

Leo v City of New York
2014 NY Slip Op 32270(U)
August 22, 2014
Sup Ct, New York County
Docket Number: 117294/08
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:

MARIA LEO, ADMINISTRATRIX OF THE ESTATE OF HER SON, DONALD CHRISTOPHER LEO, deceased May 30, 2008,

INDEX NO. 117294/08
MOTION DATE 07-24-2014
MOTION SEQ. NO. 103
MOTION CAL. NO.

Plaintiff(s).

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF BUILDINGS, MICHAEL CARBONE, PATRICIA J. LANCASTER, ROBERT LIMANDRI, NEW YORK CRANE & EQUIPMENT CORP., JAMES F. LOMMA, LOMMA TRUCKING & RIGGING, JF LOMMA RIGGING AND SPECIALIZED SERVICES, BRADY MARINE REPAIR CO., TESTWELL, INC., BRANCH RADIOGRAPHIC LABORATORIES INC., CRANE INSPECTION SERVICES, LTD., SORBARA CONSTRUCTION CORP., 1765 FIRST ASSOCIATES, LLC, LEON D. DEMATTEIS CONSTRUCTION, MATTONE GROUP CONSTRUCTION CO., LTD., MATTONE GROUP LTD., MATTONE GROUP LLC, CITY OF NEW YORK SCHOOL CONSTRUCTION AUTHORITY, CITY OF NEW YORK SCHOOL CONSTRUCTION FUND, HOWARD I. SHAPIRO & ASSOCIATES CONSULTING ENGINEERS, P.C., NEW YORK RIGGING CORP., TOWER RIGGING CONSULTANTS, INC., TOWER RIGGING, INC., UNIQUE RIGGING CORP., LUCIUS PITKIN, INC., MCLAREN ENGINEERING GROUP, M.G. MCLAREN, P.C. and JOHN/JANE DOES 1 THROUGH 10,

Defendant(s).

AND ALL RELATED ACTIONS

The following papers, numbered 1 to 8 were read on this motion to/for costs:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Includes rows for Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiff's motion seeking an Order for sanctions, costs, expenses and attorney fees pursuant to 22 NYCRR §130-1.1, and pursuant to CPLR §4402, against James Lomma and his attorneys (Wilson Elser, Moskowitz, Edelman & Dicker, LLP)

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

resulting from frivolous conduct in delaying to inform the Court of his car accident and injuries, resulting in a mistrial of this action, and requiring James Lomma's attendance on each day of the wrongful death trial, is denied.

This action 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 had been joined for the supervision of discovery. Plaintiff commenced this action to recover damages as a result of the personal injuries and death of Donald Christopher Leo on May 30, 2008, when the Crane collapsed. New York Crane & Equipment Corp. leased the 052-Crane that collapsed (together with ten tower sections) to Sorbara Construction Corp., ("Sorbara") for use at the site.

This action and the action entitled, *Xhevashire Sinanaj and Selvi Sinanovic as Co-Administrators of the Estate of the Estate of Ramadan Kurtaj, Deceased and Selvi Sinanovic, individually*, Index Number 117469/2008, were severed from the umbrella action for purposes of joint trial. The trial commenced on May 22, 2014, with opening statements, after approximately fifteen days of jury selection. On May 20, 2014 at approximately 10:50p.m., James F. Lomma was involved in a car accident which resulted in serious injuries. Mr. Lomma is a defendant whose personal assets are at risk, and a potential witness on behalf of New York Crane & Equipment Corp., JF Lomma, Inc. and TES Inc. (hereinafter referred to collectively as the "NY Crane Defendants").

Mr. Lomma's attorneys claim they first became aware of the accident on May 21, 2014. On the Friday before Labor Day, May 23, 2014, Mr. Lomma was transferred to another hospital. On May 27, 2014, the day after Labor Day, Mr. Lomma underwent major surgery related to his injuries. Mr. Lomma's attorneys notified the Court of the car accident and related developments concerning Mr. Lomma's injuries on May 29, 2014 and sought a continuance or mistrial. They claim lack of knowledge of the full extent of Mr. Lomma's injuries and the length of time for rehabilitation as an explanation for the delay. Mr. Lomma's surgeon, David Helfet, M.D., advised the Court that he would require 8-12 weeks of rehabilitation, the entire projected duration of the trial. On May 30, 2014 after review of documentation submitted by Mr. Lomma's attorneys and speaking to Dr. Helfet, this Court declared a mistrial.

Pursuant to CPLR §4402, the Court may order a continuance or mistrial, on the application of any party, "...in the interest of justice on such terms as may be just." The declared mistrial in this action was in the interest of justice, and to afford Mr. Lomma, an individually named defendant, the opportunity to appear and testify.

Plaintiff contends that costs, expenses and attorneys fees should be awarded pursuant to CPLR §4402 and 22 NYCRR §130-1.1, against James Lomma and his attorneys, due to the delay in notifying the Court of both the car

accident and related injuries. Plaintiff also contends that the delay in advising the Court until after all the wrongful death plaintiffs had completed their opening statements was intentional on the part of Mr. Lomma and his attorneys resulting in a breach of their duty of candor, prolonging the litigation. Plaintiff claims that there were significant expenditures and a reasonable entitlement to attorney fees for time spent by the attorneys along with the cost of expert witnesses. Plaintiff argues that the application for a continuance or mistrial is part of a pattern of attempts, by Mr. Lomma personally, to delay the trial of this action and that sanctions will act as a deterrent for any future behavior of this nature.

Mr. Lomma, the NY Crane Defendants and their attorneys oppose the motion contending that plaintiff's claims have no merit and there is no basis to find that their conduct was intentional, fraudulent, or deliberate, or to award costs, expenses or attorney fees. They claim the accident was not intentionally caused to delay the trial. They also contend that the delay in notifying the Court was not frivolous or an intentional means of harassing the plaintiffs, rather it was to obtain the proper and definitive documentation about Mr. Lomma's medical condition related to the accident.

22 NYCRR §130-1.1 permits the Court in its discretion to award to any party or their attorneys, costs in the form of reimbursement for reasonably incurred actual expenses and reasonable attorney fees resulting from frivolous conduct by another party or their attorneys. There is no limit on the amount to be awarded. Frivolous conduct is defined in 22 NYCRR §130-1.1 [c] as, "(1) [conduct] completely without merit and [which] cannot be supported by reasonable argument...(2) undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) [that] asserts material factual statements that are false." The determination of whether conduct is frivolous, requires the Court to consider factors such as, the circumstances under which the conduct took place, and the time for investigation of the legal or factual basis for the conduct. *Llantín v. Doe*, 30 A.D. 3d 292, 817 N.Y.S. 2d 57 (1st Dept., 2006). In awarding costs and sanctions the Court is required to set forth the conduct and reasons for finding it frivolous and state why the amount imposed is appropriate. *Cecora v. De La Hoya*, 106 A.D. 3d 565, 965 N.Y.S. 2d 464 (1st Dept., 2013).

Pursuant to 22 NYCRR §130-1.2, the Court may impose sanctions not exceeding \$10,000.00, in addition to or in lieu of costs and attorney fees. The sanction funds, pursuant to 22 NYCRR §130-1.3, can only be deposited with the "Lawyer's Fund for Client Protection." *Green v. Merchants & Businessmen's Mut. Ins. Co.*, 259 A.D. 2d 519, 686 N.Y.S. 2d 454 (2nd Dept., 1999).

The attorneys for Mr. Lomma argue they should not be sanctioned for the same reasons costs, expenses and reasonable attorney fees should not be awarded. They claim there was no misrepresentation of Mr. Lomma's medical condition or intentional avoidance of litigation. The attorneys for Mr. Lomma contend that the Court's resources were not intentionally wasted because Mr.

Lomma's car accident was not foreseeable.

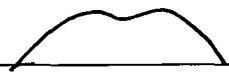
Mr. Lomma, the NY Crane Defendants and their attorneys' actions in notifying the Court of the accident, was not frivolous and there is no basis to award sanctions, costs, expenses or reasonable attorneys fees. This Court having spoken directly with Dr. Helfet finds that there were no misrepresentations or intentional assertions of false statements by the attorneys concerning Mr. Lomma's medical condition. The plaintiffs have also failed to establish that Mr. Lomma, the NY Crane Defendants and their attorneys' actions were completely without merit. The accident did not occur until almost the conclusion of jury selection, up to that point Mr. Lomma was fully expected to participate in the trial. The trial was adjourned on May 21, 2014, and opening statements were scheduled to start on May 22, 2014. The time period referred to by the plaintiffs in their motion included weekends, a national holiday and adjournments of the trial because of the Court's motion and conference calendar. The total delay in seeking a continuance or mistrial amounted to approximate five days, and was not extensive for purposes of ascertaining the extent of Mr. Lomma's injuries.

Plaintiff has not established that the accident or the application for a continuance was undertaken as part of a pattern to delay, or to prolong resolution of the trial. The arguments related to sanctions, costs, expenses and attorneys fees sought by the plaintiff, are not persuasive. Mr. Lomma and his attorneys have represented to the Court that he will be present to testify, and prior to the mistrial, they advised both the Court and potential jurors that he would not be present daily. Plaintiff has not stated a basis for an Order requiring James Lomma's daily appearance in Court for the entire trial.

Accordingly, it is ORDERED that plaintiff's motion seeking an Order for sanctions, costs, expenses and attorney fees pursuant to 22 NYCRR §130-1.1, and pursuant to CPLR §4402, against James Lomma and his attorneys (Wilson Elser, Moskowitz, Edelman & Dicker, LLP) resulting from frivolous conduct in delaying to inform the Court of his car accident and injuries, resulting in a mistrial of this action, and requiring James Lomma's attendance on each day of the wrongful death trial, is denied.

ENTER :

MANUEL J. MENDEZ
J.S.C.



MANUEL J. MENDEZ

J.S.C.

Dated: August 22, 2014

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