

Leo v City of New York
2013 NY Slip Op 33166(U)
April 9, 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 3-20-2013
MOTION SEQ. NO. 067
MOTION CAL. NO. _____

Plaintiff(s),

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT
OF BUILDINGS, NEW YORK CRANE & EQUIPMENT CORP.,
JAMES F. LOMMA, LOMMA TRUCKING & RIGGING, J.F.
LOMMA INC., TES INC., JF 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 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
Vacate the Note of Issue:

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

Cross-Motion: X Yes No

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

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

New York City Department of Buildings, Patricia J. Lancaster, and Robert Limandri (collectively "NYCDOB"), Motion to vacate the Note of Issue and Certificate of Readiness, striking the demand for a jury trial, extending time to file for summary judgment, seeking to preclude Plaintiff, and dismissing the Complaint is granted in part and denied in part. Plaintiff's, Donald R. Leo, Administrator of the Estate of his son, Donald Christopher Leo ("Leo"), Cross-Motion seeking sanctions is denied.

At the outset, this Court notes that not all of the papers e-filed were considered in deciding this Motion. Leo e-filed Affidavits dated March 22, 2013 and April 5, 2013. Not only were these Affidavits late, having been e-filed after the submission deadline, but the April 5, 2013 Affidavit also violates this Court's Part Rules. All parties are advised to review this Court's Rules, available on the nycourts.gov website. In particular, the Court draws all parties attention to Rule 21 which prohibits sur-replies. Also, parties should note Rule 2A which limits motion papers to no more than 20 pages.

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

On or about October 12, 2012, Leo filed a Note of Issue and Certificate of Readiness alleging, among other things, that "discovery proceedings now known to be necessary were completed by Plaintiff." The Certificate of Readiness also stated, as required by Section 202.21(b) of the Uniform Rules for the New York State Trial Courts, that "[t]here are no outstanding requests for discovery by Plaintiff." 22 NYCRR 202.21 does not distinguish as to parties regarding required statements certifying the completeness of discovery.

22 NYCRR 202.21(e) provides that, "[w]ithin 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial...After such [20 day] period, except in a tax assessment review proceeding, no such motion shall be allowed except for good cause shown."

NYCDOB made the instant motion on or about November 29, 2012. NYCDOB states that it missed the 20 day deadline due to Hurricane Sandy, which this Court deems as good cause.

NYCDOB argues that this case is not ready for trial because there are outstanding discovery requests to which Leo has not adequately responded.

The outstanding discovery discussed by NYCDOB can be addressed herein.

While this Court does agree with NYCDOB's assertion that Leo's filing of the Note of Issue was premature, the Court is of the opinion that so long as these proceedings continue to progress according to the schedule set forth in recent decisions, including this one, that the Note of Issue need not be struck at this time.

Given Leo's premature filing of the Note of Issue on the basis that he had completed all discovery necessary for him, while ignoring the fact that the other parties still had outstanding discovery requests, it seems only fair to grant NYCDOB's request for an extension of time to file a summary judgment motion. CPLR Section 3212 (a) requires that motions for summary judgment, "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." Leave is hereby granted to NYCDOB to extend the time to file a summary judgment motion to 60 days after the completion of all pre-trial disclosure and depositions.

NYCDOB also seeks to strike Leo's demand for a jury trial. CPLR Section 4101 permits the issues of fact to be tried by a jury in actions "in which a party demands and sets forth facts which would permit a judgment for a sum of money only." NYCDOB seeks to strike Leo's demand for a jury trial because in the Verified Complaint, Leo requests "such other, further and additional relief, including equitable relief, as justice requires and as it deemed appropriate, just and warranted to insure the future safety of workers and the general public with regard to the building projects in the City of New York." NYCDOB argues that this request for equitable relief precludes the right to a jury trial.

Courts must focus on the relief actually sought and whether "monetary damages alone will afford a full and complete remedy based upon the facts set forth by the plaintiff." *Murphy v. Am. Home Products Corp.*, 136 A.D.2d 229, 527 N.Y.S.2d 1 (N.Y.A.D. 1st Dept. 1988).

While Leo may espouse a desire to prevent others from suffering as a result of future crane collapses, it is obvious that the real relief sought by Leo is financial recompense for the losses resulting from this Crane collapse.

NYCDOB also seeks to dismiss Leo's Verified Complaint or in the alternative to preclude Leo from offering evidence at trial for Leo's failure to adequately respond to discovery requests. Neither of these penalties seems warranted in this case given the gamesmanship that has been employed by many of the parties in these proceedings in regards to discovery.

This Court is of the opinion that Leo should be held accountable for his statements regarding the completion of discovery made in the Certificate of Readiness. Therefore, Leo is precluded from requesting any further discovery in these proceedings. See *Think Pink, Inc. v. Rim, Inc.*, 19 A.D.3d 331, 798 N.Y.S.2d 413 (N.Y.A.D. 1st Dept. 2005). See also *Abbott v. Mem'l Sloan Kettering Cancer Ctr.*, 295 A.D.2d 136, 742 N.Y.S.2d 830 (N.Y.A.D. 1st Dept. 2002).

The outstanding discovery requests of other parties which NYCDOB discusses are better addressed in the Motions to Vacate the Note of Issue made by those other parties.

In light of Leo's novel interpretation of 22 NYCRR 202.21 in filing the Certificate of Readiness based on the readiness of only himself, this Court is confounded by Leo's Cross-Motion which complains of court filings "so completely without merit as to be frivolous." Leo's Cross-Motion seeking sanctions is denied.

Accordingly, it is the decision and order of this Court that NYCDOB's Motion seeking to vacate the Note of Issue and the Certificate of Readiness is denied; seeking to strike the demand for a jury trial is denied; seeking to extend NYCDOB's time to file a summary judgment motion is granted; seeking to preclude Leo is granted in part; and seeking to dismiss the Verified Complaint is denied. Leo's Cross-Motion for sanctions is denied.


Accordingly, it is ORDERED that NYCDOB's time to file a summary judgment motion is extended to 60 days after the completion of all pre-trial disclosure and depositions, and it is further

ORDERED that Leo is precluded from requesting further discovery, and it is further

ORDERED that Leo shall respond to NYCDOB's March 22, 2011 Municipal Defendant's Post Deposition Demands within 45 days of service upon Leo of a copy of this Decision with Notice of Entry by NYCDOB.

Dated: April 9, 2013

ENTER : 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