

Matter of 91st St. Crane Collapse Litig.

2014 NY Slip Op 30582(U)

March 7, 2014

Supreme Court, New York County

Docket Number: 101871/2009

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:
INDEX NO.: 771000/2010

ROBERT G. LEINO, LOUISE M. LEINO and BRIDGET
E. LEINO,

INDEX NO. 101871/09
MOTION DATE 01-29-2014
MOTION SEQ. NO. 010
MOTION CAL. NO. _____

Plaintiff(s),

- v -

JAMES LOMMA, individually and d/b/a NEW YORK
CRANE & EQUIPMENT CORP., SORBARA CONSTRUCTION
CORP., LEON D. DEMATTEIS CONSTRUCTION CORP.,
MATTONE GROUP, LLC, 1765 FIRST ASSOCIATES, LLC,
and TOTAL SAFETY CONSULTING, LLC.

Defendant(s).

AND ALL RELATED ACTIONS

The following papers, numbered 1 to 11 were read on this motion and cross-motion for
Summary Judgment:

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

Cross-Motion: Yes XNo

Upon a reading of the foregoing cited papers, it is Ordered that Defendant
Total Safety Constulting, LLC (hereinafter “ Total Safety”) motion for summary
judgment dismissing plaintiff’s complaint and all cross claims, and its motion for
summary judgment on its cross claim for contractual indemnification against
defendant Leon D. DeMatteis Construction Corp., (hereinafter “DeMatteis”) is
granted.

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

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 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 contract with Total Safety to serve as the site safety manager at the construction site. DeMatteis also 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.

When it collapsed the crane struck a building located at 354 East 91st. Street (hereinafter "the building") severely damaging the building and various apartments within it. Plaintiffs commenced this action against the defendants to recover for damage to their property, their expenses, mental anguish and emotional distress.

Two theories have been advanced for the collapse of the crane: (1) DeMatteis advances in sum, 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. (2) Defendant NY Crane advances in sum, that the accident occurred due to the improper maintenance and operation of the crane by the crane operator and oiler.

Defendant Total Safety moves for summary judgment dismissing plaintiffs' causes of action and all cross claims asserted against it and for summary judgment on its cross claims for contractual indemnification against DeMatteis. Total Safety argues that it was not responsible for this incident because it was not responsible for the maintenance or operation of the crane and did not direct or control the work of the crane operator. It further argues that since it is not responsible for this incident it is entitled, pursuant to its contract with DeMatteis, for contractual indemnification.

Plaintiffs oppose Total Safety's motion for summary judgment dismissing the complaint. Plaintiffs allege that the breach by total safety of its duties to perform in connection with the contract; the duty to make the site safe; to make the equipment safe; to make the workers work safely; to make sure the building materials, fixtures and equipment and machinery to build the building were safe; to make sure the crane operated by NY Crane was safe; to make sure that Sorbara operated the crane safely; and its breach of its contractual duty to advise and

make recommendations as to safety to DeMatteis preclude the granting of summary judgment.

DeMatteis opposes the motion for summary judgment on the cross claim for contractual indemnification against it. It argues that the indemnification provision in the contract is void as violative of General Obligations Law section 5-322.1.

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]).

In support of its motion defendant Total Safety submits a copy of its contract with DeMatteis and a copy of the deposition testimony of its on site safety consultant Fred Milteer. The contract with DeMatteis contains the duties and obligations of the parties to the contract, specifically the duty assumed by Total Safety as safety consultant. It states that Total Safety's "primary responsibility shall be to monitor safety at the construction project". [contract ¶ 3 Exhibit G] and that "under no circumstances will site safety manager have authority over decisions or actions affecting the project production, scheduling, quality, workmanship or the correction of hazardous conditions." These responsibilities are left to the project superintendent, project manager or other appropriate contractor or other subcontractor personnel. Finally the contract gives "the site safety manager only authority to advise and make recommendations." [see

Contract ¶ 4 Exhibit G].

In his deposition testimony Mr. Milteer stated at Pg. 39 Line 20: "My duties include provide safety protocols for the public, adjoining property and the workers. And any safety findings that I may discover, I make recommendations to the client so we can amend them." Mr. Novello from DeMatteis at his deposition confirmed that Total Safety had no authority or responsibility with regard to the safe maintenance or operation of the crane.

In its limited role as a safety consultant for the construction project, Total Safety is not an insurer of safety and cannot be held liable. Its contract with DeMatteis limited its responsibility to monitoring, advising and recommending. It had no authority over decisions or actions affecting work production, scheduling, quality, workmanship or the correction of hazardous conditions. It cannot be held liable under a theory of negligence (see Cappabianca v. Skanska USA Building Inc., 99 A.D.3d 139, 950 N.Y.S.2d 35 [1st. Dept. 2012]; Barreto v. Metropolitan Transportation Authority, 110 A.D.3d 630, 973 N.Y.S.2d 636 [1st. Dept. 2013]; Martinez v. 342 Property LLC, 89 A.D.3d 468, 932 N.Y.S.2d 454 [1st. Dept. 2011]).

Plaintiffs make conclusory statements without raising any issues of fact, as such defendant Total Safety's motion dismissing plaintiffs' complaint is granted and the causes of action in plaintiffs' complaint and all cross claims against defendant Total Safety are severed and dismissed.

The indemnification provision in the contract between Total Safety and DeMatteis begins with the words "to the extent permitted by law" ...and continues ... "Further , except to the extent, if any, prohibited by law" and concludes... "nothing in the above indemnification shall be construed to require any indemnification which would make such void or unenforceable or to eliminate or reduce any indemnification or rights which the indemnity or (contractor/owner/client) has by law. In the event that any term, paragraph or provision of the indemnification above is found or void or unenforceable, it shall not thereby invalidate or be construed to invalidate any other term, paragraph or provision contained within the indemnification provisions, or elsewhere in this contract; all of which shall remain in full force and effect."

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).

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.Y.2d 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]). When the determination of the extent of a potentially liable
party's negligence has yet to be determined conditional summary judgment can be
granted on a claim for contractual indemnification (Hughey v. RHM-88 LLC, 77
A.D.3d 520, 912 N.Y.S.2d 175 [1st. Dept. 2010]; Hernandez v. Argo Corp., 95 A.D.3d
782, 945 N.Y.S.2d 662 [1st. Dept. 2012]).

Total Safety has established its entitlement to contractual indemnification
as it has been established that it is not guilty of any negligence (see Jenkins v.
Related Companies, L.P., 979 N.Y.S.2d 581[1st. Dept. 2014]). DeMatteis has not
established that the clause in the contract is void as violative of General
Obligations Law§ 5-322.1.

Accordingly, it is ORDERED that Defendants, Total Safety Consulting, LLC's
motion for summary judgment dismissing plaintiffs causes of action asserted
against it in the complaint and all cross claims is granted, and it is further

ORDERED that the causes of action asserted in the complaint against
defendant Total Safety Consulting LLC and all cross claims are severed and
dismissed, and it is further

ORDERED that defendant Total Safety Consulting, LLC's motion for summary judgment on its cross claims for contractual indemnification against defendant DeMatteis is granted to the extent of granting Total Safety conditional summary judgment on its contractual indemnification cross claim, and it is further

ORDERED that the clerk of court is directed to enter judgment accordingly.

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

Dated: March 7, 2014



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE