

Matter of 91st St. Crane Collapse Litig.

2014 NY Slip Op 30528(U)

March 4, 2014

Supreme Court, New York County

Docket Number: 117469/08

Judge: Manuel J. Mendez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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:

XHEVAHIRE SINANAJ and SELVI SINANOVIC as Co-Administrators of the Estate of RAMADAN KURTAJ, Deceased & SELVI SINANOVIC Individually,

INDEX NO. 117469/08 MOTION DATE 2-07-2014 MOTION SEQ. NO. 060 MOTION CAL. NO.

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).

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, 1765 First Associates, LLC ("1765") Motion for Summary Judgment dismissing the plaintiffs' Labor Law §§200, 241 and 241(6), negligent hiring/supervision, 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

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

granted only as to dismissing plaintiff's causes of action asserted pursuant to Labor Law §241 except for Labor Law §241(6), the causes of action for negligent hiring/supervision, 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 Ramadan Kurtaj 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), negligent hiring/supervision, 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' cause of action for negligent hiring/supervision is sought by 1765 based on the contention that there is no way that it knew or could have known of the conduct that cause the crane to collapse. 1765 seeks to dismiss the res ipsa loquitur causes of action based on the contention that it lacked "exclusive control" of the crane at the time of the accident. 1765 also seeks to dismiss plaintiffs' causes of action for punitive damages arguing that it cannot be established that 1765, was grossly reckless, or committed intentional, wanton, or malicious acts affecting the public and the alleged egregious acts have not been sufficiently stated.

1765 contends that Sobara is liable to 1765 for contractual indemnification based on the contract between DeMatteis and Sorbara. 1765 seeks Summary Judgment on its claim for contractual indemnification against Sorbara arguing that

Sorbara cannot establish its lack of negligence. 1765 asserts that the indemnification clause of the contract between DeMatteis and Sorbara does not violate GOL §5-322.1.

Xhevahire Sinanaj as Administrator of the Estate of Ramadan Kurtaj ("Plaintiff") opposes the motion contending that there remain issues of fact concerning the Labor Law §200 and 241(6) causes of action. Plaintiff argues 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. Plaintiff contends 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 prevent summary judgment on the cause of action under Labor Law §241(6).

Plaintiff contends that 1765 is liable for negligent hiring/supervision because DeMatteis' employees were acting on behalf of 1765 and there remain issues of fact concerning 1765's lack of knowledge of Sorbara's work or conduct. Plaintiff also contends 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." Plaintiff argues that there remains a basis to sustain the punitive damages causes of action because 1765, is liable for the grossly reckless, intentional, wanton, or malicious acts of the contractors, as the constructive owner of the property.

New York Crane & Equipment Corp., James F. Lomma, J.F. Lomma Inc. and TES Inc. (hereinafter collectively referred to as "NY Crane Defendants") partially oppose the motion contending that there remain issues of fact as to the cause of the crane collapse and applicability of New York Industrial Code sections 12 N.Y.C.R.R. §23-8.1, and 12 N.Y.C.R.R. §23-8.3. preventing summary judgment to 1765 based on Labor Law 241(6).

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 Corp.*, 303 A.D. 2d 194, 758 N.Y.S. 2d 3 (N.Y.A.D. 1st 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. 1st Dept., 2003) *aff'd*, 1 N.Y. 3d 526, 802 N.E. 2d 1080, 770 N.Y.S. 2d 682 (2003).

A contractor's negligence is a basis to find liability under the theories of negligent hiring, negligent retention and negligent supervision. The plaintiff asserting claims for negligent hiring, negligent retention and negligent supervision, "must establish that the party knew or should have known of the contractor's propensity for the conduct which caused the injury." *Bellere v. Gerics*, 304 A.D. 2d 687, 759 N.Y.S. 2d 105 (N.Y.A.D. 2nd Dept., 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. 1st Dept., 2005). Exclusivity of control requires elimination of 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. 2nd 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. 1st 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. *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).

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 a subcontractor own liability for 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). Plaintiff has not opposed granting 1765 summary judgment on all sections of Labor Law §241, except for Labor Law §241(6).

1765 has failed to establish that it did not exercise supervision and control on 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.

1765 has stated a basis to dismiss plaintiffs' causes of action for negligent hiring/supervision. Plaintiff has not raised any issues of fact concerning 1765's alleged knowledge of a subcontractor's propensity for the conduct that caused the crane to collapse. There is no basis to maintain plaintiffs' causes of action for *res ipsa loquitur* against 1765, there are no issues of fact concerning 1765's "exclusive control" over the crane on the date of the accident. 1765 has established a *prima*

facie basis to dismiss the punitive damages causes of action asserted against it. Plaintiff has not raised any issue of fact to establish allegations that 1765,, was grossly reckless, or committed intentional, wanton, or malicious conduct affecting the public.

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 negligent hiring/supervision, res ipsa loquitur and punitive damages, and it is further,

ORDERED that the plaintiffs' causes of action against 1765 First Associates, LLC for negligent hiring/supervision, 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.

MANUEL J. MENDEZ
J.S.C.

Dated: March 4, 2014

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE