SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN PART 12

Justice

Index Number : 104543/2009

MAHONEY, KEVIN

VS.

1765 FIRST ASSOCIATES, LLC

SEQUENCE NUMBER : # 001

DISMISS

INDEX NO. 104543-09

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	See 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: February 11, 2010 1:42 p.m.

Paul G. Feinman J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

☐ REFERENCE

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

----------X

KEVIN MAHONEY and CAROLYN RYAN,
Plaintiffs,

Index Number 104543/2009

- against -

Mot. Seq. No. 001

1765 FIRST ASSOCIATES, LLC, LEON D. DEMATTEIS CONSTRUCTION CORPORATION, NEW YORK CRANE & EQUIPMENT CORP. and SORBARA CONSTRUCTION CORP.,
Defendants.

DECISION AND ORDER

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LEON D. DEMATTEIS CONSTRUCTION CORPORATION,
Third-Party Plaintiff,

Third-Party Index No. 590540/2009

- against -

THE CITY OF NEW YORK, THE CITY OF NEW YORK DEPARTMENT OF BUILDINGS, HOWARD I. SHAPIRO & ASSOCIATES CONSULTING ENGINEERS P.C., NEW YORK RIGGING CORP., BRADY MARINE REPAIR CO., INC., BRANCH RADIOGRAPHIC LABS, INC., TESTWELL INC., CRANE INSPECTION SERVICES, LTD and LUCIUS PITKIN, INC.,
Third-Party Defendants

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For Plaintiffs:
Rende, Ryan & Downes, LLP
By: Roland T. Koke, Esq.
202 Mamaroneck Avenue
White Plains, NY 10601
(914) 571-6658

For Defendant New York Crane & Equipment Corp.:
Wilson, Elser, Moskowitz, Edelman & Dicker LLP
By: Glenn J. Fuerth, Esq.
150 East 42nd Street
New York, NY 10117
(212) 490-3000

Papers considered in review of this partially E-Filed motion to dismiss:

Papers	**Numbered**
Notice of Motion and Annexed Affirmation	7 (E-Filed)
Memo of Law in Support	1 (not E-Filed)
Affidavit in Opposition	13 (E-Filed)
Memo of Law in Opposition	14 (E-Filed)

PAUL G. FEINMAN, J.:

Defendant New York Crane & Equipment Corp. ("NYC&E") moves pre-answer to dismiss the sixth cause of action, negligent infliction of emotional distress, for failure to state a cause of action (*see* CPLR 3211 [a] [7]). Given the plaintiffs' allegations in this case, that they were standing in their apartment when a crane came crashing through the bedroom window and glass terrace door, terrifying them, the motion is denied.

Background

On May 30, 2008, a construction crane collapsed at 333-335 East 91st Street, New York County. Plaintiffs, who reside across the street, allege, among other things, that defendants' negligence caused the collapse and that they consequently suffered emotional distress (Compl. ¶¶ 2, 44-46). Defendant NYC&E allegedly owned the crane and was one of a number of entities whose services were used in connection with the project (Compl. ¶¶ 4-15).

Analysis

Defendant NYC&E argues that plaintiffs' claims for emotional distress as against NYC&E must be dismissed because (1) NYC&E had no duty to protect plaintiffs, (2) plaintiffs did not suffer any physical injury, (3) plaintiffs were not within the zone of danger, and (4) emotional distress claims cannot be premised upon property damage alone (Aff. in Supp.; Memo of Law). Plaintiffs contend that they have sufficiently stated a claim for negligent infliction of emotional distress (Aff. in Opp.).

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

Preliminarily, plaintiffs correctly contend that defendant NYC&E has erroneously characterized their emotional distress claims (Memo of Law in Opp., at 6). NYC&E's motion argues, in large part, 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 (Memo of Law, at 4-7). However, "[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]). Further, the manner in which NYC&E frames plaintiffs' claims is flawed because the claims at issue 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" (Memo of Law in Opp., at 6). The court recognizes that "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]; 292 AD2d 154, 155 [1st Dept 2002]). However, 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 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 259, 260 [1st Dept 2002]). Rather, what is at issue is whether the plaintiffs have pleaded (as opposed to whether they can prove at the end of discovery), a negligent infliction of emotional distress premised upon the breach of a duty owed to them by the defendant.

To state a claim for negligent infliction of emotional distress, plaintiffs must allege: (1) that he or she was owed a duty by defendant, (2) the duty was negligently breached, (3) the breach (a) caused plaintiff to fear for his or her own safety, *or* (b) unreasonably endangered his or her 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]).

Although plaintiffs do not explicitly allege that NYC&E owed plaintiffs a duty, in this procedural context, "the court is required to . . . accord the plaintiff the benefit of every favorable inference and strive to determine only whether the facts alleged fit within any cognizable legal theory" (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 144-145 [1st Dept 2009]). Plaintiffs repeatedly allege negligence on the part of NYC&E (Compl. ¶¶ 27-31). It is reasonable to infer by the facts alleged plaintiffs' submissions that NYC&E owed a duty to plaintiffs by virtue of their residence, presence, and proximity to the site of the collapse (Compl. ¶¶ 2, 9, 16, 28). As an "agent[], servant[] and/or employee[]" of the landowner (Compl. ¶ 28), 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). Thus, plaintiffs have sufficiently alleged that a duty owed by NYC&E to them was breached.

Additionally, 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). To the extent that plaintiffs' complaint can be said to suffer from less than artful drafting, such defect, as it pertains to their cause of action for negligent infliction of emotional distress, is cured by their affidavits submitted in support of their claim (*see Zorn v Gilbert*, 60 AD3d 850, 850 [2d Dept 2009]; *Sheroff v Dreyfus Corp.*, 50 AD3d 877, 878 [2d Dept 2008]; *Wall St. Assoc. v Brodsky*, 257 AD2d 526, 526-527 [1st Dept 1999]). "[A]ffidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]). Plaintiff Mahoney's affidavit explains that "at the time of the crane collapse [he] was standing less than five feet from the glass terrace door [which] was struck by the collapsing crane, and was cracked" which terrified him (Mahoney Aff. ¶ 3). Likewise, Ryan's affidavit explains that she "was standing in the master bedroom just a few feet from the bedroom window, and only slightly further from where the crane struck the terrace

and windows" (Ryan Aff. ¶ 3). Thus, bearing in mind that 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, it is

ORDERED that defendant New York Crane & Equipment Corp.'s pre-answer motion to dismiss the sixth cause of action is denied.

This constitutes the decision and order of the court.

Dated: February 11, 2010 1:42 P.M.
New York, New York

J.S.C.

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