Harss v 1765 First Assocs., LLC
2010 NY Slip Op 33829(U)
June 11, 2010
Supreme Court, New York County
Docket Number: 150152/09
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN **PART** 12

Index Number : 150152/2009
HARSS, MARINA
vs
LOMMA, JAMES
Sequence Number : 001
DISMISS ACTION

INDEX NO. 150152/09E
MOTION DATE 4/14/2010
MOTION SEQ. NO. 001
MOTION CAL. NO. 12EFM-5

The following papers, numbered 1 to ______ were read on this motion to/for D

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	as attached
Replying Affidavits	

Cross-Motion: ☐ **Yes** ☑ **No**

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/11/2010 3:50 pm

Paul G. Feinman
J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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IN RE 91ST STREET CRANE COLLAPSE LITIGATION:

Index No. 771000/2010

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MARINA HARSS, MARCIO NISTICO, RUBY AKIN, OGUZ AKIN, PHILIP SCHIFFMAN, LINDA MCINTYRE, MICHAEL FIORENTINO, TERRENCE SCROOPE, TRAVIS LILL, RENAY LOURES and GEORGE LOURES,

Plaintiffs,

- against -

1765 FIRST ASSOCIATES, LLC, LEON D. DEMATTEIS CONSTRUCTION CORP., JAMES F. LOMMA, NEW YORK CRANE & EQUIPMENT CORP., SORBARA CONSTRUCTION CORP., THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF BUILDINGS, MATTONE GROUP, LLC, MATTONE GROUP CONSTRUCTION CO. LTD., BRADY MARINE REPAIR CO., HOWARD I. SHAPIRO, HOWARD I. SHAPIRO & ASSOCIATES CONSULTING ENGINEERS, P.C., NEW YORK RIGGING CORP., BRANCH RADIOGRAPHIC LABS, INC., TESTWELL, INC., CRANE INSPECTION SERVICES, LTD., LUCIUS PITKIN, INC. and TOTAL SAFETY CONSULTING, LLC,

Defendants.

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Index No. 150152/2009E
Mot. Seq. No. 001

DECISION and ORDER

For Defendants New York Crane & Equipment Corp. and James F. Lomma:
Wilson, Elser, Moskowitz, Edelman & Dicker LLP
By: Glenn J. Fuerth, Esq.
150 East 42nd Street
New York, NY 10017

For Plaintiffs:
Bernstein Levine Cherney, LLP
By: Hartley T. Bernstein, Esq.
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Papers considered in review of this motion:

Papers	E-File Document Number
Notice of Motion and Affirmation in Support	27
Memo of Law in Support	28
Affirmation in Opposition	47
Memo of Law in Opposition	48
Reply Affirmation	57
Reply Memo of Law	58

PAUL G. FEINMAN, J.:

Defendants New York Crane & Equipment Corp. ("NYC&E") and James F. Lomma ("Lomma defendants") move pre-answer: (1) to dismiss the complaint in its entirety as against Lomma based on documentary evidence pursuant to CPLR 3211 (a) (1); (2) to dismiss the complaint in its entirety as against Lomma for failure to state a cause of action pursuant to CPLR 3211 (a) (7); and (3) to dismiss plaintiff's emotional distress claims as against Lomma and NYC&E for failure to state a cause of action pursuant to CPLR 3211 (a) (7).

Background

On May 30, 2008, a construction crane collapsed at 333-335 East 91st Street, New York County. Plaintiffs resided across the street from where the incident occurred and allege, among other things, that defendants' negligence caused the collapse and that they consequently suffered emotional distress.[1] NYC&E allegedly owned the crane; James F. Lomma is the alleged owner of NYC&E.

Analysis

In the context of a pre-answer motion to dismiss premised upon CPLR 3211 (a) (7), "[i]t is axiomatic that . . . the pleading is to be afforded a liberal construction, the facts alleged in the complaint accepted as true, and the plaintiff accorded the benefit of every possible favorable inference" (*Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448, 454 [1st Dept 2009]). "The test on a motion to dismiss for insufficiency of the pleadings is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be *reasonably implied from its statements*, a cause of action can be sustained" (*Ambassador Factors v Kandel &*

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[1] While plaintiffs Terence Scroope and Travis Lull do not make claims for emotional distress, this order will refer to the remainder of plaintiffs, all of whom do make claims for emotional distress, as "plaintiffs" collectively.

Co., 215 AD2d 305, 306 [1st Dept 1995] [emphasis added], quoting *Feinberg v Bache Halsey Stuart*, 61 AD2d 135, 137-138 [1st Dept 1978]).

To state a cause of action for negligent infliction of emotional distress, the plaintiff must plead that: (1) he or she was owed a duty by defendant(s); (2) the duty was negligently breached; (3) the breach (a) caused plaintiff to fear for his or her own safety, *or* (b) unreasonably endangered plaintiff's physical safety (*see* PJI 2:284; *Jason v Krey*, 60 AD3d 735, 736 [2d Dept 2009]; *Yong Wong Park v Wolff & Samson, P.C.*, 56 AD3d 351, 352 [1st Dept 2008], *lv denied* 12 NY3d 704 [2009]).

As to plaintiffs Ruby Akin, Oguz Akin, and Linda McIntyre, plaintiffs' counsel conceded, at oral argument, that they have not alleged viable claims for negligent infliction of emotional distress because they were not in the vicinity of the crane at the time of the collapse.[2] Thus, the motion is granted as to those plaintiffs' negligent infliction of emotional distress claims.

On the other hand, the negligent infliction of emotional distress claims made by plaintiffs Marina Harss, Marco Nistico, Phillip Shiffman, Michael Fiorentino, Renay Loures, and George Loures against NYC&E and Lomma are viable. As to the first element, plaintiffs have alleged that "defendants created a special duty and relationship to persons lawfully within and about the premises immediately surrounding the [c]onstruction [p]roject" (Compl. ¶ 305) and that they "were responsible for ascertaining and assuring that the [c]onstruction [p]roject and the [c]rane were in compliance with prevailing municipal laws, code, rules and regulations" (Compl. ¶ 77). Plaintiffs have sufficiently alleged that "[d]efendants, their agents, servants and/or employees, knew or should have known of the dangers presented by the[ir conduct] and defective equipment being used at the [p]roperty in connection with the [c]onstruction [p]roject which created a danger

[2] "Ruby and Oguz Akin were in Ankara, Turkey when the incident occurred (Compl. ¶ 114), and plaintiff Linda McIntyre was "at P.S. 88 in the Bronx" (Compl. ¶ 152).

to the neighboring buildings" (Compl. ¶¶ 265, 339). Thus, by virtue of their "services in connection with the [c]onstruction [p]roject" (Compl. ¶¶ 37, 40, 43, 46), NYC&E may have owed a duty to plaintiffs because "[a] landowner who engages in activities that may cause injury to persons on adjoining premises surely owes those persons a duty to take reasonable precautions to avoid injuring them" (*532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 290 [2001], *rearg denied* 96 NY2d 938 [2001]; *see Weitzmann v Barber Asphalt Co.*, 190 NY 452, 457 [1908] ["If an owner or occupier of land uses upon it appliances, devices or methods that may cause injury to persons upon adjoining premises, or in public places, such owner or occupier owes to such persons the duty to take reasonable precautions to avoid injuring them"]; *see also* PJI 2:110).

As to the second element, plaintiffs allege that "[NYC&E] inspected and tested the [c]rane, on one or more occasions" before and after the time the crane was repaired "to determine whether repairs were needed and, if so, what repairs would be required" and to determine "whether the repairs had been completed properly" (Compl. ¶¶ 60, 61). Plaintiffs also allege that NYC&E was "aware of the need to perform elevated work in connection with the [c]onstruction [p]roject" and that "the [c]rane would require repair in order to be used for elevated work" (Compl. ¶¶ 64-66). Plaintiffs maintain that NYC&E "failed, omitted and neglected to . . . keep and maintain the [c]rane in a reasonably safe, proper, suitable, and fit condition" (Compl. ¶¶ 266, 270) . Hence, plaintiffs have sufficiently alleged that NYC&E breached its duty.

As to the third element, the following plaintiffs were in their apartments across the street when the crane collapsed: Harss and Nistico (Compl. ¶¶ 84-89), Shiffman (Compl. ¶¶ 137-140), Fiorentino (Compl. ¶¶ 180-184), Renay and George Loures (Compl. ¶¶ 239-242). Harss and Nistico "heard a very loud thumping and crunching noise[,] felt the building shake violently" and (Compl. ¶ 88), "Nistico immediately looked out the bedroom window and saw falling objects"

(Compl. ¶ 89). They "feared that the [c]rane was so close to [them] that it threatened their safety and well-being" (Compl. ¶ 83). Shiffman also heard those noises from his apartment and immediately "stepped onto the balcony [and] saw that the air was filled with smoke and falling debris" resulting in emotional distress (Compl. ¶¶ 138-139, 144). Fiorentino "saw large chunks of metal and debris falling, and simultaneously felt something crash into the apartment building" (Compl. ¶ 181) and that he has suffered emotional distress as a result (Compl. ¶¶ 196-201). Renay and George Loures also heard those noises and saw falling debris from their apartment (Compl. ¶¶ 240, 243-244), and claim that they suffered emotional distress as a result (Compl. ¶¶ 257-263). Therefore, plaintiffs Harss, Nistico, Shiffman, Fiorentino, and Renay and George Loures have adequately averred that Branch's "conduct unreasonably and directly endangered [their] physical safety" (*Ben-Zvi v Kronish Lieb Weiner & Hellman*, 278 AD2d 167, 167 [1 Dept 2000]) and accordingly have stated claims for negligent infliction of emotional distress sufficient to withstand this pre-answer motion to dismiss.

The Lomma defendants argue that plaintiffs' emotional distress claims are not viable because they are premised upon property damage and plaintiffs did not suffer any physical injury and were not within the zone of danger. This is unpersuasive because "[i]t is beyond cavil that a cause of action for negligent infliction of emotional distress does not always require a physical injury as a necessary element" (*Ornstein v New York City Health & Hosps. Corp.*, 27 AD3d 180, 183 [1st Dept 2006], *revd on other grounds* 10 NY3d 1 [2008]). The claims here are not premised upon property damage alone, but upon plaintiffs' emotional distress which was the result of the fear for personal injury and death directly experienced by the plaintiffs who were present. While "recovery may not be had for emotional distress caused by the negligent destruction of one's property nor for emotional distress caused by the observation of damage to one's property" (*Jensen v Whitford Co.*, 167 AD2d 826, 827 [4th Dept 1990]; *Magro v Morgan*

[* 7]

Holding Corp., 292 AD2d 154, 155 [1st Dept 2002]), negligent infliction of emotional distress premised upon a duty flowing directly to a plaintiff is distinguishable from the zone of danger theory of recovery (*see Pizarro v 421 Port Assoc.*, 292 AD2d 259, 260 [1st Dept 2002]). The latter is not applicable here because these plaintiffs do not rely on the bystander theory of recovery (*see Kennedy v McKesson Co.*, 58 NY2d 500, 506 [1983]; *compare Stamm v PHH Veh. Mgt. Servs., LLC*, 32 AD3d 784, 786 [1st Dept 2006]; *Pizarro v 421 Port Assoc.*, 292 AD2d at 260). Rather, what is at issue is whether these plaintiffs have pleaded, as opposed to whether they can prove at the end of discovery, negligent infliction of emotional distress premised upon the breach of a duty owed to them by the defendants. Plaintiffs have adequately alleged that NYC&E's "conduct unreasonably and directly endangered [their] physical safety" (*Ben-Zvi v Kronish Lieb Weiner & Hellman*, 278 AD2d 167, 167 [1st Dept 2000]). The complaint alleges that NYC&E "fail[ed] to protect the adjacent property from danger during construction," and that their negligence caused emotional distress (Compl. ¶¶ 28, 45-47). Thus, bearing in mind the procedural posture of the case, the plaintiffs have sufficiently alleged causes of action for negligent infliction of emotional distress as against defendant NYC&E to warrant an answer and discovery on these causes of action (*see Passucci v Home Depot, Inc.*, 67 AD3d 1470, 1470 [4th Dept 2009]; *Sheila C. v Povich*, 11 AD3d 120, 130 [1st Dept 2004]). Accordingly, the motion is denied as to the negligent infliction of emotional distress claims made by plaintiffs Marina Harss, Marco Nistico, Phillip Shiffman, Michael Fiorentino, Renay Loures, and George Loures against NYC&E.

Plaintiffs have also sufficiently alleged facts, if borne out through discovery, that could support a piercing of the corporate veil and imposition of liability upon Lomma individually. A party seeking to pierce the corporate veil must show "that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in

wrongful or inequitable consequences" (*TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]). The complaint alleges: that "Lomma owned and/or controlled [NYC&E] and provided serviced in connection with the [project]" (Compl. ¶ 49); that "Lomma was familiar with equipment owned by [NYC&E], and the condition of such equipment, including the Crane" (Compl. ¶ 50); that "Lomma was familiar with the condition and maintenance history of the equipment owned by [NYC&E], including the crane . . . and arranged for periodic repairs to the Crane" (Compl. ¶ 51); that "[NYC&E] arranged for the [c]rane to be repaired by" a Chinese company at a price that was substantially lower than bids received by [NYC&E] from other entities" (Compl. ¶¶ 57-58); that NYC&E inspected and tested the crane thereafter and negligently determined that "the repairs had been completed properly" and failed to maintain or keep the crane in a reasonably safe condition (Compl. ¶¶ 61, 266). It is reasonable to infer that the complaint attributes NYC&E's knowledge and conduct to Lomma personally. This is especially true in light of the fact that on March 8, 2010, a grand jury indicted James F. Lomma, NYC&E, and J.F. Lomma Inc. for manslaughter in the second degree (two counts), criminally negligent homicide (two counts), assault in the second degree, and reckless endangerment in the second degree. The coordinate statement of facts claims, among other things, that of James F. Lomma, "as the owner of [NYC&E] and J.F. Lomma, Inc.," failed to "employ an engineer to oversee the repairs, failed to hire a certified welding company to perform the work, and provided [the Chinese repair company] with grossly inadequate welding specifications that were different from the specifications of the original bearing manufacturer." Thus, this branch of defendant's motion is likewise denied, and because the documentary evidence here cannot be said to "conclusively establish[] a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]) and "utterly refute[] plaintiff's factual allegations" (*McCully v Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept 2009]), defendant is also not entitled to dismissal under CPLR 3211 (a)

(1). Accordingly, it is

ORDERED that the pre-answer motion to dismiss is granted as to the fifth cause of action for negligent infliction of emotional distress as it pertains to plaintiffs Ruby Akin, Oguz Akiorn, and Linda McIntyre only; and it is further

ORDERED that the pre-answer motion to dismiss is denied as to plaintiffs Marina Harss, Marco Nistico, Phillip Shiffman, Michael Fiorentino, Renay Loures, and George Loures; and it is further

ORDERED that a copy of this order be served upon the Clerk of Court, 60 Centre Street, Basement, New York NY 10007 who shall enter judgment dismissing the fifth cause of action for negligent infliction of emotional distress as against Ruby Akin, Oguz Akin, and Linda McIntyre only; and it is further

ORDERED that the moving defendants shall interpose an answer within 10 days of service of a copy of this order together with notice of its entry in accordance with CPLR 3211(f).

This constitutes the decision and order of the court.

Dated: June 11, 2010 3⁰⁰ pm
New York, New York

Paul G Feinman
J.S.C.

(150152_2009_001_gms(Harss_Lomma_M2D_NIED_Pierce).wpd)