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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 108449/2009
COHEN, CATHERINE M.
vs
EAST 51ST. STREET DEVELOPMENT
Sequence Number : 002
SUMMARY JUDGEMENT

INDEX NO. _____
MOTION DATE 7/22/10
MOTION SEQ. NO. _____
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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

It is hereby

ORDERED that the instant motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that Shaw Belting Company's motion, pursuant to CPLR 3212, for summary judgment dismissing any and all causes of action as against it is denied.

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

Dated: 10/20/10

HON. CAROL EDMEAD J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE NEW YORK
COUNTY OF NEW YORK: PART 35

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IN RE: EAST 51ST STREET CRANE COLLAPSE LITIGATION

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Edmead, J.:

MEMORANDUM DECISION[1]

This multi-party litigation arises from an accident which occurred on March 15, 2008, when a tower crane involved in the construction of a high-rise, mixed-use building (the project) located at 303 East 51st Street, New York, New York (the site), collapsed (the accident), resulting in several wrongful death claims, as well as multiple personal injury and property damage claims.

Pursuant to the Administrative Orders of Honorable J. Silberman, dated July 1, 2008 and November 26, 2008, approximately 60 separate lawsuits relating to the accident were consolidated before this court under Index No. 769000/2008. In this consolidated action, several plaintiffs have asserted direct claims against defendant/third-party defendant Shaw Belting Company (Shaw), and, in cases where Shaw was not named as a defendant, defendant/third-party plaintiff East 51st Street Development Company, LLC (East 51st) filed a third-party complaint against Shaw for common-law indemnification and contribution.

Shaw now moves, pursuant to CPLR 3212, for summary judgment dismissing any and all causes of action as against it pertaining to the alleged negligent manufacture and/or design of certain web slings recovered from the site.

This decision applies to all plaintiffs, third-party plaintiffs and/or third-party defendants in this consolidated action, who asserted claims, third-party claims and/or cross claims against Shaw.

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[1] This court thanks Michelle Kucsma, Senior Court Attorney, Supreme Court, New York County, Law Department, for her assistance with the decision.

BACKGROUND

At the time of the accident, East 51st was the owner and developer of the site where the accident took place. East 51st hired Reliance Construction Ltd. d/b/a RCG Group s/h/a Reliance Construction Group and RCG Group, Inc. (collectively, Reliance) to manage the construction at the site. Joy Contractors, Inc. (JCI) was hired to conduct superstructure work on the project. JCI hired William Rapetti and/or Rapetti Services, Inc. (Rapetti) to oversee the crane rigging operations underway on the day of the accident. It is undisputed that Weinstock Brothers Corporation (Weinstock), a supplier of web slings used in the rigging and erection of cranes, supplied two nylon web slings, which were manufactured by Shaw, and which were recovered intact and in one piece from the site immediately after the accident.

Initially, it should be explained that tower cranes, such as the one at issue in this case, are often used during the construction of high-rise buildings in urban areas. These cranes consist of sections which are bolted together, and, as floors are added to the building under construction, the height of these cranes are extended or "jumped." As it is important to support the lateral balance of the cranes during this process, square "collars" are placed around the tower of the cranes at certain intervals and then pinned to "tie-beams." These tie-beams are then bolted to the building's structure.

At the time of the accident, the height of the tower crane being utilized was extended to approximately 250 feet and a six-ton steel collar, consisting of two halves, was being installed around the sections located at the 18th floor level of the building. Each collar half was then lifted into place and temporarily suspended from the tower by web slings. After the two halves were

bolted together around the tower, the crane crew began to install the first of the three tie-beams, in order to connect the collar to the 18th floor of the building. These tie-beams were themselves suspended by slings. Allegedly, when the slings that were suspending the collar broke, the collar fell down along the tower and struck the ninth floor collar, severing the tie-beams at that level before further falling and dislocating the third-floor collar. The tower, now destabilized, toppled southward, striking and crushing the buildings across the street.

The facts and circumstances surrounding the crane collapse have been investigated by the New York City Department of Buildings (DOB), the New York County District Attorney's Office (DA), the New York City Department of Investigation (DOI) and the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA).

During the post-collapse investigations, multiple items were recovered from the accident site. Among these items were two four-inch-wide by 12-foot-long nylon web slings bearing orange identification labels containing the name "WEINSTOCK BROS. CORP.," in addition to that company's address and the words "STOCK NO. 400RXXXWSN," "WIDTH 4," and "NYLON" sewn into the slings (Shaw's Notice of Motion, Exhibit C, Photographs of Weinstock Web Belts). Shaw acknowledges that it manufactured and supplied to Weinstock these two slings (the Weinstock slings) for distribution. OSHA is currently in possession of the Weinstock slings, and has not yet released them for testing.

In addition to the Weinstock slings, seven pieces of broken two-inch-wide polyster web slings (the broken slings) were also recovered from the site. Based upon their respective lengths, six of the seven broken web slings were parts of three originally two-inch-wide by six-feet-long web slings. One of the broken slings contained a white-colored "Metro Wire Rope"

identification label, and three of the broken slings contained an orange-colored "Lift All" identification label.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224, 226 [1st Dept 2002]).

WHETHER QUESTIONS OF FACT EXIST AS TO WHETHER THE WEINSTOCK WEB SLINGS WERE IN USE AT THE TIME OF THE ACCIDENT, WHETHER THEY FAILED DUE TO A MANUFACTURING OR DESIGN DEFECT AND WHETHER THIS FAILURE SUBSTANTIALLY CAUSED THE ACCIDENT

"A manufacturer who places into the stream of commerce a defective product which causes injury may be liable for such injury" (*Amatulli v Delhi Construction Corporation*, 77 NY2d 525, 532 [1991]; *Codling v Paglia*, 32 NY2d 330, 339 [1973]). As put forth in the case of *Amatulli v Delhi Construction Corporation* (*supra*):

> A defect in a product may consist of a mistake in manufacturing, an improper design or the inadequacy or absence of warnings for the use of the product. For there to be a recovery for injuries or damages occasioned by a defective product, however, that defect must have been a substantial factor in bringing about the injury or damage and additionally, among other things, at the time of the occurrence, the product must have been used for the purpose and in the manner normally intended or in a manner reasonably foreseeable [internal citations omitted]

(*id.*).

Shaw puts forth as its sole argument in support of its motion that, as the Weinstock slings were found fully and completely intact when they were recovered from the accident site, they did not fail. As the Weinstock slings did not fail, they could not have substantially caused or contributed to the accident (*see Stajano v United Technologies Corporation of New York*, 273 AD2d 162, 163 [1st Dept 2000] [defendants' motion for summary judgment properly denied, since they failed to present evidence of causation, so as to eliminate the possibility that the accident was caused by a design or manufacturing defect in the helicopter's external cargo carrying system]).

To satisfy its prima facie burden, Shaw relies on authenticated photographs of the Weinstock slings, which demonstrate that these slings were recovered intact and in one piece. Shaw also submits the affidavit of Robert S. Jasany, an expert in the synthetic web industry for over 25 years, who conducted an examination of the two Weinstock slings on May 13, 2009. In his affidavit, Jasany described the Weinstock slings as being four inches wide and 12 inches in length, made of nylon and fully and completely intact. Jasany opined that, as the slings were still in one piece, they did not fail, and thus, they did not substantially cause or contribute to the accident.

In opposition, East 51st, Reliance and multiple plaintiffs argue that Shaw is not entitled to summary judgment dismissing all claims and cross claims as against it, as questions of fact exist which include, but are not limited to, the ultimate cause or causes of the accident, whether the Weinstock slings were used to support some of the crane's components during the rigging operation going on at the time of the accident, whether they failed, due to a manufacturing or design defect, and whether this failure may have contributed to or caused the crane collapse.

As put forth by the parties opposing Shaw's motion, the fact that the Weinstock slings were recovered intact and in one piece does not definitively establish that the aforementioned questions of fact regarding the Weinstock slings do not exist. For example, a review of evidence in the record indicates that certain yet unidentified slings, other than the recovered broken slings, were also in use at the time of the accident. To that effect, the DOB report states that, at the time of the collapse, the workers were maneuvering a tie-beam, which was itself suspended by slings. Also, in conjunction with his criminal trial, Rapetti stated that he used some of "his own slings," which he purchased in 2007, "to trip and raise the tower sections" (East 51st Affirmation in Opposition, Exhibit 1, Letter from District Attorney to John Espisito Regarding Statement of William Rapetti, at 10).[2] These other slings may or may not have been the Weinstock slings. The fact that the Weinstock slings were recovered in the area of the accident creates an issue of fact as to whether they were also in use at the time of the accident.

Moreover, a mere visual inspection, such as the one conducted by Shaw's expert, Jasany,

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[2]It should be noted that the court (Smith, J.) previously made a ruling admitting the criminal trial testimony as "other available proof," pursuant to CPLR 3212 (b). In addition, courts have accepted criminal trial testimony as competent evidence in determining the merits of summary judgment motions (*see Saarinen v Kerr*, 84 NY2d 494, 497 [1994]).

is insufficient to demonstrate that the Weinstock slings did not fail. Although the Weinstock slings may have looked intact and in one piece, they still may have failed by improperly slipping or stretching, due to a manufacturing and/or design defect. For example, a leaning ladder that slips out from beneath a worker, due to defective rubber installed on the feet of that ladder, may appear properly intact and in one piece following the accident. Nevertheless, the ladder failed, substantially causing the accident.

WHETHER SHAW'S MOTION FOR SUMMARY JUDGMENT IS PREMATURE BECAUSE DISCOVERY IS OUTSTANDING

The parties opposing Shaw's motion argue that Shaw's motion is premature, since discovery, which may lead to relevant evidence regarding the ultimate cause of the crane collapse, as well as the possible role that the Weinstock slings may have played in the accident, remains outstanding. "A determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (*Ruttura & Sons Construction Company v J. Petrocelli Construction, Inc.*, 257 AD2d 614, 615 [2d Dept 1999]).

Shaw asserts that its motion for summary judgment dismissing all claims, third-party claims and cross claims as against it is not premature, because no amount of further deposition testimony or testing can change the undisputed fact that the Weinstock slings were recovered intact and in one piece, and thus, they could not have played any role in the collapse of the crane. As no possible conclusion reached by OSHA or any other future determination as to the ultimate cause of the collapse will have any bearing on its motion, Shaw argues that opposing counsels'

arguments are nothing more than a "mere hope" that these parties will uncover evidence to support their case (*Kennerly v Campbell Chain Company*, 133 AD2d 669, 670 [2d Dept 1987] ["Mere hope that somehow the plaintiffs will uncover evidence that will prove their case, provides no basis, pursuant to CPLR 3212 (f), for postponing a decision on a summary judgment motion"]; *Fulton v Allstate Insurance Company*, 14 AD3d 380, 381 [1st Dept 2005] [mere hope that plaintiffs will uncover evidence that will prove their case was no basis for postponing summary judgment decision]).

Here, as further discovery is necessary in order to resolve the aforementioned issues of fact, Shaw's motion for summary judgment is premature (*see Groves v Land's End Housing Company*, 80 NY2d 978, 980 [1992]; *Syracuse University v Games 2002, LLC*, 71 AD3d 1531, 1531-1532 [4th Dept 2010] [Court held that, even assuming that plaintiff met its initial burden on the motion, the plaintiff's motion was premature because discovery had not been completed, including depositions regarding the respective roles that the parties involved in the accident may have played]).

Shaw's motion for summary judgment is premature for a number of reasons. First, in order to determine whether the Weinstock slings were in use at the time of the accident, it is necessary to obtain the deposition testimony of certain eye-witnesses to the events leading up to the crane collapse, as well as various experts involved in the post-accident investigations. For example, at the criminal trial of master rigger Rapetti, Mark Strauss (Strauss), the owner of Weinstock, alluded to the fact that certain slings, which were allegedly used on the day of the accident, may have been manufactured by Shaw. In addition, Rosaria Galluzzo (Galluzzo), a former JCI employee, personally witnessed the crane collapse. Galluzzo, as well as other JCI

employees, may be able to provide valuable information regarding which slings were utilized during the jumping operation underway at the time of the accident. In fact, witnesses produced by New York City in Rapetti's criminal trial, have yet to be deposed.

Second, further testing of certain sling fibers found on the various tower sections could indicate whether the Weinstock slings were in use at the time of the crane collapse. At the very least, fiber testing will put to rest issues of whether the slings in use at the time of the accident were made of nylon or polyster. In the event that it is found that the Weinstock slings were in use at the time of the accident, testing of the Weinstock slings themselves is necessary in order to determine whether the slings contain manufacturing and/or design defects that may have caused or contributed to the crane collapse. So far, OSHA has prohibited all parties from testing the Weinstock slings until the conclusion of the Rapetti criminal trial.[3]

A review of the evidence in this case indicates that OSHA tested the broken slings for displacement and elongation, which represented the combined effects of sliding and stretching. These kinds of tests, which could possibly demonstrate that the Weinstock slings could have slipped or stretched in a manner that caused them to fail, could potentially shed light on whether the Weinstock slings played any role in the accident.

It should also be noted that, in his affidavit, Reliance's expert, Mike Parnell, a specialist in the area of rigging and crane operations, concluded that he was not able to rely solely on the conclusions contained in the DOB report without being able to first analyze the raw data used to

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[3]The OSHA report, which examines the uses and failures of the various slings at the site, is also not yet publicly available.

reach those conclusions or observe the various methodologies employed.[4] In addition, Allyn Kilsheimer, an expert hired by East 51st, visually inspected the slings in the possession of OSHA and stated that, as the crane parts and slings have not been made available for testing and analysis, "[i]t is presently impossible to determine the proximate cause of the crane collapse with any reasonable degree of structural engineering certainty" (Affirmation in Opposition of East 51st, Exhibit 2, Kilsheimer Affidavit, dated April 19, 2010, at 3).

Accordingly, summary judgment is denied without prejudice, as premature.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that Shaw Belting Company's motion, pursuant to CPLR 3212, for summary judgment dismissing any and all causes of action as against it is denied.

DATED: October 20, 2010

ENTER:

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

[4]It is uncontested that the Court (Smith, J.) held that, pursuant to CPLR 4518, "testing, expert reports, observations and photographs," but "not statements and interviews" of witnesses used in the DOB report, were admissible under the "business records" exception to the hearsay rule.