Matter of East 51st St. Crane Collapse Litig.
2012 NY Slip Op 33313(U)
January 17, 2012
Sup Ct, NY County
Docket Number: 769000/2008
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL EDMEAD** PART 31
Justice

Index Number : 117452/2008
CRAVE FOODS INC.
vs.
RAPETTI RIGGING SERVICES
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by Langan Engineering & Environmental Services, Inc. pursuant to CPLR §3212(b) to dismiss all complaints, third-party complaints, and cross-claims against it in the consolidated cases is granted; and it is further

ORDERED that all complaints, third-party complaints, and cross-claims asserted against Langan Engineering & Environmental Services, Inc. are hereby severed and dismissed; and it is further

ORDERED that Langan Engineering & Environmental Services, Inc. serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

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

Dated: 1.17.2012

J.S.C.
HON. CAROL EDMEAD

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

----------X

IN RE EAST 51ST STREET CRANE COLLAPSE LITIGATION

Index No.: 769000/2008

----------X

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Langan Engineering & Environmental Services, Inc. ("Langan") moves pursuant to CPLR §3212(b) to dismiss all complaints, third-party complaints, and cross-claims (collectively referred to the "claims") against it in the consolidated cases arising from the collapse of a tower crane during the construction of a high-rise building (the "Building") at 303 East 51st Street (the "Site") on March 15, 2008.

Factual Background

Prior to the incident, Langan submitted four proposals for Geotechnical Engineering Services and Pre-Construction Surveying Services to JBS Construction Management ("JBS"), the representative of the owner/developer, East 51st Street Development Company, LLC ("East 51st Street").

The June 2006 Proposal provided for Langan to perform geotechnical subsurface investigation services related to the development of the Building, including, *inter alia*: (1) evaluation and preliminary geotechnical engineering report, (2) post-demolition subsurface investigation, (3) design development, (4) prepare foundation-related construction documents, and (5) Building foundation construction administration. After completion of its analysis of the subsurface to support the Building foundation, Langan issued a Geotechnical Engineering Report dated September 13, 2006 ("Geotech Report"), which contained a subsurface geotechnical evaluation and recommendations for the foundation design and construction of the Building. The

Geotech Report indicates that, "The purpose of the evaluation was to investigate the subsurface conditions and develop recommendations for the foundation design and construction."

The September 2006 Proposal required Langan to perform survey work regarding the condition of the buildings adjacent to the Site. The September 2006 Proposal "Scope of Work" was for: (1) pre-construction conditions survey, and (2) the preparation of a report of observed conditions for of the adjacent buildings. According to Langan, the survey work was performed on the facades of and inside the buildings adjacent to the Site, and the work and corresponding report were completed before construction began.

Under the October 2006 Proposal, Langan's services were limited to the "Preparation of Excavation Drawings" related to the excavation to be performed for the Building foundation. This design work also predated the construction of the Building foundation.

Finally, the July 2007 Proposal required Langan to perform an existing conditions survey of an adjacent building, 311 E. 51St Street and prepare a report of same.

Thereafter, Langan and RCG Group, the construction manager at the Site, entered into a Short Form Contract and Proposal dated January 16, 2008 for vibration monitoring services to be performed at the nearest adjacent building.

The crane collapsed approximately two months thereafter, and as a result, Langan was sued in 57 cases,[1] as either a direct defendant or third party defendant. Generally, it is alleged that Langan, "negligently, recklessly and carelessly performed testing, monitoring and inspection

[1] Of the 57 cases, according to RCG eight cases were either settled or disposed. Langan asserts that this motion applies to all cases in which claims have been asserted against it, including the 15 previously resolved cases, to the extent any claims survive in those suits. None of the plaintiffs who have alleged direct claims against Langan opposed Langan's motion.

services of the geotechnical, soil, rock, bearing and backfill aspects of construction at the site and utilities where the accident occurred and the effects on the Crane and rigging of the Crane."

In support of dismissal, Langan contends that its geotechnical services were entirely related to the Building foundation, and that it complied with the standard of care of a geotechnical engineer operating under similar circumstances. Further, there is no evidence that Langan's services were related to the design, installation, erection, operation or maintenance of the crane or the crane foundation, or were a cause of the crane collapse. Nor did its contract include any design, investigation, analysis, inspection or other services relative to the crane foundation or any services related to the design, installation, erection, operation or maintenance of the crane. Nor is there any evidence that any of its findings or recommendations with regard to the Building foundation were defective.

Langan points to the "Limitations" section of the Geotech Report, indicating that the Geotech Report was limited to Langan's subsurface condition investigation for the design of the Building foundation. Langan states that to the extent any party argues that it had any obligation to consider the crane load, with respect to "Design Earth Pressures," the Geotech Report states that, "Large concentrated loads, such as crane loading, should be analyzed individually on a case-by-case basis. The final design will be the responsibility of the foundation contractor's professional engineer."

Langan was not the professional engineer. Instead, Peter Stroh of Stroh Engineering ("Stroh") performed the engineering design for the crane foundation and for the erection and installation of the crane. Specifically, on January 10, 2008, about two months before the incident, Stroh certified that he visited the Site and "designed a steel dunnage with concrete wall

bearing on sound rock for the tower crane. . . ." Stroh also "certif[ied] the foundation system and the crane loads." Stroh later reiterated his certification of his inspection, stating that the Building "is OK" since the "building wall is thicker, shorter and takes less load than the crane support wall," and made additional engineering calculations relating to the crane's foundation design and beam bearing on the support walls, which included his engineering analysis of the "Building Foundation Wall" and the "Crane Support Wall."

Also, Langan was not the foundation contractor. Instead, Civetta Cousins JV, LLC ("Civetta") constructed and installed the crane's foundation, including the crane support wall and bearing pads.

Additionally, the report prepared by DOB's forensic engineering expert, Ove Arup & Partners, PC (the "DOB Report") concluded that the cause of the crane collapse "was the failure of the polyester web slings due to improper usage." The DOB Report does not reference Langan's services, or indicate that any of Langan's services were deficient or contributed to the crane collapse.

Langan also cites to the "Report and Recommendations" by Administrative Law Judge John B. Spooner in an action brought by the DOB seeking revocation of William Rapetti's operator licenses for negligent rigging of the crane (the "ALJ Report"). Judge Spooner found that William Rapetti caused the crane collapse by negligently rigging the crane, and there are no references in the ALJ Report to Langan's services or any conclusion that any of Langan's services were deficient or contributed to the crane collapse.

Therefore, Langan argues, no party can prove the elements of a negligence claim against it. Langan had no obligation to perform any services with respect to the crane, crane foundation,

crane rigging, or crane design, and therefore owed no duty to anyone with regard thereto. Absent a duty of care, there is no liability. Furthermore, there is no evidence establishing that Langan was negligent or breached any duty. The depositions of, *inter alia*, East 51st Street, Stroh, Civetta, and Langan, the administrative hearing before and ALJ Report, the DOB report and documents exchanged fail to indicate that Langan's geotechnical or survey/vibration monitoring services were in any way below the standard of care, or that they were related to the design, installation, erection, operation or maintenance of the crane or its foundation or were a proximate cause of the crane's collapse. Also, there is no proof that Langan's services related to the Building foundation or survey and vibration monitoring services were in any manner deficient, or deviated from the applicable engineering standard of care. Nor is there any evidence that Langan's geotechnical services were a proximate cause of the crane collapse.

In opposition, RCG argues that additional discovery is needed to determine whether Langan's recommendations and services affected the crane's safety and stability or contributed to the crane collapse. The depositions of two further witnesses from Civetta, who have knowledge about the installation of the crane base and the foundation wall and free-standing wall that supported the subject crane, are necessary to explore the extent to which Civetta and/or other contractors relied upon Langan's geotechnical recommendations. Similarly, the deposition of a further witness (Peter Khoo) from Favelle Favco USA Inc. ("Favco") (the manufacturer and distributor of the subject crane) concerning the Crane Manual is necessary, in that the Crane Manual requires that a "competent person . . . conduct tests referring to a geological report... before the crane is erected." This requirement is indicated as a "Safety and Preventive Measure" in avoiding the dangers of a situation where a "crane may tilt and fall damaging persons and/or

property." The extent to which this requirement applies to Langan and its Geotech Report is unknown because depositions remain outstanding. These depositions were adjourned due to scheduling conflicts, and were not rescheduled, as other issues in this consolidated litigation took to the forefront. Lastly, Langan's Project Manager, Alan Poeppel, P.E. ("Poeppel"), admitted that Jeong Bok Seo ("Seo") was "more knowledgeable" about Langan's geotechnical services, and RCG has not had the opportunity to locate Seo for service of a non-party subpoena deposition. Seo was at the Site and may have testimony regarding the existing Site conditions and Langan's work regarding the foundation wall and the area surrounding the freestanding wall upon which the crane was constructed.

The parties have until March 2012 to perform all testing and analysis of the subsurface conditions, foundation, and walls upon which the crane was constructed in order to rule out any theories it may have as against Langan. As Allyn E. Kilsheimer, P.E. ("Kilsheimer") attests, there are a number of factors that could have contributed to shifting of the crane from the foundation walls, such as: (1) the foundation walls could have settled more than the ½ inch predicted in the Geotech Report; (2) the rock underlying the foundation walls may not have been able to support the 40 tons per square foot calculated by Langan; and (3) the foundation and the walls they support may have had a construction defect undetected by Langan that rendered the crane base unstable. Thus, it cannot be determined (i) whether Langan complied with the appropriate standard of care; (ii) why the crane rotated from the walls; and (iii) whether the foundations of those walls were a contributing factor in causing the collapse.

Further, Langan cannot make out a *prima facie* case for summary judgment. Without the inspection or examination of any part of the crane foundation, its subsurface conditions, or the

supporting walls, Langan's own expert, Robert Alperstein ("Alperstein"), cannot conclusively state that there is no causal connection between Langan's services and the collapse of the crane. And, Alperstein relies upon the DOB and ALJ Reports, both of which are inadmissible hearsay. The full admissibility of the DOB Report has not been ruled upon by the Court, and the DOB Report does not fall under the business records exception, as it was not made in the "ordinary course of business." Rather, it was the result of an investigation undertaken approximately one year after the incident, by an entity unrelated to the DOB which did not have, or receive from a DOB employee, actual knowledge of the event. And, the DOB Report and its conclusions are based on hearsay. Nor does it fall under the public documents exception; it was not made by a public officer, and it is not in the form of a certificate of affidavit, or limited to a record of facts ascertained or acts performed by public officers. Likewise, the conclusions reached in the ALJ Report were based almost entirely on the OSHA Report and the DOB Report, both of which are inadmissible hearsay.

RCG also argues that issues of fact exist as to whether Langan's services affected the crane's safety and stability. Langan's witness Poeppel testified that it was not unusual for Langan to provide services outside any executed contract, and that Langan's scope of work included making "recommendations for the foundation," determining "the allowable bearing capacity," and "anticipated or estimated settlements under that load." Stroh designed the tower crane and its foundation in accordance with the information regarding the allowable subsurface rock bearing capacity in the Geotech Report. Stroh had to take into account subsurface conditions when calculating the vertical crane loads that would be exerted upon the foundation in order to prevent the crane base from either sliding or shifting out from its foundation.

Further, RCG's Chief Operating Officer, Paul Steenson, testified that the crane engineer would rely upon the Geotech Report in order to determine which foundation he was going to propose, and that the Geotech Report had a bearing on the design of the crane and the "things that go into supporting the crane itself." Steenson testified that Langan's geotechnical engineering services would have been related to the tower crane because "the analysis of the rock and the substrate would have been performed by Langan, and in which case we could have relied upon it when we submitted the documents to our trade contractors" who in turn, "would have relied on that information in the preparation of their design work." RCG contends that the crane was ultimately designed to be placed over an existing vault owned by Con Edison, which required that no vertical crane loads be exerted upon the vault. Thus, Stroh engineered the crane foundation such that the vertical crane loads were diverted from the vault to an existing foundation wall and another freestanding wall. Langan made recommendations for the support of the existing foundation wall that was ultimately incorporated into the crane foundation design. Thus, questions of fact also exist as to whether Langan knew or should have known the extent to which its Geotech Report would be used by other contractors or engineers. And, whether Civetta relied upon Langan's recommendations is unknown as depositions remain outstanding.

And, although Langan's recommendations played a key role in ensuring the crane's safety and stability, Poeppel testified that Langan never once took into consideration the fact that a crane was to be erected at the Site.

East 51st Street also opposes Langan's motion, arguing that Langan provided geotechnical and other services in connection with the very foundation wall that directly supported the crane base, and inspected that foundation wall on numerous occasions. In addition, the Geotech Report

included "foundation recommendations" that were relied upon by Civetta during the construction of a second foundation wall, which together with the foundation wall recommended and inspected by Langan, bore the entire weight of the crane.

Further, Langan's claim that it had no obligation to consider the crane load is flawed, given that there is no evidence that the crane load exceeded the 40 tons per square foot bearing capacity provided in the Geotech Report. Thus, any settling of the foundation walls more than the ½ inch predicted by Langan was not necessarily due to the crane load, but could have occurred because Langan underestimated the settlement potential of the underlying rock or miscalculated the amount of weight that this rock could bear. Kilsheimer has not been able to examine the foundation walls that supported the crane to determine whether a defect therein contributed to the sliding of the steel beams and the shifting of the crane base. Langan played a role in the design and construction of those walls, and any defect could be attributable to Langan's professional negligence.

Furthermore, in order to exercise reasonable care and prevent harm, an engineering firm such as Langan must consider whether the foundation can support such a crane, or, if it cannot, to either: (i) modify the foundation recommendation to provide adequate support for a crane; or (ii) inform the construction manager that a crane cannot be used. Langan's witness testified that Langan was aware that a tower crane would be used at the Site and that there was only one place on the site where it could be positioned. Thus, Langan had a duty to consider any additional strain the crane load would put on the foundation. As Langan admits that it did not account for the crane load, Langan breached its duty and contributed to the accident.

East 51st Street adds that the ALJ Report also does not fall under the public-records

exception to the hearsay rule. The ALJ Report is not signed and is not accompanied by any other form of authentication or certification as required. And, it is untrustworthy, as East 51st Street and the other defendants in this consolidated action were not parties to the hearing and thus could not present evidence or cross-examine witnesses.

Also, it cannot be determined whether the unforeseen settlement of the foundation walls was a contributing factor. Denying Langan's motion with leave to renew at the close of discovery will not prejudice Langan, which has already been in this action for three years.[2]

In reply, Langan argues that East 51st Street, RCG and La Greco (collectively, the "opponents") have long been aware of Langan's intention to move for summary judgment. Yet, they have failed to pursue any of the discovery they now claim they need, and failed to offer any valid excuse for their failure to conduct discovery diligently. The opponents' speculation about "possible theories" and hope that additional discovery might yield evidence of Langan's liability are insufficient. Kilsheimer's expert affidavit is also insufficient. Kilsheimer is not a geotechnical engineer and is unqualified to opine as to the standard of care applicable to a geotechnical engineer. The affidavit also contains nothing more than conjecture, conclusory statements, and expressions of hope, lacks an adequate factual foundation and methodology, and assumes facts not in evidence. Nor does Kilsheimer dispute the conclusions in the DOB Report and the ALJ Report, or the opinions of Langan's expert, Alperstein.

The opponents have not submitted any admissible evidence that Civetta and Stroh relied on Langan's geotechnical recommendations and data. And in any event, there is no evidence that Langan approved, authorized or was aware that Civetta and Stroh would rely upon the Geotech

[2] La Greco adopts the arguments made by East 51st Street and RCG.

Report. The opponents have failed to refute Langan's evidence that it was not responsible for the construction of the foundation wall or the freestanding support wall.

Further, the opponents have not demonstrated that additional discovery is needed. Kilsheimer provides no specifics regarding: what tests he needs to perform or specifically what he needs to examine, what realistically potential defect might be discovered in his inspection and analysis, how Langan's services relate to any defect that might be discovered. He fails to explain why an inspection is necessary. Nor are the depositions sought relevant, and there is no explanation for waiting two years to seek Seo's deposition. There is no explanation as to why Kilsheimer has "not been allowed" to visit the Site. And, Kilsheimer cannot claim that he has never visited the Site, because, he has. While Kilsheimer qualifies his statement by saying that he has not been allowed to visit the Site "for this purpose," *i.e.*, crane support wall and foundation inspection, he fails to explain why he has been allowed to visit the Site for other purposes but not for the purpose of inspecting the foundation.

The opponents should be estopped from arguing that the DOB and ALJ Reports are hearsay, as they have previously relied upon their contents and findings to support their opposition to the summary judgment motions of Weinstock Brothers Corporation, Shaw Belting Company, and Construction Realty Safety Group. In any event, the ALJ and DOB Reports are admissible under the business records and public records exceptions to the hearsay rule because they meet all of the requirements for accuracy and reliability.

And, Langan will suffer significant, irreversible harm by continuing to incur expenses in defending itself in this litigation.

Discussion

Where a defendant is the proponent of a motion for summary judgment, the defendant make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Ivanov v City of New York*, 21 Misc 3d 1148, 875 NYS2d 820 [Sup Ct, New York County 2008]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927, 908 NYS2d 33 [1st Dept 2010]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]). Upon this showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (CPLR §3212 [b]; *Meridian Management Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 894 NYS2d 422 [1st Dept 2010]; *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Cabrera v Rodriguez*, 72 AD3d 553, 900 NYS2d 29 [1st Dept 2010]; *Casper v Cushman & Wakefield*, 74 AD3d 669, 904 NYS2d 385 [1st Dept 2010]).

Preliminarily, as to the admissibility of DOB and ALJ reports, it is undisputed that these documents constitute hearsay. And, Langan failed to establish that either document, in its

entirety, falls under the business records or public records exceptions to the hearsay rule at this juncture.

CPLR 4518, entitled "Business Records," is an exception to the hearsay rule, and in subdivision (a), it states, in pertinent part, that a judge may admit into evidence any writing or record, which he or she finds "was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter ..." (*Clarke v New York City Transit Auth.*, 174 AD2d 268, 580 NYS2d 221 [1st Dept 1992]). The exception "rests upon the probability of trustworthiness which inheres in such records, by virtue of the fact, first, that they are the 'routine reflections of the day to day operations of a business' and, second, that it is the entrant's own obligation, and to his interest, to have them truthful and accurate, made and kept as they are with the knowledge, indeed, for the purpose, that they will be relied upon in the conduct of the enterprise ..." (*id.* at 273, citing *Williams v Alexander*, 309 N.Y. 283, 286–287, 129 N.E.2d 417 [1955] [internal citations omitted]). Thus, in order for the record to be admissible as proof of the facts recorded therein, it must be demonstrated that: (1) the document or record was made in the regular course of business; (2) that it was the regular course of such business to make the record; (3) that the record was made at the time of the act or occurrence recorded or within a reasonable time thereafter, and (4) that the person who made the record had actual knowledge of the event recorded or received the information from someone within the business who had actual knowledge and was under a business duty to report the event to the maker of the record or if the statement of an outsider within the business record satisfies an independent hearsay exception (*Kaiser v Metropolitan Tr. Auth.*, 170 Misc 2d 321, 648 NYS2d 248 [Sup. Ct., Suffolk County

1996] *citing* Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4518:1); *see also Wright v McCoy*, 41 AD2d 873, 343 NYS2d 143 [3d Dept 1973]). If all of the requirements are not satisfied, the record may not be admitted as a business record.

Under CPLR 4518(a), even records prepared primarily for litigation are admissible as business records "if there are other business reasons which require the records to be made." (Green v DeMarco, 11 Misc.3d 451, 812 NYS2d 772 [Sup. Ct., Monroe County 2005] *citing* People v Foster, 27 N.Y.2d 47, 52, 313 NYS2d 384, 261 N.E.2d 389 (1970).

As to the public records exception, CPLR 4520 provides:

> Where a public officer is required or authorized, by special provision of law, to make a certificate or an affidavit to a fact ascertained, or an act performed, by him in the course of his official duty, and to file or deposit it in a public office of the state, the certificate or affidavit so filed or deposited is prima facie evidence of the facts stated.

The "admissibility of government investigative reports under CPLR 4520's public documents exception has not been definitively addressed in this State" (*Fruit and Vegetable Supreme, Inc. v The Hartford Steam Boiler*, 28 Misc.3d 1128, 1133, 905 NYS2d 864 [Sup. Ct., Kings County, 2010]). "New York courts may derive some guidance on the issue from examining the Federal counterpart to CPLR 4520, Federal Rules of Evidence, rule 803(8)(C) and the judicial treatment thereof" (*Donovan v West Indian American Day Carnival Ass'n, Inc.*, 6 Misc 3d 1016(A), 800 NYS2d 345 (Table) [Sup. Ct., Kings County 2005] citing *Kaiser v Metropolitan Transit Auth.*, 170 Misc 2d 321, 325 [1996]). In this regard, FRE 803(8)(C), provides that "factual findings resulting from an investigation made pursuant to authority granted by law" are admissible and will not be excluded as hearsay "unless the sources of information or other circumstances indicate lack of trustworthiness" (*Donovan, supra*; *Fruit and Vegetable*

Supreme, Inc., supra).

And, it has been stated that in determining the admissibility of a government investigative report under the public records exception, the Court should consider the following factors:

> (1) factual findings and inferences which reasonably flow therefrom are admissible; (2) opinions may be admissible, if sufficiently supported by the facts, and provided by a qualified declarant; (3) the report may not be used as a vehicle to admit into evidence information which would otherwise be inadmissible; (4) conclusions of law are not admissible; (5) the court must be satisfied that the factual findings are supported by evidence which is trustworthy, and result from an investigative process which is free of bias. In order to make this determination it is necessary that the report contain sufficient detail; (6) the trial court has broad discretion in determining issues of trustworthiness and relevance, and must exercise such discretion in deciding whether a report, or portions thereof, should be admitted.

(*id.* at 1133-1134, citing *Bogdan v Peekskill Community Hosp.*, 168 Misc 2d 856, 642 NYS2d 478 [1996]).

As to the DOB Report, Langan does not dispute that the DOB Report was not made in the regular course of DOB's business, that it was the regular course of business for DOB to make such Report, that the Report was made within a reasonable time after the crane collapse, or that the Report, which was prepared by an independent engineering firm, contains statements from witnesses which are inadmissible. It is undisputed that the DOB Report, completed more than one year after the accident, was based on, *inter alia*, reviews of records provided by the New York County District Attorneys's office, New York City Department of Investigation, Occupational Safety and Health Administration ("OSHA")-related documents, findings by the Center for Advanced Technology for Large Structural Systems Research Center at Lehigh University. Therefore, the DOB Report cannot support Langan's motion for summary judgment, which must be based on evidence in admissible form *(Zohar v 1014 Sixth Ave. Realty Corp.*, 24

AD3d 125, 806 NYS2d 182 [1st Dept 2005] (wholesale admission of a Fire Department report, although generally admissible under the business records exception, unwarranted where it "contains information obtained from persons under no duty to report . . . .")).

While it has been held that "records of the New York City Department of Buildings would, upon a proper foundation and if properly authenticated, be admissible under the business records exception to the hearsay rule" (*People v Al-Ladkani*, 169 Misc 2d 720 [N.Y. City Crim. Ct. 1996]), the proper foundation for the DOB Report has not been established by Langan.

Nor does the DOB Report fall under the public records exception, for purposes of Langan's motion. Here, there is no showing that the DOB Report was prepared by a public officer by special provision of law, and is in the form of an affidavit or certificate. Thus, the Report fails to satisfy the stated requirements of public records exception (*see* McKinney's CPLR Rule 4520, Certificate or affidavit of public officer, "Historically, the two principal stumbling blocks to admissibility [of a government investigative report] have been: (1) the multiple layers of hearsay often contained in such reports; and (2) judicial reluctance to admit reports that contain opinions and conclusions"]; *cf.*, *Kozlowski v City of Amsterdam*, 111 AD2d 476, 488 NYS2d 862 [3d Dept 1985] (deeming admissible a report by the State Commission of Corrections that was prepared pursuant to statutory mandate)).

As to the ALJ Report, Langan failed to establish that this Report falls under the business records exception, for example, that the ALJ had actual knowledge of the event recorded or received the information from someone within the business who had actual knowledge and was under a business duty to report the event.

And, Langan has not shown that the ALJ Report as a whole falls under the public records

exception. While the Report may be free from bias, it was based in large part, on inadmissible evidence, *i.e.*, the OSHA documents and DOB Report. Further, conclusions of law are not admissible. And, and it cannot be said that the factual findings are supported by evidence which is trustworthy. The only parties to the hearing before the ALJ were the DOB and William Rapetti. The purpose of the hearing before the ALJ was to determine whether William Rapetti's rigging operator's license should be revoked pursuant to the Building Code's requirements to inspect certain construction equipment, protect slings from damage by using certain padding, and to follow manufacturer's specifications. In particular, the DOB presented expert testimony concerning the examination of the slings and other equipment at the Site, while William Rapetti sought to establish that he complied with relevant safety practices. The issue of causation of the crane collapse as it relates to *all* of the participants in the construction of the Building, such as Langan, Civetta, and Stroh, were not addressed, and none of these parties or East 51st Street or RCG, participated in the hearing. Therefore naturally, Langan's services were not mentioned in the ALJ Report, since Langan's potential culpability, if any, for the crane collapse was not an issue before the ALJ or even considered as an alternate causation theory.[3] Langan therefore has not shown that the ALJ Report is sufficiently trustworthy to be considered on its motion for summary judgment *(cf., Donovan v West Indian American Day Carnival Ass'n, Inc.*, 6 Misc 3d 1016(A) (stating that as the "ALJ decision (a determination of an administrative agency rendered pursuant to its adjudicatory function) is similarly trustworthy, the court receives and considers

[3] The ALJ Report refers to William Rapetti's counsel's suggestion that the "collapse may have been due to a host of other conditions at the construction site, including irregularities in the tie beam welds, the tie beam pins, the crane foundation, the permit approval for a different model of crane, a prior failure to the crane computer, and the criminal indictment of two DOB employees who had done inspections at th site" which the ALJ rejected. (Page 22).

these proffered documents as presumptive evidence of the facts stated therein")). And, that the ALJ Report may have been used in opposing a prior motion does not overcome this obstacle (*Lott-Coakley ex rel. Lott-Coakley v Ann-Gur Realty Corp.*, 23 Misc 3d 1114(A), 886 NYS2d 67 (Table) [Sup. Ct., Bronx County 2009] (while the movant's burden to proffer evidence in admissible form in support of a summary judgment "is absolute, the opponent's burden is not")).

However, the affidavit of Langan's expert Alperstein is sufficient to support Langan's motion. While Alperstein cites to the DOB and ALJ reports, the expert also relies on Langan's proposals and reports, Stroh's design and calculation documents, Langan's Site Inspection Reports, affidavits of Langan's witness Poeppel, contract, and deposition transcripts of witnesses produced by Langan, Stroh, Civetta, Joy Contracting, and JBS, to support his conclusion (*Potter v NYC Partnership Housing Dev. Fund Co., Inc.*, 13 AD3d 83, 786 NYS2d 438 [1st Dept 2004] (expert's failure to inspect an alleged inadequate ladder does not render expert's affidavit speculative); *Demelio v Playmakers, Inc.*, 19 Misc 3d 911, 855 NYS2d 878 [Sup. Ct., Kings County 2008] ("The photographs, 'contract diagram,' and architectural drawing can be a sufficient basis for an expert opinion" even where the expert did not perform an on-site inspection)).

Turning to the merits, a professional engineer has a duty to perform its services in a careful, non-negligent manner (*West Side Corp. v PPG Indus.*, 225 AD2d 459, 639 NYS2d 342 [1st Dept 1996] (if defendant's engineer undertook to perform inspections of plaintiff's property, defendant "became subject to a duty to perform such inspections in a careful manner and not negligently"]). And, a claim of professional malpractice "requires proof that there was a departure from accepted standards of practice and that the departure was a proximate cause of the

injury" (*Talon Air Servs. LLC v CMA Design Studio, P.C.*, 86 AD3d 511, 927 NYS2d 643 [1st Dept 2011] *citing D.D. Hamilton Textiles v Estate of Mate*, 269 AD2d 214, 215, 703 NYS2d 451 [2000]).

As the movant, and based on the deposition testimony of the parties, documents submitted and Alperstein's affidavit, Langan established that its duty to perform geotechnical and vibration monitoring services were limited to the Building foundation and adjacent buildings, respectively, and that it performed its services in a non-negligent manner. Langan also established that it had no duty to perform any services related to the design, construction, inspection, or maintenance of the crane that collapsed, or to the installation or construction of the crane's foundation. According to Alperstein's affidavit, and as the proposals independently shown, Langan was contractually retained to provide geotechnical engineering services related to the *Building* foundation and survey and vibration monitoring services at other *adjacent buildings.* None of the proposals indicate that Langan was obligated to or undertook to perform any services related to the crane that collapsed or the crane's foundation. As pointed out by Langan, Langan's Project Manager Poeppel testified that the Geotech Report was a summary of Langan's investigation and engineering analysis and foundation recommendations for the Building (Poeppel EBT, pp. 62-63). Langan also established that the tower crane and its foundation were located outside of the Building footprint, and that none of its services were performed outside of the Building footprint.

Further, the Geotech Report limits Langan's responsibility for the Geotech Report's use: "Langan cannot assume responsibility for use of this report for any areas beyond the limits of this study or for any projects not specifically discussed herein." As pointed out by Alperstein, the

Report excludes "large concentrated loads, such as crane loading . . ." and expressly provides that such loads "should be analyzed individually on a case-by-case basis. The final design will be the responsibility of the foundation contractor's professional engineer." Therefore, Langan expressly advised any reader of the document that crane loads were excluded from consideration, and should be considered by the foundation contractor's professional engineer. Such language eliminates the issue of whether Langan should have known that other contractors would rely on the Geotech Report or whether the foundation can support such a crane, as it was expected that the foundation contractor's professional engineer would consider any large concentrated load on a "case-by-case" basis.

Further, Langan established that its vibration monitoring service and resulting recommendations and conclusions, were not defective in any way and that it satisfied the applicable standard of care under the circumstances. As shown by Alperstein's affidavit, the information provided in Langan's site inspection reports are typical in nature of the observational information presented.

And, Langan established that its services with respect to the Building foundation subsurface or its survey and vibration monitoring services were not a proximate cause of the crane collapse. While Langan's geotechnical and vibration monitoring services were clearly related to the construction of the Building, Langan established that its services were not causally related to the crane collapse.

While it cannot be disputed that Langan had a duty to perform its geotechnical and vibration monitoring services in a careful and non-negligent manner, Langan did not undertake the broad duty claimed by the opponents to make recommendations for the foundation of the

subject crane (*see Westside Corp., supra*). The claim that Langan made recommendations and inspections of the very foundation wall that was used, in part, to support the crane base and that Civetta relied on the Geotech Report's analysis in order to construct the *second* foundation wall used to also support the crane ignores the fact that the scope of Langan's services did not, and were not intended to, include these factors. Nor is there any showing that Langan's inspection and evaluation of the subsurface condition of the Building foundation, including the foundation that was used in part to support the crane, was faulty or defective or done in a negligent manner. And, there is no evidentiary support for the claim that the settlement could have occurred because Langan underestimated the settlement potential of the underlying rock under the Building foundation, or miscalculated the amount of weight that this rock could bear. That Kilsheimer was unable to examine the foundation walls that supported the crane and to determine whether a defect in those walls contributed to the sliding of the steel beams and the shifting of the crane base is insufficient. There is no explanation as to why Kilsheimer was unable to perform such examination (*Garcia-Rosales v 370 Seventh Ave. Assocs., LLC*, 88 AD3d 464, 930 NYS2d 183 [1st Dept 2011] (rejecting as unpersuasive plaintiff's claim that summary judgment is premature because an expert was denied the opportunity to conduct a physical inspection where the motion court permitted plaintiff to have an expert engineer inspect the premises, and plaintiff never identified an engineer or proposed a date for the inspection)). Indeed, there is no basis to impose upon Langan the additional duty to consider whether the Building foundation could have supported the crane, or, that it could not, to either: (i) modify the Building foundation recommendation to provide adequate support for a crane; or (ii) inform the construction manager that a crane cannot be used. This duty was expressly excised by the express terms of Langan's

agreements.

Based on the above, the purported need for additional discovery is unwarranted. The additional discovery sought would only yield additional evidence on matters this Court finds insufficient to impose liability upon Langan.

Therefore, having failed to raise an issue of fact as to Langan's liability for the crane collapse accident, Langan is entitled to summary dismissal of all of the claims asserted against it.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by Langan Engineering & Environmental Services, Inc. pursuant to CPLR §3212(b) to dismiss all complaints, third-party complaints, and cross-claims against it in the consolidated cases is granted; and it is further

ORDERED that all complaints, third-party complaints, and cross-claims asserted against Langan Engineering & Environmental Services, Inc. are hereby severed and dismissed; and it is further

ORDERED that Langan Engineering & Environmental Services, Inc. serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: January 17, 2012

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

HON. CAROL EDMEAD