

Matter of 91st St. Crane Collapse Litig.

2014 NY Slip Op 30634(U)

March 12, 2014

Sup Ct, NY County

Docket Number: 110068/08

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 91ST STREET CRANE COLLAPSE LITIGATION:

**ANDREA GRAVES, AS EXECUTRIX OF THE ESTATE
OF ROBERT GRAVES, deceased**

Plaintiff(s),

INDEX NO. 110068/08
MOTION DATE 02-07-2014
MOTION SEQ. NO. 012
MOTION CAL. NO. _____

- v -

**THE CITY OF NEW YORK, 1765 ASSOCIATES, LLC,
MATTONE 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 INDEX NO. 595954/2008

Third-Party Plaintiff(s),

- v -

SORBARA CONSTRUCTION CORP.,

Third-Party Defendant(s).

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

SECOND THIRD-PARTY INDEX NO. 591001/2008

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).

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

AND ALL RELATED ACTIONS

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

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

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 complaint and all cross-claims asserted against them, is granted. The remainder of the City of New York and New York City Department of Buildings' 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. ("Sorbara"), is granted to the extent that the City of New York's claims for contractual indemnification against 1765 are severed and dismissed. 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 Leon D. DeMatteis Construction Corp. ("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.

This action was commenced on behalf of the deceased plaintiff, Robert Graves, based on the May 30, 2008, Crane collapse. On the date of the accident, Robert Graves was employed by Mo Metal Structures. Plaintiff alleges he sustained serious injuries when he was struck by the collapsing Crane. The Estate of Robert Graves was granted Approval of Settlement with 1765, DeMatteis Construction, Leon D. DeMatteis Construction Corporation and Sorbara, by the October 9, 2013, Decision and Order of this Court.

The City of New York seeks Summary Judgment dismissing the 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 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 argues that there is 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 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 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.

Sorbara partially opposes the cross-motion contending 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 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 clause, 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 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 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 failed to establish that it is entitled to summary judgment on its cross-claims for contractual indemnification against Sorbara and 1765. Plaintiff's estate has settled its claims for negligence against both Sorbara and 1765, and there can be no finding of negligence as a basis for indemnification against those defendants in this action.

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 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 and Sorbara have settled this action with the plaintiff and there is no basis to find either of them negligent in this action. 1765 has not established a basis to obtain summary judgment on its claims for contractual indemnification against Sorbara.

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 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 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 remainder of the City of New York and New York City Department of Buildings' Motion seeking Summary Judgment on their cross-claims for contractual indemnity and breach of contract in this action, 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,

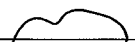
ORDERED, that the remainder of 1765 First Associates, LLC's cross-motion seeking summary judgment dismissing the City of New York and New York City Department of Buildings' claims for breach of contract against 1765 First Associates, LLC in this action and for Summary Judgment on its claims for contractual 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 12, 2014



MANUEL J. MENDEZ
J.S.C.

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