

**Matter of 91st St. Crane Collapse Litig.**

2014 NY Slip Op 30526(U)

March 4, 2014

Supreme Court, 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 91<sup>ST</sup> 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 2-07-2014  
MOTION SEQ. NO. 086  
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 15 were read on this motion to/ for Summary Judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-4</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>5-8, 10-12</u>
Replying Affidavits _____	<u>13-15</u>

**Cross-Motion: Yes X No**

Upon a reading of the foregoing cited papers, it is Ordered that, 1765 First Associates, LLC ("1765") 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 dismissing

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

plaintiff's 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. 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 91st 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 personal injuries and death of Donald Christopher Leo on May 30, 2008, when the Crane collapsed. A Development Agreement and ground lease were entered into between New York City Educational Construction Fund ("NYCEF") and 1765, as the developer of the property. 1765 entered into a construction management agreement with Leo D. DeMatteis Construction Corporation ("DeMatteis") to perform construction work. DeMatteis entered into a contract with Sorbara Construction Corp. ("Sorbara") to serve as the concrete superstructure contractor. Sorbara rented the Kodiak Tower Crane from New York Crane and Equipment Corp., pursuant to a rental contract.

1765 seeks Summary Judgment dismissing 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.

1765 contends that Labor Law §200 does not apply to it because it did not control or supervise any of the work performed at the job site. 1765 claims that the only section of Labor Law §241 properly alleged to be violated is Labor Law §241(6) and no other section of Labor Law §241 was violated. 1765 argues that there is no basis for the alleged violations of Labor Law §241(6) because the industrial code sections cited by plaintiff are either too general to be enforced, or not applicable to the facts of this case.

Dismissal of the plaintiffs' causes of action for res ipsa loquitur is sought by 1765 based on the contention that it lacked "exclusive control" of the crane at the time of the accident and that the crane was in the exclusive control of Sorbara. 1765 seeks to dismiss the punitive damages causes of action arguing that plaintiff cannot establish that 1765, was grossly reckless, or that it committed intentional, wanton, or malicious acts affecting the public. 1765 claims that plaintiff has not sufficiently described the egregious acts that would support such an award.

1765 seeks Summary Judgment on its claim for contractual indemnification against Sorbara. 1765 argues that Sorbara cannot establish its lack of negligence and that the indemnification clause of the contract between DeMatteis and Sorbara does not violate GOL §5-322.1. 1765 contends that Sobara is liable to 1765 for contractual indemnification based on the contract between DeMatteis and Sorbara.

Plaintiffs oppose the motion contending that there remain issues of fact concerning the Labor Law §200 and 241(6) causes of action. Plaintiffs argue that 1765 remains liable under Labor Law §200 because it retained supervision and

control over the project and the work performed prior to the accident. Plaintiffs contend that applicability of New York Industrial Code sections 12 N.Y.C.R.R. §23-8.1, 12 N.Y.C.R.R. §23-8.2 and 12 N.Y.C.R.R. §23-8.3 are a basis to deny summary judgment on the cause of action under Labor Law §241(6).

Plaintiffs contend that 1765 is liable under *res ipsa loquitur* because it maintained exclusive control over the crane based on 1765's "exclusive possession of the premises" and responsibility for implementation of the "hoisting plan." Plaintiffs argue that there remains a basis to sustain the punitive damages causes of action because 1765, is liable for the acts of DeMatteis and as the constructive owner and developer of the property, it was grossly reckless, and committed intentional, wanton, or malicious conduct affecting the public.

Sorbara partially opposes the motion arguing that the indemnification provision relied upon by 1765 is void and unenforceable pursuant to GOL §5-322.1. Sorbara argues that neither Sorbara or its employees were negligent or the cause of any damages as required by the indemnification provisions of the Sorbara and DeMatteis contract, and there is no basis for 1765 to obtain summary judgment.

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).

Labor Law §241(6), requires that the plaintiff establish a nondelegable duty of the owner 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). The plaintiff is required to specifically plead and prove violations of the Industrial Code regulations, as the proximate cause of the injuries. *Ross v. Curtis-Palmer Hydro Electric Company*, 81 N.Y. 2d 494, 618 N.E. 2d 82, 601 N.Y.S. 2d 49 (1993).

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).

A charge on the theory of *res ipsa loquitur* requires plaintiff to establish three elements, "(1) the event must be of a kind that ordinarily would not occur absent negligence; (2) it must be caused by an agency or instrumentality within the

exclusive control of the defendant; and (3) it must not be due to any voluntary action or contribution on the part of the plaintiff.” *Banca Di Roma v. Mutual of America Life Ins. Co., Inc.*, 17 A.D. 3d 119, 793 N.Y.S. 2d 341 (N.Y.A.D. 1<sup>st</sup> Dept., 2005). The plaintiff seeking to establish exclusivity of control must eliminate the possibility that the negligence was caused by the agency of an entity other than the defendant. *Dermatossian v. New York City Transit Authority*, 67 N.Y. 2d 492 N.E. 2d 1200 (1986).

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 (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).

A party seeking common law indemnification cannot recover if it is negligent beyond strict statutory liability. *Gulotta v. Bechtel Corporation*, 245 A.D. 2d 75, 664 N.Y.S. 2d 801 (N.Y.A.D. 1<sup>st</sup> Dept., 1997). A party seeking common law indemnification is required to prove that it is not liable for negligence other than statutorily and that the proposed indemnitor contributed to the cause of the accident. *McCarthy v. Turner Construction, Inc.*, 17 N.Y. 3d 369, 953 N.E. 2d 794, 929 N.Y.S. 2d 556 (2011).

Contractual indemnification involves the parties agreeing to shift liability from the owner or contractor to the subcontractor that proximately caused plaintiff’s injuries through its negligence. It is premature to conditionally grant summary judgment on a contractual indemnification claim where there is a possible finding that the plaintiff’s injuries can be attributed to the party seeking indemnification. *Picasso v. 345 East 73 Owners Corp.*, 101 A.D. 3d 511, 956 N.Y.S. 2d 27 (N.Y.A.D. 1<sup>st</sup> Dept., 2012).

An indemnification agreement is void as against public policy pursuant to GOL §5-322.1, if it contains language that indemnifies an owner or general contractor for harm caused by their own negligence. *Brown v. Two Exch. Plaza Partners*, 76 N.Y. 2d 172, 556 N.E. 2d 430, 556 N.Y.S. 2d 991 (1990). An indemnification agreement modifying liability for negligence and containing language that limits indemnification to subcontractor liability for its own negligence does not violate GOL §5-322.1. *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).

1765 does not seek summary judgment on plaintiffs’ causes of action asserted under Labor Law §240(1). Plaintiffs have not opposed granting 1765 summary judgment on all sections of Labor Law §241, except for Labor Law §241(6).

This Court recognizes that there is more than one theory as to what caused the Crane collapse. There remain issues of fact regarding the proximate cause of the accident and the New York Crane Defendants' liability. The plaintiffs have sufficiently raised issues of fact with respect to the alleged gross negligence of the New York Crane Defendants in relation to the punitive damages claims.

The New York Crane Defendants have stated a basis to dismiss those causes of action asserted in the complaint under New York Labor Law Sections 240, 241 and 241(6) for violation on the rental contract for the 052-Crane. Plaintiffs have raised an issue of fact as to the presence of the New York Crane Defendants at the job site on a regular basis for the repair of the rented equipment and their potential liability under Labor Law Section 200.

Accordingly, it is ORDERED that New York Crane & Equipment Corp., James F. Lomma, J.F. Lomma Inc. and TES Inc.'s 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 them by plaintiffs in this action, is granted, only as to 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), and it is further,

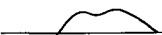
ORDERED that, the plaintiffs claims under Labor Law Sections 240, 241 and 241(6), asserted against New York Crane & Equipment Corp., James F. Lomma, J.F. Lomma Inc. and TES Inc., are severed and dismissed, and it is further,

ORDERED that, the remainder of the motion, is denied, and it is further,

ORDERED that the Clerk enter judgment accordingly.

ENTER :

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

  
\_\_\_\_\_  
MANUEL J. MENDEZ  
J.S.C.

Dated: March 4, 2014

Check one:  FINAL DISPOSITION X NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE