

**Matter of 91st Street Crane Collapse Litig. v City of
New York**

2014 NY Slip Op 30583(U)

March 7, 2014

Supreme Court, New York County

Docket Number: 108088/09

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:

JACK RIZZOCASIO

Plaintiff(s),

INDEX NO. 108088/09
MOTION DATE 2-07-2014
MOTION SEQ. NO. 007
MOTION CAL. NO. _____

- v -

THE CITY OF NEW YORK,
1765 FIRST ASSOCIATES, LLC,
MATTONI GROUP CONSTRUCTION CO. LTD.,
DEMATTEIS CONSTRUCTION,
LEON D. DEMATTEIS CONSTRUCTION CORPORATION,
and NEW YORK CRANE & EQUIPMENT CORP.,

Defendant(s).

LEON D. DEMATTEIS CONSTRUCTION CORPORATION,

THIRD-PARTY INDEX NO. 590753/2009

Third-Party Plaintiff(s),

- v -

SORBARA CONSTRUCTION CORP.,

Third-Party Defendant(s).

LEON D. DEMATTEIS CONSTRUCTION CORPORATION,

SECOND THIRD-PARTY INDEX NO. 590816/2009

Second Third-Party Plaintiff(s),

- v -

HOWARD I. SHAPIRO & ASSOCIATES CONSULTING
ENGINEERS, P.C., NEW YORK RIGGING CORP., BRADY
MARINE REPAIR CO., INC., BRANCH RADIOGRAPHIC LABS, INC.,
TESTWELL INC., CRANE INSPECTION SERVICES, LTD, and
LUCIUS PITKIN, INC.,

Second Third-Party Defendant(s).

AND ALL RELATED ACTIONS

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

The following papers, numbered 1 to 18 were read on this motion and cross-motion to/ for Summary Judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 5
Answering Affidavits — Exhibits _____ cross motion _____	6-11, 12 -14.
Replying Affidavits _____	15 - 18

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that 1765 First Associates, LLC's ("1765") Motion for Summary Judgment dismissing the plaintiff's Labor Law §§200, 241(6) and common law causes of action asserted against 1765 is granted only as to plaintiff's Labor Law §200 and common law negligence causes of action. 1765's Motion for Summary Judgment on the cross-claim for contractual indemnification against Sorbara Construction Corp. ("Sorbara"), is granted only to the extent of awarding conditional summary judgment on the cross-claim. The remainder of the relief sought 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.

A Development Agreement and ground lease were entered into between NYCEF and 1765, as the developer of the property. 1765 entered into a construction management agreement with DeMatteis to perform work as construction manager. DeMatteis entered into a trade contract with 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.

Jack Rizzocasio, commenced this action for personal injuries sustained on May 30, 2008, when the Crane collapsed. On the date of the accident, Mr. Rizzocasio was employed by Sorbara as a laborer, he claims he was trapped and injured by a collapsing sidewalk bridge, brought down by the falling crane and related debris.

1765 seeks Summary Judgment dismissing the plaintiff's Labor Law §§200 and 241(6) causes of action asserted against 1765 and granting 1765's cross-claims for contractual indemnification against Sorbara.

1765 seeks Summary Judgment contending 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 contends that plaintiff's cause of action under Labor Law §241(6) must be dismissed because the industrial code sections cited by plaintiff as a basis for that cause of action are either too general to be enforced, or not applicable to the facts of this case.

1765 also 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 also argues that Sorbara 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 it and the City of New York as an additional insured on its insurance policies.

Plaintiff, Jack Rizzocasio, submitted no opposition to 1765's motion for summary judgment.

New York Crane and Equipment Corp., James F. Loma, J.F. Loma, Inc. and T.E.S., Inc. (hereinafter collectively referred to as the "NY Crane Defendants") partially oppose 1765's cross-motion for summary judgment contending that there remain issues of fact as to 1765's liability pursuant to Labor Law §241(6). The NY Crane Defendants do not oppose the remainder of the relief sought in 1765's cross-motion. The New York Crane Defendants argue that Labor Law §241(6) liability may apply to 1765 based on Industrial Code sections 12 N.Y.C.R.R. §23-8.1 and 12 N.Y.C.R.R. §23-8.3 concerning maintenance, inspection and operation of the crane.

Sorbara opposes 1765's 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).

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 for 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).

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).

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).

1765 has met its prima facie claim that it did not exercise supervision and control and is not negligent pursuant to Labor Law §200 or common law negligence. There was no opposition submitted by either the plaintiff or the NY Crane Defendants to raise an issue of fact on those causes of action. 1765 has failed to meet its burden

of proof to obtain summary judgment on plaintiff's Labor Law §241(6) cause of action. The NY Crane Defendants have raised an issue 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 and 1765's liability.

1765 has established its lack of negligence, therefore summary judgment on its cross-claim for contractual indemnification against Sorbara is conditionally granted. Sorbara has not raised any issues of fact based on its claims that the indemnification provision in its contract with DeMatteis is void pursuant to GOL §5-322.1.

This Court recognizes that there is more than one theory as to what caused the Crane collapse. The theory posited by Sorbara is a failed weld caused the collapse while the alternate theory is that Crane operator error and/or a lack of proper Crane maintenance caused the collapse. There remain issues of fact regarding the proximate cause of the accident, no matter which theory is given every favorable inference. The failure to establish Sorbara's negligence, renders 1765 only entitled to conditional summary judgment on the indemnification and contribution claims.

Accordingly, it is ORDERED that 1765 First Associates' Motion for Summary Judgment on the plaintiff's Labor Law §§200, 241(6) and common law causes of action asserted against 1765, is granted only as to plaintiff's Labor Law §200 and common law negligence causes of action, and it is further,

ORDERED, that plaintiffs causes of action asserted against 1765 First Associates pursuant to Labor Law §200 and for common law negligence are severed and dismissed, and it is further,

ORDERED, that 1765 First Associates' Motion for Summary Judgment on the plaintiff's Labor Law §241(6), is denied, and it is further

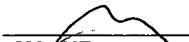
ORDERED, that the remainder of 1765 First Associates' Motion for Summary judgment on its cross-claim for contractual indemnification against Sorbara Construction Corp., is granted only to the extent of awarding conditional summary judgment on the cross-claim, and it is further,

ORDERED that the Clerk enter judgment accordingly.

ENTER :

MANUEL J. MENDEZ
J.S.

Dated: March 7, 2014



MANUEL J. MENDEZ

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE