

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

2014 NY Slip Op 30618(U)

March 11, 2014

Supreme Court, New York County

Docket Number: 108543/08

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

IN RE 91ST STREET CRANE COLLAPSE LITIGATION:

FIRST & 91 LLC,
Plaintiff(s),

INDEX NO. 108543/08
MOTION DATE 02-07-2014
MOTION SEQ. NO. 011
MOTION CAL. NO. _____

- v -

1765 FIRST ASSOCIATES, LLC, LEON D. DEMATTEIS
CONSTRUCTION CORPORATION, NEW YORK CRANE &
EQUIPMENT CORP. and SORBARA CONSTRUCTION CORP.,

Defendant(s).

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

THIRD-PARTY INDEX NO. 590758/2008

Third-Party Plaintiff(s),

- v -

THE CITY OF NEW YORK, THE CITY OF NEW YORK DEPARTMENT
OF BUILDINGS, 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.,

Third-Party Defendant(s).

AND ALL RELATED ACTIONS

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 ...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>5-9, 10-12, 13-15, 16-19</u>
Replying Affidavits _____	<u>20-22</u>

Cross-Motion: X Yes No

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

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 all third-party claims and 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") and 1765 First Associates, LLC's ("1765"), the remainder of the motion is denied. 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, and seeking summary judgment on 1765 First Associates, LLC's claims for contractual indemnification against Sorbara Construction Corp., 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.

First & 91 LLC commenced this negligence action based on the May 30, 2008, Crane collapse. On the date of the accident, the plaintiff owned 354 East 91st Street,, New York, New York, located next to the construction site. First & 91 LLC brought this action to recover all damages to plaintiff as owner, other than those that were subrogated by an insurance carrier. There are no causes of action asserted against the City of New York in plaintiffs complaint.

The City of New York seeks Summary Judgment dismissing 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 all third-party claims and 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 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 they cannot be found liable in any of the third-party actions or on any cross-claims for negligence in 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 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. The City of New York asserts that Article 2.05 of the Development Agreement included a schedule of minimum coverage limits for Commercial General Liability (CGL) and Excess Liability Insurance, requiring contractors engaged in various types of work to maintain the highest level of coverage of any listed trade or component of work it was engaged in. The City of New York contends 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 argues 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.

Plaintiff opposes the motion contending that it is moot. Plaintiff argues that on November 27, 2013, it executed a release and has been attempting to execute a stipulation of discontinuance for the main action and all third-party actions, which would include cross-claims asserted by and against the City of New York.

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 plaintiffs' and the City of New York's claims against it, contending that it was not negligent and 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 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 all cross-claims against the City of New York.

1765 also 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 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. 1765 contends that Sorbara is liable to both the City of New York and 1765 for contractual indemnification pursuant to Sorbara's contract with DeMatteis.

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.

Plaintiff opposes 1765's cross-motion contending that it is moot, for the same reason it opposes the City of New York's 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 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. *Picasso 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. *Hughesy 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, LLLC v. Peter Scalamandre & 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 third-party claims and cross-claims asserted against the City of New York related to 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 and 1765, because there remain issues of fact in this action on the extent of both Sorbara and 1765's negligence.

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 obtained a 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 not established its lack of negligence in this action, therefore summary judgment on its claims for contractual indemnification against Sorbara is premature. Sorbara has not established that the provisions of the indemnification clause in its contract with DeMatteis are void pursuant to GOL §5-322.1 or that they do not apply to 1765's cross-claims.

Accordingly, it is ORDERED that the City of New York and New York City Department of Buildings' Motion for Summary Judgment and to dismiss all third-party claims and 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 all third-party claims and cross-claims against the City of New York and New York City Department of Buildings, and it is further,

ORDERED, that all third-party claims and cross-claims asserted against the City of New York and New York City Department of Buildings related to 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 1765 First Associates, LLC, 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, and seeking summary judgment on its claims for contractual indemnification against Sorbara Construction Corp., is denied, and it is further,

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

ENTER :

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Dated: March 11, 2014

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