

<b>Matter of 91st St. Crane Collapse Litig.</b>
2014 NY Slip Op 30525(U)
March 4, 2014
Supreme Court, New York County
Docket Number: 117294/08
Judge: Manuel J. Mendez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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,

Plaintiff(s),

INDEX NO. 117294/08 MOTION DATE 2-19-2014 MOTION SEQ. NO. 087 MOTION CAL. NO.

- 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 13 were read on this motion to/ for Summary Judgment:

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

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that New York Crane & Equipment Corp., James F. Lomma, J.F. Lomma Inc. and TES Inc.'s (hereinafter collectively referred to as "NY Crane Defendants"), Motion for Summary Judgment dismissing all claims against them, also dismissing the punitive damages claims and the Labor Law Sections 200, 240, 241 and 241(6) claims asserted against

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

them by plaintiffs in this action, is granted only as to dismissing plaintiffs' claims asserted against New York Crane & Equipment Corp., James F. Lomma, J.F. Lomma Inc. and TES Inc., under the Labor Law Sections 240, 241 and 241(6), the remainder of the motion is denied.

This case relates to the collapse of a Kodiak Tower Crane (#84-052) (the "Crane") on May 30, 2008, at East 91<sup>st</sup> Street, New York County. All actions related to the Crane collapse have been joined for the supervision of discovery. Plaintiffs commenced this action to recover damages as a result of the personal injuries and death of Donald Christopher Leo on May 30, 2008, when the Crane collapsed. New York Crane & Equipment Corp. leased the 052-Crane that collapsed together with ten tower sections to Sorbara Construction Corp., ("Sorbara") for use at the site.

NY Crane Defendants seek Summary Judgment dismissing all claims against them.

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). 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. *Amatulli v. Delhi Constr. Corp.*, 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 (1999).

James F. Lomma, argues that there is no basis to pierce the corporate veil or to find that he is personally liable in this action, because he only acted in his capacity as president of New York Crane and Equipment Corp. with respect to the ownership, maintenance, leasing and control of the 052-Crane. James F. Lomma, Inc. and T.E.S. Inc. seek to dismiss this action as to each of them arguing that they cannot be liable because they did not own, maintain, or lease the 052-Crane and that no parent-subsidiary relationship or other principal-agent relationship exists between either of them or with New York Crane & Equipment Corp.. They claim that they are not liable to any of the defendants in this action for contribution or indemnification because they were not negligent.

The NY Crane Defendants seek to dismiss the plaintiffs' claims for punitive damages against all of them, because there is no basis to find that their conduct was intentional, fraudulent, or deliberate. They argue that the conviction of Tibor Varganyi for criminally negligent homicide is inadmissible against them in this civil action.

The NY Crane defendants argue that the claims asserted under New York Labor Law Sections 200, 240, 241 and 241(6), do not apply to them because they were neither owners or general contractors and had no authority to direct, control, or supervise the work at the job site. They claim that the rental agreement with Sorbara gave "quiet possession of the equipment" for a term of six months commencing

March 1, 2008 and was a "bare lease" making Sorbara solely liable for the use and maintenance of the 052-Crane at the project.

Plaintiffs oppose the motion arguing that there is a basis to pierce the corporate veil and there remain issues of fact as to the relationship of all of the NY Crane Defendants. Plaintiffs contend that knowledge of the actual relationship and corporate structure of all of the NY Crane Defendants requires a credibility determination. Plaintiffs contend that James F. Lomma acted in his personal capacity in directing the defective repair or cover-up of the defective bearing and in contacting the Department of Buildings on March 11, 2008, to advise that the defective bearing had been replaced with a new bearing, that had been welded and tested (Opp. Exh. 22). The transfer of cranes and equipment between companies and J.F. Lomma Inc.'s financing of payroll and other expenses, are alleged by the plaintiffs to raise issues of fact as to the domination and control between the corporate defendants.

It is alleged that the claim for punitive damages by the plaintiffs is warranted and should not be dismissed. Plaintiffs assert that the NY Crane Defendants, by obtaining a faulty part to maintain the 052-Crane, relying on Tibor Varganyi to design and submit specifications to a company with little experience in China, committed gross-negligence and demonstrated a conscious disregard for the decedent and those using their cranes.

It is argued that there remain issues of fact as to all of the Labor Law Sections 200, 240, 241 and 241(6) causes of action asserted against the NY Crane Defendants. Plaintiffs claim that the "bare lease" with Sorbara does not excuse the NY Crane Defendants' Labor Law negligence in providing a defective crane. Plaintiffs assert that the NY Crane Defendants were a major sub-contractor and had employees available at the job site that performed repairs, controlled, set and worked on the 052-Crane's computer making them liable under the Labor Law.

A cause of action to pierce the corporate veil seeks equitable relief based on an abuse of the corporate form for purposes of perpetrating, "...a wrong or injustice against the party asserting the claim.." *Tap Holdings, LLC v. Orix Finance Corp.*, 109 A.D. 3d 167, 970 N.Y.S. 2d 178 (N.Y.A.D. 1<sup>st</sup> Dept., 2013). Generally piercing of the corporate veil requires, "...a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury. *Morris v. New York State Dept. of Taxation and Finance*, 92 N.Y. 2d 135, 623 N.E. 2d 1157, 603 N.Y.S. 2d 807 (1993). Regardless of whether the corporate veil is pierced, a corporate officer that participates in the commission of a tort may still be held personally liable. *D'Mel & Associates v. Athco, Inc.*, 105 A.D. 3d 451, 963 N.Y.S. 2d 65 (N.Y.A.D. 1<sup>st</sup> Dept., 2013).

The determination of whether a principal agent relationship exists between two corporations is generally an issue of fact to be decided at trial. *Key Intl. Mfg. v. Morse/Diesel Inc.*, 142 A.D. 2d 448, 536 N.Y.S. 2d 792 (N.Y.A.D. 2<sup>nd</sup> Dept., 1988). A

claim seeking to pierce the corporate veil where multiple "purported dummy corporations" are involved, requires that all the corporations be named as parties. *Popwich v. Korman*, 73 A.D. 3d 515, 900 N.Y.S. 2d 297 (N.Y.A.D. 1<sup>st</sup> Dept., 2010). Piercing of a corporate veil between multiple corporations requires proof that: (1) complete domination and control of the subsidiary corporation by the parent, including the transaction at issue; (2) a fraud or other wrong was committed based on the control, that contravened the plaintiff's rights and (3) the misuse of the control resulted in a loss. *Eastern States Elec. Contractors, Inc. v. William L. Crow Const. Co.*, 153 A.D. 2d 522, 544 N.Y.S. 2d 600 (N.Y.A.D. 1<sup>st</sup> Dept., 1989).

Punitive Damages are recoverable when the plaintiff proves such conscious and deliberate disregard of the interest of others that the conduct may be called willful 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 (N.Y.A.D. 2<sup>nd</sup> 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).

The purpose of Labor Law §240[1], is to protect construction workers by imposing strict liability on "owners, contractors and their agents," for violations which proximately cause injuries. *Cahill v. Triborough Bridge and Tunnel Authority*, 4 N.Y. 3d 35, 823 N.E. 2d 439, 790 N.Y.S. 2d 74 (2004).

Labor Law §241[6], requires that the plaintiff establish a nondelegable duty of owners and contractors to provide "reasonable and adequate protection and safety" for construction workers. *Padilla v. Frances Schervier Housing Development Fund Corporation*, 303 A.D. 2d 194, 758 N.Y.S. 2d 3 (N.Y.A.D. 1<sup>st</sup> Dept., 2003).

Labor Law § 200 imposes a common law duty on the owner of the property or contractor to maintain a safe construction site. A precondition to a Labor Law § 200 claim is that the party charged must have authority or exercise direct supervisory control over the activity that resulted in the injury. *Esposito v. New York City Industrial Development Agency*, 305 A.D. 2d 108, 760 N.Y.S. 18 (N.Y.A.D. 1<sup>st</sup> Dept., 2003) aff'd, 1 N.Y. 3d 526, 802 N.E. 2d 1080, 770 N.Y.S. 2d 682 (2003).

The New York Crane Defendants failed to established a complete defense to this action as a matter of law. James F. Lomma has failed to establish that he acted solely in his capacity as president of the corporate defendants or that he is not personally liable for his own negligence in this action. Plaintiffs have raised an issue of fact concerning Mr. Lomma's personal liability. Plaintiffs have raised questions of fact based on the extent of involvement and the duties between New York Crane & Equipment Company and the remaining corporate defendants.

1765 has failed to establish that it did not exercise supervision and control or a basis to dismiss the plaintiff's causes of action pursuant to Labor Law §200. 1765 has not met its burden of proof for summary judgment on plaintiffs' Labor Law §241(6) causes of action. This Court finds that there remains issues of fact concerning the applicability of Industrial Code sections 12 N.Y.C.R.R. §23-8.1 and 12 N.Y.C.R.R. §23-8.3, based on whether safety devices were disengaged, proper inspections were conducted and the potential lack of lubrication of the crane.

1765 has stated a basis to dismiss the plaintiffs' causes of action for res ipsa loquitur based on lack of "exclusive control" over the crane at the time of the accident. 1765 has established a prima facie basis to dismiss the punitive damages causes of action asserted against it. Plaintiffs have not raised any issue of fact and rely on speculation to establish allegations that 1765, as the constructive owner and developer of the property, was grossly reckless, or committed intentional, wanton, or malicious conduct affecting the public. Plaintiffs have also failed to describe the egregious acts committed by 1765 that would support an award for punitive damages.

1765 has failed to establish its lack of negligence, therefore summary judgment on its claims for contractual indemnification against Sorbara is denied as premature. Sorbara has not established that the provisions of the indemnification provision in its contract with DeMatteis is void pursuant to GOL §5-322.1 or that they do not apply to 1765's claims.

Accordingly, it is ORDERED that 1765 First Associates, LLC's Motion for Summary Judgment dismissing the plaintiffs' Labor Law §§200, 241, and 241(6), res ipsa loquitur and punitive damages causes of action asserted against 1765 and on 1765's claim for contractual indemnification against Sorbara Construction Corp. ("Sorbara"), is granted only as to plaintiffs' causes of action asserted pursuant to Labor Law §241 except for Labor Law §241(6), the causes of action for res ipsa loquitur and punitive damages, and it is further,

ORDERED that the plaintiffs' causes of action against 1765 First Associates, LLC for res ipsa loquitur, punitive damages and pursuant to Labor Law §241 except for Labor Law §241 (6), are severed and dismissed, and it is further,

ORDERED, that the remainder of 1765 First Associates, LLC's Motion for Summary Judgment, is denied, and it is further,

ORDERED that the Clerk enter judgment accordingly.

ENTER :

**MANUEL J. MENDEZ**  
J.S.C.

Dated: March 4, 2014

**MANUEL J. MENDEZ**

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE