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

PRESENT: KAREN S. SMITH PART 62
Justice

CONSOLIDATED INDEX NO. 769000/08

IN RE: EAST 51ST STREET CRANE COLLAPSE LITIGATION

E-FILE

MATTHEW DEPOULI, et al.,
Plaintiffs,

- v -

KENNELLY DEVELOPMENT COMPANY, LLC, et al.,
Defendants.

INDEX NO. 105934/09
MOTION DATE 12/17/09
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion for/to Dismiss

	PAPERS NUMBERED
Notice of Motion — Affidavits – Exhibits	1
Notice of Cross-Motion — Affidavits – Exhibits	2, 3
Answering Affidavits — Exhibits	4, 5
Replying Affidavits	6, 7, 8

RECEIVED
DEC 8 2009
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

FILED
Dec 08 2009
NEW YORK
COUNTY CLERK'S OFFICE

(2x Cross-motions)

Cross-Motion: ☒ Yes ☐ No

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

Upon the foregoing papers, it is ORDERED that this motion by defendants New York Crane & Equipment Corporation and James F. Lomma, seeking an order dismissing the emotional distress claims of plaintiffs Sarah Shumway, Needhi Sheth and Rachel Bernard, and all claims against James F. Lomma, pursuant to CPLR § 3211(a)(7), is granted in part and denied in part, as set forth more fully below. Both the cross-motion by defendant Reliance Construction Ltd. d/b/a RCG Group, s/h/a Reliance Construction Group and RCG Group Ltd. and the cross-motion by defendant JBS Construction Management, Inc., seeking an order dismissing the emotional distress claims of plaintiffs Sarah Shumway, Needhi Sheth and Rachel Bernard, pursuant to CPLR § 3211(a)(7) and/or CPLR § 3212 for failure to state a cause of action, are granted in part and denied in part, as provided more fully below.

This action stems from an accident that occurred on March 15, 2008, when a crane involved in construction at 303 East 51st Street, New York, New York, collapsed, portions of which came into contact with nearby buildings.[1] At the time of the collapse, plaintiffs Matthew DePouli, Sarah Shumway and Needhi Sheth each resided in apartments in the building known as 301 East 50th Street, New York, New York. Plaintiffs Rachel Bernard and Joyce Munn both resided in apartments in the building known as 311 East 50th Street, New York, New York.

[1] There are numerous related actions, each of which has been or will be consolidated for limited purposes under Consolidated Index No. 769000/08, while each action maintains its own individual Index No. as well.

MDH

Defendants New York Crane & Equipment Corporation ("NY Crane") and James F. Lomma ("Lomma") now move, pre-Answer, for an order, 1) dismissing all claims against James F. Lomma, individually, pursuant to CPLR § 3211(a)(1) and (a)(7), as he is merely the Owner/President of the company and cannot be held individually liable, and 2) dismissing the emotional distress claims of plaintiffs Sheth, Shumway and Bernard for failure to state a cause of action, pursuant to CPLR § 3211(a)(7). Defendants Reliance Construction Ltd. d/b/a RCG Group, s/h/a Reliance Construction Group and RCG Group Ltd. ("Reliance") and JBS Construction Management, Inc. each cross-move for an order dismissing those portions of the Verified Complaint seeking to recover for emotional distress on behalf of Sheth, Shumway and Bernard. Plaintiff opposes the motion and both cross-motions.

In deciding a motion brought pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the Complaint should be liberally construed and the facts alleged in the Complaint and any submissions in opposition to the dismissal motion accepted as true, according plaintiffs the benefit of every possible favorable inference. (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law'." (*Id.*). Affidavits are considered "only for the limited purpose of determining whether the plaintiff has stated a claim, not whether he has one and, in the absence of proof that an alleged material fact is untrue or beyond significant dispute, [the Court] must not dismiss the Complaint." (*Wall Street Associates v Brodsky et al.*, 257 AD2d 526, 526-7 [1st Dept 1999]).

Claims Against James F. Lomma

NY Crane and James F. Lomma move to dismiss plaintiffs' claims against Lomma, individually, contending that plaintiffs have failed to allege any facts that would justify piercing the corporate veil and holding Lomma liable individually. Lomma, the owner and president of NY Crane, submits an affidavit in which he affirms that he had no personal involvement with the purchase, maintenance or lease of the subject crane. In addition, Lomma affirms that the company is adequately capitalized and there is no co-mingling of corporation funds, nor does he exercise undue control over the operations, employees or accounting. Plaintiffs argue that there is sufficient basis for allowing them to explore in discovery the possibility that Lomma should be held personally liable.

Generally, a corporation exists independently of its owners, as a separate legal entity, and the owners cannot normally be held liable for the obligations of the corporation. The concept of "piercing the corporate veil" is a limitation on this principal, allowing the Court to "disregard the corporate form . . . whenever necessary 'to prevent fraud or to achieve equity.'" (*Joseph Morris v New York State Department of Taxation and Finance, et al.*, 82 NY2d 135, 140 [1993], *quoting International Aircraft Trading Co. v Manufacturers Trust Co.*, 297 NY 295, 292 [1948]). Generally, 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 fraud or wrong against the plaintiff which resulted in plaintiff's injury. (*Id.* at 141 [internal citations omitted]). "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 [the plaintiffs] such that a court in equity will intervene." (*Id.* at 142, *citing to Matter of Guptill Holding Corporation v State of New York*, 33 AD2d 362, 365 [3d Dept 1970], *aff'd* 31 N.Y.2d 897 [1972]).

The only factual allegations specific to Lomma in plaintiffs' Verified Complaint are that he owned and/or controlled NY Crane and provided services related to the construction project at 303 East 51st Street, and that Lomma was familiar with the equipment owned by NY Crane, and the condition and maintenance of same, including the subject crane. In their opposition to NY Crane and Lomma's motion, plaintiff suggests that Lomma's affidavit is insufficient to support dismissal of their claims against him, because it does not address Lomma's role in, 1) acquisition and selection of equipment, including the crane; 2) the manner in which equipment is maintained; 3) the policies affecting maintenance of equipment; 4) the ultimate decisions affecting the quality of equipment and repairs; 5) creating, agreeing to and driving the schedule of work at the construction site. Plaintiff also points to another crane accident, also involving NY Crane equipment, which occurred just two months after the instant accident, noting that in lawsuits related to that accident it has been alleged that NY Crane, at Lomma's direction, chose to have that crane repaired by a less-expensive vendor with questionable qualifications.

Even assuming that each of the allegations against Lomma in both the Verified Complaint and the affirmation in opposition are true, plaintiffs have failed to allege sufficient facts to support a cause of action against Lomma directly and insufficient facts to pierce NY Crane's corporate veil. Presuming that Lomma was heavily involved with each of the areas described in the preceding paragraph, as plaintiffs suggest, only supports an inference that he was an integral part of NY Crane's corporate management and ventures, precisely what the job of president or owner would normally entail. That Lomma may have ordered equipment to be serviced and repaired by a questionable vendor does not give rise to an inference that he "abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against" the plaintiffs, such that this Court will intervene in equity and find Lomma personally subject to liability. (*Joseph Morris v New York State Department of Taxation and Finance, et al., supra* at 140). None of the facts alleged go to the elements plaintiffs must prove to pierce the corporate veil such as complete domination and commingling of funds. As such, all claims against Lomma individually must be dismissed.

Emotional Distress/Damages Claims[2]

NY Crane, Reliance and JBS each contend that the emotional distress claims of plaintiffs Sheth, Shumway and Bernard should be dismissed for failure to state a cause of action for such relief, as their respective alleged emotional distress is based on the damage suffered to their property. Plaintiff opposes the motion and cross-motions, arguing that the facts justify allowing plaintiffs to proceed on their claims for emotional distress.

"When there is a duty owed by defendant to plaintiff, breach of that duty resulting directly in emotional harm is compensable even though no physical injury occurred." (*Kennedy v McKesson Co.*, et al., 58 NY2d 500, 504; *citing, Ferrara v Galluchio*, 5 NY2d 16 [1958] [physical injury alleged]; *Battalla v State of New York*, 10 NY2d 237 [1961] [no physical injury]; *Johnson v State of New York*, 37 NY2d 378 [1975] [no physical injury]; *Lando v State of New York*, 39 NY2d 803 [1976] [no physical injury]). Further, "there may be recovery for the emotional harm, even in the absence of fear of potential physical injury, to one subjected directly to the negligence of another as long as the psychic injury was genuine, substantial, and proximately caused by the defendant's conduct." (*Howard v Lecher*, 42 NY2d 109, 111 [1977]). However, emotional injuries may not be based solely on damage to one's property. (*See, e.g., Stanley v Smith*, 183 AD2d 675 [1st Dept 1992]; *Fowler v Town of Ticonderoga*, 131 AD2d 919 [3rd Dept 1987]).

Here, neither Sheeth nor Shumway were in their apartment or the building when the crane collapsed on March 15, 2008. While these plaintiffs argue they should be allowed to seek damages for emotional distress based on the fact that they returned to the building shortly thereafter and "were quickly exposed to the horrors of the incident and 'what might have been,'" this would allow Sheeth and Shumway to base their claims on the "horror" of viewing their property damage. Plaintiffs argue that the images of what could have happened are emotionally damaging and real.

The Court does not deny that Sheeth and Shumway may have suffered some emotional distress. However, not all emotional distress is recoverable under the law of this State. There is no contention that either Sheeth or Shumway were ever in physical danger themselves, or reasonably believed they were in danger, nor is there an allegation that either actually suffered physical injury. Therefore, there appears to be no basis, other than the damage their property suffered and their knowledge that if they had been home they could have been in danger, upon which to base allegations of emotional distress, which is insufficient.

Plaintiff Bernard must be analyzed separately, as she was at home in her apartment at the time of the collapse. According to the Verified Complaint, Bernard was recovering from unspecified surgery at home when she heard a thundering noise and felt the building shake. Looking out her apartment window,

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[2] This Court has had several opportunities in a number of In re: East 51st Street Crane Collapse Litigation cases to discuss the applicable law and the parties are referred thereto for an in depth analysis. (See, e.g. *Battistello v East 51st Street Development Company, et al.*, Index No. 111409/2008, Motion Seq. 001 [May 12, 2009]; *Antoniello v East 51st Street Development Company, et al.*, Index No. 102024/2009, Motion Seq. 001 [November 19, 2009]).

she saw one or more individuals clinging to the cab of the crane as it careened into buildings and then fell to the ground, narrowly missing her building. There is no allegation that Bernard's building was hit by the crane when it collapsed or suffered any structural damage, but the Verified Complaint does allege that Bernard saw the cab of the crane falling toward her building and hitting other buildings on its way down. Bernard claims that after waiting for the building to stop shaking she evacuated the building, she took the elevator down to evacuate the building because of her physical condition, and was filled with fear and anxiety, wondering if the elevator would remain in service until she could exit the building. Bernard also claims that when she returned to the building, the elevator was out of service and that she had to traverse eight flights of stairs, aggravating her surgical condition and impeding her recovery. Dust from the crane's collapse made its way into Bernard's apartment and allegedly caused unspecified property damage and adverse health effects.

Assuming the allegations in the Verified Complaint to be true, Bernard's claims for emotional distress will not be dismissed at this early stage. Contrary to Bernard's argument, her claims are not significantly similar to those of Margery Jane Bonia, a plaintiff in the *Battistello* action, but rather resemble the claims made by plaintiff Wilfredo Vego in another consolidated action, *Antoniello*. (See, Index No. 102024/09, Motion Sequence No. 001 [November 16, 2009]). In that case, Vego alleged that he was standing outside his window looking up at the crane and discussing the construction when he observed the crane falling toward his building. When the crane came to rest on the ground, Vego alleged that it was leaning up against his apartment window. In denying NY Crane's motion to dismiss Vego's claims for emotional distress, this Court found his proximity to the accident and the reasonable inference that he was in harm's way dispositive. Although there are differences, the most important being that Vego's building was actually impacted by the crane while Bernard's was not, at this early stage the Court finds under all the circumstances alleged in the Complaint, such as the shaking of the building and that Bernard watched the cab of the crane fall toward her building, that it is reasonable to infer that Bernard believed she was in harm's way and that she feared for her safety.

Although Bernard's claims for emotional distress are not being dismissed, the Court explicitly rejects her argument that such claims are supported by either 1) the allegations about the breakdown of the elevator, which forced her to use the stairs upon her return to the building, exacerbating her condition, or 2) her observation of unrelated individuals falling with or from the crane cab.

Bernard has made no allegation and submitted no evidence to indicate that the elevator outage in her building was caused by the crane collapse and it is not reasonable to infer causation as her building was not hit by the crane.

In addition, Bernard's allegations that she suffered emotional distress after seeing one or more individuals falling from the crane's cab after it collapsed cannot be a basis for recovering damages. Plaintiff cites to no cases which support allowing a bystander claim, otherwise known as a "Zone of Danger" claim, based on observing the death or injury of a stranger. In order to recover under a "Zone of Danger" theory, "a plaintiff must establish that he suffered serious emotional distress that was proximately caused by the observation of a family member's death or serious injury while in the zone of danger." (*Stamm v PHH Vehicle Management Services, LLC*, 32 AD3d 784, 786, 2006 NY Slip Op 6812, *2 [1st Dept 2006] [emphasis added]; citing, *Bovsun v Sanperi*, 61 NY2d 219 [1983]).

Finally, it should be noted that, while the defendants argue that they respectively owed no duty to any of the plaintiffs in this action, in a case such as this where issues of duty may be inextricably linked to issues of causation, the Court does not view such an issue as appropriately determined on a motion to dismiss for failure to state a cause of action. As such, the Court declines to make any determination at this time as to the defendants' duty to plaintiffs, and this portion of their motion is denied without prejudice to resubmit at a later date.

Accordingly, it is

ORDERED that the portion of this motion by defendants New York Crane & Equipment Corporation and James F. Lomma seeking to dismiss plaintiff's complaint as to James F. Lomma in its entirety, is granted; it is further

ORDERED that the portion of this motion by defendants New York Crane & Equipment Corporation and James F. Lomma seeking an order dismissing the claims for emotional distress asserted by plaintiffs, is granted in part, SOLELY to the extent of dismissing all such claims asserted by plaintiffs Sarah Shumway and Needhi Sheth; it is further

ORDERED that the cross-motions by defendants Reliance Construction Ltd. d/b/a RCG Group, s/h/a Reliance Construction Group and RCG Group Ltd. and JBS Construction Management, Inc., seeking an order dismissing the emotional distress claims of plaintiffs, are granted in part, SOLELY to the extent of dismissing all such claims asserted by plaintiffs Sarah Shumway and Needhi Sheth; it is further

ORDERED that the portion of the motion and cross-motions seeking an order dismissing the emotional distress claims of plaintiff Rachel Bernard, is DENIED as provided above; it is further

ORDERED that the motion is denied in all other respects.

This constitutes the decision and order of the Court.

Dated: December 3, 2009

Hon. Karen S. Smith, *J.S.C.*

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**