

Matter of 91st Street Crane Collapse Litig.
2014 NY Slip Op 32054(U)
March 6, 2014
Sup Ct, New York County
Docket Number: 111626/2008
Judge: Manuel J. Mendez
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FILED: NEW YORK COUNTY CLERK 03/12/2014 INDEX NO. 11626/2008

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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:

DANIEL ODDO,

Plaintiff(s),

INDEX NO. 111626/08

MOTION DATE 02-14-2014

MOTION SEQ. NO. 010

MOTION CAL. NO.

- v -

THE CITY OF NEW YORK, 1765 ASSOCIATES, LLC,
MATTORE 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),

- 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),

- 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):

THIRD-PARTY INDEX NO. 590943/2008

SECOND THIRD-PARTY INDEX NO. 590956/2008

The following papers, numbered 1 to 21 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, 15-18
Replying Affidavits _____	19 - 21

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is Ordered that, Leon D. DeMatteis Construction Corporation's ("DeMatteis") Motion for Summary Judgment on its third-party action for contractual indemnity and breach of contract against Sorbara Construction Corp. ("Sorbara"), is granted only to the extent of awarding conditional summary judgment on the third-party claims for contractual indemnification against Sorbara, the remainder of the motion is denied. Sorbara Construction Corp.'s Cross-Motion for Summary Judgment dismissing the DeMatteis' third-party action, 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.

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 while running from the collapsing crane. 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. DeMatteis contends that there is limitation language in Article 17, which would make it valid under GOL §5-322.1.

DeMatteis seeks summary judgment contending that it is entitled to summary judgment on its breach of contract causes of action according to the "hold harmless" provisions of Article 17, titled "Damages to Persons or Property," of the contract entered into between DeMatteis and Sorbara. DeMatteis argues that it is entitled to indemnification from Sorbara because neither DeMatteis or its employees are negligent in this action. DeMatteis claims that Daniel Oddo has provided a stipulation of discontinuance with prejudice as to all claims asserted against DeMatteis for common law negligence and pursuant to Labor Law §200. DeMatteis also claims that the only remaining claims by Daniel Oddo against it sound in Labor Law §240(1) and §241(6), for which DeMatteis can only be found vicariously liable.

DeMatteis claims that, "Exhibit 'H'" titled, "Insurance Requirements," of the trade contract entered into between DeMatteis and Sorbara, includes a provision for minimum CGL coverage with a \$10,000,000.00 limit, "for each occurrence and aggregate for each policy period." DeMatteis asserts that Sorbara was required to and failed to name DeMatteis as an additional insured on the CGL policy. DeMatteis also asserts that Sorbara failed to obtain the required coverage limit under the Sorbara CGL insurance policy. DeMatteis contends that the failure to name DeMatteis as an additional insured and obtain the required coverage limit, is a basis to find Sorbara breached its contract.

Sorbara opposes the motion and seeks summary judgment dismissing the third-party action arguing that it is not negligent at all in this action and the indemnification provision in its trade contract with DeMatteis is void pursuant to GOL §5-322.1. Sorbara claims that indemnity does not apply where liability does not arise out of Sorbara's own negligence. Sorbara contends that it performed proper inspection and maintenance on the Crane and there is no basis upon which to establish it or its employees were negligent. Sorbara asserts that the Crane collapse was caused solely by an inadequate weld within the turntable of the Crane.

Sorbara contends that the "hold harmless" provision of Article 17 of its contract with DeMatteis is ambiguous and is not a basis for contractual indemnification from Sorbara. Sorbara claims that any ambiguity in the trade contract must be construed against the drafter which is DeMatteis. Sorbara contends that even if DeMatteis was not negligent the indemnification provision of the trade contract is void pursuant to GOL §5-322.1. Alternatively, Sorbara contends that if DeMatteis is found negligent to any degree, then the causes of action for contractual indemnification must be dismissed. Sorbara asserts that potential reasons for finding DeMatteis negligent include, failure to test the bearing for a defect in the weld, the selection of the diesel tower crane and the use of New York Crane & Equipment Corp.

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"), submit an affirmation in response to both the motion and cross-motion which takes no position on the relief sought, but argue that there remain issues of fact concerning the cause of the crane collapse and no finding should be made as to the cause of the collapse.

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.

Third-party claims against the plaintiff's employer for indemnification and contribution are not precluded by Worker's Compensation Law §11, if the parties

entered into an agreement prior to the date of plaintiff's accident. *Portelli v. Trump Empire State Partners*, 12 A.D. 3d 280, 786 N.Y.S. 2d 5 (N.Y.A.D. 1st Dept., 2004) and *Public Adm'r of Bronx County v. 485 East 188th Street Realty Corp.*, 2014 N.Y. Slip Op. 01142 (N.Y.A.D. 1st Dept., 2014). A claim for common law indemnification permitted against an employer is subject to establishing plaintiff suffered a grave injury as defined by Worker's Compensation Law §11. *Mouta v. Essex Market Development LLC*, 106 A.D. 3d 549, 966 N.Y.S. 2d 13 (N.Y.A.D. 1st Dept. 2013).

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).

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 based on their negligence. This include language involving "sole 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).

This Court finds that the DeMatteis has established that it is entitled to conditional summary judgment in its third-party action, on its causes of action for contractual indemnification against Sorbara, because there remain issues of fact on the extent, if any, of Sorbara's negligence. DeMatteis has established that it would not be found liable for negligence in this action. The indemnification provision of the trade contract, Article 17, has limitation language which states, "Such obligation shall not be construed to negate, abridge or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party described in this Article 17." The indemnification agreement does not violate 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 DeMatteis only entitled to conditional summary judgment on the indemnification and contribution claims.

DeMatteis failed to establish a prima facie basis to obtain summary judgment on its causes of action in the third-party action for breach of contract against Sorbara. DeMatteis failed to provide proof to substantiate its claim that Sorbara does not have a CGL policy as described in "Exhibit H" of the trade agreement.

Sorbara has failed to establish its lack of negligence, therefore summary judgment in DeMatteis' third-party action is premature. Sorbara has not established that the provisions of the indemnification provision in its contract with DeMatteis is void pursuant to GOL §5-322.1.

Accordingly, it is ORDERED that Leon D. DeMatteis Construction Corporation's Motion for Summary Judgment on its third-party action for contractual indemnity and breach of contract against Sorbara Construction Corp., is granted only to the extent of awarding conditional summary judgment on the third-party claims for contractual indemnification against Sorbara, and it is further,

ORDERED that the remainder of Leon D. DeMatteis Construction Corporation's Motion seeking Summary Judgment on its causes of action in the third-party action for breach of contract against Sorbara Construction Corp., is denied, and it is further,

ORDERED, that Sorbara Construction Corp.'s Cross-Motion for Summary Judgment dismissing the third-party action against Sorbara Construction Corp., is denied, and it is further,

ORDERED that the Clerk enter judgment accordingly.

ENTER :

MANUEL J. MENDEZ
J.S.C.

Dated: March 6, 2014


MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE