

**Consolidated Edison Co. of N.Y., Inc. v 60 Hudson
Owner LLC**

2018 NY Slip Op 31664(U)

July 17, 2018

Supreme Court, New York County

Docket Number: 151486/18

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Index No.: 151486/18

Plaintiff,

Motion Date: 07/16/2018

- v -

Motion Seq. No.: 001

60 HUDSON OWNER LLC, COLLIERS INTERNATIONAL NY LLC, DATAGRYD DATA CENTERS, LLC, NOVA CORP a/k/a NOVA/MISSION CRITICAL, BAY CRANE SERVICE INC., MRA ENGINEERING P.C., GALASSO TRUCKING, INC., GALASSO TRUCKING & RIGGING, INC., KEVIN REILLY, HATZEL and BUEHLER, INC., COMPUTER COOL/ICE AGE MECHANICAL CORP., SAFEGATE ASSOCIATES, LLC, THE CITY OF NEW YORK,

Defendants.

The following papers, numbered 1 to 5 were read on this motion to dismiss pursuant to CPLR 3211(a) and cross motion to consolidate pursuant to CPLR 602, and to amend the complaint .

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

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

<u>PAPERS NUMBERED</u>
1
2, 3, 4
5

Cross-Motion: Yes No
ORDER

Upon the foregoing papers, it is

ORDERED that the motion to dismiss the complaint against defendant Bay Crane Services, Inc. pursuant to CPLR 3211(a)(7) is denied; and it is further

ORDERED that the cross motion of plaintiff for leave to

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

amend the complaint is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served and filed, upon service of a copy of this order with notice of entry, and it is further

ORDERED that the defendants shall serve an answer to the amended complaint within 30 days from the date of such service; and it is further

ORDERED that the cross motion that seeks to consolidate is granted to the extent that pursuant to the Administrative Order dated September 16, 2016 (Moulton, J.) discovery in the above-captioned action shall take place jointly with the discovery in the action captioned Consolidated Edison Company of New York, Inc. v. City of New York, Index No. 154079/2017, and Wichs v 60 Hudson Owner, LLC, Index No. 155164/2016, each now pending in Supreme Court of the State of New York, County of New York; and it is further

ORDERED that the plaintiff in this action shall file and pay the fee for a Request for Judicial intervention, to which shall be attached a copy of this order, and that respectfully, the Clerk shall transfer the foregoing action consolidated for discovery only (Index No. 154079/2017) to the undersigned Justice as a related matter; and it is further

ORDERED that the movant is directed to serve a copy of this order with notice of entry on the General Clerk's Office (Room

119, 60 Centre Street), which is directed to mark the court's records to reflect the consolidation; and it is further

ORDERED that counsel in all consolidated and related actions are directed to appear in IAS Part 59, 60 Centre Street, Room 331, for a discovery conference on September 24, 2018, 10:00 AM.

DECISION

"It is well settled that '[i]n assessing the adequacy of a complaint under CPLR 3211(a)(7), the court must give the pleading a liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference'...Whether the plaintiff will be ultimately successful in establishing those allegations 'is not part of the calculus'...

As a threshold matter, we must determine whether [defendant] owed plaintiff a duty of care.

Although the existence of a contractual relationship by itself generally is not a source of tort liability to third parties, we have recognized that there are certain circumstances where a duty of care is assumed to certain individuals outside the contract (see Espinal v Melville Snow Contrs., 99 NY2d 136, 1370139...[2002]). As relevant here, such a duty may arise 'where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launch[es] a force or instrument of harm'...This principle recognizes that the duty to avoid harm to others is distinct from the contractual duty of performance."

Landon v Kroll Laboratory Specialists, Inc., 22 NY3d 1, *5 (2013).

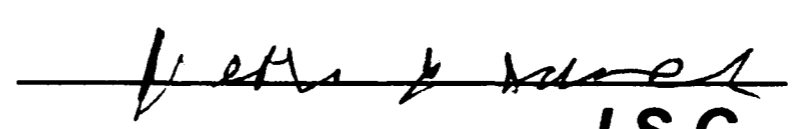
Accepting the allegations of the proposed amended complaint as true, Bay Crane did not exercise reasonable care in the leasing and/or operation of the crane, which resulted in harm to the plaintiff. Nor does the documentary evidence, in the form of the bare rental agreement defeat plaintiff's claim. Unlike in Mahoney v Turner Constr Co, 37 AD3d 377, 380 (1st Dept 2007),

Mahoney v Turner Constr Co, 37 AD3d 377, 380 (1st Dept 2007), where on a post joinder motion for summary judgment, the crane operator came forward with prima facie proof that it was not more than a lessor of the crane, here, defendant does not refute the allegations of the amended complaint that Bay Crane negligently selected and/or trained the crane operator and provided a "defective or inappropriate crane"

. This is the decision and order of the court.

Dated: July 17, 2018

ENTER:


J.S.C.
DEBRA A. JAMES