

**Matter of 91st St. Crane Collapse Litig. (Leo) v
Lomma**

2014 NY Slip Op 32540(U)

October 1, 2014

Supreme Court, New York County

Docket Number: 771000 /10

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.: 771000 /10 INDEX NO. 117294/08 MOTION DATE 09-30-2014 MOTION SEQ. NO. MOTION CAL. NO.

Plaintiff(s),

- Against-

JAMES F. LOMMA, J.F. LOMMA, INC., NEW YORK CRANE & EQUIPMENT CORP., TES INC., BRADY MARINE REPAIR CO., 1765 FIRST ASSOCIATES, LLC, LEON DEMATTEIS CONSTRUCTION CORPORATION, MATTONE GROUP CONSTRUCTION CO., LTD., MATTONE GROUP, LTD., MATTONE GROUP LLC and HOWARD I. SHAPIRO & ASSOCIATES CONSULTING ENGINEERS, P.C., Defendants.

XHEVAHIRE SINANAJ and SELVI SINANOVIC as CO-ADMINISTRATORS OF THE ESTATE OF RAMADAN KURTAJ, DECEASED, and SELVI SINANOVIC Individually,

INDEX NO. 117469/08 MOTION DATE 09-30-2014 MOTION SEQ. NO. MOTION CAL. NO.

Plaintiff(s),

- Against-

NEW YORK CITY EDUCATIONAL CONSTRUCTION FUND, NEW YORK CRANE & EQUIPMENT CORP., J.F. LOMMA INC., TES INC., JAMES F. LOMMA, BRADY MARINE REPAIR CO., SORBARA CONSTRUCTION CORP., 1765 FIRST ASSOCIATES, LLC, LEON D. DeMATTEIS CONSTRUCTION CORPORATION, MATTONE GROUP CONSTRUCTION CO., LTD., MATTONE GROUP LTD., MATTONE GROUP, LLC and HOWARD I. SHAPIRO & ASSOCIATES CONSULTING ENGINEERS, P.C.,

DECISION MOTION IN LIMINE

Defendant(s).

AND ALL RELATED ACTIONS

The following papers, numbered 1 to 5 were read on this motion for a continuation of injunction barring extra judicial statements:

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits cross motion

Replying Affidavits

PAPERS NUMBERED

1

2-3, 4-5

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

Prior to the first trial of this matter the New York Crane defendants moved for an injunction barring all parties and their attorneys from making extra-judicial statements during the trial. This motion was joined by the remaining defendants. This court conditionally granted the motion by barring all parties and their attorneys, under penalty of sanctions, from making extra-judicial statements that the party or lawyer knows will be disseminated by means of public communication (oral, television, print media or the internet) that will have a substantial likelihood of materially prejudicing the trial, and by further ordering :

- (1) That all parties and their attorneys are barred from making inflammatory or disparaging statements and remarks about any other party, an attorney or any witnesses, and;
- (2) That all parties and their attorneys are barred from making personal ad-hominem attacks on the character and reputation of another party, an attorney or any witness, and;
- (3) That all parties and their attorneys are barred from commenting on the credibility or lack thereof of any other party, attorney or witness.

In arriving at this conclusion the court stated that:

"The court is mindful of the impact extra-judicial statements can have on a trial and must seek to limit anyone from making any potentially damaging statements. The court is mindful of the parties' First Amendment Rights but needs to limit the type of statements that can be made to the press in order that the parties are afforded a fair trial before an impartial jury and that the jury render a verdict based solely on the evidence before it." (See Leo, Motion Seq. 94, Kurtaj Motion Seq. 72).

Prior to the commencement of jury selection in this trial defendants requested that the court continue all prior rulings including the conditional ruling on the motion for an injunction. Plaintiffs objected and requested an opportunity to brief this issue. The court granted plaintiffs' request, plaintiffs have submitted papers in support of their arguments against the injunction, defendants have submitted papers in support of their arguments for maintaining the injunction. (These papers have been marked as court exhibits 14, 12 and 13).

Plaintiffs argue in essence that this conditional order is a violation of their and their counsels' sacred First Amendment Rights to free speech. Defendants argue in essence that not maintaining the injunction will compromise their clients' rights to a fair trial and that plaintiffs' freedom of speech is not abridged by having to abstain from making disparaging, inflammatory or Ad-hominem remarks. They further argue that the court's limited restraint was proper given the interest the press has demonstrated on this case. Absent a gag order, they argue, there may be articles daily in the press that will compromise the ability of the jury to render a fair verdict, untainted by the publicity this case has generated.

Speech may neither be forbidden nor penalized and is protected from censorship unless shown likely to produce a "clear and present danger of some serious substantive evil that rises far above public inconvenience, annoyance, or unrest(16A Am. Jur. 2d §515 Constitutional Law; Rosenberg Diamond Development Corp., v. Appel, 290 A.D.2d 239, 735 N.Y.S.2d 528 [1st. Dept. 2002]). In the context of a trial the right to free speech may only be restricted where the extra judicial statements present a clear and present danger to the fair administration of justice (Matter of Markfield v. Association of the Bar of City of New York, 49 A.D.2d 516, 370 N.Y.S.2d 82 [1st. Dept. 1975]; Sheppard v. Maxwell, 384 U.S.333, 86 S.Ct. 1507, 16 L.Ed.2d 600 [1966]). Courts have the power to restrain extra judicial statements of attorneys, parties, witnesses, jurors and court personnel whenever in the opinion of the court such statements have a reasonable likelihood of tending to prevent a fair trial, free of prejudice (People v. Dupree, 88 Misc.2d 780, 388 N.Y.S.2d 203 [N.Y. Sup. 1976]). Judges in discharging their responsibility to secure a defendant's right to a fair trial may not, except in extra ordinary circumstances employ gag orders or prior restraints, but must rely instead on other protective measures (Nebraska Press Association v. Stewart, 427 U.S.539, 96 S.Ct. 2791, 49 L.Ed.2d 683 [1976]).

A court may not impose prior restraints upon attorneys and other parties in a trial without the requisite showing of a necessity for such restraint and a determination that less restrictive alternatives would not be just as effective in assuring the defendant a fair trial. (National Broadcasting Company, Inc., v. Cooperman, 116 A.D.2d 287, 501 N.Y.S.2d 405 [2nd. Dept. 1986] finding a court oral directive that attorneys for parties and witnesses refrain from any discussion of case with media constitutionally impermissible as there was no evidence to support finding that extra judicial statements were reasonably likely to pose a serious threat to defendants' right to fair trial, and there was no indication that less restrictive alternatives to the prior restraints would not have been just as effective in preserving defendants' right to a fair trial; Coggins v. County of Nassau, 2014 WL 495646 [E.D.N.Y. 2014]).

Thus courts have found it to be constitutionally impermissible to restrain a defendant from disseminating false, slanderous and libelous material (Rosenberg v. Diamond Dev. Corp., v. Appel, 290 A.D.2d 239, 735 N.Y.S.2d 528 [1st. Dept. 2002]), from making numerous unnecessary and vexatious ramblings (Ash v. Board of Managers of the 155 Condominium, 44 A.D.3d 324, 843, N.Y.S.2d 218 [1st. Dept. 2007]), to restrain counsel and their employees from discussing case with news media, except as to certain scheduling matters (New York Times Co., v. Rothwax, 143 A.D.2d 592,533 N.Y.S.2d 73 [1st. Dept. 1988]), and to restrain newspaper from printing and publishing criminal background information of defendants on trial for murder (New York Times Co., v. Starkey, 51 A.D.2d 60, 380 N.Y.S.2d 239 [2nd. Dept. 1976]).

The burden is on the party requesting the restraint to demonstrate that plaintiffs' or their counsels' statements will compromise their right to a fair trial (*Ash v. Board of Managers of the 155 Condominium*, 44 A.D.3d 324, 843 N.Y.S.2d 218, *Supra*). This defendants have failed to do. Absent a factual showing of a necessity for prior restraints, imposition of a gag order is constitutionally impermissible (*New York Times Co., v. Rothwax*, 143 A.D.2d 592, 533 N.Y.S.2d 73, *Supra*). The articles annexed to the New York Crane defendants papers, dating from 2008 (reporting immediately after the crane collapse) and 2012 (reporting immediately after Mr. Lomma's acquittal in the Criminal case) containing quotes from family members, plaintiff's attorneys, prosecutors, defense attorneys, politicians and investigators fail to demonstrate that any statements to be made by plaintiffs or their attorneys will compromise defendants' right to a fair trial.

This however does not mean that plaintiffs' attorneys and the attorneys for the defendants should not be mindful of the Rules of Professional conduct that do impose some restrictions on statements that are made to the press in general during the pendency of a trial.

Rule 3.6 of the New York State Rules of Professional Conduct (22 NYCRR §1200.0) (a) prohibits "a lawyer participating in a civil matter from making extra judicial statements that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter"; (b) states that "a statement ordinarily is likely to prejudice materially an adjudicative proceeding when it refers to a civil matter triable to a jury.... and the statement relates to (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness or the expected testimony of a party or witness"; (3)the performance or results of any examination or test, or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented; and (5) "information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed, create a substantial risk of prejudicing an impartial trial.

Paragraph [c] of rule 3.6 sets forth the statement a lawyer may state without elaboration. Paragraph (d) allows a lawyer to "make a statement that a reasonable lawyer believes is required to protect a client from the substantial prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity."


Counsel for all the parties should not only be mindful of these rules but should communicate them to their clients, who should also keep them in mind when and if they ever make any statements that they know or reasonably should know will be disseminated by means of public communication. It has always been the intention of this court, specially in issuing its prior order, to keep the trial free of any taint or prejudice to the character, reputation and credibility of any of the parties, their attorneys or their witnesses, so as to reasonably assure a fair trial to all the parties involved. This goal can be achieved without the need for a gag order or prior restraint on the parties' First Amendment right to free speech. There are less restrictive alternatives which this court can employ to assure a fair trial to all the parties involved.

Accordingly, it is ORDERED that the motion for an injunction barring extra judicial statements by the parties and their attorneys is denied.

ENTER :

MANUEL J. MENDEZ
J.S.C.

Dated: October 1, 2014



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
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