

**Matter of 91st St. Crane Collapse Litig.**

2014 NY Slip Op 30633(U)

March 11, 2014

Sup Ct, NY County

Docket Number: 104543/09

Judge: Manuel J. Mendez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. MANUEL J. MENDEZ PART 13  
*Justice*

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

KEVIN MAHONEY and CAROLYN RYAN,

INDEX NO. 104543/09  
MOTION DATE 02-07-2014  
MOTION SEQ. NO. 007  
MOTION CAL. NO. \_\_\_\_\_

Plaintiff(s),

- v -

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

Defendant(s).

LEON D. DEMATTEIS CONSTRUCTION CORPORATION,

THIRD-PARTY INDEX NO. 590454/2009

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

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 cross-claims asserted

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

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.

Kevin Mahoney and Carolyn Ryan (collectively referred to as "plaintiffs") commenced this action based on the May 30, 2008, Crane collapse. On the date of the accident, the plaintiffs were tenants of 354 East 91<sup>st</sup> Street, Apt. 1803, New York, New York, located next to the construction site. Plaintiffs brought this action to recover for property damage, other than those that were subrogated by an insurance carrier. Plaintiffs also seek to recover damages resulting from their being evacuated and displaced from their apartment. 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 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 they cannot be found liable on any cross-claims for negligence in this action. The City of New York argues 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. 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.

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.

Plaintiffs do not oppose the City of New York's motion for summary judgment.

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 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.

Plaintiffs oppose the cross-motion contending that 1765 as "developer" retained control over the project and in part created the dangerous condition. Plaintiffs assert that in the contract between 1765 and DeMatteis, 1765 retained the ability to conduct a "special inspection" or testing related to the work being performed, and 1765 failed to do so. Plaintiffs also assert that 1765 is owned in part by DeMatteis. Plaintiffs argue that 1765 as owner of the property had a duty to ensure that the work was done safely and has provided no affirmative evidence to establish that it did anything. Plaintiffs contend that 1765 has failed to establish that 1765 had no actual or constructive knowledge and therefore the cross-motion should be denied.

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. *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 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. 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 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. There remain issues of fact concerning whether the insurance coverage obtained by 1765 was in conformance with the terms of the contract so that 1765 cannot obtain summary judgment dismissing the City of New York's claims for breach of contract.

1765 has failed to 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 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 cross-claims against the City of New York and New York City Department of Buildings, and it is further,

ORDERED, that all 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.

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