

Matter of 91st St. Crane Collapse Litig.
2015 NY Slip Op 31458(U)
May 26, 2015
Supreme Court, 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

Plaintiff(s).

- v -

JAMES F. LOMMA, JF LOMMA INC., NEW YORK CRANE
& EQUIPMENT CORP., LOMMA TRUCKING AND RIGGING,
TES INC., 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.,

In Limine Motion for a
Directed Verdict

Defendant(s).

XHEVAHIRE SINANAJ AND SELVI SINANOVIC AS
CO-ADMINISTRATORS OF THE ESTATE OF RAMADAN
KURTAJ, DECEASED; AND SELVI SINANOVIC, INDIVIDUALLY.

INDEX NO. 117469/08

Plaintiff(s).

- v -

JAMES F. LOMMA, JF LOMMA INC., NEW YORK CRANE
& EQUIPMENT CORP., TES INC., 1765 FIRST ASSOCIATES, LLC,
LEON D. DEMATTEIS CONSTRUCTION CORPORATION,
SORBARA CONSTRUCTION CORP., MATTONE GROUP
CONSTRUCTION CO., LTD., MATTONE GROUP LTD.,
MATTONE GROUP LLC,

Defendant(s).

AND ALL RELATED THIRD-PARTY ACTIONS

Following the close of plaintiff's case, defendants' James F. Lomma, J.F. Lomma Inc., New York Crane & Equipment Corp., and TES Inc. (Hereinafter collectively referred to as the "Lomma defendants"), seek a directed verdict dismissing each of the wrongful death plaintiffs' (hereinafter referred to as "plaintiffs") claims against them.

The Lomma defendants contend that neither of the wrongful death plaintiffs have made a prima facie case upon the evidence presented, and there is no rational process by which a trier of fact could find in favor of the wrongful death plaintiffs, therefore they are entitled to a judgment as a matter of law (See CPLR §4401; *Szczerbiak v. Pilat*, 90 N.Y. 2d 553, 686 N.E. 2d 1346, 664 N.Y.S. 2d 252 [1992]; *Hand v. Field*, 15 A.D. 3d 542, 790 N.Y.S. 2d 681 [2nd Dept., 2005]).

The Lomma defendants argue that the plaintiffs have failed to make a prima facie case and there is no rational process by which a trier of fact could find either TES Inc. or J.F. Lomma Inc. are implicated or liable for the crane collapse, are interrelated permitting piercing of the corporate veil, or are liable for punitive damages.

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

They contend that each named corporate Lomma defendant is a separate independent entity maintaining its own identity, there is no commingling so that there is no basis for a finding that they are interrelated alter egos -so as to overcome the corporate personalities- or to pierce the corporate veil. They contend that plaintiffs have not provided proof of the alleged domination or control by any one entity which resulted in the alleged injuries or otherwise inequitable and wrongful consequences to the plaintiffs. According to the Lomma Defendants, TES Inc. sells cranes and construction equipment, and J.F. Lomma, Inc. is involved solely in transportation and hauling. They claim the only entity with a possessory interest in the Kodiak crane involved in the wrongful death actions is New York Crane & Equipment Corp., which is not seeking to be insulated from judgment by the other named Lomma corporate entities.

The Lomma defendants contend that plaintiffs have only alleged that TES Inc. sold cranes to New York Crane & Equipment Corp., and undertook the sale of New York Crane & Equipment Corp.'s Kodiak cranes after the collapse. They argue that plaintiffs have not presented any proof of TES, Inc.'s involvement in the crane collapse, or any wrong doing on its part.

The Lomma defendants argue that although J.F. Lomma, Inc. employees may also be employed by New York Crane & Equipment Corp. each of the entities distributes paychecks separately for each shared employee. J.F. Lomma, Inc. was named as a payee of insurance proceeds involving New York Crane & Equipment Corp., but the Lomma defendants contend the funds were returned to New York Crane & Equipment Corp. and there is no basis to pierce the corporate veil.

The corporate veil may be pierced when there is complete domination and control by one corporation over another corporation, and the domination is used to commit a fraud or wrong resulting in an injury to a plaintiff (*Sass v. TMT Restoration Consultants Ltd.*, 100 A.D. 3d 443, 953 N.Y.S. 2d 574 [1st Dept., 2012]). Corporations that are intertwined so that they are merely an alter ego of each other are effectively a "single entity" permitting piercing of the corporate veil (*Sumpter v. 5825 Broadway LLC*, 19 A.D. 2d 327, 797 N.Y.S. 2d 494 [1st Dept., 2005] and *Martinez v. Plaza Prospect Apt., Inc.*, 25 A.D. 3d 437, 808 N.Y.S. 2d 199 [1st Dept., 2006]).

Factors to be considered that warrant piercing the corporate veil include:

"(1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e. issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arms length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by the other corporations as if it were its own."

(*Shisgal v. Brown*, 21 A.D. 3d 845, 801 N.Y.S. 2d 581 [1st Dept., 2005] citing to *Passalacqua Bldrs. v. Resnick Devs. S.*, 933 F2d 131 [2nd Cir., 1991]).

Plaintiffs have submitted sufficient evidence for the jury to determine that J.F. Lomma Inc. failed to observe corporate formalities and, is the financial alter-ego of New York Crane & Equipment Corp., or the actual owner of the collapsed crane. Plaintiffs have produced exhibits and evidence at trial that "J.F. Lomma Inc.," appears on paychecks written out to New York Crane & Equipment Corp. personnel; the only employees on the scene immediately after the 91st Street crane collapse were those of J.F. Lomma Inc.; that insurance proceeds for the collapsed crane was collected by J.F. Lomma Inc., and that the two entities shared assets. The relationship of J.F. Lomma Inc. to New York Crane & Equipment Corp., together with the damage to the plaintiffs are issues that may warrant piercing of the corporate veil.

Plaintiffs have not made a prima facie case and there is no rational process by which a trier of fact could find TES, Inc. is negligent in this action. The exhibits and evidence produced by the plaintiffs do not establish that New York Crane & Equipment Corp. and TES, Inc. are alter-egos warranting piercing of the corporate veil. Plaintiffs reliance on their Exhibit 347 in evidence to connect TES, Inc. to the other Lomma defendants in this action is misplaced because the documents do not establish that the Kodiak Crane involved in the collapse was sold by TES, Inc. to New York Crane & Equipment Corp.. Plaintiffs have not established that they were caused any injury or harm by TES, Inc.'s sale of Kodiak Cranes after the collapse.

Accordingly, TES, Inc.'s motion for a directed verdict is granted and all claims asserted against it are severed and dismissed.

There remain issues of fact warranting the denial of the relief sought as to J.F. Lomma, Inc. and the claims asserted by the wrongful death plaintiffs against this defendant will remain in effect. Accordingly, this defendant's motion for a directed verdict is denied.

The Lomma defendants argue that the plaintiffs have failed to make a prima facie case and there is no rational process by which a trier of fact could find any alleged domination or control of New York Crane & Equipment Corp., by James F. Lomma, personally, which resulted in the alleged injuries or otherwise inequitable and wrongful consequences. The Lomma defendants contend that even though Mr. Lomma is the sole shareholder and director of all the corporate Lomma defendants, they are all separate independent entities and the corporate form is not abused for personal gain. Mr. Lomma contends that he receives a separate paycheck as if he were an employee from all Lomma companies and he has not drained corporate funds or assets, therefore plaintiffs cannot establish any wrongful or unjust act.

Sorbara Construction Corp. opposes the relief sought by the Lomma defendants arguing that James F. Lomma negligently certified that the allegedly defective bearing met or exceeded manufacturers specifications. That is, by doing so he acted in his personal capacity.

An attempt of a third party to pierce the corporate veil...is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners...Generally, however, piercing the corporate

veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury...some showing of a wrongful or unjust act toward plaintiff is required ...The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene (*Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y. 2d 135, 623 N.E.2d 1157 [1993]).

Plaintiffs have presented sufficient evidence for this jury to determine whether James F. Lomma could be held personally liable as a result of his failure to observe corporate formalities. Plaintiffs have presented witness testimony, exhibits and evidence at trial that Mr. Lomma controlled and dominated both New York Crane & Equipment Corp. and James F. Lomma Inc., by transferring assets between the entities, personally approving the vendor for the replacement bearing and weld, authorizing the funds paid for the replacement bearing and weld, and certifying that the RTR bearing met or exceeded manufacturers specifications, all resulting in the harm caused to the wrongful death plaintiffs.

This evidence warrants the denial of the relief sought as to James F. Lomma personally. The wrongful death plaintiffs' liability claims asserted against this defendant will remain in effect. Accordingly, this defendant's motion for a directed verdict is denied.

The Lomma defendants seek a directed verdict dismissing the plaintiffs' punitive damage claims contending that no evidence has been produced of intentional or deliberate actions, of outrageous circumstances with evil motive, or that there has been willful or wanton disregard of the rights of others. The Lomma defendants argue that there is no evidence that they had actual knowledge of the design defect, of a reckless decision to continue operations with knowledge of defects, or that it was impermissible to rely on RTR's expertise as a crane part manufacturer regarding the failed bearing. The Lomma defendants argue that they did not require an engineer to work with RTR because they relied on those provided by RTR to design and build the bearing for the crane, that James F. Lomma had no knowledge of the e-mail exchange between his employee Tibor Varganyi and Joyce Wang of RTR, and although there were initial concerns expressed by Joyce Wang, ultimately the ability to perform the requested work was confirmed. They contend that Mr. Lomma believed he requested testing from Brady Marine regardless of the testimony concerning the actual testing and there was no willful, wanton or intentionally reckless conduct.

"Punitive damages are available to vindicate a public right where the actions of the alleged tortfeasor constitute gross recklessness or intentional, wanton or malicious conduct aimed at the public generally or are actuated by evil or reprehensible motives" (*Nooger v. Jay-Dee Fast Delivery*, 251 A.D.2d 307, 673 N.Y.S.2d 1006 [N.Y.A.D. 2nd Dept., 1998]). "Punitive damages are appropriate where the wrong complained of is actuated by evil and reprehensible motives, where the defendant's wrongdoing has been intentional and deliberate and has the character of outrage frequently associated

with crime" (*Launders v. Steinberg*, 39 A.D. 3d 67 [1st Dept., 2007]). A punitive damage claim in tort requires, one of the following: "...intentional or deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil motive, or a conscious act that willfully and wantonly disregards the rights of another." (*Gamiel v. Curtis & Riess-Curtis, P.C.*, 16 A.D. 3d 140, 791 N.Y.S. 2d 78 [1st Dept., 2005]). Gross misconduct justifying punitive damages requires a showing of something more than ordinary negligence. It must be reckless and of a criminal nature as when the wrong doer has acted maliciously, wantonly, or with a recklessness that is close to criminality (*Camilo v. Geer*, 185 A.D. 2d 192, 587 N.Y.S. 2d 306 [1st Dept., 1992]).

An employer may be liable for punitive damages as a result of the acts of its employee, if there is complicity including, "authorizing, participating in, consenting to or ratifying the conduct of the employee." (*Harrell v. Champlain Enters.*, 222 A.D. 2d 876, 634 N.Y.S. 2d 880 [1st Dept., 1995] citing *Loughry v. Lincoln First Bank*, 67 N.Y. 2d 369, 494 N.E. 2d 70, 502 N.Y.S. 2d 965 [1986]). An employee that takes on a responsibility encompassing supervision of work performed and is provided with broad authority to act on behalf of the employer, becomes more than a mere employee and is an agent for purposes of liability because of the authority to speak on the employer's behalf (*Candela v. City of New York*, 8 A.D. 3d 45, 778 N.Y.S. 2d 31 [1st Dept., 2004]).

Plaintiffs have presented sufficient evidence to maintain the punitive damages claims against New York Crane & Equipment Corp., J.F. Lomma Inc., and James F. Lomma, personally. New York Crane & Equipment Corp. employed Tibor Varganyi. The alleged reliance on Tibor Varganyi -a non-engineer- to act as an agent on behalf of the Lomma defendants, including the review and approval of plans submitted by RTR for the alleged defective bearing, together with ratification of Tibor Varganyi's actions is a basis to retain the claims for punitive damages. The Lomma defendants argument that the mistaken reliance on testing from Brady Marine amounts to mere negligence and there was no reckless, wanton, or willful conduct, does not warrant dismissal of the punitive damages claim. This argument raises an issue of fact warranting a jury determination.

Accordingly, the Lomma defendants' motion to dismiss the punitive damages claim is denied.

In summary, the wrongful death plaintiffs have failed to make a prima facie case, upon the evidence presented, and there is no rational process by which a trier of fact could find in favor of the wrongful death plaintiffs against TES, Inc. The remainder of the relief sought on this motion seeking a directed verdict dismissing the wrongful death plaintiff's claims for J.F. Lomma Inc.'s liability, James F. Lomma's personal liability and for punitive damages, is denied.

Accordingly, it is ORDERED that, the wrongful death plaintiffs causes of action asserted against TES, Inc. are severed and dismissed, and it is further,

ORDERED that the remainder of the relief sought on this motion seeking a directed verdict dismissing the wrongful death plaintiff's claims asserted against J.F.

Lomma Inc. for negligence and punitive damages, and asserted against James F. Lomma for personal negligence and for punitive damages, is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.



MANUEL J. MENDEZ,
J.S.C.

Dated: May 26, 2015