

Matter of 91st St. Crane Collapse Litig.

2014 NY Slip Op 30478(U)

February 27, 2014

Sup Ct, New York County

Docket Number: 117469/08

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:

**XHEVAHIRE SINANAJ and SELVI SINANOVIC as
CO-ADMINISTRATORS OF THE ESTATE OF
RAMADAN KURTAJ, DECEASED, and SELVI
SINANOVIC Individually,**

INDEX NO. 117469/08
MOTION DATE 02-19-2014
MOTION SEQ. NO. 056
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 10 were read on this motion and cross-motion to/ for Summary Judgment:

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____ cross motion _____
Replying Affidavits _____

PAPERS NUMBERED	
_____	1-2, 3-4
_____	5-6, 7-8,
_____	9-10

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant's, DeMatteis Construction and Leon D. DeMatteis (hereinafter "DeMatteis") motion for Partial summary judgment dismissing plaintiff's cause of action for punitive damages, common-law negligence and Labor Law § 200, Dismissing all Cross-claims and counter-claims asserted against DeMatteis for common law contribution and/or common law indemnity and Granting DeMatteis summary judgment on its Third-party action against Sorbara Construction Corp., (hereinafter "Sorbara") for contractual and/or common-law indemnity, and Defendant Sorbara Construction Corp.'s Cross-Motion pursuant to CPLR Section 3212 seeking Summary Judgment dismissing defendant and Third-party Plaintiff's " DeMatteis" causes of action against it for common-law indemnification and contractual indemnification are denied.

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.

DeMatteis states that it entered into a Construction Management agreement with 1765 First Associates, LLC for construction of the residential portion of the East 91st. Street project. As construction manager DeMatteis entered into a trade contract with Sorbara for the performance of the concrete superstructure work. On February 6, 2008 Sorbara rented a tower crane from New York Crane & Equipment (hereinafter "NY Crane") to be utilized at the construction site. On May 30, 2008 the crane collapsed.

DeMatteis states that the evidence unequivocally establishes that the crane collapse was caused by a failed weld, a latent defect which was neither caused by or known to exist by DeMatteis at any time prior to May 30, 2008. It further states that Sorbara - its subcontractor- was solely responsible for the selection, erection, jumping, inspection, maintenance and operation of the crane. DeMatteis alleges that it did not control the means and methods of Sorbara's work as such it is not liable, other than statutorily liable under Labor Law § § 240(1) and 241(6).

DeMatteis moves for summary judgment dismissing Plaintiff's Common-law negligence, Labor Law § 200 claims, and punitive damages cause of action as asserted in the complaint. It argues that the evidence unequivocally establishes that these claims are without merit. it was not aware of any defect with the Crane, so there cannot be a showing that it was willfully or wantonly negligent or reckless. It also seeks summary judgment dismissing all cross-claims and counterclaims asserted against it for common law contribution and/or indemnification. Finally, it argues, that since it is not liable other than statutorily, it is entitled to summary

judgment on its common law and contractual indemnification claim.

Sorbara cross-moves for Summary judgment dismissing DeMatteis causes of action seeking contractual and/or common-law indemnification because DeMatteis has failed to demonstrate as a matter of law either that DeMatteis was not negligent to any degree, or that Sorbara was 100% negligent. In addition it alleges that the contractual indemnification provision in the contract is void and unenforceable as violative of General Obligations Law § 5-322.1 Sorbara does not oppose DeMatteis application for dismissal of plaintiff's punitive damages claim.

Sorbara states that it was hired by the construction manager for the construction project at the site, Defendant Leon D. DeMatteis Construction Corporation ("DeMatteis"). Sorbara states it was hired to serve as the concrete superstructure contractor. Sorbara asserts that the Crane collapse was caused by an inadequate weld within the turntable of the Crane. Sorbara argues that the inadequate weld was a latent defect that could not be observed or detected unless the Crane was disassembled and sent for off-site testing, which Sorbara was not required or even able to do.

Sorbara argues that it performed proper inspection and maintenance on the Crane and that there is no basis upon which to establish it was negligent. Sorbara argues that it was the Crane's owner, Defendant New York Crane & Equipment Corp., that was obligated to perform both frequent and periodic inspections of the Crane of the type that would have discovered the defective weld. It also argues that DeMatteis also had a duty to inspect and/or test the crane being utilized at the project.

Defendant NY Crane partially opposes the motion. It argues that the issue of whether a defective weld caused the crane to collapse or whether the crane collapsed due to improper operation are disputed factual questions herein and are the subject of opposing expert opinions to be resolved by a jury.

Plaintiff, Xhevahire Sinanaj, Co-Administrator of the Estate of Ramadan Kurtaj, ("Sinanaj") opposes the Motion arguing that there are outstanding questions of fact and that DeMatteis has not demonstrated it is entitled to Summary Judgment. Plaintiff argues that DeMatteis was responsible for all subcontractors on the project and retained authority and supervisory control over them and the work to be performed in accordance with the trade agreement, as such it had supervision and authority over crane selection and inspection.

Plaintiff argues that DeMatteis retained Howard Shapiro & Company as crane engineer to handle the permitting and erection design requirements for the

crane operation; Hired Sorbara to operate the crane; Its staff attended pre-erection and jump meetings yet made no inquiries with regard to the condition of the crane; weekly safety meeting minutes confirm concern with regard to safety issues with the crane; Its site project superintendent and personnel were aware of the crane's load failures and stop work orders by the DOB yet made no inquiry with regard to the crane's condition and safety for the site; pursuant to its safety agent "Total Safety Consultants" daily crane inspections were to be performed; in sum, DeMatteis supervised, controlled and had overall authority on site.

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, eliminating all material issues of fact. (Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp., 77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341 [1966]; Sillman v. 20th Century-Fox Film Corp., 3 N.Y. 2d 395, 165 N.Y.S. 2d 498, 144 N.E. 2d 387 [1957]; Epstein v. Scally, 99 A.D. 2d 713, 472 N.Y.S. 2d 318 [1984]. Summary Judgment is "issue finding" not "issue determination" (Sillman, supra; Epstein, supra). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve (Brunetti, v. Musallam, 11 A.D. 3d 280, 783 N.Y.S. 2d 347 [1st Dept. 2004]).

Despite DeMatteis assertions as to the cause of the Crane collapse, there are alternative theories, supported by expert testimony, as to the cause of the collapse. The alternative theory posits that improper maintenance and/or improper operation caused the Crane to collapse. The outstanding questions of fact as to the cause of the Crane collapse preclude granting DeMatteis' Motion as to negligence claims (See *Camillo v. Olympia & York Properties Co.*, 157 A.D.2d 34, 554 N.Y.S.2d 532 [1st Dept. 1990]).

A party seeking contractual indemnification must prove itself free from negligence because to the extent its negligence contributed to the accident, it cannot be indemnified therefor. The party seeking indemnity must prove not only that it was not guilty of any negligence beyond statutory liability, but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the cause of the accident (*Konsky v. Escada Hair Salon, Inc.*, 113 A.D.3d 656, 978 N.Y.S.2d 342 [2nd. Dept. 2014]; *Mikelatos v. Theofilaktidis*, 105 A.D.3d 822, 962 N.Y.S.2d 693 [1st. Dept. 2013]; *Mak v. Silverstein Properties, Inc.*, 81 A.D.3d 520, 916 N.Y.S.2d 592 [1st. Dept. 2011]; *DiFilippo v. Parkchester North Condominium*, 65 A.D.3d 899, 885 N.Y.S.2d 81 [1st. Dept. 2009] ; *Crespo v. City of New York*, 303 A.D.2d 166, 756 N.Y.S.2d 183 [1st. Dept. 2003] denying summary judgment on contractual and common-law indemnification claims when there are issues of fact as to whose negligence caused the plaintiff's accident).

DeMatteis has not established its entitlement to contractual or common-law indemnification as it has not been established that it is not guilty of any negligence beyond statutory liability. Similarly Sorbara has not established that the clause in the contract is void as violative of General Obligations Law § 5-322.1. Although generally an indemnification agreement which contemplates full rather than partial indemnification of the general contractor by the subcontractor is unenforceable under General Obligations Law § 5-322.1 where the general contractor has been found partially negligent, where such agreement "contains language limiting the subcontractors obligation to that permitted by law or to the subcontractor's negligence" the agreement will be found to be enforceable (*Itri Brick & Concrete Corp., v. Aetna Cas. & Sur. Co.*, 89 N.Y.2d 786, 680 N.E.2d 1200, 658 N.Y.S.2d 903 [1997]; *Bennet v. Bank of Montreal*, 161 A.D.2d 158, 554 N.Y.S.2d 869 [1st. Dept. 1990]).

Punitive Damages are recoverable when the plaintiff proves such conscious and deliberate disregard of the interest of others that the conduct may be called wilful or wanton (NY Prac-Comm § 47:9). "Punitive damages are available for the purpose of vindicating a public right where the actions of the alleged tortfeasor constitute gross recklessness or intentional, wanton or malicious conduct aimed at the public generally or are activated by evil or reprehensible motives (*Nooger v. Jay-Dee Fast Delivery*, 251 A.D.2d 307, 673 N.Y.S.2d 1006 [2nd. Dept. 1998]). Although punitive damages need not be specifically pleaded the complaint must sufficiently describe the egregious acts of the defendant that would support such an award (NY-Prac-Torts § 21:141).

Plaintiff opposes the dismissal of her punitive damages claim arguing that there are questions as to whether DeMatteis was aware of problems with the Crane based on work performed on other construction projects and failed intentionally to inspect the same on a daily basis as recommended by its safety consultant. Plaintiff also argues that dismissing punitive damages claims before the


presentation of evidence at trial is premature. Plaintiff argues that it is a question of fact as to whether DeMatteis conduct merits the imposition of punitive damages. (See *Camillo v. Olympia & York Properties Co.*, 157 A.D.2d 34, 554 N.Y.S.2d 532 [1st Dept. 1990] supra).

The complaint has sufficiently described acts of the defendant that would support an award for punitive damages. Dismissal of this claim at this juncture, given the issues of fact is premature.

Accordingly, it is ORDERED that Defendants', DeMatteis Construction and Leon D. DeMatteis (hereinafter "DeMatteis") motion for Partial summary judgment dismissing plaintiff's cause of action for punitive damages, common-law negligence and Labor Law § 200, Dismissing all Cross-claims and counter-claims asserted against DeMatteis for common law contribution and/or common law indemnity and Granting DeMatteis summary judgment on its Third-party action against Sorbara Construction Corp., (hereinafter "Sorbara") for contractual and/or common-law indemnity, is denied, and it is further

ORDERED that Defendant Sorbara Construction Corp.'s Cross-Motion pursuant to CPLR Section 3212 seeking Summary Judgment dismissing defendant and Third-party Plaintiff's " DeMatteis" causes of action against it for common-law indemnification and contractual indemnification is denied.

Dated: February 27, 2014

ENTER :

 MANUEL J. MENDEZ
 J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE