Oddo v City of New York
2013 NY Slip Op 33588(U)
March 21, 2013
Sup Ct, New York County
Docket Number: 111626/08
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:

DANIEL ODDO

Plaintiff(s),

- v -

THE CITY OF NEW YORK, 1765 ASSOCIATES, LLC, MATTONE GROUP CONSTRUCTION CO., LTD., DEMATTEIS CONSTRUCTION, LEON D. DEMATTEIS CONSTRUCTION CORPORATION, and NEW YORK CRANE & EQUIPMENT CORP.,

Defendant(s).

INDEX NO. 111626/08
MOTION DATE 2-22-2013
MOTION SEQ. NO. 009
MOTION CAL. NO. ______

1765 FIRST ASSOCIATES, LLC, DEMATTEIS CONSTRUCTION and LEON D. DEMATTEIS CONSTRUCTION CORPORATION,

Third-Party Plaintiff(s),

- v -

SORBARA CONSTRUCTION CORP.,

Third-Party Defendant(s).

THIRD-PARTY INDEX NO. 590975/2008

1765 FIRST ASSOCIATES, LLC, DEMATTEIS CONSTRUCTION and LEON D. DEMATTEIS CONSTRUCTION CORPORATION,

Second Third-Party Plaintiff(s),

- v -

HOWARD I. SHAPIRO & ASSOCIATES CONSULTING ENGINEERS, P.C., NEW YORK RIGGING CORP., BRADY MARINE REPAIR CO., INC., BRANCH RADIOGRAPHIC LABS, INC., TESTWELL INC., CRANE INSPECTION SERVICES, LTD, and LUCIUS PITKIN, INC.,

Second Third-Party Defendant(s).

SECOND THIRD-PARTY INDEX NO. 591053/2008

AND ALL RELATED ACTIONS

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

The following papers, numbered 1 to ___8___ were read on this motion and cross-motion to/ for Summary Judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 2
Answering Affidavits — Exhibits _______cross motion	3 - 7
Replying Affidavits	8

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Second Third-Party Defendant's, New York Rigging Corp. ("NYRC"), Motion pursuant to CPLR Section 3212 seeking Summary Judgment and dismissing the Second Third-Party Complaint as against NYRC and any and all cross-claims against NYRC is granted.

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.

NYRC makes this motion for Summary Judgment seeking to dismiss the Third-Party Complaint as against NYRC and any and all cross-claims against NYRC.

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 support of its Motion, NYRC argues that there has been significant discovery in the Crane collapse cases. NYRC goes on to argue that, "there is absolutely no evidence that NYRC was negligent or otherwise proximately caused the [C]rane collapse...NYRC's duties as the rigger were limited to ensuring that the [C]rane was erected and jumped safely. It had no responsibility for the inspection, testing or maintenance of the turntable. Even if one or more of the [C]rane owner's alternative theories for the accident's cause is correct, none of those theories implicate NYRC."

NYRC states that the company responsible for the operation of the Crane at

the time of the collapse, Third-Party Defendant, Sorbara Construction Corp., ("Sorbara") retained NYRC pursuant to an oral agreement. NYRC states that the oral agreement never included inspection or testing services and that NYRC never agreed to defend or indemnify any other party.

From this, NYRC asserts that its duty at the construction site ended after the Crane was jumped the final time, a few days before the collapse occurred.

Once NYRC demonstrates an entitlement to judgment as a matter of law, the burden shifts to parties opposed to the motion to raise a triable question of fact by offering competent evidence which, if credited by the jury, sufficiently rebuts NYRC's claims. In determining the motion, the Court must construe the evidence in the light most favorable to the non-moving parties. *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).

Five of the parties from the main action and the third-party actions submitted papers in opposition to NYRC's Motion, in many cases with duplicative arguments.

As a threshold matter, one opponent to the Motion, Defendant New York Crane & Equipment Corp., argues that the Motion must be denied because it is supported only by an attorney's affirmation and not by an affidavit from an individual with personal knowledge of the facts. "The affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide evidentiary proof in admissible form, e.g., documents, transcripts." *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718 (1980).

Another opponent to the Motion, Defendant/Third-Party Plaintiff/Second Third-Party Plaintiff Leon D. Dematteis Construction Corp. ("Dematteis"), argues that "genuine material issues of fact are raised regarding [NYRC]'s active negligence through the pre-accident on-site [C]rane records. On May 28, 2008, the [C]rane was jumped under the auspices of the master rigger, [NYRC], and at that time it is probable that in order to jump the [C]rane, the limit switches would have to have been disengaged." The on-site Crane records that Dematteis refers to is merely a sign-in sheet establishing that agents of NYRC were at the construction site at the time of the jump. Dematteis does not elaborate as to how it determined the probability that the limit switches were disengaged or offer any evidence, competent or otherwise, to support its claim.

Many of the opponents to the Motion allude to provisions of New York City's Administrative Code that establish requirements for obtaining a rigger license in the City of New York as a basis to deny this Motion for Summary Judgment. None of the opponents to the Motion explain why activities described in the requirements to obtain a rigger license should be assumed to be NYRC's responsibilities in the instant case. Many of the opponents to the Motion state that Section 26-174 of the Administrative Code requires riggers to perform certain tasks

including inspecting and maintaining equipment and making sure safety requirements are met at all times. Section 26-174 of the Administrative Code does nothing of the sort, it merely describes the classification of rigger licenses.

All of the opponents to the Motion argue that the testimony of Jim Weithorn in the criminal trial related to the Crane collapse creates a question of fact that requires the denial of this Motion. Mr. Weithorn testified as an expert witness for the defendants at the criminal trial. Mr. Weithorn testified at the criminal trial that it was his expert opinion that the Crane collapse was caused by user error. When asked why the safety devices on the Crane did not prevent the user error that he determined had caused the collapse, Mr. Weithorn stated that the safety devices, "were either turned off or overridden."

The only connection between Mr. Weithorn's theory of the accident and the jumping of the Crane, which would create a question of fact as to this Motion, comes by way of prompting by the attorney asking him questions during direct examination.

> Q: What if any connection is there between jumping the crane and the safety devices?
>
> A: Well, at that time you're going to readjust your limit device on your load line, because obviously if you're now higher we have an upper limit which would be the A-2-B, which would be the upper limit that you want that line to go and then you have a lower limit and, of course, if you raised it 60 feet now your lower limit is 60 feet off the ground so you're going [t]o have to shut it off, reset the drum, turn it on and then reset up and lower.

This is the only time during his entire testimony that Mr. Weithorn mentions the jumping of a crane. Mr. Weithorn's testimony connecting jumping cranes and safety devices is merely speculation at the prompting of the question. Mr. Weithorn does not state that in the case of the jumping of this Crane that the safety devices were turned off, he merely answers a 'what if any' question by stating that in general when cranes are jumped the safety devices are reset.

"Whether or not expert testimony is admissible on a particular point is a mixed question of law and fact addressed primarily to the discretion of the [C]ourt. *Selkowitz v. Nassau County*, 45 N.Y.2d 97, 379 N.E.2d 1140 (1978). To create a question of fact necessitating the denial of this Motion Mr. Wiethorn's testimony would require more than construing the evidence in a light most favorable to the non-moving parties. It would require the finder of fact to conclude that Mr. Weithorn's answer to a 'what if any connection' question is actually part of his expert theory of the case, to further conclude that his answer of what is done generally should be assumed to be his expert opinion as to what actually happened in this case, and to assume that even though he offers no basis for such a conclusion or that his description of his investigation and analysis in no way

suggest he looked into this fact, that he did in fact investigate this issue sufficiently to be able to offer an expert opinion as to whether the safety devices on this Crane were disengaged during the jumping of this Crane several days before the accident.

"Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion. Rather, [opponents] must establish the existence of material facts of sufficient import to create a triable issue." *Shaw v. Time-Life Records*, 38 N.Y.2d 201, 341 N.E.2d 817 (1975).

Two opponents to the Motion, Sorbara and Plaintiff Daniel Oddo, also references portions of the deposition of James Lomma, the owner of Defendant New York Crane & Equipment Corp. Neither opponent to the Motion makes any legal arguments related to Mr. Lomma's testimony, but both opponents refer to and paraphrase portions of the deposition when Mr. Lomma mentions safety devices. Mr. Lomma's testimony is even more speculative than Mr. Weithorn's testimony. Mr. Lomma states several times during his deposition that he is not familiar with the safety devices specific to this Crane (pages 2318, 2323, 2325, 2331, 2332, 2333), but discusses safety devices in general. Mr. Lomma states several times that he has no knowledge of what, if any, safety devices were installed in this Crane (pages 2325, 2331, 2332) or whether they were disengaged at the time the Crane was jumped several days before the collapse (pages 2330, 2333). As for his knowledge of a connection between jumping cranes and safety devices, Mr. Lomma states that, generally, when he has observed cranes being jumped, he noticed safety devices were disengaged (pages 2329, 2336). Mr. Lomma does not state how many crane jumps he has observed or if he ever observed this Crane being jumped. When asked specifically whether he knew whether the safety devices were engaged or disengaged when the Crane was jumped, Mr. Lomma replied that he did not know (page 2330).

Again, neither Plaintiff nor Sorbara makes any legal arguments in connection with their references to Mr. Lomma's testimony. Even if the parties did make legal arguments, Mr. Lomma's testimony, with constant admissions of having limited personal knowledge in regards to safety devices generally and no personal knowledge of the specific safety devices on this Crane, cannot be a basis to deny this Motion, even if parlayed with the testimony of Mr. Weithorn.

Most of the opponents to the Motion argue that necessary discovery, namely the testing of the Crane, remains outstanding. Opponents assert that until the testing of the Crane can be completed and the cause of the Crane collapse established, it is premature to grant Summary Judgment to NYRC. Opponents to the motion reason that because there is more than one theory of the cause of the collapse, the Crane must be tested to determine which theory is correct.

As noted above, none of the theories of the cause of the collapse implicate NYRC. None of the proposed testing will determine what happened during the jumping of the Crane, which is NYRC's only connection to the Crane. While this

Court agrees that the testing of the Crane is critical to the Crane collapse cases, as applied to the case against NYRC it amounts to nothing more than "a fishing expedition to explore the possibility of fashioning a viable cause of action against [NYRC]." *Oates v. Marino*, 106 A.D.2d 289, 482 N.Y.S.2d 738 (N.Y.A.D. 1st Dept. 1984). "To speculate that something might be caught on a fishing expedition provides no basis to postpone decision on [this Summary Judgment Motion] under the authority of CPLR 3212(f)." *Auerbach v. Bennett*, 47 N.Y.2d 619, 393 N.E.2d 994 (1979).

"[T]o defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact." *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 390 N.E.2d 298, (1979). *See Also CPLR Section 3212 (d)*. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." *Zuckerman, supra.* The opponents of this Motion have not put forth any competent evidence which could be credited by a jury. Nor have they given this Court any basis to conclude that "facts essential to justify opposition may exist but cannot [now] be stated." *CPLR Section 3212 (f).*

Accordingly, it is the decision and order of this Court that NYRC's Motion seeking Summary Judgment and dismissing the Second Third-Party Complaint as against NYRC and any and all cross-claims against NYRC is granted.

Accordingly, it is ORDERED that NYRC's Motion seeking Summary Judgment and dismissing the Second Third-Party Complaint as against NYRC and any and all cross-claims against NYRC is granted, and it is further

ORDERED, that the Second Third-Party Complaint and any and all cross-claims against Second Third-Party Defendant New York Rigging Corp., are severed and dismissed.

ENTER :

Dated: March 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