

..... Matter of 91st St. Crane Collapse Litig.
2013 NY Slip Op 32651(U)
October 21, 2013
Supreme Court, New York County
Docket Number: 150170/11
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:

EVELYN WELLENS and SHOSHANA BARNES,

INDEX NO. 150170/11
MOTION DATE 10-16-2013
MOTION SEQ. NO. 02
MOTION CAL. NO.

Plaintiff(s),

- v -

NEW YORK CRANE & EQUIPMENT CORP., J.F. LOMMA INC.,
TES INC., BRADY MARINE REPAIR CO., INC., TESTWELL INC.,
BRANCH RADIOGRAPHIC LABS, INC., SORBARA CONSTRUCTION
CORP., 1765 FIRST ASSOCIATES, LLC, LEON D. DEMATTEIS
CONSTRUCTION CORPORATION, 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, and M.G. McLAREN, P.C.,

Defendant(s).

AND ALL RELATED ACTIONS

The following papers, numbered 1 to 3 were read on this motion and cross-motion to/ for Dismiss:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits cross motion

Replying Affidavits

PAPERS NUMBERED

1 - 3

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant's, New York Rigging Corp. ("NYRC"), Motion pursuant to CPLR Section 3025(b) seeking leave to amend NYRC's Answer and deem the proposed Amended Answer served on all parties is granted. NYRC's Motion pursuant to CPLR Section 3211(a)(5) seeking to dismiss all cross-claims asserted against NYRC is granted on default. NYRC's Motion pursuant to CPLR 3212 seeking summary judgment and dismissing the Complaint as against NYRC is also granted on default.

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

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.

NYRC was retained to provide rigging services for the initial erection and two subsequent "jumps" of the Crane at the construction site where the Crane collapse occurred.

On or about November 2, 2012, NYRC filed motions for Summary Judgment in a number of related Crane collapse actions, seeking to dismiss third-party complaints as against NYRC and any and all cross-claims asserted against NYRC in those actions as well.

On or about March 21, 2013, this Court granted the Summary Judgment Motions thereby dismissing the third-party complaints and all cross-claims against NYRC. This Court granted those Motions upon a finding that none of the discovery conducted in the Crane collapse cases had produced anything to even suggest that NYRC was liable for the Crane collapse and that none of the theories proposed by any of the parties to explain the Crane collapse created legitimate questions of fact implicating NYRC.

Based on this Court's ruling in those other Crane collapse cases, NYRC submits the instant Motion seeking to amend its Answer in this action to assert the affirmative defense of collateral estoppel, to then deem the Amended Answer served on all parties, and finally to dismiss the claims asserted against NYRC in this action pursuant to the affirmative defense of collateral estoppel.

CPLR Section 3025 permits parties, upon leave of the Court, to amend their pleadings. See *Mayers v. D'Agostino*, 58 N.Y.2d 696, 444 N.E.2d 1323 (1982).

No party objects to NYRC amending its Answer, nor does this Court, in its discretion, see any reason granting leave to do so would not be just.

Therefore, this Court grants NYRC leave to amend its Answer.

The Court also grants NYRC's request to deem its proposed Amended Answer served on all parties because no party objects and all parties had an opportunity to review NYRC's proposed Amended Answer efiled along with the instant Motion.

The Court now considers the sufficiency of NYRC's newly asserted affirmative defense of collateral estoppel as a basis to dismiss all claims against

NYRC.

“The equitable doctrine of collateral estoppel is grounded in the facts and realities of a particular litigation, rather than rigid rules. Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity...The policies underlying its application are avoiding relitigation of a decided issue and the possibility of an inconsistent result...” *Buechel v. Bain*, 97 N.Y.2d 295, 766 N.E.2d 914 (2001).

“The party seeking the benefit of collateral estoppel must demonstrate that the identical issue was necessarily decided in the prior adjudication and is decisive in the newly presented circumstance and forum.” *David v. Biondo*, 92 N.Y.2d 318, 703 N.E.2d 261 (1998).

The issue decided in the prior adjudication(s) was whether there was any basis to allow the parties to maintain claims related to the Crane collapse against NYRC. Given that this Court ruled there was none, it would be fairly decisive in the instant proceedings.

“Second, the party to be precluded from relitigating an issue must have had a full and fair opportunity to contest the prior determination. The burden is on the party attempting to defeat the application of collateral estoppel to establish the absence of a full and fair opportunity to litigate...” *D'Arata v. New York Cent. Mut. Fire Ins. Co.*, 76 N.Y.2d 659, 564 N.E.2d 634 (1990).

Due process permits that a party to be bound need not have been an actual party in the prior litigation, so long as privity can be established between a party in the prior litigation and the party to be bound. See *Gilberg v. Barbieri*, 53 N.Y.2d 285, 423 N.E.2d 807 (1981).

“In the end, the fundamental inquiry is whether relitigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results. No rigid rules are possible, because even these factors may vary in relative importance depending on the nature of the proceedings...” *Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 N.Y.2d 147, 527 N.E.2d 754 (1988).

Several parties, some of whom are NYRC's co-defendants in the present action, did oppose the prior Motions, but this Court ultimately rejected those objections.

No party opposes the instant Motion, so no party raises the objection of an absence of a full and fair opportunity to litigate.

Accordingly, it is the decision and order of this Court that NYRC's Motion seeking leave to amend NYRC's Answer and deem the proposed Amended Answer served on all parties is granted. NYRC's Motion pursuant to CPLR Section 3211(a)(5) seeking to dismiss all cross-claims asserted against NYRC is granted on default. NYRC's Motion pursuant to CPLR 3212 seeking summary judgment and dismissing the Complaint as against NYRC also is granted on default

Accordingly, it is ORDERED that Defendant New York Rigging Corp.'s Motion seeking leave to amend its Answer is granted, and it is further

ORDERED that Defendant New York Rigging Corp.'s Motion seeking the Court to deem the proposed Amended Answer served on all parties is granted, and it is further

ORDERED that any and all cross-claims as asserted against Defendant New York Rigging Corp., are severed and dismissed on default, and it is further

ORDERED that Defendant New York Rigging Corp.'s Motion for Summary Judgment is granted on default, and it is further

ORDERED that Plaintiff's causes of action asserted against New York Rigging Corp. are severed and dismissed on default, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

ENTER :

Dated: October 21, 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