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

PRESENT: HON. CAROL EDMEAD Justice PART 35

Index Number : 117452/2008
CRAVE FOODS INC.
VS.
RAPETTI RIGGING SERVICES
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the attached Memorandum Decision, it is hereby

ORDERED that the motion of defendant/third-party defendant Construction Realty Safety Group LLC, pursuant to CPLR §3212, for summary judgment dismissing all claims, cross-claims and counterclaims against it, is granted solely to the extent that (1) all contractual indemnification claims asserted against Construction Realty Safety Group LLC are dismissed and (2) all contribution and contractual and common law indemnification claims by Reliance Construction Ltd., a/k/a RCG Group Ltd. against Construction Realty Safety Group LLC are dismissed.

This constitutes the decision and order of the Court.

Dated: 1/5/11

HON. CAROL EDMEAD J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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IN RE: EAST 51ST STREET CRANE COLLAPSE LITIGATION

Index No.: 769000/2008

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

This consolidated action arises from the March 15, 2008 crane collapse (the "accident") at the 303 East 51st Street, New York, New York construction site (the "site"). Defendants/third-party plaintiffs East 51st Street Development Company, LLC and Kennelly Development Company, LLC (collectively "East 51st"), and Reliance Construction Ltd., a/k/a RCG Group Ltd. ("Reliance"), brought claims[1] against defendant/third-party defendant Construction Realty Safety Group LLC ("CRSG") for, *inter alia*, contractual and/or common law indemnification and contribution. CRSG now moves, pursuant to CPLR §3212 (b), for summary judgment dismissing all such against it. East 51st opposes the motion.[2]

Background Facts

At the time of the accident, East 51st was the owner and developer of the construction project at 303 East 51st Street (the "project") and Reliance was the construction site manager. In or about June-July of 2007, Reliance retained CRSG pursuant to a proposal dated April 25, 2007 (the "proposal") to establish safety and health protection procedures for the performance of the work in connection with the project. In or about September 2007, CRSG created the Site Safety

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[1] In one of the consolidated actions, *American Bankers Insurance Company of Florida as assigned/subrogee of Lauren and Sean Cutrona and Melissa Dolman* ("American Bankers") *v Reliance Construction Ltd., et al.*, (Index No. 100754/2009), CRSG was named as a defendant, and Reliance, one of the co-defendants in that action, asserted several cross-claims against co-defendants, including CRSG.

[2] The court notes that plaintiffs in *Richard Solomon v Kennelly Development, et al.* (Index No. 114922/2008) and *Matthew DePouli, et al. v Kennelly Development Co., LLC, et al.* (Index No. 105934/09) joined in East 51st's opposition. However, neither American Bankers, nor Reliance opposed the motion.

Plan (the "Safety Plan")(exhibit C to motion). CRSG maintained its regular (at least weekly) presence at the site until January 18, 2008, and thereafter, stopped performing its services due to Reliance's alleged failure to pay CRSG.

In support of dismissal, CRSG argues that it could not have caused or contributed to the crane collapse, and thus, cannot be held liable under theories of indemnification or contribution. CRSG argues that at the time it performed services for Reliance, CRSG's responsibilities did not include any work related to the design or erection of the crane. CRSG claims that other parties to this litigation, including Reliance, Stroh Engineering Services, P.C. ("Stroh"), Joy Contractors, Inc. ("Joy"), Rapetti Rigging Services ("Rapetti Rigging") and New York Crane and Equipment Corporation ("NY Crane"), performed all the work in connection with the tower crane, and that CRSG's only responsibility was to provide the project Safety Plan and manage the site safety services.

Further, CRSG could not have caused or contributed to the crane collapse because it terminated its services for Reliance on January 18, 2008, approximately two months before the accident, when the crane erection was still in its nascent stages, *i.e.*, when it was delivered and raised to the initial floors. CRSG supports this assertion with a letter of termination, dated January 18, 2008 and the testimony of its vice president Matthew Caruso ("Caruso"), its project safety manager Joseph Pagano ("Pagano"), and representatives of Joy, Stroh and Rapetti. CRSG asserts that it stopped working at the project site "due to lack of pre-fund payments from [Reliance]" (Affirmation in support of motion, ¶9; Caruso transcript, exhibit D).

And, even assuming CRSG was a site safety consultant for the project, it did not control or supervise the work of the injured workers. CRSG had no supervision or control over the site's

construction work, since it neither provided any materials or safety equipment, nor performed any day-to-day operations at the site. In support, CRSG submits deposition transcripts of Tony Lorenzo, the project manager of Joy, Peter Stroh of Stroh Engineering and William Rapetti of Rapetti Rigging.

Also, CRSG argues that there was only a proposal by CRSG accepted by Reliance and no contract between the parties containing indemnity language in favor of Reliance or East 51st existed. Thus, CRSG cannot be liable for contractual indemnification.

East 51st opposes the motion, arguing that CRSG was contractually obligated to ensure safety in connection with all construction-related activities through the entire duration of the project by creating the Safety Plan, conduct safety meetings and audit inspections and monitor compliance with the safety regulations of the U.S. Department of Labor, Occupational Safety and Health Administration ("OSHA") and NYC Department of Buildings Code (the "Building Code"). Further, there are factual questions as to whether the Safety Plan was adequate, since the Plan's safety provisions relating to the safety operation of the crane, diagrams for placement of the crane and a schedule for installation of safety devices for height-related work were too general to provide the required safety guidelines for workers.

Specifically, the Safety Plan did not include the required guidelines of OSHA (Part 1926) and the Building Code (Article 19) concerning safe operation of tower cranes, which specifically require inspection of the rigging equipment, including slings, prior to each use. And, since the evidence indicates that the slings used to "jump" the crane on the date of the accident were not properly inspected and eventually failed, leading to the crane collapse, an issue of fact exists as to whether including these important guidelines in the Safety Plan and conducting the crane

operations in accordance with those guidelines, could have prevented the accident.

Furthermore, the general standards contained in the Safety Plan were not properly implemented, as most of the workers were not aware of CRSG or its Safety Plan; the horizontal netting for fall protection was never installed on the day of the accident; there were other numerous violations of the governing OSHA and DOB regulations, and CRSG admitted that it left the task of implementing the Safety Plan to Reliance.

According to East 51st, that CRSG was not physically present at the site on the day of the accident does not relieve CRSG from liability. Caruso testified that the Safety Plan was to remain in effect *throughout the duration of the project* and CRSG remained on the site up to and including the crane's initial installation and erection on January 18, 2008, as reflected in the "Site Safety Managers Log" and its multiple photographs of the initial crane assembly and installation (exhibit C to motion). Summary judgment is premature because, while CRSG unilaterally terminated the agreement alleging nonpayment by Reliance, the circumstances of this termination have not been explained by either party and Reliance has not yet been deposed.

East 51st would be entitled to recover from CRSG for common law indemnification to the extent that its alleged failure to perform under the proposal caused or contributed to the accident. And, even if East 51st were found partially at fault, CRSG is obligated to pay damages for contribution based on its proportion of responsibility for the accident.

In reply, CRSG argues that, other than an unexecuted proposal, no contract existed with any entity involving the work at the project site.[3] CRSG did not have any involvement in the

[3] The court notes that, since CRSG's reply papers contain a new assertion not previously made in the initial motion papers, that CRSG had no contract with any party involving the work at the site, the court granted East 51st leave to file a sur-reply addressing this issue.

rigging or erection of the tower, which arrived on January 18, 2008, the last day of CRSG's work at the site, and the crane's assembly did not begin until January 20, 2008. Pursuant to the proposal, CRSG's obligations were limited to creating the Safety Plan and program, conducting safety meetings and providing a licensed safety manager "when needed," and it "merely filled in" for Reliance's safety manager during the two-week period just before CRSG left the project.

Further, the Safety Plan was approved by the DOB and it was Reliance's responsibility to ensure that the Plan was carried out. Finally, there is no outstanding discovery from either CRSG, Rapetti, Stroh or Joy, which could reasonably lead to the conclusion that CRSG had anything to do with the erection of the crane.

In its sur-reply, East 51st counters that a contract existed between CRSG and Reliance, even though in the form of a proposal setting forth CRSG's obligations. In support, East 51st points to Caruso's testimony that CRSG had a contract with Tony Catanzaro of Reliance.

Discussion

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]), and to demonstrate, by advancing sufficient "evidentiary proof in admissible form," the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562).

At the outset, notwithstanding East 51st's contention that a contract between Reliance and CRSG existed, the proposal does not require CRSG to indemnify Reliance, East 51st or any other party in this litigation. Therefore, there is no basis for any contractual indemnification claim against CRSG.

As to the common-law indemnification claim against CRSG, "the one seeking indemnity must prove not only that it was not guilty of any negligence beyond statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (*Correia v Professional Data Management, Inc.*, 259 AD2d 60, 693 NYS2d 596 [1st Dept 1999], *citing McDermott v City of New York*, 50 NY2d 211, 428 NYS2d 643 [1980]), or, in the absence of any negligence, that the proposed indemnitor had the authority to direct, supervise and control the work giving rise to the injury (*see McCarthy v Turner Const., Inc.*, 72 AD3d 539, 898 NYS2d 836 [1st Dept 2010]; *Reilly v DiGiacomo & Son*, 261 AD2d 318, 690 NYS2d 424 [1st Dept 1999]; *Perri v Gilbert Johnson Enterprises, Ltd.*,14 AD3d 681, 790 NYS2d 25 [2d Dept 2005]).

To establish a *prima facie* case of negligence, plaintiff must prove that the defendant owed her/him a duty of care, and breached that duty, and that the breach proximately caused her/ his injury (*Solomon v City of New York*, 66 NY2d 1026, 1027, 499 NYS2d 392 [1985]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 302, 724 NYS2d 34 [1st Dept 2001]). Negligence may arise where a party to a contract fails to comply with the duty imposed by the terms of the contract [. . .], but the negligence arises not because of a breach in the contract but because of a failure to perform the contractual duty with due care (see *F.W. Woolworth v Southbridge Towers et al.*, 101 AD2d 434 [1st Dept 1984]; *Trans Carribean Airways, Inc. v*

Lockheed Aircraft Service International, Inc., 14 AD2d 749 [1st Dept 1961]).

"Contribution is available where two or more tortfeasors combine to cause an injury' and is determined in accordance with the relative culpability of each such person' [citation omitted]" (*Crespo v HRH Const. Corp.*, 24 Misc 3d 1246, 901 NYS2d 898 [Sup Ct, New York County 2009]).

Here, CRSG, as the movant, met its initial burden of establishing its freedom from negligence in the happening of the crane collapse accident, because it terminated its services under the proposal approximately two months before the accident and had no supervision or control over the crane-related work at the site, and did not provide any materials or safety equipment at the site. The evidence submitted by CRSG (the proposal, the Safety Plan, the deposition testimony of Caruso and Pagano) demonstrate that pursuant to its proposal with Reliance,[4] CRSG had an obligation to "[p]rovide job safety set up and Site Safety Plan and Program guidelines per [A]rticle 19 [of the Building Code] and OSHA [Part]1926," and conduct audit inspections and weekly safety meetings, attend subcontractors safety meetings, report safety violations to Reliance and coordinate the permits applications process (exhibits D, C, J, K). The evidence also indicates that the Safety Plan was approved by the DOB and Reliance (Caruso transcript, pp. 27-28), and, on January 18, 2008, CRSG terminated its services under the proposal with Reliance (letter, dated January 18, 2008, from Matthew Caruso to Tony Cartazano of

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[4] The court notes that, CRSG's reversal of its position as to the existence of a contract with Reliance, contradicts its own admissions in the moving papers that it performed its duties in accordance with the "agreement with [Reliance]," and that CRSG's proposal was accepted by Reliance. It is black letter contract law that "an acceptance of the proposal or offer completes manifestation of assent" or "meeting of the minds," essential for creation of a contract (see 1 Williston on Contracts §§4:1, 4:3 4th ed]). Moreover, the testimony of Caruso, that he signed the proposal containing the terms (as evidenced in exhibits C and J), and the invoices showing that Reliance paid for CRSG's services, at least up until September 2007 (exhibit J), support the court's determination that the contract existed.

Reliance, exhibit C). Thus, CRSG initially established that its work performed under the proposal did not cause the collapse of the crane.

However, East 51st, as the nonmoving party, raised material issues of fact as to the scope/duration of CRSG's contractual obligations, which, if breached, may give rise to CRSG's negligence, requiring denial of the motion. It is well-settled that summary judgment should not be granted where there is any doubt as to the existence of a triable issue of fact (*see American Home Assurance Co. v Amerford International Corp.*, 200 AD2d 472, 606 NYS2d 229 [1st Dept 1994]).

First, a question of fact exists as to whether the safety guidelines, developed by CRSG in or about September 2007, remained in effect after it terminated its services for Reliance, and if so, whether those guidelines were adequate in establishing the required safety standards for rigging, installation, erection and operation of the tower crane. Although CRSG terminated its services on January 18, 2008, Caruso testified that the Safety Plan was created for the duration of the entire project, "until the superstructure [*i.e.*, the building] is completed," and it *was in effect* on March 15, 2008 (Caruso transcript, exhibit D, pp. 116 -118). Consequently, if it is determined that the Safety Plan was inadequate, and that such inadequacy was a proximate cause of plaintiffs' injuries, CRSG may be held liable for common law indemnification and/or contribution (*cf. Doherty v City of New York* (16 AD3d 124, 791 NYS2d 523 [1st Dept 2005] [affirming grant of summary judgment to a job site safety consultant, a third-party defendant therein, upon a finding that it did not direct, supervise or control plaintiff or his co-workers *and there was no evidence that it acted negligently or otherwise unreasonably as the site safety consultant*] [emphasis added]).

Notably, East 51st introduced evidence showing that the provisions of the Plan were inadequate to properly instruct the workers in the safe methods of rigging, installation, erection and operation of the crane, because the Plan did not include the guidelines of OSHA (Part 1926)[5] or the Building Code (Article 19),[6] as required by the contract (the proposal) between CRSG and Reliance. For example, Section 1926.251 of OSHA requires the inspection of the rigging equipment prior to each use. Thus, in light of the claim asserted by various parties that the slings used to "jump" the crane on the date of the accident were not properly inspected and eventually failed, leading to the crane collapse,[7] an issue of fact exists as to whether CRSG's failure to include said guidelines caused or contributed to the accident.

In addition, East 51st raised a material issue of fact as to whether CRSG properly advised of compliance with the OSHA and DOB requirements for inspection of slings and placement of the appropriate protective devices, and whether noncompliance with such recommendation, which apparently continued to the day of the accident, was discussed at a safety meeting on or before January 18, 2008, *i.e.*, the day of the crane's initial installation. Notably, Rapetti testified at his deposition that the fall protection netting was not installed on the day of the accident (exhibit 3).

Thus, issues of whether including the OSHA and Building Code safety guidelines in the Safety Plan and advising of the compliance with those guidelines, could have prevented the

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[5] Various sections of OSHA regulate rigging equipment for material handling (Section 1926.251); use and maintenance of safety belts and their minimum load capacity (Section 1926.104); safety nets (Section 1926.105); fall protection (Sections 1926.105 and 1926.760).

[6] Like OSHA, various sections of Article 19 of the Building Code govern the conduct of all construction operations with regard to the safety of the public and property.

[7] See DOB's "51st Street Crane Investigation Report," dated March 2009 (Exhibit 2 to opposition).

accident, cannot be resolved on this motion and should be left for the fact finder to decide.

In light of the above issues as to CRSG's negligence, CRSG's reliance on *Doherty v City of New York* (16 AD3d 124, *supra*) and *Buccini v 1568 Broadway Associates* (250 AD2d 466, 673 NYS2d 3 [1st Dept 1998]) is unavailing. Significantly, in those cases, the determination of absence of liability of the safety/construction managers was necessarily premised, *inter alia*, upon the absence of any evidence of negligence on their part. Unlike in those cases, here, there is evidence that CRSG may have been negligent in failing to provide adequate safety guidelines for the entire project, which remained in effect on the day of the accident.

Thus, in light of the factual issues as to whether any negligence on the part of CRSG, arising from the breach of its obligations under the proposal, may have contributed to the accident, thereby creating a common law duty of indemnification and/or contribution, summary judgment is denied.

The court considered the parties' remaining arguments and finds them unavailing.[8]

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendant/third-party defendant Construction Realty Safety Group LLC, pursuant to CPLR §3212, for summary judgment dismissing all claims, cross-claims and counterclaims against it, is granted solely to the extent that (1) all contractual indemnification claims asserted against Construction Realty Safety Group LLC are dismissed and (2) all contribution and contractual and common law indemnification claims by Reliance

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[8] The court notes that, whether CRSG's termination of its services was proper, is irrelevant for the determination of this motion, in view of the evidence that the Safety Plan may have remained in effect throughout the entire project, including the day of the accident.

Construction Ltd., a/k/a RCG Group Ltd. against Construction Realty Safety Group LLC are dismissed.

This constitutes the decision and order of the Court.

Dated: January 5, 2011

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD