

**318 W. 15th St. Apt. Corp. v 320 W 15 LLC**

2023 NY Slip Op 31579(U)

May 11, 2023

Supreme Court, New York County

Docket Number: Index No. 156309/2020

Judge: Melissa A. Crane

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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. MELISSA A. CRANE PART 60M**

*Justice*

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318 WEST 15TH STREET APARTMENT CORP.,

Plaintiff,

- v -

320 W 15 LLC,STONE CORE & SHELL LLC,VICE  
CONTRACTING LLC,STRUCTURAL ENGINEERING  
INTEGRATED, P.C.,

Defendant.

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320 W 15 LLC

Plaintiff,

-against-

CALIBER CONTROL INSPECTION INC. D/B/A CALIBER  
CONTROL INSPECTIONS INC., IRISH DRAFT RENTALS  
LLC, STONE CORE & SHELL CONSULTANTS, LLC

Defendant.

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STONE CORE & SHELL LLC

Plaintiff,

-against-

JACK GEULA

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 009) 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 333, 334, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595898/2020

Second Third-Party  
Index No. 595448/2021

On the record at oral argument on May 11, 2023, the court denied that part of plaintiff 318 WEST 15TH STREET APARTMENT CORP's (318) motion seeking to hold Stone Core & Shell LLC liable under New York Building Code § 3309.4. There is a threshold issue of fact as to whether or not Stone Core's role was one that would even be subject to strict liability under the building code § 3309.4.

The court also denied defendant 320 West 15<sup>th</sup> Street LLC's (320) cross motion for summary judgment on the record. This motion relied on plaintiff not producing sufficient evidence of damages throughout the course of the litigation. It is true that plaintiff has been less than forthcoming with discovery as to its damages. Although it did produce an estimate of repairs from its prior expert, Mr. Nakrosis during discovery, incredibly, for the first time, in opposition to the cross motion for summary judgment, plaintiff produced a "supplemental CPLR 3101(d) Expert Witness Disclosure" [See EDOC 446] that contained an expert estimate from Timothy Lorio from DBA Consultants. This disclosure is far more detailed than the disclosure from Mr. Nakrosis, and does create an issue of fact as to plaintiff's damages.

Plaintiff claimed, without explanation, that Mr. Nakrosis had to "recuse" himself from this case, hence the need for a new expert. This event comes on the tail of repeated flouting of this court's (and the commercial division rules) standing pre motion conference requirement. Also, at no point prior to the motion, or even during briefing, did plaintiff bring to its adversary's (or the court's) attention that it had lost Mr. Nakrosis as an expert and needed a new one. At no point did plaintiff warn that it was bringing in additional information about its damages.

Thus, plaintiff has really created a situation where defendant 320 made a motion it otherwise should not have had to bring. Had plaintiff made the court and defendants aware of this new expert and the new information, the schedule could have been rearranged to

accommodate for it. By blindsiding the defendant on this motion, plaintiff has charted its course. Therefore, because the estimate does create an issue of fact as to plaintiff's damages, and because there was a prior estimate from Nakrosis that 320 was aware of, the court denies that part of defendant 320's motion for summary judgment to dismiss for lack of damages. However, to ameliorate the prejudice to 320 from plaintiff's less than above-board conduct, the court orders plaintiff to reimburse defendant 320 for the costs of making this (now unnecessary) cross motion. In addition, plaintiff will provide documents at 320's request related to this new estimate by June 30, 2023 and make Timothy Lorio available for deposition on or before July 27, 2023. The parties are forewarned that documents that were not produced in discovery will not be allowed in at trial.

#### 320's counterclaims

The court denies that part of plaintiff's motion to dismiss defendant 320's counterclaims. There is evidence in the record that plaintiff failed to maintain its own property in a proper manner and this prevented 320 from being able to develop its property to its full potential, such as by putting in a subcellar. Whether 320 will be able to convince a jury that it has damages from this inability is not an issue at this juncture. 320 has also raised an issue with respect to the trespass claim as there is evidence that plaintiff intentionally placed concrete grout beneath the party wall encroaching on 320's property. Whether this caused any cognizable damage is an issue for trial, as is 320's right to have the "encroachment" removed. Finally, to the extent that plaintiff's failure to maintain its property is harming 320's property, 320 has a right to injunctive relief to force plaintiff to remediate the condition.<sup>1</sup> Accordingly, the court denies that part of plaintiff's motion seeking to dismiss 320's counterclaims. For the same reasons, (i.e. the may

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<sup>1</sup> This is probably not a question for the jury.

issues of fact), the court denies that part of 320's cross motion seeking summary judgment in its favor on its counterclaims.


### Strict Liability

Finally, after much thought, the court **grants** that part of plaintiff's motion seeking partial summary judgment in its favor for strict liability under New York City Building Code § 3309.4, against 320 only. Plaintiff made a *prima facie* case that the use of the vibratory hammer caused the building on 318's property to suffer additional settlement. As 320 concedes, the report from Paul J. Angelides (EDOC 319) discusses that the 318 premises suffered additional settlement AFTER the use of the vibratory hammer ((id pg 3). In response to this showing, 320 failed to raise an issue as to proximate cause. Neither of 320's experts explain away the stunning coincidence that the 318 building settled further once defendant's use of the vibratory hammer was underway. Although the prior condition of plaintiff's property may have been terrible, this does not factor into a proximate cause analysis under § 3309.4. All it does is raise an issue as to apportionment of damages (see *Dfaweast, LLC v Friedland Properties, Inc.*, 211 AD3d 462, 463 [1<sup>st</sup> Dep't 2022]).

Accordingly, it is

ORDERED THAT the court grants that part of plaintiff's motion for summary judgment for liability under the New York City Building Code § 3309.4 against defendants 320 W 15 LLC only and otherwise denies the motion; and it is further

ORDERED that the cross motion of 320 W 15 LLC is denied.

  
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5/11/2023

DATE

MELISSA A. CRANE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE