Matter of 91st St. Crane Collapse Litig.
2014 NY Slip Op 30584(U)
March 7, 2014
Supreme Court, New York County
Docket Number: 150152/09
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

IN RE 91ST STREET CRANE COLLAPSE LITIGATION:
INDEX NO.: 771000/2010

MARINA HARSS, MARCO NISTICO, RUBY AKIN, OGUZ AKIN PHILIP SCHIFFMAN, LINDA McINTYRE, MICHAEL FIORENTINO, TERENCE SCROOPE, TRAVIS LULL, RENAY LOURES, GEORGE LOURES,

INDEX NO. 150152/09
MOTION DATE 01-29-2014
MOTION SEQ. NO. 011
MOTION CAL. NO. ______

Plaintiff(s),

- v -

1765 FIRST ASSOCIATES, LLC, LEON D. DEMATTEIS CONSTRUCTION CORP., JAMES F. LOMMA, NEW YORK CRANE & EQUIPMENT CORP., SORBARA CONSTRUCTION CORP., THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF BUILDINGS, MATTONE GROUP, LLC, MATTONE GROUP CONSTRUCTION CP, LTD, BRADY MARINE REPAIR CO., HOWARD I. SHAPIRO, HOWARD I. SHAPIRO & ASSOCIATES CONSULTING ENGINEERS, P.C., NEW YORK RIGGING CORP., BRANCH RADIOGRAPHIC LABS, INC., TESTWELL, INC., CRANE INSPECTION SERVICES, LTD., LUCIUS PITKIN, INC., TOTAL SAFETY CONSULTING, LLC,

Defendant(s).

AND ALL RELATED ACTIONS

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

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 ...	1-2, 3
Answering Affidavits — Exhibits ____ cross motion	4-5, 6, 7-8, 9
Replying Affidavits	10-11

Cross-Motion: Yes X No

[* 2]

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 asserted against it, and its motion for summary judgment on its cross claim for contractual indemnification against defendant Leon D. DeMatteis Construction Corp., (hereinafter "DeMatteis") is granted.

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 as 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 do not oppose Total Safety's motion for summary judgment dismissing the complaint.

Defendant NY Crane oppose Total Safety's motion and alleges that the fact Total Safety and DeMatteis prepared a checklist for the crane's inspection or maintenance- and the unresolved issues surrounding the checklist- preclude the granting of summary judgment to Total Safety . NY Crane alleges that there are issues of fact as to whether Total Safety's duties at the project included ensuring Sorbara properly maintained and inspected the crane and whether Total Safety failed to properly carry out those duties. NY Crane discounts the testimony of Sorbara's witnesses John Boits and Joseph Sorbara who state in their deposition testimony that Boits performed the required crane maintenance/inspections and completed the checklists on a daily basis.

DeMatteis opposes the motion for summary judgment on Total Safety's 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 ensurer 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]).

Total Safety has established it is not liable, the parties opposing the motion have failed to raise an issue of fact sufficient to deny the motion for summary judgment. Total Safety's motion dismissing plaintiffs' complaint is granted and the causes of action in plaintiffs' complaint and all cross-claims asserted 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]; DiFilipo 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.Y2d 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 and all cross-claims asserted against it in the complaint is granted, and it is further

ORDERED that the causes of action and all cross-claims asserted in the complaint against defendant Total Safety Consulting LLC 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 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 X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE