

**Matter of 91st St. Crane Collapse Litig. v 1765 First
Assoc., LLC**

2014 NY Slip Op 30609(U)

March 11, 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
Justice

PART 13

IN RE 91ST STREET CRANE COLLAPSE LITIGATION:

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 02-16-2014
MOTION SEQ. NO. 12
MOTION CAL. NO. _____

Plaintiff(s),

- v -

1765 FIRST ASSOCIATES, LLC, LEON D. DEMATTEIS CONSTRUCTION CORPORATION, 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 CO. LTD, BRADY MARINE REPAIR CO., INC., 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

The following papers, numbered 1 to 19 were read on this motion and cross-motion to/ for Summary Judgment:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>4-7, 8-10, 11-13</u>
Replying Affidavits _____	<u>14 -16, 17-19</u>

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

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

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.

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.

Marina Harss, Marco Nistico, Ruby Akin, Oguz Akin, Philip Schiffman, Linde McIntyre, Michael Fiorentino, Terence Scroope, Travis Lull, Renay Loures and George Loures (collectively referred to as "plaintiffs") commenced this negligence action based on the May 30, 2008, Crane collapse. On the date of the accident, the plaintiffs resided in apartments at a building known as "The Electra," located at 354 East 91st Street, New York, New York, which was next to the construction site. Plaintiffs allege that they each sustained property damage, were displaced from their home, suffered financial distress and that some of the plaintiffs suffered emotional and physical distress as a result of the crane collapse.

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 there was no special duty and they exercised reasoned judgment in relation to the crane (*In re 91st Street Crane Collapse Litigation*, 103 A.D. 3d 503, 960 N.Y.S. 2d 31 (N.Y.A.D. 1st Dept., 2013)). The City of New York contends that it cannot be found liable under plaintiff's causes of action for 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 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 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.

Sorbara partially opposes the motion arguing that the indemnification provision relied upon by the City of New York is void and unenforceable pursuant to GOL §5-322.1. Sorbara contends that neither Sorbara or its employees were negligent or the cause of any damages and there is no basis for the City of New York to obtain summary judgment. Sorbara does not oppose that part of the City of New York's motion seeking summary judgment on its claims for contractual indemnification and breach of contract against 1765.

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 claims contending that it is not liable for negligence and could only be found vicariously liable in this action. 1765 contends that there is no basis for the City of New York to obtain contractual indemnification from it. 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 takes no position on the relief sought in this motion to dismiss the causes of action asserted by the plaintiff and all cross-claims against the City of New York.

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 Sobara 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.

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 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 dismissing the City of New York's contractual indemnification claims.

Plaintiffs did not oppose the motion or the cross-motion.

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. 1st 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. 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 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 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 of 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. 1st Dept., 2013) citing to *AB Green Gansevoort, LLC v. Peter Scalandre & Sons, Inc.*, 102 A.D. 3d 425, 961 N.Y.S. 2d 3 (N.Y.A.D. 1st 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 cross-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 clause 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 plaintiff's complaint and all cross-claims 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., 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 only 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 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,

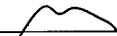
ORDERED, that 1765 First Associates, LLC's cross-motion seeking summary judgment on its claims for contractual indemnification against Sorbara Construction Corp. Is granted, and it is further,

ORDERED that the Clerk of Court is directed to enter judgment accordingly.

ENTER :

MANUEL J. MENDEZ
J.S.C.

Dated: March 11, 2014



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE