

Matter of 91st St. Crane Collapse Litig.

2014 NY Slip Op 30477(U)

February 28, 2014

Sup Ct, 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:

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

INDEX NO. 117294/08 MOTION DATE 02-14-2014 MOTION SEQ. NO. 090 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 11 were read on this motion and cross-motion to Renew and Reargue decision on motion sequence # 75:

Table with 2 columns: Description of papers and PAPER NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: 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 Defendant/Third-Party Plaintiff DeMatteis motion and Defendant Sorbara's Cross-motion for leave to Renew and Reargue their opposition to Branch Radiographic Laboratories' (hereinafter "Branch") motion for summary judgment and this court's decision and order dated October 30, 2013 (on motion sequence #75) which granted defendant Branch Summary judgment dismissing all claims and cross-claims as asserted against defendant Branch is denied.

Defendant DeMatteis moves and Defendant Sorbara Cross-moves for an order for leave to Renew and Reargue their opposition to Branch's motion for summary judgment and upon Renewal/ Reargument vacating this court's decision and order dated October 30, 2013 which upon granting Defendant Branch Renewal/Reargument of its summary judgment motion (Motion Sequence #70) vacated its prior order on that motion and granted Branch Summary judgment dismissing all claims and cross-claims as against Branch. (Motion Sequence #75).

The moving defendants allege that this court overlooked matters of fact in granting Branch summary judgment. Most specifically they allege that this court overlooked the affidavit of Dennis C. Deegan, Phd., who examined the Branch report which indicates that the welds were "accepted" and is of the opinion that "had UT(Ultrasound Testing) been performed on the welds connecting the slewing bearing to the spacer ring, the testing would have detected and disclosed weld defects in those welds and the welds should have been marked "rejected." Defendants contend that this affidavit raises an issue of fact regarding Branch's negligence sufficient to defeat summary judgment.

Defendants further point to the affidavit of James Lomma, submitted herewith who states that Brady was requested to test all welds and argues that this raises material issues of fact which include: whether Branch was asked to test all welds, not just the Brady weld; whether Branch tested all welds, not just the Brady weld and whether regardless of which welds Branch was asked to test - and regardless of which welds Branch actually tested - did Branch report that all welds (the RTR and Brady Weld) were free of defect.

Branch opposes the motion and argues that this court did not misapprehend the facts. Branch's only involvement in this matter was its contractual agreement with Brady to conduct Ultrasonic Test (UT) of the single Brady weld and this limited contractual undertaking imposes no duty of care upon Branch with respect to plaintiffs or other Third parties. Furthermore Branch argues that it established as a matter of law that it was retained by Brady to inspect/test the Brady weld only, that neither Branch nor Brady were aware of the RTR weld, that Branch was 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. Finally it argues that this court was correct in concluding that Branch's duty extended no further than testing the

Brady weld.

The New York Crane defendants take no position with respect to this motion.

CPLR § 2221(d) states that a motion for leave to Reargue (1) shall be identified specifically as such, (2) 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, and (3) shall be made within 30 days after service of a copy of the order determining the prior motion and written notice of its entry.

CPLR Section 2221(e) states that a motion for leave to renew shall be “based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination.” It requires that such Motions “ contain reasonable justification for the failure to present such facts on the prior motion.”

A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided (V.Veereswamy Realty v. Yenom Corp., 71 A.D. 3d 874, 895 N.Y.S. 2d 860 [2nd. Dept. 2010]), but to point out controlling principles of law or fact that the court may have overlooked (Simon v. Mehryahi, 16 A.D. 3d 664, 792 N.Y.S. 2d 543 [2nd. Dept. 2005]).

The moving defendants have failed to offer reasonable justification for failing to present the affidavit of James F. Lomma in opposing Branch’s previous motion for summary judgment or its renewal/reargument of this court’s denial of Branch’s previous motion for summary judgment. Simply stating that this affidavit was not available is not reasonable justification for failing to present this affidavit, specially when James F. Lomma is an individually named defendant in this case. As such Renewal is denied.

This court after considering the facts as presented and analyzing the deposition testimony and documentation is of the opinion that it did not misapprehend the facts or law.

The court based its decision on the documentary evidence and deposition testimony submitted which conclusively establishes that Brady did not request Branch to test the RTR weld, that Branch tested only the Brady welds as requested and that the Brady welds did not fail (they were intact following the accident of May 30, 2008). [see Moving Papers Exhibit A, Exhibit Y deposition of Casimiro Marques].

Mr. Marques testified at his deposition of June 2011 as follows:

P.199 Line 22:

Q- “when you say they tested the welds, they tested your weld, correct?”

A- "Brady Marine welds".

Q- "who told them just to test the Brady Marine weld?"

P.200 Line 5:

Q-"who told them ? I'm asking who told them, not why, in other words, did you give the instruction to Branch?"

A- "Yeah. I request Branch technician to come to Brady's shop to test the weld."

Q- "Did you speak to that technician to tell him or her what to do?"

A- "yes".

Q- "Who was that?"

A- " I believe it was-- his name is William Hunter. I believe no."

Q- "Did you write these instructions down, or they were verbal instructions?"

A- "No. Verbal."

Q- "Verbally you told them what to do?"

A- "No, I didn't tell him what to do. I showed him. Listen can you please test these welds. The outside and the inside welds. He said yes I can. He did his job."

The facts point to the conclusion, Branch was asked by Brady to only test the Brady weld, which Branch did. The Brady weld did not fail. Under this set of facts there is no basis to conclude that Branch was asked to test the RTR weld or that any other party expected or relied on Branch's Testing of the RTR weld since the only party Branch dealt with was Brady.

Accordingly, it is ORDERED that defendants' DeMatteis motion and Sorbara's Cross-motion to Renew/Reargue this court's decision and order dated October 30, 2013 which granted defendant's Branch reargument/renewal (Motion Sequence #75) and upon granting Reargument/Renewal granted Branch's motion for summary judgment dismissing all claims and cross-claims as against Branch is denied.

Dated: February 28, 2014

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