SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 2
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ORJ Properties Inc.,

Plaintiff,

-against-
NYHK West 40 LLC, Sam Chang, Neil Wexler, Wexler & Associates, Gene Kaufman, Gene Kaufman Architect PC, Brian Redlien and Metropolis Group, Inc. and Cava Construction and Development,

Defendants.
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DECISION AND ORDER

Ind. No.: 154776/2017

Mot. Seq. 001

Kathryn E. Freed, J.:

In accordance with CPLR 2219(a), the following is a statement of the documents filed with NYSCEF which were considered in determining this motion: Doc. Nos. 25-34, 40, and 43-53.

Defendants Gene Kaufman and Gene Kaufman Architect PC (together "Kaufman Architect") move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss plaintiff's complaint against them based upon documentary evidence and for failure to state a claim.

Underlying Allegations

Plaintiff alleges that it is the owner of real property ("the Property") located at 356-358 West 40th Street, New York, New York, that there is a six story commercial building ("the Building") on the Property and that NYHK West 40 LLC ("NYHK") is

the owner of the adjoining real property ("the Adjoining Property") located at 350 West 40th Street, New York, New York (Complaint, Doc. 29, §§ 12-13). It contends that in 2014, NYHK demolished an existing six story parking facility on the Adjoining Property as part of a project ("the Project") to build a new 36 story hotel ("the Hotel") on NYHK's Adjoining Property (*id.*, § 14). It asserts that, as part of the Project, in October 2014, plaintiff, NYHK and Cava Construction and Development ("Cava") entered into an agreement ("the Access Agreement") for access to the Property so as to provide adequate support for the Building (*id.*, §§ 24-28).

Plaintiff claims that, in November 2014, "[d]efendants began excavating and shoring the foundation for the []Hotel on the [Adjoining] Property" and in March 2015, plaintiff began to observe damage to the Building in the form "of falling bricks, diagonal cracks to the masonry, and apparent settling of the foundation . . . particularly in the south eastern corner of the Building," allegedly caused by the excavation work (*id.*, §§ 32, 34-35, 75).

Plaintiff's allegations against Kaufman Architect are that they "were the architects of record retained by []NYHK to design the [Hotel on the Adjoining] Property and [were] responsible for the submission of the foundation plans and their drawings to the New York City Department of Buildings [and that they] were

responsible for or played a substantial role in connection with, among other things, the [e]xcavation [w]ork in connection with the construction of the [] Hotel" (*id.*, §§ 16, 20).

Kaufman Architect submits a copy of their contract with McSam Hotel LLC ("McSam") ("the GKA Contract"). The GKA Contract was executed between McSam by Sam Chang, a member, on behalf of the owner for "architectural and engineering work at" the Adjoining Property. It specifically excluded "sub-grade testing or conditions or shoring, bracing or underpinning . . . [s]heeting, shoring, bracing, and support of excavation or any related engineering or filing" (GKA Contract, Doc. 31, §§ 3.1, 3.7). It also provided that Kaufman Architect did "not have control over, charge of, or responsibility for the construction means, methods, techniques . . . in connection with the [Project]" (Standard AIA form contract, § 3.6.2, incorporated by reference into GKA Contract, Doc. 31, § 5.3). It contends that it operated in accordance with the GKA Contract.

In opposition to the motion, plaintiff reiterates its allegation that Kaufman Architect "were the architects of record retained" by NYHK (Miller affirmation, Doc. 43, § 7). Plaintiff did not make any specific factual assertions of any actions by Kaufman Architect or any assertions that they acted beyond the scope of the GKA Contract.

Dismissal Standard

In determining a motion to dismiss pursuant to CPLR 3211, "the court must accept the facts as alleged in the complaint as true, accord [them] the benefit of every possible favorable inference, and determine . . . whether the facts as alleged fit within any cognizable legal theory" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005] [internal quotation marks and citation omitted]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Dismissal based upon documentary evidence is appropriate only where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Allegations that are bare legal conclusions or are inherently incredible or that are flatly contradicted by the documentary evidence are not accorded such favorable inferences and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]). Also, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Documentary evidence that is sufficient to establish a defense as a matter of law includes "an unambiguous contract that indisputably undermines the asserted causes of action" (*Whitebox Concentrated Convertible Arbitrage Partners,*

L.P. v Superior Well Servs., Inc., 20 NY3d 59, 63 [2012]; *cf. Calpo-Rivera v Siroka*, 144 AD3d 568, 568 [1st Dept 2016]).

Excavation and Administrative Code § 3309.4

Former New York City Administrative Code § 27-1031 (b) (1) provided:

> "When an excavation is carried to a depth more than ten feet below the legally established curb level the person who causes such excavation to be made shall, at all times and at his or her own expense, preserve and protect from injury any adjoining structures, the safety of which may be affected by such part of the excavation as exceeds ten feet below the legally established curb level provided such person is afforded a license to enter and inspect the adjoining buildings and property."

The equivalent provision of the New York City Administrative Code currently in effect, § 3309.4 provides:

> "Whenever soil or foundation work occurs, regardless of the depth of such, the person who causes such to be made, shall, at all times during the course of such work and at his or her own expense, preserve and protect from damage any adjoining structures, including but not limited to footings and foundations, provided such person is afforded a license in accordance with the requirements of Section 3309.2 to enter and inspect the adjoining property, and to perform such work thereon as may be necessary for such purpose. If the person who causes such soil or foundation work is not afforded a license, such duty to preserve and protect the adjacent property shall devolve to the owner of the adjoining property, who shall be afforded a similar license with respect to the property where the soil or foundation

work is to be made."

This "provision [is] a strict liability statute . .. [whose] purpose [is] shifting the risk of injury from the injured landowner to the excavator of adjoining land" (*Yenem Corp. v 281 Broadway Holdings*, 18 NY3d 481, 490-491 [2012]; *see also Moskowitz v Tory Burch LLC*, 161 AD3d 525, 527 [1st Dept 2018]; *American Sec. Ins. Co. v Church of God of St. Albans*, 131 AD3d 903, 905 [2d Dept 2015]). However, this absolute liability is imposed on those persons or entities "who undertake excavation work" (*Yenem*, 18 NY3d at 491) or who "cause" such work to be performed (*Chan v Begum*, 153 AD3d 1223, 1225 [2d Dept 2017]; *American Sec. Ins.*, 131 AD3d at 905; *87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540, 541 [1st Dept 2014]). An architect is generally not "'a person who cause[d]' soil or foundation work to be made" (*Moskowitz*, 161 AD3d at 527; *American Sec. Ins.*, 131 AD3d at 905; *87 Chambers*, 122 AD3d at 541.

Nuisance

"The elements of . . . a private nuisance . . . are: (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failing to act" (*Copart Indus. v Consolidated Edison Co. of*

New York, 41 NY2d 564, 570 [1977]; *see also 61 W. 62 Owners Corp. v CGM EMP LLC*, 77 AD3d 330, 334 [1st Dept 2010], *mod on other grounds* 16 NY3d 822 [2011]). Put another way, "one may be liable for a private nuisance where the wrongful invasion of the use and enjoyment of another's land is intentional and unreasonable" (*Copart*, 41 NY2d at 570; *see also Board of Mgrs. of Honto 88 Condominium v Red Apple Child Dev. Ctr. A Chinese Sch.*, 160 AD3d 580, 581 [1st Dept 2018]; *cf. Liberman v Cayre Synergy 73rd LLC*, 108 AD3d 426, 427 [1st Dept 2013], holding "that nuisance can be negligent; it does not have to be intentional").

Contractor's Tort Liability

"[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party . . . [However,] under some circumstances, a party who enters into a contract thereby assumes a duty of care to certain persons outside the contract" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138-139 [2002]; *see also Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]). Those circumstances are "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm';(2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other

party's duty to maintain the premises safely" (*Espinal*, 98 NY2d at 140 [internal citations omitted]; *see also Church*, 99 NY2d at 111-112; *Megaro v Pfizer, Inc.*, 116 AD3d 427 [1st Dept 2014]).

"As part of its prima facie showing, a contracting defendant is only required to negate the applicability of those *Espinal* exceptions that were expressly pleaded by the plaintiff or expressly set forth in the plaintiff's bill of particulars" (*Glover v John Tyler Enters., Inc.*, 123 AD3d 882, 882 [2d Dept 2014]; *see also Diaz v Port Auth. of NY & NJ*, 120 AD3d 611, 612 [2d Dept 2014]). Where the contractor shows that it "did precisely what it was obligated to do under the contract, [the party opposing summary judgment must] raise an issue of fact [as to] whether [the contractor] performed its contractual obligations negligently and created an unreasonable risk of harm to plaintiff, for whose injuries it could be held liable" (*Miller v City of New York*, 100 AD3d 561, 561 [1st Dept 2012]; *see also Fernandez v 707, Inc.*, 85 AD3d 539, 541 [1st Dept 2011]; *Agosto v 30th Place Holding, LLC*, 73 AD3d 492, 493 [1st Dept 2010]).

Discussion

Kaufman Architect has presented the GKA Contract to support their contention that the documentary evidence demonstrates that plaintiff lacks a cognizable cause of action against them. In opposition, plaintiff notes that the cases cited by Kaufman

Architect were decided on summary judgment, rather than on a motion to dismiss. However, bare legal conclusions or factual assertions that are flatly contradicted by documentary evidence, including an unambiguous contract, are insufficient to sustain a claim (*see Whitebox*, 20 NY3d at 63; *Goshen*, 98 NY2d at 326; *see also Greenberg v Blake*, 117 AD3d 683, 685 [2d Dept 2014]).

The excavation provision of the New York City Administrative Code, § 3309.4, is a strict liability statute, but it is limited to those individuals or entities who "cause" the excavation to be undertaken, such as owners or contractors (*see Yenem*, 18 NY3d at 491; *Chan*, 153 AD3d at 1225). The documentary evidence, in the form of the GKA Contract, indicates that sub-surface, foundation and excavation work were specifically excluded from the scope of Kaufman Architect's work and consequently, the general rule that an architect is not a party that "cause[d] soil or foundation work to be made" applies to this case (*Moskowitz*, 161 AD3d at 527; *87 Chambers*, 122 AD3d at 541). Accordingly, that branch of Kaufman Architect's motion that seeks dismissal of the cause of action for strict liability for breach of the New York City Administrative Code must be granted.

Similarly, the portion of Kaufman Architect's motion that seeks dismissal of the cause of action for nuisance must be dismissed, since such a claim requires an intentional and unreasonable invasion of a party's right to use and enjoy real

property, and the allegation that Kaufman Architect was the architect of record does not amount to an intentional and unreasonable invasion of plaintiff's land (*see Copart*, 41 NY2d at 570).

Additionally, the portion of Kaufman Architect's motion which seeks dismissal of plaintiff's negligence cause of action against them must be granted, since Kaufman Architect, in proffering the GKA Contract and its exclusion of any foundation work, has shown the applicability of the limitations of a claim against a contractor and plaintiff has not alleged any facts that would warrant any of the exceptions to the limitations on a contractor's tort liability (*see Church*, 99 NY2d at 111; *Espinal*, 98 NY2d at 138-140).

In light of the foregoing, it is hereby:

ORDERED that the motion of Gene Kaufman and Gene Kaufman Architect PC to dismiss plaintiff's complaint against them is granted, and the complaint is dismissed against said parties, with costs and disbursements as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that the caption of this action shall hereinafter read as follows:

ORJ Properties Inc.,
Plaintiff,

-against-

NYHK West 40 LLC, Sam Chang, Ind. No. 154776/2017

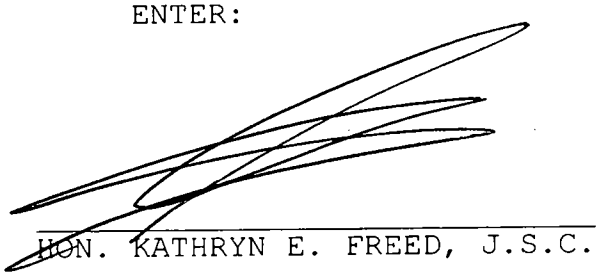
Neil Wexler, Wexler & Associates, Brian Redlien and Metropolis Group, Inc. and Cava Construction and Development,
Defendants.

And it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein.

Dated: September 17, 2018

ENTER:



HON. KATHRYN E. FREED, J.S.C.