontractor" (Shah aff, exhibit F, AIA Form Subcontract, § 3.2.2), and Urban was to supervise and direct its own work (*id.*, § 4.1.1).

In response, plaintiffs fail to raise a material issue of fact. Plaintiffs rely on the DOB documents. As discussed in relation to the first cause of action, however, plaintiffs' reliance on the DOB notice of violation and related documents is unavailing. Plaintiffs also rely on the affidavit of their expert, Cornelius, which they argue is sufficient to show proximate cause. Cornelius' affidavit, however, does not differentiate among the defendants in terms of assigning blame. Instead, he avers that, in his professional opinion, "the damage was caused by settlement of the West wall of plaintiffs' home and of the soils beneath their patio, which was caused by defendants' excavation and shoring activities immediately west of and below plaintiffs' property" (Cornelius aff, ¶ 18). Thus, Cornelius's affidavit is insufficient to hold Tri-Star liable specifically, as it does not show what actions Tri-Star took or failed to take.

Finally, while plaintiffs are correct that the general conditions applicable to and incorporated by reference into Tri-Star's contract with 20 East provide that Tri-Star would have "control over, construction means, methods, techniques, sequences and procedures" the same provision also provides that the contract documents related to the project may "give other specific instructions concerning these matters" (Roberts affirmation, exhibit A, AIA General Conditions, § 3.3.1). As set

forth above, the subcontract between Urban and Tri-Star provides that Urban will supervise and direct its own work.

While plaintiffs fail to raise a material issue of fact, Urban's opposition to the consolidated motions does. Van Leeuwen, Urban's principal, avers that Tri-Star retained Bronzino as special inspector for excavation and related work, in which capacity Bronzino supervised Urban daily (Van Leeuwen aff, ¶ 15). Further, Tri-Star "employed a full-time superintendent . . . to supervise [Urban's] work" (*id.*, ¶ 16). Finally, Tri-Star "oversaw, supervised, managed, and at times controlled [Urban's] work" (*id.*, ¶ 28). Thus, there is an issue of fact related to Tri-Star's involvement with the excavation that precludes summary judgment. Accordingly, that branch of Tri-Star's motion for partial summary judgment dismissing the second cause of action for negligence is denied.

Trespass (Sixth Cause of Action)

As set forth above, the sixth cause of action asserts a continuing trespass by 20 East and Tri-Star related to the underpinning under plaintiffs' wall. For the reasons set forth above in granting summary judgment and dismissing this cause of action against 20 East, Tri-Star also is entitled to summary judgment. Accordingly, that branch of Tri-Star's motion for partial summary judgment dismissing the sixth cause of action for trespass is granted.

20 East's Cross Claims

20 East asserts cross claims for contractual indemnification, common-law indemnification, contribution, and failure to procure insurance against Tri-Star. Tri-Star argues that these claims should be dismissed because it was not actively negligent, and had no control over, or involvement with, Urban's excavation. In opposition, 20 East argues that, as it was not actively negligent and had nothing to do with the excavation, Tri-Star and Urban will be responsible for any damages to plaintiffs' house caused by the excavation. Neither party submits any information regarding Tri-Star's insurance, or lack thereof.

As set forth above, the court has granted 20 East conditional common-law indemnification against Tri-Star, and accordingly Tri-Star's motion for summary judgment dismissing that cross claim is denied. Moreover, there exist issues of fact as to Tri-Star's alleged negligence. As 20 East's cross claims for indemnification and contribution require findings of negligence against Tri-Star, and as there is a question as to the degree of supervision provided by Tri-Star and Tri-Star's inspector, Bronzino, with respect to Urban's excavation work that branch of Tri-Star's motion for summary judgment dismissing those cross claims is denied (*Godoy*, 302 AD2d at 61; *Reilly*, 261 AD2d at 318). Further, since the record is devoid of any information regarding Tri-Star's insurance coverage, that branch of Tri-Star's motion for summary judgment dismissing the failure to procure insurance cross claim is also denied.

Urban's Cross Claim

Urban cross claims against Tri-Star for common-law indemnification and contribution. Tri-Star moves for summary judgment dismissing this cross claim because it was not actively negligent. Urban argues that there are issues of fact as to Tri-Star's alleged negligence, and further discovery is required to determine the extent of Tri-Star's negligence.

As set forth above, there are issues of fact in the record with respect to Tri-Star's alleged negligence. Thus, Tri-Star cannot make out a prima facie case that this cross claim should be dismissed (*Reilly*, 261 AD2d at 318), regardless of the state of discovery in this action. Accordingly, that branch of Tri-Star's motion for summary judgment dismissing Urban's sole cross claim is denied.

Contractual Indemnification against Urban

Tri-Star asserts that it is entitled to conditional contractual indemnification from Urban pursuant to the subcontract between Urban and Tri-Star. Pursuant to that contract, Urban agreed to indemnify Tri-Star for any claims arising out of Urban's excavation work (Shah aff, exhibit F, AIA

Form Subcontract, § 4.6.1). Tri-Star argues that, as it had no part in the excavation work, it can only be vicariously liable, and, therefore, is entitled to conditional contractual indemnification from Urban. In opposition, Urban argues that there are issues of fact as to Tri-Star's alleged negligence, and further discovery is required to determine the extent of Tri-Star's negligence.

Urban's argument, that more discovery is needed, suffers from the same flaw as with regard to 20 East's cross claims. Having said that, however, as set forth above, there are issues of fact relating to Tri-Star's potential liability. Thus, Tri-Star is not currently entitled to a conditional judgment on its contractual indemnification cross claim (*Reilly*, 261 AD2d at 318). Accordingly, that branch of Tri-Star's motion for summary judgment on its cross claim against Urban for contractual indemnification is denied.

RA's Motion (Mot. Seq. No. 007)

The remaining branch of RA's motion is for summary judgment dismissing Urban's cross claim for common-law indemnification and contribution. RA argues that it was not actively negligent in conducting its investigation and did not cause any damage to plaintiffs' home, and, thus, cannot be liable for indemnification or contribution. In opposition, Urban argues that RA was negligent, because its report on subsurface conditions regarding the amount of water that would enter the job site was incorrect. Further, Urban asserts, discovery is needed to establish the extent of RA's alleged negligence.

Here, RA's expert, Papathanasiou, avers that, in his professional opinion, RA's work and efforts "conformed with the standard of care, skill and judgment usually exercised by a geotechnical engineer with respect to a project of this kind" (Papathanasiou aff, ¶¶ 12, 23). In response, Urban argues that significantly more groundwater entered the work site than was called for in RA's report. Urban asserts that there is an issue of fact as to whether RA was negligent in reporting that groundwater infiltration would be "manageable using sumps and pumps" (Papp aff, exhibit D, Report of Geotechnical Investigation at 6). Urban's own evidence, however, shows that RA's report was not

incorrect as to the amount of water that would enter the site. Specifically, Van Leeuwen, Urban's principal, testified that the water flowing into the site was not groundwater, but city water flowing out of the New York City water system (Van Leeuwen aff, ¶ 20). RA's report predicting groundwater infiltration has nothing to do with city water entering the site, and Urban provides no other evidence of negligence. As set forth above, Urban's speculative argument that more discovery might disclose other ways in which RA was negligent is insufficient to defeat the motion. Accordingly, that branch of RA's motion to dismiss Urban's cross claim for common-law indemnification and contribution is granted.

Abelow Sherman's Motion (Mot. Seq. No. 008)

The remaining branch of Abelow Sherman's motion is to dismiss Urban's cross claim for common-law indemnification and contribution. Abelow Sherman argues that this cross claim must be dismissed because it had no duty to safeguard plaintiffs' property and was not otherwise negligent in drafting its architectural plans. In opposition, Urban argues that Abelow Sherman was aware of water entering the job site, and further, that Abelow Sherman "worked as [part of] a team over the life of the project to perform the work safely and according to the building code as necessary to protect adjoining structures" (Van Leeuwen aff, ¶ 27).

Here, Abelow Sherman establishes that it had no part of the underpinning and excavation work on the project. Specifically, Abelow, Abelow Sherman's principal, avers that Abelow Sherman did not "design, perform, direct, inspect or supervise any excavation and /or support of excavation activities on the [p]roject, including underpinning, sheeting, shoring or bracing of adjacent properties during excavation activities" (Abelow aff, ¶ 6). Further, Abelow Sherman did not design or inspect any of the underpinning work, and had no obligation to do so (*id.*). Finally, while Abelow Sherman periodically inspected work at the job site, none of the work inspected was related to the excavation or underpinning.

In response, Urban argues that Abelow Sherman was aware of the water entering the site, and received reports of the various monitoring programs installed at plaintiffs' house. Urban fails, however, to show that Abelow Sherman would have been responsible for any part of the excavation, or for inspecting, supervising, or altering it. As such, Abelow Sherman's alleged awareness of water entering the site is entirely irrelevant, as is its receipt of monitoring reports. Similarly unavailing are Urban's arguments regarding changes that Abelow Sherman might have been required to make in response to hypothetical communications about the job site between Tri-Star and 20 East. As set forth above, a party may not oppose summary judgment, or obtain discovery delaying such motion, by offering speculation (*Morgan*, 220 AD2d at 729; *Kennerly*, 133 AD2d at 670). Accordingly, that branch of Abelow Sherman's motion to dismiss Urban's cross claim for common-law indemnification and contribution is granted.

CONCLUSION

Accordingly, it is hereby

ORDERED that motion sequence number 004 by plaintiff is granted to the following extent:

[1] plaintiffs are granted partial summary judgment on their first cause of action for statutory strict liability against 20 East and Urban on the issue of liability, only; and

[2] plaintiffs are granted partial summary judgment on their fifth cause of action for contractual indemnification against 20 East on the issue of liability only, pending a finding of liability on plaintiffs' claim for breach of contract (fourth cause of action); and it is further

ORDERED that motion sequence number 004 is otherwise denied; and it is further

ORDERED that motion sequence number 005 by 20 East is granted to the following extent:

[1] 20 East is granted summary judgment dismissing plaintiffs' third cause of action for nuisance and sixth cause of action for trespass against it; and

[2] Tri-Star, RA and Abelow's cross claims against 20 East are severed and dismissed; and

[3] 20 East is granted summary judgment against Urban on its cross claims for conditional contractual and common-law indemnification; and it is further

ORDERED that motion sequence number 005 is otherwise denied; and it is further

ORDERED that motion sequence number 006 by Tri-Star is granted to the following extent:

[1] Tri-Star is granted summary judgment dismissing plaintiffs' third and sixth causes of action; and

[2] RA and Abelow Sherman's cross claims against Tri-Star are severed and dismissed; and it is further

ORDERED that motion sequence number 006 is otherwise denied; and it is further

ORDERED that motion sequence number 007 by RA is granted to the extent following extent:

[1] plaintiffs' complaint against RA is severed and dismissed with costs and disbursements to defendant RA as taxed by the Clerk, upon the submission of an appropriate bill of costs; and

[2] the cross claims against RA filed by defendants 20 East, Tri-Star, Urban, and Abelow Sherman are severed and dismissed; and it is further

ORDERED that the branch of motion sequence number 007 by RA for partial summary judgment on its cross claim for conditional contractual indemnification against 20 East is denied as moot; and it is further

ORDERED that motion sequence number 008 by Abelow Sherman is granted to the following extent:

[1] plaintiffs' complaint against Abelow Sherman is severed and dismissed with costs and disbursements to defendant Abelow Sherman as taxed by the Clerk, upon the submission of an appropriate bill of costs; and

[2] the cross claims against Abelow Sherman filed by defendants 20 East, Tri-Star, Urban, and Abelow Sherman are severed and dismissed; and it is further

ORDERED that the branch of motion sequence number 008 by Abelow Sherman for partial summary judgment on its cross claim for conditional contractual indemnification against Urban is denied as moot; and it is further

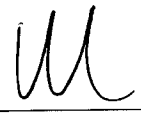
ORDERED that the Clerk is directed to enter judgment in favor of RA and Abelow Sherman accordingly; and it is further

ORDERED that the remainder of the action is severed and shall continue.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 9/26/17
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.