

<b>Leo v City of New York</b>
2013 NY Slip Op 32754(U)
October 28, 2013
Sup Ct, New York County
Docket Number: 117294/2008
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 91<sup>ST</sup> STREET CRANE COLLAPSE LITIGATION:

MARIA LEO, ADMINISTRATRIX OF THE ESTATE OF HER SON, DONALD CHRISTOPHER LEO, deceased May 30, 2008,

INDEX NO. 117294/08  
MOTION DATE 10-21-2013  
MOTION SEQ. NO. 075  
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 9 were read on this motion and cross-motion to/ for Renew & Reargue:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-3</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>4-5; 6; 7-8</u>
Replying Affidavits _____	<u>9</u>

**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):

**Motion to Reargue is granted.**

In this Motion to Renew and Motion to Reargue, Defendant, Branch Radiographic Laboratories, Inc. ("Branch"), seeks an order pursuant to CPLR Section 2221(d), granting Reargument and pursuant to CPLR Section 2221(e), granting Renewal of the April 16, 2013 Decision and Order issued by this Court that denied Branch's Motion seeking Summary Judgment to dismiss all claims against Branch.

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, Maria Leo, Administratrix of the Estate of her son, Donald Christopher Leo ("Leo") commenced this action to recover damages as a result of personal injuries suffered by and death of Donald Christopher Leo on May 30, 2008, when the Crane collapsed.

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.

On or about February 6, 2013, Branch moved for Summary Judgment arguing that Branch owed no duty to any of the other parties and that Branch's testing of the weld performed by Brady (the "Brady Weld") was not a substantial factor in causing the collapse because the Brady Weld was not defective and did not fail.

Branch's Motion for Summary Judgment was opposed by Defendant Leon D. DeMatteis Construction Corp. ("DeMatteis"). DeMatteis argued that there were "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 argued that there was 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.”

Ultimately, this Court denied Branch’s Motion for Summary Judgment. In support of its Motion, Branch had submitted a report by Arup USA, Inc. (“Arup”), which investigated the Crane collapse on behalf of the District Attorney of New York. The Court found that Branch relied 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. The Court ruled that as an unsworn statement, the report by Arup was not admissible evidence sufficient for a Motion for Summary Judgment, and therefore Branch had failed to meet its burden to make a showing of an entitlement to judgment as a matter of law.

Branch now moves for Reargument of the April 16, 2013 Decision and Order. CPLR Section 2221(d) states that a Motion for leave to Reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.”

Initially, Branch argues that, contrary to the Court’s ruling, the Arup report was admissible because no other party challenged its admissibility and/or because it had been admitted at the criminal trial of Defendant James F. Lomma (“Lomma”). Branch does not offer a credible legal basis to support either argument.

Branch’s second argument regarding what the Court overlooked or misapprehended on the previous Motion, is that even if the Court disregarded the Arup report on the Motion for Summary Judgment, Branch submitted sworn, admissible, statements from individuals with knowledge that it was the RTR Weld that failed and that post-collapse the welds performed by Brady were still structurally sound.

Upon review, the Court agrees with Branch’s argument.

The deposition transcripts of Daniel Muirhead and Casimiro Marques (“Marques”) from Brady Marine were submitted in support of Branch’s Motion. The two individuals state that the welds performed by Brady were structurally sound post-collapse. The Court also notes that no party argued that the Brady Weld failed or even contributed to the Crane collapse.

Opposition to the underlying Motion asserted that there was a question of fact as to whether it was negligent for Branch to have not tested the RTR Weld.

However, “[t]he existence and extent of a duty is a question of law...”  
*Alnashmi v. Certified Analytical Grp., Inc.*, 89 A.D.3d 10, 929 N.Y.S.2d 620

(N.Y.A.D. 2<sup>nd</sup> Dept. 2011). “Although a jury determines whether and to what extent a particular duty was breached, it is for the court first to determine whether any duty exists, taking into consideration the reasonable expectations of the parties and society generally.” *Tagle v. Jakob*, 97 N.Y.2d 165, 763 N.E.2d 107 (2001).

In the instant case, Branch’s duty is established according to the work it was hired and agreed to perform. The documents submitted which establish the scope of the work consist of a letter and three invoices.

In a letter dated October 6, 2007 (the “Bid Letter”), Marques, on behalf of Brady, submitted a bid to NY Crane for the work it was to perform. In the Bid Letter, Brady agrees to weld the RTR Bearing to the Damaged Turntable. The Bid Letter also states that Brady will provide for testing of ‘all welds’.

There are two invoices between Branch and Brady. Based on the documents submitted, Brady is the only party that Branch dealt with directly. As far as the work performed, the invoices merely state that a bearing on a rubella was tested.

Finally, after the work was completed, Brady sent NY Crane an invoice, dated March 10, 2008 (the “Completion Invoice”) which listed all the steps Brady had performed to weld the RTR Bearing to the Damaged Turntable and that ‘all welds’ had been tested. The language in the Completion Invoice mirrored that from the Bid Letter regarding testing.

During his deposition, Marques explained what services Brady, and consequently Branch, was to perform pursuant to the Bid Letter that Marques sent to NY Crane. When asked what the word ‘all’ referred to on the Bid Letter, Marques stated that it referred to the Brady Weld. See *Marques Deposition page 300*. The questioning attorney then asked Marques how many welds Brady performed and Marques clarified that the Brady Weld consisted of welds on the inside and outside of where the RTR Bearing attached to the Damaged Turntable. Marques further clarified that this meant that the Brady Weld consisted of an inside weld and an outside weld “with multiple passes of welding on both sides of the welding band.” See *Marques Deposition pages 301-302*.

During his deposition, Marques was also asked about the weld testing described in the Bid Letter, for which Brady would hire Branch:

Q: Do you recall whether [NY Crane] requested that Brady Marine provided [the weld testing]?

... ..

A: ...[NY Crane] didn't ask me for that.

Q: [NY Crane] did not ask you --

A: No.

Q: -- to test?

A: No.

[Objections]

A: As standard procedure, we, Brady Marine, always test those types of welds. It's a standard procedure, yes. That's the reason why Brady Marine wrote upon completion of weldings, there would be [testing of the welds]. *Marques Deposition pages 305-306.*

The only support for the argument that Branch was expected to or should have tested more than the Brady Weld, other than the conjecture of counsel in the Motion papers, is a letter, dated March 11, 2008, that Lomma sent to NYC DOB (the "Repair Letter").

In the Repair Letter, Lomma informs NYC DOB that the Damaged Turntable had been repaired and that, "the new bearing was welded, checked and an Ultrasonic test was run by Branch Laboratories Inc."

During Lomma's deposition he was asked about the reference to Branch Laboratories he made in the Repair Letter:

Q: Who welded the new bearing?

A: [Brady].

Q: Was it welded by any other company?

A: No.

Q: Were there any other welds, as far as you knew, on March 11<sup>th</sup>, 2008, on that bearing?

A: Not that I know of.

Q: Did you know whether [RTR] did any welding?

**A: No. *Lomma Deposition page 1400.***

As a matter of law, this Court finds that Branch's duty extended no further than testing the Brady Weld. There is no basis to conclude Branch was asked to test the RTR Weld. There is no basis to conclude that any party expected or relied upon Branch to test the RTR Weld. Further, no party challenged the assertions that the RTR Weld failed and that post-collapse the Brady Weld was still structurally sound.

Accordingly, it is the decision and order of this Court that Branch's Motion to Reargue is granted, and upon Reargument, Branch's Motion for Summary Judgment is granted and Leo's causes of action asserted against Branch and all cross claims asserted against Branch are dismissed.

Accordingly, it is ORDERED that Defendant Branch Radiographic Laboratories, Inc.'s Motion seeking leave to Reargue is granted, and it is further

ORDERED that upon Reargument, Defendant Branch Radiographic Laboratories, Inc.'s Motion for Summary Judgment is granted, and it is further

ORDERED that Plaintiff's causes of action and any and all cross-claims as asserted against Defendant Branch Radiographic Laboratories, Inc., are severed and dismissed, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

ENTER :

Dated: October 28, 2013

  
 \_\_\_\_\_  
 MANUEL J. MENDEZ  
 J.S.C. MANUEL J. MENDEZ  
 J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE