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

PRESENT: BARBARA JAFFE J.S.C. PART 5

Index Number : 105375/2008
BORST, MICHAEL
vs.
LOWER MANHATTAN DEVELOPMENT
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT
CAL # 11

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

SEP 08 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/6/11

SEP 06 2011

BARBARA JAFFE
J.S.C.

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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MICHAEL BORST, *et al.*,

Plaintiffs,

-against-

LOWER MANHATTAN DEVELOPMENT CORPORATION, *et al.*,

Defendants.

----------x

Index No. 105375/08

Motion Subm.: 6/14/11
Motion Seq. No.: 002
Cal. No.: 13

DECISION & ORDER

BARBARA JAFFE, JSC:

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By notice of motion dated February 4, 2011, plaintiffs Michael Borst, Sean McBrien, and Steve Olsen move pursuant to CPLR 3212 for an order granting them summary judgment as to liability only in their action against defendant Bovis Lend Lease LMB, Inc. (Bovis). Bovis opposes.

I. BACKGROUND

On August 18, 2007, moving plaintiffs, New York City firefighters, were injured while fighting a fire at the Deutsche Bank building in Manhattan. (Affirmation of Dominique Penson, Esq., dated Feb. 4, 2011 [Penson Aff.], Exh. 1). Following a criminal investigation into the cause of the fire, Bovis entered into a non-prosecution agreement with the New York County District Attorney's Office (DANY) (Agreement). (*Id.*, Exh. 5). In the Agreement, DANY states that it has determined that it could institute a criminal prosecution for the crimes of manslaughter

in the second degree, criminally negligent homicide, and reckless endangerment in the second degree related to the fire, but that it has agreed not to prosecute Bovis in connection with these crimes in consideration for Bovis's willingness "to acknowledge responsibility for its actions," comply with various safety initiatives, and establish a memorial fund. Bovis agrees therein that it "does not challenge the factual recitation of its conduct and that of its employees as set forth in the Statement of the District Attorney attached (Statement) . . . and incorporated herein by reference . . ." and "neither admits nor denies criminal or civil liability." (*Id.*). The Agreement prohibits Bovis from making "any public statement contradicting, excusing or justifying any statement of fact contained in the Statement, except in connection with testimony or argument in any civil litigation or proceeding" related to the fire, and it "explicitly excludes Bovis' testimonial obligations or its right to take legal or factual positions in litigation or other legal and/or administrative proceedings to which DANY is not a party."

The Statement contains the following pertinent facts:

1) The Deutsche Bank building had been damaged in the September 11, 2001 terrorist attack, and the building's sprinkler system was permanently disabled, with the dry standpipe system the only remaining way to bring water into the building to fight fires;
2) Bovis was the construction manager of the deconstruction plan for the building, which included the simultaneous abatement of toxic substances and demolition, and it hired The John Galt Corp. (Galt) as a subcontractor to perform the deconstruction;
3) As part of the deconstruction plan, Bovis and Galt agreed, among other things, to: a) comply with all applicable laws and statutes; b) perform daily inspections to ensure that the work being performed did not endanger employees or the general public; c) maintain the building's standpipe so that it would be functioning and available at all times; d) inform the New York City Fire Department (FDNY) of any change in the plan; e) coordinate their scope of work with FDNY; f) prepare a fire plan that complied with all FDNY and New York City Department of Buildings (DOB) codes; g) call 911 to report any fire in the building; and h) prohibit any smoking in the building;

4) Pursuant to City Rules and Regulations and the Administrative Code, Bovis and Galt were required to inspect, maintain, and protect the standpipe and maintain unobstructed egress from the building;
5) Bovis was required by law to employ a full-time safety manager to ensure compliance with its safety obligations, and although Galt was contractually obligated to do the same, it never did so;
6) As the risk of fire in the building was a recognized risk, Bovis and Galt were required to notify the FDNY of any fire by calling 911 and the FDNY was required to inspect the building at least every 15 days;
7) Between June 11, 2007 and August 10, 2007, several fires occurred in the building but were not reported to the FDNY and the FDNY never performed its inspections;
8) On August 18, 2007, a fire started on the 17th floor of the building;
9) Before the first fire engine company entered the building, its lieutenant was informed that the standpipe was operational;
10) After firefighting operations were underway, several FDNY officials were advised that the standpipe was working;
11) After the fire had begun, firefighters connected two hydrants in the street next to the building to the standpipe and water began to flow into it; however, the standpipe did not become fully charged and water was not reaching the firefighters fighting the fire;
12) Connections to the standpipe had previously been removed;
13) The firefighters were ultimately required to use an exterior riser and haul a water hose line from the street to the floors where the fire was burning, and water was thus first available approximately 61 minutes after firefighters first entered the building;
14) Due to the delay in having water to fight the fire, the building conditions became chaotic and deadly, causing injuries to numerous firefighters and the deaths of two of them;
15) FDNY's investigation revealed that the standpipe had been dismantled at least eight months before the fire during asbestos removal, when Galt supervisors removed the hanging rods that kept the standpipe attached to the ceiling in the building's basement, causing two portions of the standpipe to tear off and either fall down or hang semi-suspended;
16) Two Galt employees and Bovis's site safety manager observed the broken standpipe and decided to remove the broken pieces, and the open ends of the standpipe were then sealed with tape and glue;
17) The removal of the broken pieces resulted in a gaping, 42-inch breach in the standpipe, and the standpipe was not repaired before the fire, nor did anyone report its condition;
18) Before the standpipe was broken, Bovis's site superintendent insisted on testing it but Bovis replaced him and the pipe was never again tested;
19) Even though Bovis's site safety manager knew that the standpipe was broken, he

did nothing to fix it, and he prepared daily Project Checklists indicating that the standpipe was operable; and

20) Bovis's site superintendents also failed to verify the Checklists or examine the standpipe.

(*Id.*, Exh. 5).

Bovis also annexed its own public statement to the Agreement, in which it stated that it does not "challenge the factual conclusions of the District Attorney's office that Bovis' Site Safety Manager failed to maintain the standpipe, as was his and Bovis' obligation, and that a number of Bovis' Site Superintendents failed to properly supervise [Bovis's] Site Safety Manager." (*Id.*).

II. CONTENTIONS

Plaintiffs contend that Bovis is judicially estopped from re-litigating the issue of whether its actions related to the standpipe and fire were negligent as it is bound by the position it takes in the Agreement, that the statements made or acknowledged by Bovis therein constitute admissions, and that based on the Agreement and plaintiffs' supporting affidavits in which they discuss how they were injured during the fire, they have established, *prima facie*, Bovis's liability for negligence pursuant to General Municipal Law § 205-a and for common-law negligence. (Penson Aff.).

Bovis denies that plaintiffs are entitled to summary judgment as the Agreement is not an admission of liability but rather the resolution of a pre-action dispute, or settlement agreement, which is inadmissible. It observes that the Agreement provides that it does not admit liability and that it may challenge the Agreement's factual findings in a civil action, thereby indicating that the statements are not admissions. Bovis also denies that it is judicially estopped as the

Agreement does not involve or result from a judicial action or proceeding, and denies that plaintiff's affidavits demonstrate that it was negligent, submitting the affidavit of its project manager in which he states that Bovis's plan for and work at the building was in compliance with applicable codes and regulations. (Affirmation of Stephen M. Bigham, Esq., dated Apr. 18, 2011).

In reply, plaintiffs observe that Bovis does not deny the accuracy of the factual allegations set forth in the Agreement or Statement, and deny that the Agreement constitutes an inadmissible settlement agreement or that it provides that the facts stated therein are not admissions. They also contend that Bovis is judicially estopped by the Agreement as a related criminal proceeding was commenced by DANY's investigation and presentation to the grand jury. (Reply Affirmation, dated May 5, 2011).

III. ANALYSIS

A. Is the Agreement admissible and do the statements constitute admissions?

As a matter of public policy favoring the out-of-court resolution of claims, it is generally held that an offer to settle a claim or the acceptance of an offer to settle is inadmissible as proof of liability for the claim. (CPLR 4547; 58 NY Jur 2d, Evidence and Witnesses § 306 [2011]). Nor does an offer to settle constitute an admission of liability, and statements of fact made during settlement negotiations are likewise inadmissible. (*Id.*).

Here, when Bovis entered into the Agreement with DANY, DANY had already commenced the criminal investigation into the fire and was contemplating criminal charges against Bovis. Thus, the Agreement constitutes a settlement of impending criminal charges against Bovis, and is thus inadmissible. Consequently, any factual statements contained therein,

notwithstanding their culpable nature, do not constitute admissions. (*See eg Bernheim v Elia*, 2010 WL 743887 [WD NY 2010], *affd* 410 Fed Appx 407 [2d Cir 2011] [statements made in settlement agreement inadmissible and thus any alleged admission a nullity]; *U.S. v Gilbert*, 668 F2d 94 [2d Cir 1981] [consent decree may not be used to prove underlying facts of liability] *Oei v Citibank, N.A.*, 957 F Supp 492 [SD NY 1997] [admissions in settlement agreement inadmissible]; *Univ. Carloading & Distrib. Co. v Penn Cent. Transp. Co.*, 101 AD2d 61 [1st Dept 1984] [settlement offer, made to procure settlement of pending controversy, not admission of fact]; *J.A.O. Acquisition Corp. v Stavitsky*, 192 Misc 2d 745 [Sup Ct, New York County 2001], *affd* 293 AD2d 323 [1st Dept 2002] [concessions made by parties in attempt to resolve dispute without litigation inadmissible on motion for summary judgment in civil action]).

Moreover, the parties expressly agreed to permit Bovis to contradict, excuse or justify any statement of fact contained in the Statement in connection with testimony or argument in any civil litigation or proceeding and to take any legal or factual position in any litigation to which DANY is not a party. The parties thereby expressed their intent that the factual statements made by Bovis in the Agreement not constitute admissions binding on Bovis outside of the criminal proceeding. (*See* 8 Carmody-Wait 2d § 56:73 [2011] [stipulation of settlement not admissible as admission if it provides that it is not to be taken as admission in any other proceeding]; *Callahan v P.J. Carlin Constr. Co.*, 223 AD2d 459 [1st Dept 1996], *lv denied* 88 NY2d 896 [*prima facie* claim of negligence not shown based on OSHA violations as stipulation settling OSHA claims specified that settlement was not admission in any other proceeding]; *Kollmer v Slater Elec.*, 122 AD2d 117 [2d Dept 1986] [where worker was killed by alleged negligence of employer and employer was fined by OSHA for violation of workplace rule pursuant to stipulation that

provided that settlement was not to be taken as admission in any other proceeding, stipulation inadmissible in worker's civil action for negligence]; *see also* 58 NY Jur 2d, Evidence and Witnesses § 339 ["if a stipulation or admission is made only for the purpose of the pending trial and is so understood, it is not conclusive or even admissible in evidence on a subsequent trial"]).

The opinions cited by plaintiffs are not probative as they do not address the admissibility of a non-prosecution agreement. Thus, plaintiffs have failed to establish that the Agreement is admissible or that the factual statements contained therein constitute admissions.

B. Does the Agreement judicially estop Bovis from denying liability?

A party is estopped from taking inconsistent positions in separate legal proceedings. Consequently, where there has been no prior legal proceeding, a party is not estopped from doing so. (57 NY Jur 2d, Estoppel, Etc. § 57 [2011]). Moreover, as a settlement does not constitute a judicial endorsement of a party's claims, a settlement does not operate to estop the party from making a claim absent court approval of the settlement. (57 NY Jur 2d, Estoppel, Etc. § 67 [2011]).

Here, when Bovis entered into the Agreement with DANY, there was no legal proceeding to which it was a party (*see eg Ferring v Merrill Lynch & Co., LLC*, 244 AD2d 204 [1st Dept 1997] [plaintiff's prior appearance before Social Security Administration, which did not involve a hearing, did not constitute prior legal proceeding that could form basis for applying judicial estoppel], and the Agreement was a settlement agreement which was neither judicially endorsed nor approved (*see In re Estate of Costantino*, 67 AD3d 1412 [4th Dept 2009] [judicial estoppel inapplicable as prior matrimonial proceeding ended in settlement]; *Douglas v Dashevsky*, 62 AD3d 937 [2d Dept 2009] [prior action was settled and did not result in judgment]).

And, as the parties also agreed that Bovis may contest any facts or take any factual or legal position in any litigation or legal proceeding, it would constitute an unfair exaltation of form over substance to consider that its present denial of liability constitutes a position inconsistent with its prior position. For all of these reasons, plaintiffs have not demonstrated that Bovis is judicially estopped from contesting the facts set forth in the Agreement.

C. Plaintiff's affidavits

As the Agreement is inadmissible, and absent any other evidence related to Bovis's allegedly negligent actions, plaintiffs have failed to establish, *prima facie*, that Bovis was negligent or that its negligence was the proximate cause of their injuries.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for summary judgment is denied.

ENTER:

Barbara Jaffe, JSC

DATED: September 6, 2011
New York, New York