



New York Court Imposes Duty on Design Professional to Third-Party Owner in Light of Certifications to City Building Department

In a reported decision, a New York trial court recently denied an architect's request to dismiss a suit by an adjacent property owner claiming damage to his building. The owner claims that excavation on the adjacent project in which the architect prepared design plans caused his building to settle. The architect argued that he owed the adjacent property owner no duty of care and that his services did not otherwise cause the property owner any harm. The trial court disagreed, citing certifications the architect made to the city building department regarding underpinning adjacent buildings. As a result, the trial court found the design professional owed a duty to an adjacent property owner to ensure that inspections which directly affected the adjacent owner's property were performed properly.

This decision is significant because it represents that design professionals may be found liable to adjacent property owners, absent privity of contract, where a court determines the design professional has taken on inspection and regulatory certification responsibilities which contemplate and may affect adjacent property. New York law provides that when a regulation imposes a duty for the benefit of an adjacent property owner, that owner may maintain an action against a party who does not comply with the regulation.

In this case, the architect contracted with an owner to provide architectural services for the construction of a new building located in Brooklyn, New York. The architect's services included design of excavation plans for the project. The design called for the footings of the project to be at the same level as those of the adjacent building. The contractor excavated deeper than required, resulting in footings that were not level with those of the adjacent building. The building owner sued the architect, among others, alleging damage to its building due to settling as a result of a lack of underpinning.

In support of his motion to dismiss, the architect presented that he did not have any oversight or inspection duties on the project. The court noted that if the architect did not have knowledge of the contractor's deviation in the excavation plans, he would not be responsible for the damage to the adjacent building. The court found, however, that the architect did, or should have had knowledge, of the deviation. The architect signed two certifications to the New York City Department of Buildings giving him responsibility for inspecting the construction after excavation and before pouring of the foundation. Pursuant to the certifications, the court concluded that the architect should have discovered the deviation by the excavator through his inspections. Because the record of certifications showed that the architect did or should have had knowledge of the deviation in the excavation, he was therefore obligated to notify the building department and ensure remedial measures were taken.

In rather pointed language, the court also determined that either the architect falsely certified that he performed the inspection or he did the inspection and falsely certified that the excavation conformed to the plans. The false certifications constitute a separate basis to impose liability on the architect for alleged damages.

Despite the fact that the architect's contractual privity was with the project owner and not the owner of the adjacent property, the court ruled that by providing the certification, the architect undertook a duty to the city and to adjacent owners for any injuries suffered as a result of the improper certification.

The case is scheduled to proceed to trial against the architect and the project owner. The excavator was not named as a defendant. It is reported as *27 Jefferson Ave., Inc. v Emergi*, 18 Misc.3d 336 (Nov. 19, 2007).

Risk Management Prevention Tip

Had the architect properly inspected the contractor's work before submitting certifications to the city, the necessary corrective action could have been taken, preventing the need for litigation. Furthermore, he should not have certified the work without confirming that the excavation conformed to the plans. This wrongful certification ultimately led to the adverse ruling against the architect. Whenever a design professional's duties include certification, it is vital that they personally visit the site and carefully inspect the project to help ensure the veracity of their conclusion. This diligence will not only help prevent claims, but also will assure the public's safety on and around the job locale.

by Douglas M. Marrano, Esq., Donovan Hatem LLP, World Trade Center East, Two Seaport Lane, Boston, MA 02210. © Donovan Hatem LLP 2008. All rights reserved.

ASCE is dedicated to providing its members with high-quality professional liability coverage at affordable rates. Through their partnership with the ASCE Professional Liability Plan Administrator, Pearl Insurance, they can provide insured members with valuable risk management tools and services to help effectively assess and reduce their potential risks and liabilities. For more information about the ASCE Professional Liability Plan, call a Customer Service Representative today at 1.888.619.1908 or email ascepro@pearlinsurance.com.

The information contained in the Reporter should not be relied upon as legal advice for specific facts and circumstances and is not intended to be a substitute for consultation with counsel.