

<b>JDS Constr. Group LLC v U.S. Crane &amp; Rigging LLC</b>
2023 NY Slip Op 32808(U)
August 11, 2023
Supreme Court, New York County
Docket Number: Index No. 655044/2021
Judge: Melissa A. Crane
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. MELISSA A. CRANE PART 60M**

*Justice*

-----X

JDS CONSTRUCTION GROUP LLC,111 WEST 57TH  
PROPERTY OWNER LLC,111 WEST 57TH HOLDINGS  
LLC,

Plaintiff,

INDEX NO. 655044/2021

MOTION DATE 07/31/2023,  
07/31/2023

MOTION SEQ. NO. 002 003

- v -

U.S. CRANE & RIGGING LLC, NYC CRANE HOIST &  
RIGGING LLC, NYC CRANE HOIST OPERATIONS, LLC,

Defendant.

**DECISION + ORDER ON  
MOTION**

-----X

NYC CRANE HOIST OPERATIONS, LLC

Plaintiff,

Third-Party  
Index No. 595216/2022

-against-

VALJATO ENGINEERING, P.C.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 282, 284

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 283, 285

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

This case derives from an incident in late October 2020 where defendants allegedly failed to secure a crane tower properly despite warnings of high winds from Hurricane Zeta.

Apparently, the crane tower came loose and the winds caused to spin out of control. It then repeatedly struck façade panels and shattered glass. DOB shut down the project until December 15, 2020. Then, on December 24, 2020 a curtainwall vent fell from the 53<sup>rd</sup> floor during another high wind day. Plaintiff blames defendants for this incident as well.

In motion 2, defendant US Crane and Rigging (US Crane) moves for: (1) an order dismissing the claims against it; (2) an Order pursuant to CPLR § 3212 granting U.S. Crane partial summary judgment as to liability on its claims for contractual and common-law indemnification against Defendant NYC Crane Hoist Operations, LLC, (Crane Operations) and (3) an Order pursuant to CPLR § 4101 striking Plaintiffs' jury demand.

In motion 3, Crane Operations moves for an order: (1) dismissing 111 West 57th Holdings LLC ("Holdings") claims because it is not a proper party to this action; (2) dismissing the breach of contract claims asserted by 111 West 57th Property Owner LLC ("Property Owner") and JDS Construction Group LLC ("JDS") to the extent that they are alleged against NYCCHO; (3) dismissing any claims arising from a falling curtainwall vent at the Project on December 24, 2020; and (4) striking the Plaintiffs' demand for a jury trial. The court consolidates both motions for disposition and decides them as follows:

1. Indemnification against Crane Operations

That part of US Crane's motion seeking summary judgment that defendant Crane Operations must indemnify it pursuant to the contract between the parties is granted. US Crane has set forth a *prima facie* case by citing the following provision:

"INDEMNIFICATION: To the fullest extent permitted by law, Subcontractor agrees to defend, indemnify, and hold harmless Contractor from any and all liability arising out of Subcontractors operations except for personal injury and property damage caused by Contractor's sole negligence. Subcontractor agrees to indemnify Contractor for all loss, damage or injury to property, including the Equipment. ..."

Crane Operations has not opposed the motion. Accordingly, the court grants that part of US Crane's motion for contractual indemnification against Crane Operations

2. The Jury Demand.

The court denies that part of the motion seeking to strike the jury demand for the reasons set forth on the record of August 1, 2023. Namely, most of the issues in this case have a right to trial by jury. To the extent there are issues for a bench trial, they can be heard at the same time as the questions for the jury.

3. Plaintiff Holdings

Additionally, the court dismisses all claims asserted by plaintiff 57<sup>th</sup> Holdings LLC (Holdings). It is undisputed that Holdings neither (1) owns the property that suffered damage, (2) is not a party to the contract at issue, nor (3) is a named third-party beneficiary under the contract. Holdings points to Rider E of the Agreement between JDS and US Crane which is entitled "Indemnification Supplemental Provisions" to argue that Holdings can recover its alleged losses (apparently it had to pay more under some loans than it would have otherwise even though it does not own the property) as an indemnitee. Holdings misinterprets the provision. It clearly states that:

"Contractor shall indemnify, defend and hold harmless Construction Manage and all indemnitees **from and against** all claims., damages, losses and expenses, including but not limited to attorney's fees, to the extent arising out of or resulting from the performance of the work."

"[F]rom and against" implies a defensive posture, not an affirmative claim. Here, Holdings is a plaintiff. More important, the indemnification provision is limited to:

"provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or injury to or destruction of tangible property (other than the Work itself) including loss of use"

Holdings alleges in the Second Amended Complaint that because of the construction delays it sustained damages in the form of such expenses as property taxes, construction loans, and other costs. This is not damage attributable to bodily injury, sickness, property damage etc.

Moreover, Holdings' negligence claim would be barred because its "injuries extend far beyond a failure to receive the benefit of the bargain" (*Volt Electric NYC Corp. v. A.M.E., Inc.*, 586 F.Supp.3d 262, 299 [SDNY 2022]; see also *Traveler's Casualty and Surety Co., v DASNY*, 734 F.Supp2d 368, 386 [SDNY 2010] [insurer could not recover bond losses under exception to economic loss doctrine]). Simply put, with or without the economic loss doctrine, the unfortunate accident did not make defendants the insurers of non-property owner Holdings' attenuated loan costs (see *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Center, Inc.*, 96 N.Y.2d 280, 292 [2001][In negligent construction case, "plaintiffs' negligence claims based on economic loss alone fall beyond the scope of the duty owed them by defendants and should be dismissed"]).

Accordingly, Holdings' damages are inappropriate for recovery in this case and it should not be a plaintiff. The court therefore dismisses all claims to the extent Holdings has asserted them.

#### 4. Plaintiff Owner:

By contrast, plaintiff 111 West 57<sup>th</sup> Property Owner LLC (Plaintiff Owner), as the owner of property has suffered property damage. Therefore, it is a proper indemnitee and can seek contractual indemnification. However, it has not done so. The second cause of action pleads that plaintiff Owner was a party to the contract and somehow "performed all the conditions of the Crane Contract, which were on their part to be performed" (see Complaint ¶ 49). As Plaintiff Owner had no contractual duties under the Crane contract, it is strange that it pleads this way.

Therefore, the court dismisses this cause of action with leave to replead as a claim for contractual indemnification.

5. Length of Delay and December incident

Both defendants argue that this court should dismiss plaintiffs' claims to the extent they seek damages resulting from the separate incident in December 2020 when a curtain wall fell. Plaintiffs point to JDS' December 26, 2020 incident report that blamed excess airflow through the upper portion of the tower where the building enclosure was damaged in multiple locations during the incident on 10/29/20. (Bourne Aff. Ex 27). This report creates an issue of fact whether the previous damage from the October incident contributed to excess airflow that then caused the curtain wall damage in December. Therefore, the court declines to dismiss this part of plaintiffs' claim.

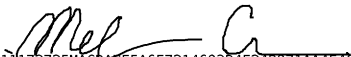
Accordingly, it is

ORDERED THAT the court grants US Crane's motion to the extent it dismisses all the claims of Plaintiff Holdings with prejudice, the second cause of action to the extent plaintiff Owner has asserted it with leave to replead and otherwise denies the motion; and it is further

ORDERED THAT the court grants Crane Operation's motion to the extent it dismisses all the claims of Plaintiff Holdings with prejudice and otherwise denies the motion; and it is further;

ORDERED THAT the remaining parties are to attend a pre trial conference on September 15, 2023 at noon.

ORDERED THAT there shall be no further motion practice without prior conference  
with the court.

  
202308111972725MACRANE5A6F7214693B4F24B971AA4F4C731AFA

8/11/2023  
DATE

\_\_\_\_\_  
MELISSA A. CRANE, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE