To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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LORC, LLC,

DECISION & ORDER
Index No. 51575/2019

Plaintiff, **Sequence No.** 1

-against-

CHIENG SENG CHHOUR, SASCO BUILDERS, INC. and LEO Y. LEE, P.E.,

Defendants.

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WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 27-63, were read in connection with the motion by moving defendant Chieng Seng Chhour**,** for summary judgment dismissing the complaint and all cross claims against Chhour, or in the alternative, for common-law indemnity against the co-defendant Sasco Builders Inc.

Plaintiff LORC is the owner of a parcel of real property located at 1950 Cruger Avenue, Bronx (the "LORC Property"). Defendant Chhour owns an adjacent property located at 1945 Hunt Avenue, also in the Bronx (the "Chhour Property").

This is an action by LORC to recover approximately $19,000, arising out of alleged damages to large concrete blocks as a result of the work done to install a new retaining wall by defendants. Alleged damages to LORC's property include soil that was undermined and de-stabilized, interrupting LORC's use and enjoyment of the LORC Property. Notably, there is a history of litigation concerning work and improvements along the shared property line between these properties.

NOW based upon the foregoing, the motion is decided as follows:

It is well settled that "a proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v. Sokol, 128 AD2d 492 [2d Dept 1987]). A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (*Marconi v Reilly,* 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320,324 [1986]).

Chhour argues that there is no evidence or arguments setting forth any negligence by any of his actions and LORC has not sustained any financial loss because of the shifting of the gravity retaining element. The damages sought are for the costs of fixing the wall, including any temporary diminution in rents during the remedial work. However, that has not happened yet. As a result, Chhour asserts that there is no evidence in this record of any material interference with LORC's use or enjoyment of its property

The Second Department has held that a party who hires an independent contractor is generally not liable for the independent contractor's negligence (Flaherty v Fox House Condo., 299 AD2d 448, 448–49 [2d Dept 2002]). Exceptions include situations where the party has assumed a specific duty by contract, is under a statutory duty to perform or control the work or a duty to keep the premises safe, and has assigned work to an independent contractor which the party knows or has reason to know involves inherently dangerous work (Flaherty v Fox House Condo., 299 AD2d at 448–49).

There is no competent evidence that Chhour himself was statutorily obligated to control the work of the contractor who actually did the work, nor are there issues of fact as to whether Chhour violated statutory obligation to maintain the premises in good repair, and as to whether Chhour assigned work which he knew or should have known was inherently dangerous or whether Chhour negligently hired the contractor.

Of significance, the evidence shows that Chhour relied upon a licensed engineer, Lee, who hired a licensed contractor, Sasco. There is no evidence that Chhour instructed or supervised Sasco, a licensed contractor. Nothing in the record reflected that the work, the removal of a cinder block wall that was less than six feet in height, was especially or inherently dangerous.

For all of the above reasons, Chhour made a prima facie showing of entitlement to summary judgment.

In opposition, LORC argues that Sasco installed the wall on the Chhour Property at the property line of the LORC Property, without installing any shoring or otherwise protecting the LORC Property. LORC retained Murray Engineering to perform an assessment. Robert J. Murray, P.E., prepared a report dated May 22, 2017 (the "Murray Report") which will be considered by the court:

> Based on the evidence observed and reviewed, it is our professional opinion that the gravity retaining element installed at 1950 Cruger Avenue was damaged during the 2017 excavation work at 1945 Hunt Avenue. We understand that this excavation was performed to support Mr. Chhour's new CMU wall. It is our professional opinion that proper care and procedures were NOT taken by Mr. Chhour or his contractor to protect [LORC's] retaining wall during these excavation operations. As a result, [LORC's] wall is now damaged. To a high degree of engineering certainty, we believe that this excavation action undermined [LORC's] retaining wall. We expect that further deformations may occur over time as the subsurface material continues to consolidate (NYSCEF#58).

LORC argues that Defendants Chhour and Sasco violated the New York City Building Code and Administrative Code by failing to monitor and protect the LORC Property during the excavation at the Chhour Property, and that neither Defendants Chhour nor Sasco took any measures to shore up, protect, preserve or otherwise safeguard LORC's gravity retaining element, as required under the New York City Building Code/Administrative Code.

In addition to failing to protect the LORC Property during the excavation process, LORC contends that neither Defendants Chhour nor Sasco requested a license to enter on to the LORC Property before, during or after the excavation was performed, for monitoring purposes.

Taking into consideration the parties' arguments, LORC failed to dispute or raise a triable issue of fact, regarding any negligence committed by Chhour. Further, at this juncture, Chhour has not demonstrated entitlement to common law indemnification. "In the 'classic indemnification case,' the one seeking indemnity 'had committed no wrong, but by virtue of some relationship with the tort-feasor or obligation imposed by law, was nevertheless held liable to the injured party' " (Santoro v Poughkeepsie Crossings, LLC, 180 AD3d 12, 16–17 [2d Dept 2019]).

NOW THEREFORE, it is hereby

ORDERED, that defendant Chieng Seng Chhour's motion for summary judgment is granted to the extent of dismissing all claims and cross-claims against Chhour; and it is further

ORDERED, that the remaining parties are directed to appear in the Settlement Conference Part, at a date, time, place, and manner as so designated by that Part.

All matters not herein decided are denied. Plaintiffs are directed to serve a copy of this Decision and Order, with notice of entry, upon defendants, within 10 days of such entry. This constitutes the Decision and Order of the court.

Dated: April 27, 2021
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF