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

PRESENT: PAUL G. FEINMAN J.S.C. PART 12

Index Number : 150152/2009
HARSS, MARINA
vs
LOMMA, JAMES
Sequence Number : 002
DISMISS

INDEX NO. 150152/09
MOTION DATE 1-11-2010
MOTION SEQ. NO. 002
MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	See Attached
Answering Affidavits — Exhibits	
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.

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

Dated: 2/11/2010 at 5:15 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

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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
Submission Date	1/11/10
Mot. Seq. No.	003

DECISION AND ORDER

For Defendant Branch Radiographic Labs Inc.
Clausen Miller, P.C.
By: Carl M. Perri
One Chase Manhattan Plaza, 39th Floor
New York, NY 10005
(212) 805-3900

For Plaintiffs
Bernstein Levine Cherney, LLP
By: Hartley T. Bernstein, Esq.
370 Lexington Avenue, 24th Floor
New York, NY 10017
(212) 381-9684

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

Papers	**Numbered**
Notice of Motion	43
Affirmation in Support	44
Memo of Law	45
Affirmation in Opposition	49
Memo of Law in Opposition	50
Reply Affirmation	61

PAUL G. FEINMAN, J.:

Defendant Branch Radiographic Labs, Inc. ("Branch") moves pre-answer to dismiss

002

plaintiff's emotional distress claims for failure to state a cause of action (*see* CPLR 3211 [a] [7]). For the reasons below, the motion is granted as to certain plaintiffs and denied as to other plaintiffs.

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] Defendant Branch was one of a number of entities whose services were used in connection with the construction project (Compl. ¶ 37).

Analysis

Defendant Branch argues that plaintiffs' claims for negligent infliction of emotional distress as against Branch must be dismissed because: (1) plaintiffs did not suffer any physical injury; (2) were not within the zone of danger; and (3) Branch had no duty to protect them (Memo of Law). Plaintiffs contend that Branch did in fact owe plaintiffs a duty and that the breach of that duty gave rise to the claim for negligent infliction of emotional distress (Aff. in Supp; Memo of Law 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

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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.

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]).

To state a claim for negligent infliction of emotional distress, plaintiffs must allege: (1) that plaintiff 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 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 the first element, plaintiffs allege 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). Plaintiff has 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 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), Branch may have owed a duty to plaintiff 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, plaintiff alleges that "Branch . . . 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 Branch 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 Branch "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 Branch breached its duty.

With respect 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). Similarly, plaintiff Shiffman also heard those noises from his apartment and immediately thereafter, "stepped onto the balcony [and] saw that the air was filled with smoke and falling debris" resulting in emotional distress (Compl. ¶¶ 138-139, 144). Likewise, Fiorentino also "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 defendant Branch's motion to dismiss at the pre-answer stage..

In contrast, plaintiffs "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). Because these plaintiff were not in the vicinity of the crane at the time of the collapse, they have not alleged viable claims for negligent infliction of emotional distress. Branch's conduct cannot be said to have unreasonably endangered their physical safety nor caused them to fear for their physical safety because they were not present when the crane collapsed. Only "breach of [a] duty resulting directly in emotional harm is actionable" (*Martinez v Long Is. Jewish Hillside Med. Ctr.*, 70 NY2d 697, 699 [1987]) and these plaintiffs cannot recover for any emotional distress purportedly resulting from Branch's alleged breach because "such injury [if any,] is compensable only when [it is] a direct, rather than a consequential, result of the breach" (*Kennedy v McKesson Co.*, 58 NY2d 500, 506 [1983]). Nor can Ruby Akin, Oguz Akin, nor Linda McIntyre claim that "the accident was a traumatic event which placed [them] in imminent fear for [their] safety [because] mere observance of the negligently imposed physical damage to [one's] home is insufficient to support [a] claim for emotional distress" (*Graber v Bachman*, 27 AD3d 986, 988 [3d Dept 2006]). "Moreover, 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]).

Branch's remaining contentions are unavailing for the reasons set forth in a separate decision and order by this court (*Podlaski v 1765 First Associates LLC, et al.*, Index No. 150166/2009 [Mot. Seq. No. 003], Dec. and Ord. [Feinman, J.]). The portion of that decision which discusses the court's reasoning for denying Branch's remaining arguments is deemed fully incorporated into this decision.

Accordingly, it is

ORDERED that defendant Branch Radiographic Labs, Inc.'s pre-answer motion to dismiss is granted as to the negligent infliction of emotional distress claims made by plaintiffs Ruby Akin, Oguz Akin, and Linda McIntyre; and it is further

ORDERED that defendant Branch Radiographic Labs, Inc.'s 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 remainder of the action is severed and continued under this index number.

This constitutes the decision and order of the court.

Dated: February 11, 2010
New York, New York

5:15 p.m.

J.S.C.

(150152_2009_002_gms(Harss_M2D_NIED).wpd)