

Sinanaj v City of New York

2013 NY Slip Op 30975(U)

May 6, 2013

Sup Ct, New York County

Docket Number: 117469/08

Judge: Manuel J. Mendez

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

PRESENT: HON. MANUEL J. MENDEZ
Justice

PART 13

IN RE 91ST STREET CRANE COLLAPSE LITIGATION:

XHEVAHIRE SINANAJ and SELVI SINANOVIC as
Co-Administrators of the Estate of RAMADAN KURTAJ,
Deceased & SELVI SINANOVIC Individually,

INDEX NO. 117469/08
MOTION DATE 3-20-2013
MOTION SEQ. NO. 046
MOTION CAL. NO. _____

Plaintiff(s),

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT
OF BUILDINGS, MICHAEL CARBONE, PATRICIA J.
LANCASTER, ROBERT LIMANDRI, NEW YORK CRANE
& EQUIPMENT CORP., JAMES F. LOMMA, LOMMA
TRUCKING & RIGGING, JF LOMMA RIGGING AND
SPECIALIZED SERVICES, BRADY MARINE REPAIR CO.,
TESTWELL, INC., BRANCH RADIOGRAPHIC
LABORATORIES INC., CRANE INSPECTION SERVICES, LTD.,
SORBARA CONSTRUCTION CORP., 1765 FIRST ASSOCIATES,
LLC, LEON D. DEMATTEIS CONSTRUCTION, MATTONE GROUP
CONSTRUCTION CO., LTD., MATTONE GROUP LTD., MATTONE
GROUP LLC, CITY OF NEW YORK SCHOOL CONSTRUCTION
AUTHORITY, CITY OF NEW YORK SCHOOL CONSTRUCTION FUND,
HOWARD I. SHAPIRO & ASSOCIATES CONSULTING ENGINEERS,
P.C., NEW YORK RIGGING CORP., TOWER RIGGING
CONSULTANTS, INC., TOWER RIGGING, INC., UNIQUE RIGGING
CORP., LUCIUS PITKIN, INC., MCLAREN ENGINEERING GROUP,
M.G. MCLAREN, P.C. and JOHN/JANE DOES 1 THROUGH 10,

Defendant(s).

AND ALL RELATED ACTIONS

The following papers, numbered 1 to 6 were read on this motion and cross-motion to/ for
Summary Judgment:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____ cross motion _____
Replying Affidavits _____

PAPERS NUMBERED	
1 - 2	_____
3 - 5	_____
6	_____

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant's,
Branch Radiographic Laboratories, Inc. ("Branch"), Motion pursuant to CPLR

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

Section 3212 seeking Summary Judgment and dismissing the Complaint as against Branch and any and all cross-claims against Branch is denied without prejudice.

At the outset, the Court notes that not all of the papers e-filed were considered in deciding this Motion. Branch e-filed three Affidavits, all dated March 19, 2013. This violates the Court's Part Rules. All parties are advised to review the Court's Rules, available on the nycourts.gov website. In particular, the Court draws all parties attention to Rule 21 which prohibits sur-replies, meaning that there is a limit of one reply. Therefore, the Court only considered one of the Affidavits filed. Also, parties should note Rule 2A which limits motion papers to no more than 20 pages.

This case relates to the collapse of a Kodiak Tower Crane (#84-052) (the "Crane") on May 30, 2008, at East 91st Street, New York County. All actions related to the Crane collapse have been joined for the supervision of discovery.

On or about May 16, 2007, Defendant, New York Crane & Equipment Corp., ("NY Crane"), the owner of the Crane, reported to the New York City Department of Buildings ("NYC DOB") that the Crane experienced excessive noise and vibration during rotation and that a 2 to 3 foot circumferential crack was observed on the upper area of the Crane's turntable bearing's spacer or support ring. The NYC DOB then declared the Crane unsafe and ordered NY Crane to cease all operation of the Crane until all necessary repairs had been completed in accordance with the manufacturer's specifications.

On or about May 20, 2007, NY Crane removed the turntable, reference number TT-052 (the "Damaged Turntable"), and replaced it with a turntable, reference number TT-053 (the "Replacement Turntable").

NY Crane contracted with RTR Bearing Company Limited ("RTR") to fabricate a new bearing to replace the damaged bearing in the Damaged Turntable.

RTR fabricated a new bearing for the Damaged Turntable (the "RTR Bearing"). NY Crane provided RTR with welding instructions for certain parts of the RTR Bearing that differed from the bolt holes in the manufacturer's specifications supplied to RTR by NY Crane. RTR advised NY Crane that it was not qualified to perform the weld, but NY Crane had RTR perform the welding (the "RTR Weld") anyway.

On or about October 6, 2007, NY Crane hired Defendant Brady Marine Repair Co. Inc. ("Brady") to "install the [NY Crane] furnished [RTR Bearing]. [Brady would] fit the [RTR Bearing] as directed, and weld the [RTR Bearing] solid...On completion of welding operation [Brady would] provide a certified NDT Technical to test and

prove all welds.”

The RTR Bearing was delivered to NY Crane from RTR on or about December 10, 2007.

The RTR Bearing was delivered to Brady about a month and half after it was delivered to NY Crane.

Brady hired Branch to perform non-destructive testing on the welds completed by Brady to attach the RTR Bearing to the Damaged Turntable for NY Crane.

At depositions, Brady and Branch both stated that they were not aware of the RTR Weld, they were not asked to check the RTR Weld, nor would it be standard procedure to check welds other than those that had been performed by Brady.

After Branch had completed its tests and the Damaged Turntable was returned to NY Crane, the Replacement Turntable was removed from the Crane and the Damaged Turntable was put back. There is no indication that Brady or Branch was involved in replacing the Replacement Turntable with the Damaged Turntable.

On or about March 11, 2008, NY Crane informed NYC DOB that they had replaced the old bearing with the RTR Bearing and that, the RTR Bearing “was welded, checked, and an Ultrasonic test was run by [Branch].”

On May 30, 2008, the Crane collapsed.

Branch makes this Motion for Summary Judgment asserting that it was the RTR Weld that failed and caused the Crane collapse. Branch argues that it was not contracted to inspect the RTR Weld, it did not inspect the RTR Weld, nor did it have a duty to inspect the RTR Weld.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact. See *Klein v. City of New York*, 89 N.Y.2d 883, 652 N.Y.S.2d 723 (1996); *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party. See *SSBS Realty Corp. v. Public Service Mut. Ins. Co.*, 253 A.D.2d 583, 677 N.Y.S.2d 136 (N.Y.A.D. 1st Dept. 1998); *Martin v. Briggs*, 235 A.D.2d 192, 663 N.Y.S.2d 184 (N.Y.A.D. 1st Dept. 1997).

Defendant Leon D. DeMatteis Construction Corp. (“DeMatteis”) opposes the Motion arguing that there are “genuine triable issues as to whether Branch was negligent in failing to test the RTR [Weld]; whether Branch was negligent in failing

to competently conduct the ultrasonic testing of the [C]rane and its functional and structural components; and whether Branch was negligent in failing to accurately report the true condition of the [Crane]." DeMatteis further argues that there is a question of fact "regarding the manner in which the parties herein relied upon Branch's representations concerning the condition of the [C]rane, its components and welds, all to their detriment."

Defendant Sorbara Construction Corp. ("Sorbara") opposes the Motion with papers that mirror those of DeMatteis.

Plaintiff, Xhevahire Sinanaj, Administrator of the Estate of Ramadan Kurtaj ("Sinanaj") opposes the Motion arguing that there are questions of fact regarding the nature of Branch' tests, whether said tests were properly performed, the method with which test results were provided, as well as the exact components and welds tested. Sinanaj also questions NY Crane's reliance on the tests performed by Branch. Sinanaj asserts that it cannot be reasonably and sufficiently supported that Branch acted in accord with good and accepted practices and acted reasonably with regard to their inspections and testing of the weld that failed.

Based on the papers filed in support of the Motion, the Court can not grant Branch's Motion at this time.

Branch submits a report by Arup USA, Inc. ("Arup"), which investigated the Crane collapse on behalf of the District Attorney of New York. Branch relies on the unsworn report by Arup to establish that it was the RTR Weld that failed and that the weld performed by Brady did not contribute to the Crane collapse. As an unsworn statement, the report by Arup is not admissible evidence. See *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718 (1980). Therefore, Branch cannot make a showing of an entitlement to judgment as a matter of law.

Accordingly, it is the decision and order of this Court that Branch's Motion seeking Summary Judgment and dismissing the Complaint as against Branch and any and all cross-claims against Branch is denied without prejudice.

Accordingly, it is ORDERED that Branch's Motion seeking Summary Judgment and dismissing the Complaint as against Branch and any and all cross-claims against Branch is denied without prejudice.

ENTER :

Dated: May 6, 2013


MANUEL J. MENDEZ

J.S.C.

MANUEL J. MENDEZ

J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE