

Matter of 91st St. Crane Collapse Litig.
2014 NY Slip Op 30523(U)
March 3, 2014
Supreme Court, New York County
Docket Number: 771000/2010
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:
INDEX NO.: 771000/2010

JACK RIZZOCASIO,

Plaintiff(s),

INDEX NO. 108088/09
MOTION DATE 02-07-2014
MOTION SEQ. NO. 011
MOTION CAL. NO. _____

- v -

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

Defendant(s).

LEON D. DEMATTEIS CONSTRUCTION CORPORATION,

Third-Party Plaintiff(s),

THIRD-PARTY INDEX NO. 590753 /2008

- v -

SORBARA CONSTRUCTION CORP.,

Third-Party Defendant(s).

LEON D. DEMATTEIS CONSTRUCTION CORPORATION,

SECOND THIRD-PARTY INDEX NO.
590816/2009

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).

AND ALL RELATED ACTIONS

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

The following papers, numbered 1 to 11 were read on this motion and cross-motion for summary judgment by Second Third-party/Fourth Third-party defendant Branch:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2, 3
Answering Affidavits — Exhibits _____ cross motion _____	4-5, 6, 7-8, 9, 10-11
Replying Affidavits _____	_____

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Second Third-party/Fourth Third-Party defendant Branch Radiographic Laboratories, Inc.'s (hereinafter "Branch") Motion for summary judgment dismissing the complaint and all Third-party complaints and cross-claims as against it is granted, the complaint, all Third-party complaints and all cross-claims against Branch are severed and dismissed.

Defendant, Branch Radiographic Laboratories, Inc. ("Branch"), seeks an order granting it summary judgment dismissing the complaint, all Third-party complaints and all cross-claims as against it. Branch argues that it was hired by Brady Marine Repair Co, Inc., (hereinafter "Brady") to perform non-destructive testing on the welds completed by Brady to attach the RTR Bearing to the damaged turntable for NY Crane. Branch states that it tested the Brady welds as agreed with Brady and that after the crane collapsed it was determined that the Brady welds did not fail. Branch states that it was not hired to test any welds other than the Brady welds and was not aware that there were any other welds.

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.

Branch's Motion for Summary Judgment is 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.” Defendant /Third-party plaintiff 1765 First Associates LLC (hereinafter 1765) incorporate by reference the arguments of DeMatteis.

Although plaintiff submits opposition to the motion, the opposition fails to raise any factual basis for the motion’s denial. NY Crane takes no position as to whether Branch is entitled to the relief requested; however, it does argue that the issue of whether the RTR weld was defective and whether the RTR weld was the proximate cause of the crane collapse as opposed to improper crane operation are issues of fact yet to be resolved and which do not have to be resolved in order to determine this motion.

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).

Branch argues that it 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. 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. 2nd 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.

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 11th, 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).

Additionally, Mr. Marques stated in his deposition 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.

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, post-collapse the Brady Weld was still structurally sound.

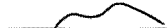
Accordingly, it is ORDERED that Branch's Motion for Summary Judgment dismissing the complaint, Third party complaints and all cross claims as against it is granted and it is further

ORDERED that the complaint, Third-party complaints and all cross-claims against Second Third-party/ Fourth Third-party defendant Branch Radiographic Laboratories, Inc., are severed and dismissed, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

ENTER : MANUEL J. MENDEZ
J.S.C.

Dated: March 3, 2014



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE