Matter of 91st St. Crane Collapse Litig.
2014 NY Slip Op 30527(U)
March 4, 2014
Supreme Court, 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 & SELVI SINANOVIC Individually,

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).

INDEX NO. 117469/08
MOTION DATE 2-07-2014
MOTION SEQ. NO. 063
MOTION CAL. NO. ______

AND ALL RELATED ACTIONS

The following papers, numbered 1 to 19 were read on this motion to/ for Summary Judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 6
Answering Affidavits — Exhibits ______ cross motion	7-10, 11-13, 14 -16
Replying Affidavits	17 - 19

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

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is Ordered that, the City of New York and New York City Department of Buildings' (collectively referred to as, "City of New York"), motion pursuant to CPLR Section 3212 seeking Summary Judgment on its cross-claims for contractual indemnity and breach of contract, is granted only to the extent of awarding conditional summary judgment on the cross-

claims for contractual indemnification against 1765 First Associates, LLC ("1765") and Sorbara Construction Corp. ("Sorbara"), the remainder of the motion is denied. 1765 First Associates, LLC's Cross-Motion for Summary Judgment dismissing the City of New York and New York City Department of Buildings' cross-claims for contractual indemnification and breach of contract and on 1765 First Associates, LLC's cross-claims for contractual indemnification against Sorbara Construction Corp., 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 Ramadan Kurtaj on May 30, 2008, when the Crane collapsed. The City of New York entered into a City Fund Disposition Agreement with the New York City Educational Construction Fund ("NYCEF"). A Development Agreement and ground lease were entered into beween 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.

The City of New York seeks Summary Judgment on its cross-claims for contractual indemnity and breach of contract for failure to procure proper insurance against 1765 and Sorbara.

1765 cross-moves for Summary Judgment dismissing the City of New York's cross-claims for breach of contract and granting 1765's cross-claims for contractual indemnification against Sorbara.

The City of New York claims that there has been a finding by the Appellate Division First Department, that it was not under a special duty and exercised reasoned judgment in relation to the crane, in this action (In re 91st Street Crane Collapse Litigation, 103 A.D. 3d 503, 960 N.Y.S. 2d 31 (N.Y.A.D. 1st Dept., 2013)). The City of New York argues that it is not negligent and according to the terms of Section 2.04 of the Development Agreement titled "Indemnification of the Fund and Designated Parties," and Articles 17 and 19 of the ground lease, 1765 is contractually obligated to indemnify the City of New York.

Pursuant to the terms of Article 2.05 of the Development Agreement, titled "Insurance," the City of New York argues that 1765 was obligated to procure General Commercial Liability and Follow Form Excess Liability Insurance. The City of New York contends that the terms of Article 2.05 of the Development Agreement also requires that 1765 have its contractors, obtain insurance prior to the commencement of work naming NYCEF and all other related entities including the City of New York, as additional insureds. The City of New York asserts that Article 2.05 of the

Development Agreement included a schedule of minimum coverage limits for Commercial General Liability (CGL) and Excess Liability Insurance, requiring contractor's engaged in various types of work to maintain the highest level of coverage of any listed trade or component of work it was engaged in. The City of New York argues that 1765, failed to comply with and breached the terms of the Development Agreement by failing to procure, or enter into an agreement with Sorbara, to procure proper insurance naming the City of New York as additional insureds.

The City of New York argues that according to the "hold harmless" provisions of Article 17, titled "Damages to Persons or Property," of the contract entered into between DeMatteis and Sorbara, it is entitled to indemnification from Sorbara. The City of New York argues that, "Exhibit 'H ' "titled, "Insurance Requirements," of the contract entered into between DeMatteis and Sorbara, includes a provision for minimum CGL coverage and states that "Leon D. DeMatteis Construction Corporation,..., New York City Educational Construction Fund, City of New York, HSBC Bank USA N.A., together with their trustees, officers, employees and agents... " are required to be additional insureds protected under the "hold harmless" provisions of the contract. The City of New York argues that Sorbara's failure to name the City of New York as additional insured's or obtain the required coverage under the Sorbara insurance policy is a basis to find Sorbara breached its contract.

Sorbara partially opposes the City of New York's motion for summary judgment arguing that it is not liable for contractual indemnification. Sorbara does not oppose any cross-claims for contractual indemnification asserted by the City of New York against 1765. Sorbara argues that it is not negligent in this action and the indemnification provision in its contract with DeMatteis is void pursuant to GOL §5-322.1. Sorbara also argues that the "hold harmless" provision of Article 17 of its contract with DeMatteis is ambiguous and does not specifically name the City of New York as an indemnitor resulting in no basis for contractual indemnification from Sorbara. Sorbara asserts that the City of New York as a third-party beneficiary of the drafter of the contract, is bound by any ambiguity construed against the drafter which is DeMatteis.

New York Crane and Equipment Corp., James F. Lomma, J.F. Lomma Inc. and T.E.S. Inc. i/s/a TES Inc., take no position as to whether the City of New York is entitled to summary judgment, but seek to avoid having this Court render any finding regarding the condition of the crane as an issue in factual dispute.

1765 cross-moves seeking summary judgment dismissing the City of New York's cross-claims for indemnification and breach of contract. 1765 opposes summary judgment on the City of New York's cross-claims for contractual indemnification arguing that 1765 is free of negligence and is not liable for contractual indemnification. 1765 opposes summary judgment on the City of New York's cross-claims for breach of contract based on failure to procure insurance. 1765 argues that it did in fact procure all the necessary insurance required under its

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contract and that its combined Primary Policy and Excess Policy total $6 million dollars, which is in excess of the $5 million required under Section 2.05 of the Development Agreement. 1765 also opposes the City of New York's motion arguing that if 1765 is contractually obligated to indemnify the City of New York, then Sorbara is contractually obligated to indemnify both the City of New York and 1765, with the practical effect of Sorbara being solely liable.

1765 seeks Summary Judgment in the cross-motion on its cross-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 also argues that Sobara is liable to both The City of New York and 1765 for contractual indemnification pursuant to Article 17 of the of the contract between DeMatteis and Sorbara. 1765 asserts that in the preamble of the contract between DeMatteis and Sorbara, 1765 is identified as the "Owner." 1765 asserts that "Exhibit H" of the contract between DeMatteis and Sorbara , titled "Insurance Requirements" requires that Sorbara "hold harmless" and name the City of New York as an additional insured on its insurance policies.

Sorbara opposes the cross-motion arguing that the indemnification provision relied upon by 1765 is void and unenforceable pursuant to GOL §5-322.1. Sorbara asserts that pursuant to the provisions of its contract with DeMatteis, Sorbara or one of its employees , "by reason of acts or omissions...," would have to be liable for damages, for 1765 to obtain contractual indemnification. Sorbara argues that neither Sorbara or its employees were negligent or the cause of any damages 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); *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993). 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). Summary judgment is a drastic remedy and should not be granted where triable issues of fact 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).

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. 1st Dept.,1997) and *Walker v. Trustees of the University of Pennsylvania*, 275 A.D. 2d 266, 712 N.Y.S. 2d 117 (N.Y.A.D. 1st Dept., 2000). 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. *Picaso v. 345 East 73 Owners Corp.*, 101 A.D. 3d 511, 956 N.Y.S. 2d 27 (N.Y.A.D. 1st Dept., 2012). Conditional summary judgment is granted on a claim of contractual indemnification when the determination of the extent of each potentially liable party's negligence has yet to be determined. *Hughey v. RHM-88, LLC*, 77 A.D. 3d 520, 912 N.Y.S. 2d 175 (N.Y.A.D. 1st Dept., 2010) and *Hernandez v. Argo Corp.*, 95 A.D. 3d 782, 945 N.Y.S. 2d 662 (N.Y.A.D. 1st 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 based on their own negligence. The purpose of GOL §5-322.1 is to prevent subcontractors from assuming liability for the negligence of the owner or contractor pursuant to the contract, *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 that modifies the liability for negligence and contains language that limits indemnification to subcontractor liability for its own negligence has been found not to violate GOL §5-322.1 If it is found that plaintiff's injuries are based on the negligence of the defendant with a void indemnification provision, enforcement of the provision is barred. *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).

A claim of breach of contract for failure to procure insurance, based on a provision in a subcontract agreement, may be sustained if the subcontract agreement does not incorporate by reference clauses from the main contract. A determination of whether a party is an additional insured under an insurance policy requires a reading of the language of the policy to determine whether a contract is required between the named insured and the organization seeking coverage. *Mayo v. Metro Opera Association, Inc.*, 108 A.D. 3d 422, 969 N.Y.S. 2d 39 (N.Y.A.D. 1st Dept., 2013) citing to *AB Green Gansevoort, LLLC v. Peter Scalamandre & Sons, Inc.*, 102 A.D. 3d 425, 961 N.Y.S. 2d 3 (N.Y.A.D. 1st Dept., 2013).

This Court finds that the City of New York has established that it is entitled to conditional summary judgment on its cross-claims for contractual indemnification against both 1765 and Sorbara. 1765 and Sorbara have failed to raise issues of fact on the City of New York's cross-claims for contractual indemnification. 1765 has not established that its contract with another party covers its obligation to indemnify the City of New York and is a valid basis to deny enforcing the clause requiring 1765 to indemnify the City of New York.

The City of New York failed to established a prima facie basis to obtain summary judgment on its cross-claims for breach of contract against 1765 and Sorbara. 1765 did obtain combined Primary Policy and Excess Policy of insurance and the City of New York did not provide proof that additional insured coverage was requested and denied by 1765 and its carriers. The City of New York, relies on "information and belief" and failed to provide proof that it is not named an additional insured in Sorbara's insurance policy.

1765 has failed to establish its lack of negligence, therefore summary judgment on its cross-claims for contractual indemnification against Sorbara are premature. Sorbara has not established that the provisions of the indemnification provision in its contract with DeMatteis are void pursuant to GOL §5-322.1 or that they do not apply to 1765's cross-claims. There remain issues of fact concerning whether Sorbara must indemnify both 1765 and the City of New York.

Accordingly, it is ORDERED that the City of New York and New York City Department of Buildings' Motion pursuant to CPLR Section 3212 seeking Summary Judgment on its cross-claims for contractual indemnity and breach of contract, is granted to the extent of awarding conditional summary judgment on the cross-claims for contractual indemnification against 1765 First Associates, LLC and Sorbara Construction Corp., and it is further,

ORDERED that the remainder of the City of New York and New York City Department of Buildings' Motion pursuant to CPLR Section 3212 seeking Summary Judgment on its cross-claims for breach of contract against 1765 First Associates, LLC and Sorbara Construction Corp., is denied, and it is further,

ORDERED, that 1765 First Associates, LLC's Cross-Motion for Summary Judgment dismissing the City of New York and New York City Department of Buildings' cross-claims for contractual indemnification and breach of contract and on 1765 First Associates, LLC's cross-claims for contractual indemnification against Sorbara Construction Corp., 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 X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE