

Matter of 91st St. Crane Collapse Litig.

2014 NY Slip Op 33546(U)

August 22, 2014

Supreme Court, New York County

Docket Number: 117469/08

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:

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 08-15-2014
MOTION SEQ. NO. 85
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 for costs:

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...
Answering Affidavits – Exhibits cross motion
Replying Affidavits

Table with 2 columns: PAPERS NUMBERED, and values 1-4, 5-7, 8.

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiffs'
motion seeking an Order for costs, expenses and attorney fees pursuant to 22
NYCRR §130-1.1, the Court's inherent power to regulate judicial proceedings, and

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

pursuant to CPLR §4402, against James Lomma and his attorneys for frivolous conduct in delaying to inform the Court of his car accident and injuries resulting in a mistrial of this action, is granted only to the extent that James F. Lomma personally, New York Crane & Equipment Corp., JF Lomma, Inc. and TES Inc. jointly and severally are ordered to reimburse the Kurtaj/Sinanaj plaintiffs for their travel expenses in the amount of \$3,751.17. The remainder of the 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 had been joined for the supervision of discovery. Plaintiffs commenced this action to recover damages as a result of the personal injuries and death of Ramadan Kurtaj 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, *Maria Leo, Administratrix for the Estate of her son, Donald Christopher Leo*, Index Number 117294/2008, 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 that 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 a 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.

Plaintiffs contend that costs, expenses and attorneys fees should be awarded pursuant to CPLR §4402, in the interest of justice, 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. They also contend that the delay in advising the Court until after the 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. They claim that there were significant expenditures by the Kurtaj family, and they are entitled to

reasonable attorney fees for time spent by the attorneys that could have been used on other trials, along with the cost of expert witnesses. They argue 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.

The NY Crane Defendants and their attorneys oppose the motion contending that plaintiffs' claims for punitive damages have no merit and there is no basis to find that their conduct was intentional, fraudulent, or deliberate, or to award costs, expenses, sanctions 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. *Llantin 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).

Mr. Lomma and the NY Crane Defendants and their attorneys' conduct in notifying the Court of Mr. Lomma's accident, was not frivolous pursuant to 22 NYCRR §130-1.1. This Court having spoken directly with Dr. Helfet finds that there were no intentional assertions of false statements or misrepresentations by the attorneys concerning Mr. Lomma's medical condition. The plaintiffs have also failed to establish 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 approximately five days, and was not extensive for purposes of ascertaining the extent of Mr. Lomma's injuries. There is no basis to award expenses, costs, or reasonable attorneys fees to plaintiffs under 22 NYCRR §130-1.1.

The plaintiffs have 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 remaining arguments related to costs, expenses and attorneys fees sought by the plaintiffs, derived from the Court's inherent power to regulate judicial proceedings, are not persuasive.

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. By serving the interests of justice and declaring a mistrial on behalf of Mr. Lomma, the Kurtaj family as residents of Kosovo, through no fault of their own, had to return home sooner than expected and to pay additional fees for their travel. The mistrial declared on behalf of Mr. Lomma should not result in a penalty against the Kurtaj family. It is just to have Mr. Lomma and the NY Crane Defendants reimburse the Kurtaj family for their travel expenses as a result of the mistrial. Plaintiffs' provided proof of an additional \$660.00 in fees added to the Kurtaj family's airfare of \$3,091.17. Mr. Lomma and the NY Crane Defendants are directed to reimburse the Kurtaj family, \$3,751.17 for their airfare.

Accordingly, it is ORDERED that plaintiffs' motion is granted, only to the extent that, James F. Lomma personally, New York Crane & Equipment Corp., JF Lomma, Inc. and TES Inc., jointly and severally, shall reimburse the Kurtaj/Sinanaj plaintiffs for their travel expenses in the amount of \$3,751.17, and it is further,

ORDERED, that payment of the \$3,751.17 shall be delivered to counsel for the Kurtaj/Sinanaj plaintiffs, and written proof of such payment shall be provided to the Clerk of IAS Part 13 within thirty (30) days after service of a copy of this Order with Notice of Entry; and it is further,

ORDERED, that in the event that timely payment is not made, the Clerk of the Court, upon service of a copy of this Order with Notice of Entry and an affirmation or affidavit reciting the fact of such non-payment, shall enter a judgment in favor of the Kurtaj/Sinanaj plaintiffs and against James F. Lomma personally, New York Crane & Equipment Corp., JF Lomma, Inc. and TES Inc., jointly and severally, for \$3,751.17, and it is further,

ORDERED, that the remainder of the motion 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