

**233 E. 34 St. LLC v Trinity Bldrs. of N.Y., Inc.**

2020 NY Slip Op 30095(U)

January 13, 2020

Supreme Court, New York County

Docket Number: 157301/2016

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. ARLENE P. BLUTH**

**PART**

**IAS MOTION 32**

*Justice*

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**INDEX NO. 157301/2016**

233 EAST 34 ST. LLC, NATIONAL UNION FIRE  
INSURANCE COMPANY OF PITTSBURGH, PA, AS  
SUBROGEE OF 233 EAST 34TH ST. LLC,

**MOTION DATE N/A**

**MOTION SEQ. NO. 005**

Plaintiff,

- v -

TRINITY BUILDERS OF NEW YORK, INC., 237 PARTNERS  
LLC,

**DECISION + ORDER ON  
MOTION**

Defendant.

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TRINITY BUILDERS OF NEW YORK, INC., 237 PARTNERS  
LLC

Third-Party  
Index No. 595328/2017

Plaintiff,

-against-

JJSL DEVELOPMENT INC., LMW ENGINEERING GROUP,  
LLC

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113

were read on this motion to/for PARTIAL SUMMARY JUDGMENT

The motion by plaintiff 233 East 34 St. LLC ("233") for partial summary judgment on its claim brought under Building Code § 28-3309.4 is granted. The cross-motion by plaintiff National Union Fire Insurance Company of Pittsburgh, PA, as subrogee of 233 East 34<sup>th</sup> St. LLC, for the same relief is granted.

## Background

In this case, plaintiff 233 claims that defendant, doing construction next door to 233, damaged 233's building. Defendants' building was directly east of 233's building before defendants demolished its building in 2014. 233 insists that the demolition and related construction caused 233's building to lean eastward (towards defendants' lot), and caused cracks throughout plaintiff's building's façade, cellar space and rear wall.

Defendants stress that no excavation occurred below the foundation or footings of 233's building and that any excavation that did, in fact, take place happened at least 10 feet away from 233's property. Defendants argue that the specific building code provision under which 233 now seeks relief is not applicable here because defendant took steps to preserve and protect 233's building and 233 has not established that the damage arose from defendants' *excavation* work.

## Discussion

Resolution of this motion requires the Court to assess the meaning of Building Code § 28-3309.4. This section provides that:

“Regardless of the excavation or fill depth, whenever soil or foundation work occurs, regardless of the depth of such, the person who causes an excavation or fill 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 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, soil or foundation work 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, soil or foundation work is to be made.”

Courts interpreting this provision have found that “While Administrative Code § 27-1031 [now Building Code § 28-3309.4] has been held to impose absolute liability, both the

owner and contractor who perform the excavation in these and other cases relied upon by plaintiffs, liability was determined after trial upon findings that defendants had failed to take adequate precautions to protect adjoining structures and that defendants' activities were the proximate cause of the damage" (*Coronet Properties Co. v L/M Second Ave., Inc.*, 166 AD2d 242, 243, 560 NYS2d 444 [1st Dept 1990] [citations omitted]; *see also Moskowitz v Tory Burch LLC*, 161 AD3d 525, 77 NYS3d 364 [1st Dept 2018] [finding that plaintiff met its burden to show that defendant's pile driving work caused damaged to plaintiff's building]).

Here, 233's expert concluded that "there is no questions [sic] that the demolition, pile driving, excavation operations and construction at the adjacent premises substantially caused serious structural damage to the subject premises" (NYSCEF Doc. No. 82 ¶ 12). This expert details his review of the pre-construction survey, site visits and his analysis of photos depicting 233's property from before and after construction (*id.* at 2-7). This establishes 233's prima facie burden that defendants violated Building Code § 28-3309.4.

Defendants' expert contends that there was no excavation below the footings/foundations of 233's building nor was there any installation of underpinning (NYSCEF Doc. No. 105 at 13). Defendants' expert concludes that 233's building was provided with protection "in the form of unexcavated subsurface materials supporting those building elements to a distance of at least 10 feet away from the property line" (*id.* at 16). He adds that the "structural integrity" of 233's building "was maintained and necessary steps to protect [the eastern wall] were taken . . . in the form of the unexcavated subsurface materials supporting the subject wall footings and foundation to a distance at least 10 feet away from the property line (*id.* at 19).

233 argues that defendants' expert cites to rules that do not exist in an effort to raise an issue of fact. 233 argues that the only "protection" offered to its building is the fact that defendant's work only took place 10-30 feet away from its property line.

The Court agrees with 233. Despite the lengthy and confusing affidavit of defendants' expert, the fact is that there is no dispute that defendants performed excavation work and that there was substantial damage to 233's building. Defendants' expert does not sufficiently explain how working 10-30 feet away from the property line provided adequate protection for the 233's building especially given that defendants do not contest the fact that its work caused the damage. Neither defendants nor their expert claim that some other cause created the damage to 233's building or that the damage was already there.

Instead, defendants appear to make a narrow argument that they took adequate steps to protect 233's building—but those steps are not fully explained. Put another way, on this record, the Court has no idea why working a few feet from the property line is adequate protection for a neighboring four-story building. Moreover, the building code section provides "whenever ... soil work occurs"; it does not say "whenever soil work occurs less than ten feet from the property line".

Accordingly, it is hereby


ORDERED that the motion by plaintiff 33 East 34 St. LLC ("233") for partial summary judgment on its claim brought under Building Code § 28-3309.4 is granted; and it is further

ORDERED that the cross-motion by plaintiff National Union Fire Insurance Company of Pittsburgh, PA, as subrogee of 233 East 34<sup>th</sup> St. LLC is granted; and it is further

ORDERED that the Court declines to sever this cause of action and the matter shall continue with respect to plaintiffs' remaining causes of action.

Next Conference (already scheduled): March 24, 2020 at 2:15 p.m.

1/13/2020  
DATE

  
ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	