

Matter of 91st St. Crane Collapse Litig.

2014 NY Slip Op 30524(U)

March 4, 2014

Supreme Court, New York County

Docket Number: 110069/08

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:

GUISEPPE CALABRO

Plaintiff(s),

INDEX NO. 110069/08
MOTION DATE 02-14-2014
MOTION SEQ. NO. 016
MOTION CAL. NO. _____

- v -

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

Defendant(s).

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

Third-Party Plaintiff(s),

THIRD-PARTY INDEX NO. 590943/2008

- v -

SORBARA CONSTRUCTION CORP.,

Third-Party Defendant(s).

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

Second Third-Party Plaintiff(s),

SECOND THIRD-PARTY INDEX NO. 590956/2008

- 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).

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

AND ALL RELATED ACTIONS

The following papers, numbered 1 to 12 were read on this motion and cross-motion to/ for Summary Judgment:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-2, 3-4</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>5-6, 7-8,, 9-10</u>
Replying Affidavits _____	<u>11-12</u>

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 summary judgment dismissing plaintiff's complaint in its entirety, Dismissing all Cross-claims and counter-claims asserted against DeMatteis ,or in the alternative granting DeMatteis summary judgment on its Third-party action against Sorbara Construction Corp., (hereinafter "Sorbara") for contractual and/or common-law indemnity, is denied. 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.

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 to plaintiff.

DeMatteis moves for summary judgment dismissing Plaintiff's Common-law negligence, Labor Law § 200 §§ 240(1) and 241(6) claims, as asserted in the complaint. It argues that the evidence unequivocally establishes that these claims are without merit. At the time of his accident Plaintiff was not engaged in any protected activity, he was not performing any work on behalf of his employer but was working on behalf of the union.

In his Verified complaint plaintiff alleged that he was struck by a piece of the crane. However, in his 50 H deposition testimony plaintiff stated that he was employed by Sorbara as a laborer/shop steward and his duties consisted of making sure that the workers at the construction site had their union books and making sure that they were not mistreated. He was not involved in any physical activity or construction work. Furthermore, plaintiff was not performing any construction work on behalf of Sorbara at the time of his accident, he was working on behalf of the union, doing union paperwork.

DeMatteis asserts that at the time of the accident plaintiff was in a Sorbara shanty doing union paperwork when he heard a series of loud noises. While attempting to exit the Sorbara shanty he tripped and fell over a Sorbara tool that had been left on the floor by a Sorbara worker. There was no notice to DeMatteis that there were tools on the floor of the shanty .

DeMatteis asserts that the evidence unequivocally establishes that plaintiff was not engaged in any of the protected activities enumerated in the labor law statutes; was not in the zone of danger at the time of the crane collapse and was not a relative or family member of the decedents; none of the industrial code provisions relied upon by plaintiff in support of his labor law claims are applicable to this case; DeMatteis did not direct, control or supervise the means and methods of plaintiff's work therefore liability cannot be imposed against DeMatteis under labor law §200; the evidence unequivocally establishes that DeMatteis neither created nor had actual or constructive notice of the purported condition of the Sorbara Shanty and liability cannot be imposed under a theory of common law negligence.

DeMatteis 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 , 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 that Plaintiff was injured by reason of the "acts or omissions of Sorbara in connection with the work." Sorbara asserts that because plaintiff was not engaged in any work on behalf of Sorbara at the time of the accident, but engaged in non protected union work, his accident neither arose out of "the performance by [Sorbara] of its obligations under the contract" nor "by reason of the acts or omissions of [Sorbara] in connection with the work." 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

Defendant NY Crane takes no position as to whether DeMatteis and/or Sorbara made a prima facie showing of entitlement to summary judgment

Plaintiff opposes the motion and argues that he was employed by Sorbara as a laborer/shop steward with duties analogous to a safety supervisor/safety officer. While working in this capacity as a laborer shop/steward, his responsibilities included being present at work sites (specially for safety reasons) addressing guidelines with the workers, safety meetings with the foremen and general contractors, and ensuring that the workers were wearing their safety equipment. The shanty was used by carpenters, steel laborers and latherers for tools and machinery, and was used by plaintiff to complete paperwork ancillary to his position. Half of the shanty was for plaintiff and the foreman, and the other half was for tools where the laborers would drop their tools onto the floor.

Plaintiff further argues that the accident arose as a result of the crane collapse. He states that he was injured as he ran from the shanty which was stationed beneath the crane, as the crane collapsed.

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]).

There are questions of fact that preclude the granting of summary judgment to defendant DeMatteis. Plaintiff claims he was an employee of Sorbara also working as a shop steward. That He reported to the construction site daily from 7 A.M. to 3:30 PM and was in charge of supervising the Sorbara laborers to ensure they were wearing and utilizing the proper safety equipment. That He inspected laborers when they came to work and visited all levels of the construction site. That He himself wore safety equipment when visiting the different levels at the construction site and had authority to terminate laborers not wearing safety equipment. That He was responsible for enforcing work rules and conditions (see Campisi v. Epos Construction Corp., 299 A.D.2d 4, 747 N.Y.S.2d 218 [1st. Dept. 2002]). There is a question as to whether plaintiff is affiliated with the construction project (Blandon v. Advance Construction Co., 264 A.D.2d 550, 659 N.Y.S.2d 36 [1st. Dept. 1999]) and should be afforded the protections of the labor law (see Fitzpatrick v. State of New York, 25 A.D.3d 755, 809 N.Y.S.2d 515 [2nd. Dept. 2006]). Furthermore, there is no need that plaintiff be struck with a piece of the crane to allow him to recover under the labor law (see Van Eken v. Consolidated Edison Co., of N.Y., 294 A.D. 2d 352, 742 N.Y.S.2d 94 [3rd. Dept. 2002]). As such DeMatteis motion dismissing the complaint, all cross claims and counterclaims as against it is denied.

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.Y2d 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]).

DeMatteis has not established that it is not guilty of any negligence with respect to plaintiff's accident. Therefore it has failed to make a prima facie showing of entitlement to judgment as a matter of law on its claim for contractual and/or common law indemnification. Sorbara has not established its negligence in the performance of the contract did not contribute to the cause of the accident (see Mikelatos v. Theofilaktidis, 105 A.D.3d 822, 962 N.Y.S.2d 693 [2nd. Dept. 2013]; Konsky v. Escada Hair Salon, Inc., 113 A.D.3d 656, 978 N.Y.S.2d 342 [2nd. Dept. 2014]).

Accordingly, it is ORDERED that Defendant's, DeMatteis Construction and Leon D. DeMatteis (hereinafter "DeMatteis") motion for summary judgment dismissing plaintiff's complaint in its entirety, Dismissing all Cross-claims and counter-claims asserted against DeMatteis, or in the alternative 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.

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

Dated: March 4, 2014

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE