

<b>Matter of 91st St. Crane Collapse Litig. v City of New York</b>
2013 NY Slip Op 31051(U)
May 10, 2013
Supreme Court, New York County
Docket Number: 117294/08
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:

DONALD R. LEO, ADMINISTRATOR OF THE ESTATE OF HIS SON, DONALD CHRISTOPHER LEO, deceased May 30, 2008,

INDEX NO. 117294/08 MOTION DATE 5-09-2013 MOTION SEQ. NO. 068 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 4 were read on this motion and cross-motion to/ for Summary Judgment:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Includes rows for Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant's,

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

City of New York (the "City"), Motion pursuant to CPLR Section 3212 seeking Summary Judgment and dismissing the Complaint as against the City and any and all Third Party Complaints against the City is granted as to the Third Party Complaints and denied as to the main action Complaint.

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 (the "Premises"). All actions related to the Crane collapse have been joined for the supervision of discovery.

Plaintiff, Donald R. Leo, Administrator of the Estate of his son, Donald Christopher Leo ("Leo") commenced this action to recover damages as a result of personal injuries suffered by and death of Leo's son on May 30, 2008, when the Crane collapsed.

On or about February 7, 2011, the Honorable Paul G. Feinman, who previously presided over the Crane cases, granted a Motion to Dismiss which dismissed all of the common law negligence claims alleged by Leo against the City. As to Leo's Labor Law Section 240 claim, Justice Feinman decided that

Contrary to the City defendant's argument, the deed they rely upon does not conclusively establish a defense as a matter of law. Notably, the deed indicates that the City's grant of [the Premises] to the [Defendant New York City Educational Construction Fund ("NYCECF")] is made 'subject to all of the terms and conditions of the...City-Fund Disposition Agreement entered into between Grantor and Grantee, and to the provisions of the...Lease of School Premises between Grantee, as the landlord, and Grantor, acting by and through the Department of Education of the City of New York, as the tenant'. These and other provisions of the deed leave open many issues of fact regarding the City's ownership status or potential interest in the [Premises] as a tenant. Therefore, the City has not established that it is not the owner based on the proffered document or that the various sections of the Labor Law are not pertinent as a matter of law. It may be that after discovery is completed, upon summary judgment, the City will be able to establish its position as a matter of law.

The City now moves for summary judgment as to the alleged violation of Labor Law Section 240. The City argues that it was neither the title owner of record of the Premises, nor controlled the construction project at which the Crane was operating when it collapsed (the "Azure Project"), and thus was not an 'owner' as contemplated by Labor Law Section 240(1).

The City also seeks summary judgment dismissing all Third Party Complaints arguing that the claims in the Third Party Complaints are identical to the cross-claims that were previously dismissed by Justice Feinman in a Decision and Order dated October 4, 2011.

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. 1<sup>st</sup> Dept. 1998); *Martin v. Briggs*, 235 A.D.2d 192, 663 N.Y.S.2d 184 (N.Y.A.D. 1<sup>st</sup> Dept. 1997).

Leo opposes the Motion, arguing that Justice Feinman's February 7, 2011 Decision and Order established the law of this case and that the law of the case is that Leo's Labor Law Section 240 cause of action against the City is viable.

No party opposes the City's request to dismiss the Third Party Complaints.

As an initial matter, this Court agrees with Leo's assertion that Justice Feinman's February 7, 2011 Decision and Order is the law of the case. However, Justice Feinman made it clear that his Decision and Order would not, as a matter of law, preclude a summary judgment motion such as this.

Labor Law Section 240(1) requires "all contractors and owners...who contract for but do not direct or control the work" to cause proper protection for workers to be furnished or erected.

"This statute places a duty on 'contractors and owners and their agents.' It says nothing about lessees. That does not necessarily mean lessees can never be liable. Appellate Division cases have said that lessees who hire a contractor, and thus have the right to control the work being done, are 'owners' within the meaning of the statute." *Ferluckaj v. Goldman Sachs & Co.*, 12 N.Y.3d 316, 908 N.E.2d 869 (2009).

"The statute may also apply to a lessee, where the lessee has the right or authority to control the work site, even if the lessee did not hire the general contractor." *Zaher v. Shopwell, Inc.*, 18 A.D.3d 339, 795 N.Y.S.2d 223 (N.Y.A.D. 1<sup>st</sup>

Dept. 2005). "While one way to prove such control of the work site is through evidence that the lessee actually hired the general contractor, the right to control the work site may be proved by other means, such as contractual or statutory provisions granting such right." *Bart v. Universal Pictures*, 277 A.D.2d 4, 715 N.Y.S.2d 240 (N.Y.A.D. 1<sup>st</sup> Dept. 2000). When determining whether a party has divested itself of all traces of control, and consequently ownership, courts look for a 'nexus or link' to the property or project that the party seeking to disclaim ownership has contractually kept for itself. See *Manning v. St. John's Smithtown Hosp.*, 141 Misc. 2d 739, 534 N.Y.S.2d 76 (Sup. Ct., Suffolk County 1988).

This concept of a contractual right to control the work being done, as opposed to fee ownership, is what Justice Feinman was alluding to in his denial of the City's Motion to Dismiss Leo's Labor Law Section 240 claim. Justice Feinman ruled that there were questions of fact regarding the right(s) to control the Azure Project that the City maintained by way of the City-Fund Disposition Agreement and the Lease of School Premises.

The City conveyed title to the Premises to NYCECF by way of the City-Fund Disposition Agreement, executed January 18, 2007. The City-Fund Disposition Agreement was executed in contemplation of the erection of a combined occupancy structure consisting of a new public school complex and a mixed use residential/commercial space.

As per the City-Fund Disposition Agreement, the City conveyed title to the Premises to NYCECF "without payment of present consideration." NYCECF provided and paid for the construction of the school facility and then leased the school facility back to the City for forty years. When the City's forty year lease ended, NYCECF would then transfer full title to the Premises (both the school facility and mixed use portions) back to the City, again for no consideration.

The City argues that *Manning v. St. John's Smithtown Hosp.*, is controlling case law and stands for the proposition that the City should not be considered an owner for the purposes of Labor Law Section 240(1).

This Court does not find the City's argument compelling. *Manning* is not binding upon this Court. Even if *Manning* were binding authority, it is distinguishable from the present case. The *Manning* Court specifically held that one of the key factors in ruling against the grantor of title being considered an owner was the fact that, "the [grantor] was in fact prohibited from any involvement in the construction activity pursuant to the contract between the [grantor] and the [grantee]. The City cannot make that showing in the present case.

Paragraph 104.2 of the City-Fund Disposition Agreement states that,

[NYCECF] intends to lease the Non-School Portion of the [Azure] Project to [Defendant 1765 First Associates

("1765") ] thereof for a term of seventy-five (75) years, commencing on the latter of (a) the date of a Final Determination of the Approvals (as defined below) has occurred...A Final Determination of the Approvals shall mean the issuance of the approvals by the applicable agencies of the City with regard to the aforementioned documents.

The "aforementioned documents" included the Development Agreement between NYCECF and 1765 which designated 1765 as the developer of the Azure Project, The Lease of School Premises, the Lease of Non-School Premises, and the Deed for the Premises from the City to NYCECF.

There are questions of fact as to the nature of and basis for the approvals by the un-named City agencies mentioned in the City-Fund Disposition Agreement. Based on the wording of the City-Fund Disposition Agreement it is not clear what control the City maintained by way of requiring those approvals.

Additionally, the Lease of School Premises was not submitted to this Court or described in the City's papers. As far as this Court can determine, none of the questions of fact that caused Justice Feinman to deny the City's Motion based on the provisions of that document have been resolved either.

As such, the City has not made a prima facie showing of entitlement to dismissal of Leo's Labor Law Section 240 claims.

The City has made a prima facie showing of entitlement to dismissal of the Third Party Complaints and no party opposes.

Accordingly, it is the decision and order of this Court that the City's Motion seeking Summary Judgment and dismissing the Complaint as against the City and any and all Third Party Complaints against the City is granted as to the Third Party Complaints and denied as to Leo's Complaint.

Accordingly, it is ORDERED that the City's Motion seeking Summary Judgment and dismissing the Complaint as against the City and any and all Third Party Complaints against the City is granted as to the Third Party Complaints and denied as to Leo's Complaint.

ENTER :

Dated: May 10, 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