

New York Univ. v Turner Constr. Co.
2021 NY Slip Op 30823(U)
March 9, 2021
Supreme Court, New York County
Docket Number: 653535/2015
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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INDEX NO. 653535/2015

NEW YORK UNIVERSITY, NYU SCHOOL OF MEDICINE,
NYU HOSPITALS CENTER,

10/20/2020,

12/04/2020,

12/21/2020

Plaintiff,

MOTION DATE

- v -

MOTION SEQ. NO. 011 012 013

TURNER CONSTRUCTION COMPANY,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 011) 323, 324, 325, 326, 328, 329, 330, 331, 332, 334

were read on this motion to/for

DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 012) 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405

were read on this motion to/for

DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 013) 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 393, 394, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428

were read on this motion to/for

DISMISSAL

The Third Party Complaint is Dismissed Without Prejudice (Mtn. Seq. Nos. 011 and 13)

New York University, NYU School of Medicine, and NYU Hospitals Center's (collectively, **NYU**) motion to dismiss (Mtn. Seq. No. 11) and Ennead Architects LLP, Jaros, Baum & Bolles Consulting Engineers, LLP f/k/a Jaros, Baum & Bolles and i/s/h/a Jaros, Baum & Bolles, Inc., Jensen Hughes Engineering, P.C. f/k/a and i/s/h/a Hughes Associates Fire & Safety Engineers, P.C. and Hughes Associates, Inc., Leslie E. Robertson Associates Consulting Engineers P.C., Langan Engineering and Environmental Services, Inc., and NBBJ Architecture PLLC's motion to dismiss (Mtn. Seq. No 13) are granted pursuant to CPLR § 1010 and the third party complaint

is dismissed without prejudice. Dismissal is appropriate because (i) of the substantial prejudice to the potential third party defendants, (ii) of the certain substantial delay that would be caused in this now over five year old case and (iii) Turner Construction Company (**Turner**) lacks adequate justification for their belated serving of the third party complaint. Millions of documents have been exchanged. Expert discovery is complete. The note of issue will be filed imminently.

Although it's true that NYU was recently granted leave to file an Amended Complaint asserting a claim for gross negligence, the Amended Complaint does not allege new facts not known to Turner that would support Turner's failure to timely implead the potential third party defendants or that give rise to the claims. Turner has known of the potential designer third party defendants at least since 2015 when this case was filed, and Turner never moved to serve the third party complaint within the time set forth in any of the status conference orders. Nothing learned during discovery justifies its failure to timely serve the third party complaint. Turner's assertion that the "lynchpin" for the gross negligence claim is the failure to comply with the building code is false. The lynchpin for the additional allegation is based on Turner's witness' deposition testimony that Turner knew of the importance of protecting the airshaft and the photographic evidence that this did not occur. Additionally, the allegation that Turner failed to comply with the building code does not raise design issues not previously known to it. To the extent that this case involves Turner's alleged breach of contract, negligence and gross negligence in protecting against the damage caused by Super Storm Sandy, Turner has been on notice since the commencement of this litigation that they may look to seek indemnification or contribution from others based on other contributing factors. Any suggestion to the contrary lacks factual basis and common sense. Moreover, Turner served third party subpoenas on the potential third party defendants in 2019 — almost 2 years ago — yet inexplicably delayed in bringing them into this

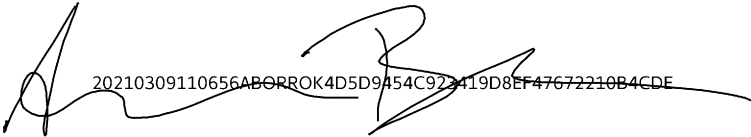
case. Given Turner's failure to bring in these potential third party defendants, permitting the third party complaint at this late stage is simply not warranted or appropriate. Delay is certain and judicial economy will not be served. Finally, there is minimal to no prejudice to Turner. Turner can immediately bring its action as a new complaint seeking indemnification or contribution if it is appropriate to do so. The potential new action can potentially proceed very quickly because access to the existing pleadings and discovery could be provided allowing the potential defendants (i.e., proposed third party defendants here) to assess their exposure. Thus, the third party complaint is dismissed without prejudice.

Turner's Motion to Compel is Granted (Mtn. Seq. No. 012)

Turner's motion (Mtn Seq. No. 12) to compel is granted. The common interest doctrine does not protect production of the Federal Emergency Management Agency's (**FEMA**) materials. For the common interest privilege to apply, it would mean that FEMA would either sue the same party or be sued by the same party and seek to assert the same kind of defenses arising out the same or similar facts. Although it is true that the common interest privilege contemplates that parties to the common interest privilege may have their own interests that may diverge, it does not change the fact that for the common interest to apply, both parties to the common interest privilege must each be potential litigants that want information (*see, e.g., Kindred Healthcare, Inc. v SAI Global Compliance, Inc.*, 169 AD3d 517 [1st Dept 2019] [common interest privilege requires, in part, that material must relate to pending or reasonably anticipated litigation for it to be protected]; *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 629 [2016] [declining to extend common interest doctrine to communications made in the absence of pending or anticipated litigation]). FEMA is not that because Turner was never adverse to FEMA as there is

no privity or basis for a claim either by Turner or by FEMA against one another. Accordingly, the application of the common interest doctrine fails. NYU has its own interests for giving FEMA information and while it may decrease the overall outflow from FEMA, this does not create a common interest privilege. Moreover, NYU has not asserted that the information given to FEMA was for an independent investigation by FEMA of Turner. Finally, the record does not indicate that FEMA indicated that the information would be kept confidential or subject to some claim of privilege. Turner's motion to compel is therefore granted and it shall produce the FEMA materials within 20 day from this decision and order.

NOI: April 2, 2021

<u>3/9/2021</u> DATE		 20210309110656ABORROK4D5D9A54C92A419D8EF47672210B4CDE ANDREW BORROK, J.S.C.	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE