

<b>Matter of 91st St. Crane Collapse Litig. v City of N.Y.</b>
2014 NY Slip Op 30606(U)
March 7, 2014
Supreme Court, New York County
Docket Number: 111626/08
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:

DANIEL ODDO,

Plaintiff(s),

INDEX NO. 11626/08  
MOTION DATE 02-07-2014  
MOTION SEQ. NO. 011  
MOTION CAL. NO. \_\_\_\_\_

- v -

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

Defendant(s).

1765 FIRST ASSOCIATES, LLC, DEMATTEIS CONSTRUCTION  
and LEON D. DEMATTEIS CONSTRUCTION CORPORATION,

Third-Party Plaintiff(s),

THIRD-PARTY INDEX NO. 590943/2008

- v -

SORBARA CONSTRUCTION CORP.,

Third-Party Defendant(s).

1765 FIRST ASSOCIATES, LLC, DEMATTEIS CONSTRUCTION  
and LEON D. DEMATTEIS CONSTRUCTION CORPORATION,

Second Third-Party Plaintiff(s),

SECOND THIRD-PARTY INDEX NO. 590956/2008

- 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: X Yes 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, §240(1), §241(6) and common law causes of action asserted against 1765 is granted only as to plaintiff's Labor Law §200, §240(1) and common law negligence causes of action. 1765 First Associates LLC's Motion for Summary Judgment on its 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.

Daniel Oddo, commenced this action for personal injuries sustained on May 30, 2008, when the Crane collapsed. On the date of the accident, Mr. Oddo was employed by Sorbara, he claims he tripped and fell over debris on the ground level of the building while running from the collapsing crane.

1765 seeks Summary Judgment dismissing the plaintiff's Labor Law §200, §240(1) §241(6) and common law negligence 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 argues that Labor Law §240(1), does not apply to the facts of this action because plaintiff concedes that his injuries were based on a ground level trip and fall involving debris which is not the type of hazard contemplated by the statute. 1765 also argues Labor Law §240(1) does not apply because the plaintiff was not in the "zone of danger" from the falling crane. 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, Daniel Oddo, 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. 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. *Picaso 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 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. 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 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. 1<sup>st</sup> Dept., 2003) *aff'd*, 1 N.Y. 3d 526, 802 N.E. 2d 1080, 770 N.Y.S. 2d 682 (2003).

The purpose of Labor Law §240[1], also known as the "scaffold law" is to protect construction workers by imposing strict liability on "owners, contractors and their agents," for violations which proximately cause injuries. Labor Law §240[1] is a strict and absolute liability statute, the comparative negligence of the worker is not a defense. *Cahill v. Triborough Bridge and Tunnel Authority*, 4 N.Y. 3d 35, 823 N.E. 2d 439, 790 N.Y.S. 2d 74 (2004). Labor Law §240[1], is to be construed liberally to accomplish its purpose, however, it is limited to "special hazards" involving elevation differentials. *Ross v. Curtis-Palmer Hydro Electric Company*, 81 N.Y. 2d 494, 618 N.E. 2d 82, 601 N.Y.S. 2d 49 (1993). An accident alone is not sufficient to establish a

Labor Law §240[1] violation or causation, because not every worker that falls at a construction site is covered under the statute. Recovery does not extend to harm resulting from routine workplace risks. *Runner v. New York Stock Exchange*, 12 N.Y. 3d 599, 922 N.E. 2d 865, 895 N.Y.S. 2d 279 (2009). A trip over floor level debris resulting in injury, is not related to an elevated risk and dismissal of Labor Law §240(1) claims is warranted on those facts. *Kutza v. Bovis Lend Lease LMB, Inc.*, 95 A.d. 3d 590, 944 N.Y.s. 2d 99 (N.Y.A.D. 1<sup>st</sup> Dept., 2012).

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. 1<sup>st</sup> 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. 1765 has also met its prima facie case as to Labor Law §240 (1), and its contention that plaintiff’s injuries were not based on a height related risk. 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, §240(1), §241(6) and common law causes of action asserted against 1765, is granted only as to plaintiff’s Labor Law §200, §240(1), 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, §240(1) and common law negligence are severed and dismissed, and it is further,

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

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

ORDERED that the Clerk is directed to enter judgment accordingly.

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

Dated: March 7, 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