

<b>Matter of 91st St. Crane Collapse Litig. v City of New York</b>
2014 NY Slip Op 30603(U)
March 10, 2014
Supreme Court, New York County
Docket Number: 105221/09
Judge: Manuel J. Mendez
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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT: HON. MANUEL J. MENDEZ**  
*Justice*

**PART 13**

**IN RE 91<sup>ST</sup> STREET CRANE COLLAPSE LITIGATION:**

**SIMEON ALEXIS and KATHLYN MOORE**

INDEX NO. 105221/09  
MOTION DATE 2-07-2014  
MOTION SEQ. NO. 011  
MOTION CAL. NO. \_\_\_\_\_

Plaintiff(s),

- v -

**THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, NEW YORK CITY EDUCATION CONSTRUCTION FUND, 1765 FIRST ASSOCIATES, LLC, LEON D. DEMATTEIS CONSTRUCTION CORPORATION, THE DEMATTEIS ORGANIZATION, and NEW YORK CRANE AND EQUIPMENT CORP.,**

Defendant(s).

**LEON D. DEMATTEIS CONSTRUCTION CORPORATION,**

THIRD-PARTY INDEX NO. **590576/2009**

Third-Party Plaintiff(s),

- v -

**SORBARA CONSTRUCTION CORP.,**

Third-Party Defendant(s).

**LEON D. DEMATTEIS CONSTRUCTION CORPORATION,**

SECOND THIRD-PARTY INDEX NO. **590689/2009**

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 22 were read on this motion and cross-motion to/ for Summary Judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits _____ cross motion _____	5-9, 10-12, 13-15, 16-19
Replying Affidavits _____	20-22

**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 for Summary Judgment and to dismiss the plaintiff's complaint and all cross-claims asserted against them, is granted. The City of New York and New York City Department of Buildings are granted conditional summary judgment on their cross-claims for contractual indemnification against Sorbara Construction Corp. ("Sorbara"), the remainder of the motion is denied. 1765 First Associates, LLC's ("1765") Cross-Motion for Summary Judgment dismissing the City of New York's claims for contractual indemnification and breach of contract and for Summary Judgment on 1765 First Associates, LLC's claim for contractual indemnification against Sorbara Construction Corp., is granted to the extent that the City of New York's claims for contractual indemnification against 1765 are severed and dismissed. 1765 is granted conditional summary judgment on 1765's claims for contractual indemnification against Sorbara. The remainder of the Cross-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.

Simeon Alexis (hereinafter referred to as "plaintiff"), commenced this action for personal injuries sustained on May 30, 2008, when the Crane collapsed. On the date of the accident, Mr. Alexis was employed by Sorbara as a carpenter. Plaintiff claims he was injured when the crane collapsed. Kathryn Moore, is plaintiff's spouse and has asserted derivative claims.

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 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.

The City of New York seeks Summary Judgment dismissing the plaintiff's complaint and all cross-claims asserted against them. The City of New York also 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's Cross-Motion seeks to dismiss the City of New York's cross-claims for contractual indemnification and breach of contract, and obtain Summary Judgment on 1765's cross-claim for contractual indemnification against Sorbara.

The City of New York seeks Summary Judgment and to dismiss the plaintiff's complaint and all cross-claims asserted against them for failure to state a cause of action. The City of New York argues 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 re 91<sup>st</sup> Street Crane Collapse Litigation*, 103 A.D. 3d 503, 960 N.Y.S. 2d 31 (N.Y.A.D. 1<sup>st</sup> Dept., 2013)). The City of New York contends that it cannot be found liable under plaintiff's Labor Law causes of action or for any negligence in this action. The City of New York claims that plaintiff has failed to plead a special duty, the notice of claim failed to specifically allege a legal theory and does not state any factual predicate for a "special relationship," which is fatal to maintenance of this action. The City of New York asserts that there is a lack of ownership of the property or supervision and control over the crane or the areas of the job site involved in the accident which results in no basis to sustain either the plaintiff's Labor Law claims or any cross-claims for indemnification.

The City of New York argues that 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 argues 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 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 Sorbara's failure to name the City of New York as additional insureds or obtain the required coverage under the Sorbara insurance policy is a basis to find Sorbara breached its contract.

New York Crane and Equipment Corp., James F. Lomma, J.F. Lomma Inc. and T.E.S. Inc. i/s/a TES Inc. (hereinafter referred to collectively as the "NY Crane Defendant"), 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 opposes the Motion and cross-moves for Summary Judgment dismissing the City of New York's cross-claims contending that it is not liable for negligence because it did not control or supervise any of the work performed at the job site. 1765 argues that it could only be found vicariously liable in this action and there is no basis for the City of New York to obtain contractual indemnification from 1765. 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 contract and that its combined Primary Policy and Excess Policy is in excess of the \$5 million required under Section 2.05 of the Development Agreement. 1765 does not oppose the relief sought by the City of New York on the plaintiffs' causes of action.

1765 seeks Summary Judgment in the cross-motion 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 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 partially 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. Sorbara does not oppose that part of 1765's motion seeking summary judgment on plaintiff's Labor Law §§200 and 241(6) and common law negligence causes of action.

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 plaintiff's Notice of Claim against the City of New York that fails to allege or provide a factual predicate for the special relationship will result in the inability to maintain the action. *Peta-Gaye Blackstock v. Board of Educ. of City of New York*, 84 A.D. 3d 524, 921 N.Y.S. 2d 858 (N.Y.A.D. 1<sup>st</sup> Dept., 2011).

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. 1<sup>st</sup> 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. 1<sup>st</sup> 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. *Picasso v. 345 East 73 Owners Corp.*, 101 A.D. 3d 511, 956 N.Y.S. 2d 27 (N.Y.A.D. 1<sup>st</sup> Dept., 2012). Conditional summary judgment is granted on a claim of contractual indemnification when 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. 1<sup>st</sup> Dept., 2010) and *Hernandez v. Argo Corp.*, 95 A.D. 3d 782, 945 N.Y.S. 2d 662 (N.Y.A.D. 1<sup>st</sup> 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 modifying liability for negligence and containing language that limits indemnification to a subcontractor's own liability for negligence does not 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 for 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. 1<sup>st</sup> Dept., 2013) citing to *AB Green Gansevoort, LLLC v. Peter Scalandre & Sons, Inc.*, 102 A.D. 3d 425, 961 N.Y.S. 2d 3 (N.Y.A.D. 1<sup>st</sup> Dept., 2013).

This Court finds that the City of New York has established that it is entitled to summary judgment dismissing all of the causes of action asserted against the City of New York in the complaint and all cross-claims against the City of New York. There remain no issues of fact concerning the City of New York's negligence in this action. There is no basis to sustain indemnification claims against the City of New York.

The City of New York has established that it is entitled to conditional summary judgment on its cross-claims for contractual indemnification against Sorbara, because there remain issues of fact in this action on the extent of Sorbara's negligence. Sorbara has failed to raise issues of fact on the City of New York's cross-claims for contractual indemnification.

1765 has established that it is not liable for negligence in this action and The City of New York is not entitled to contractual indemnification from 1765. The City of New York failed to establish 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.

1765 has established its lack of negligence in this action, therefore conditional summary judgment on its claims for contractual indemnification against Sorbara is granted. 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 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 for Summary Judgment and to dismiss the plaintiff's complaint and all cross-claims asserted against them and for Summary Judgment on the City of New York's cross-claims for contractual indemnity and breach of contract in this action, is granted to the extent of awarding Summary Judgment dismissing plaintiff's causes of action and cross-claims against the City of New York and New York City Department of Buildings, and it is further,

ORDERED, that the causes of action asserted in the complaint and all cross-claims asserted against the City of New York and New York City Department of Buildings in this action are severed and dismissed, and it is further,

ORDERED that the City of New York and New York City Department of Buildings' Motion seeking Summary Judgment on its cross-claims for contractual indemnity and breach of contract in this action, is granted to the extent of awarding conditional summary judgment on the cross-claims for contractual indemnification against 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 seeking Summary Judgment on its cross-claims for breach of contract against 1765 First Associates, LLC and Sorbara Construction Corp., and for contractual indemnification from 1765 First Associates, LLC, 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, is granted to the extent that the City of New York and New York City Department of Buildings' cross-claims for contractual indemnification against 1765 First Associates LLC, are severed and dismissed, and it is further,

ORDERED, that 1765 First Associates, LLC's Cross-Motion seeking summary judgment on its claims for contractual indemnification against Sorbara Construction Corp., is granted to the extent of awarding conditional summary judgment on the cross-claims for contractual indemnification against Sorbara Construction Corp., and it is further,

ORDERED, that 1765 First Associates, LLC's Cross-Motion seeking to dismiss the City of New York and New York City Department of Buildings' claims for breach of contract against 1765 First Associates, LLC in this action, is denied, and it is further,

ORDERED that the Clerk enter judgment accordingly.

ENTER :

**MANUEL J. MENDEZ**  
J.S.C.

Dated: March 10, 2014

  
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MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE