

**Matter of 91st St. Crane Collapse Litig.**

2017 NY Slip Op 30787(U)

April 18, 2017

Supreme Court, New York County

Docket Number: 110069/08

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

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:

GUISEPPE CALABRO
Plaintiff(s),
- v -

INDEX NO. 110069/08
MOTION DATE 04-12-2016
MOTION SEQ. NO. 029
MOTION CAL. NO.

THE CITY OF NEW YORK, 1765 ASSOCIATES, LLC,
MATTORE GROUP CONSTRUCTION CO., LTD.,
DEMATTEIS CONSTRUCTION, LEON D. DEMATTEIS
CONSTRUCTION CORPORATION, and NEW YORK
CRANE & EQUIPMENT CORP.,
Defendant(s).

1765 FIRST ASSOCIATES, LLC, DEMATTEIS CONSTRUCTION
and LEON D. DEMATTEIS CONSTRUCTION CORPORATION,
Third-Party Plaintiff(s),
- v -

THIRD-PARTY INDEX NO. 590943/2008

SORBARA CONSTRUCTION CORP.,
Third-Party Defendant(s).

1765 FIRST ASSOCIATES, LLC, DEMATTEIS CONSTRUCTION
and LEON D. DEMATTEIS CONSTRUCTION CORPORATION,
Second Third-Party Plaintiff(s),
- v -

SECOND THIRD-PARTY INDEX NO. 590956/2008

HOWARD I. SHAPIRO & ASSOCIATES CONSULTING ENGINEERS,
P.C., NEW YORK RIGGING CORP., BRADY MARINE REPAIR CO.,
INC., BRANCH RADIOGRAPHIC LABS, INC., TESTWELL INC.,
CRANE INSPECTION SERVICES, LTD, and LUCIUS PITKIN, INC.,
Second Third-Party Defendant(s).

AND ALL OTHER RELATED THIRD-PARTY ACTIONS

The following papers, numbered 1 to 8 were read on this motion to compel discovery post-Note of Issue:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits cross motion
Replying Affidavits

Table with 2 columns: PAPERS NUMBERED, and rows for 1-4, 5-6, 7, 8-10, 11, 12-13.

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is Ordered that, the defendants DeMatteis Construction and Leon D. DeMatteis Construction Corporation's (hereinafter referred to collectively as "DeMatteis") motion to compel the plaintiff: (1) to respond to post-note of issue discovery demands for HIPPA and ARONS authorizations, and (2)

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

pursuant to CPLR §3119 and the Uniform Interstate Deposition Discovery Act permitting the defendants to conduct depositions of plaintiff's treating doctors and health care providers in Kentucky, Indiana and Illinois, is granted only as to the furnishing of authorizations. The remainder of the relief sought is denied. 1765 First Associates, LLC's (hereinafter referred to individually as "1765") cross-motion to compel plaintiff to: (1) respond to post-Note of Issue discovery demands for HIPAA compliant authorizations for medical records pertaining to treatment of a left arm fracture suffered prior to the incident that is the subject of this litigation, and (2) pursuant to CPLR §3119 and the Uniform Interstate Deposition Discovery Act permitting the defendants to conduct depositions of plaintiff's treating doctors and health care providers in Kentucky, Indiana and Illinois, is granted only as to the furnishing of authorizations. The remainder of the relief sought is denied.

This case relates to the collapse of a Kodiak Tower Crane (#84-052) (the "Crane") on May 30, 2008 at East 91st Street, New York County. 1765, as the developer of the property, entered into a construction management agreement with DeMatteis to perform work as construction manager. DeMatteis entered into a Trade Contract with Sorbara to serve as the concrete superstructure contractor. Sorbara rented the Kodiak Tower Crane from New York Crane and Equipment Corp., pursuant to a rental contract.

Guiseppe Calabro commenced this action for personal injuries sustained on May 30, 2008, when the Crane collapsed. On the date of the accident Mr. Calabro was a shop steward, and was employed by Sorbara. He alleges the performance of duties similar to a safety officer or safety supervisor. Plaintiff claims he tripped and fell over a tool lying on the floor while inside the shanty at the time the crane collapsed, causing him to smash into a wall and sustained severe injuries.

All actions related to the Crane collapse were joined for the supervision of discovery. The wrongful death actions were severed and tried from September of 2014 through August of 2015. Plaintiff's action was scheduled to be the next case tried. After the jury verdict in the wrongful death actions, on January 6, 2016, defendant New York Crane & Equipment Corp. (hereinafter referred to individually as "New York Crane") declared bankruptcy resulting in a stay of all related actions.

DeMatteis filed this motion under Motion Seq. 029 to compel the plaintiff: (1) to respond to post-note of issue discovery and inspection demands dated November 19, 2015 for HIPAA and ARONS authorizations, and (2) pursuant to CPLR §3119 and the Uniform Interstate Deposition Discovery Act permitting the defendants to conduct depositions of plaintiff's treating doctors and health care providers in Kentucky, Indiana and Illinois, to preserve their testimony for trial.

1765 cross-moved to compel plaintiff to: (1) respond to post-Note of Issue discovery and inspection demands, provide HIPAA compliant authorizations for medical records pertaining to treatment of a left arm fracture suffered prior to the incident that is the subject of this litigation, and (2) pursuant to CPLR §3119 and the Uniform Interstate Deposition Discovery Act permitting the defendants to conduct depositions of plaintiff's treating doctors and health care providers in Kentucky, Indiana and Illinois in order to preserve their testimony for trial.

This motion and cross-motion were pending in the Submissions Part, Room 130 at 60 Centre Street, New York, New York, when New York Crane declared bankruptcy. After submission on April 12, 2016 the motion and cross-motion were part of the stay in this action. On December 20, 2016, the Hon. Carla E. Craig, United States Bankruptcy Judge Eastern District of New York, signed a Stipulation and Order vacating the automatic stay for the limited purpose of taking certain physician depositions to preserve testimony and allow a determination on Motion Seq. 029 (NYSEF Docket # 1557).

**Motion Seq. 029 by DeMatteis seeks to compel plaintiff to respond to a demand for authorizations dated November 19, 2015 (Mot. Exh. D). DeMatteis argues that plaintiff has not provided all of the HIPPA authorizations sought pursuant to prior demands dated December 16, 2011 (Mot. Exh. H), or any ARONS authorizations at all, and there have been no updated medicals or treatment records since August of 2013. DeMatteis further argues that pursuant to CPLR §3119 and the Uniform Interstate Deposition and Discovery Act, the defendants have a right to depose plaintiff's treating doctors in Kentucky, Indiana and Illinois concerning a subsequent head injury plaintiff suffered in July of 2012, that resulted in hospitalization in Indiana and Illinois, and additional treatment provided in Kentucky. DeMatteis seeks depositions of the treating doctors due to contradictory testimony by plaintiff at his deposition, to address the issue of damages. DeMatteis wants to depose the treating doctors as fact witnesses arguing their testimony is material and necessary to establish plaintiff's non-compliance with physical therapy, abuse of pain medication, and non-compliance generally with doctors' orders for his treatment and care.**

**1765's cross-motion seeks essentially the same relief and incorporates the arguments raised by DeMatteis but adds that discovery is needed on a prior injury to plaintiff's left arm. 1765 argues the discovery is needed to eliminate any doubt that it was omitted from the injuries alleged to plaintiff's left shoulder in this action. 1765 refers to plaintiff's Bill of Particulars at paragraph 13, which refers to a shoulder injury and "surrounding muscles, tendons,...musculature and bone structure surrounding the areas of injury" as proof (DeMatteis Mot. Exh. A).**

**Sorbara submitted an affirmation in support of the relief sought by DeMatteis incorporating the arguments made in the motion papers.**

**Generally discovery is waived for failure to move to vacate the note of issue absent a showing of special circumstances or an adequate reason for the delay (Dominguez v. Manhattan and Bronx Surface Transit Operating Authority, 168 A.D. 2d 376, 562 N.Y.S. 2d 694 [1<sup>st</sup> Dept., 1990] and Seredo v. Sounds of Cuba, Inc., 95 A.D. 3d 651, 944 N.Y.S. 2d 538 [1<sup>st</sup> Dept. 2012]). Trial courts in their discretion may permit post-note of issue discovery, "so long as neither party will be prejudiced" (Cuprill v. Citywide Towing and Auto Repair Services, 2017 N.Y. Slip Op. 02729 [1<sup>st</sup> Dept., 2017]).**

**Plaintiff filed the Note of Issue on March 22, 2013 but the parties continued to exchange discovery and proceeded under the joinder with the other related actions. Plaintiff in opposition to the motion argues that authorizations responsive to DeMatteis' November 19, 2015 demand were served on March 4, 2016, and objected to depositions as delaying the start of trial.**

**DeMatteis' reply papers identified authorizations that were missing from plaintiff's March 4, 2016 response, specifically, Steven Touliopoulos, Coney Island Hospital, Christopher Fabian, M.D. , Daniel Kuhn, M.D., New York Spine Medicine, Rusk Institute of Rehabilitation Medicine, Donna Lagenbaum, M.D., Complete Medical Care Services of New York, P.C. and Dr. Martin. Plaintiff has not provided any Arons authorizations. Plaintiff's willingness to provide authorizations, and the parties proceeding to exchange discovery long after the note of issue was filed, demonstrates a lack of prejudice for the exchange of authorizations.**

**Plaintiff objected to the relief sought by 1765 for the injury to his left arm in 1995 because the same injury was not claimed in this action. Plaintiff in opposition to the cross-motion did not clarify or withdraw the claims of injury to "musculature and bone structure surrounding the areas of injury," which potentially incorporates the left arm. 1765 is entitled to authorizations for left arm injury that occurred in 1995.**

**Defendants have failed to show that plaintiff's out of state treating physician deposition testimony is warranted. Defendants have been in possession of medical**

records from out of state medical providers and the authorizations sought on this motion will obtain additional medical record. Defendants have not shown prejudice or the necessity of additional testimony by the doctors and medical providers on the issue of damages.

Accordingly, it is ORDERED that defendants, DeMatteis Construction and Leon D. DeMatteis Construction Corporation's motion to compel the plaintiff: (1) to respond to post-note of issue discovery and inspection demands dated November 19, 2015 for HIPPA and ARONS authorizations, and (2) pursuant to CPLR §3119 and the Uniform Interstate Deposition Discovery Act permitting the defendants to conduct depositions of plaintiff's treating doctors and health care providers in Kentucky, Indiana and Illinois, is granted only as to ordering plaintiff to provide the defendants with HIPPA and ARONS authorizations, and it is further,

ORDERED that within thirty days of service of a copy of this Order with Notice of Entry pursuant to e-filing protocol, plaintiff shall fully respond to DeMatteis Construction and Leon D. DeMatteis Construction Corporation's November 19, 2015 discovery and inspection demands by providing the HIPPA and ARONS compliant authorizations, and it is further,

ORDERED that the remainder of the relief sought in DeMatteis Construction and Leon D. DeMatteis Construction Corporation's motion pursuant to CPLR §3119 and the Uniform Interstate Deposition Discovery Act, to serve subpoenas and conduct depositions of plaintiff's treating doctors and health care providers in Kentucky, Indiana and Illinois, is denied, and it is further,


ORDERED that 1765 First Associates, LLC's cross-motion to compel plaintiff to: (1) respond to post-Note of Issue discovery demands for HIPAA compliant authorizations for medical records pertaining to treatment of a left arm fracture suffered prior to the incident that is the subject of this litigation, and (2) pursuant to CPLR §3119 and the Uniform Interstate Deposition Discovery Act permitting the defendants to conduct depositions of plaintiff's treating doctors and health care providers in Kentucky, Indiana and Illinois, is granted only as to ordering the plaintiff to provide the defendant with HIPPA and ARONS authorizations, and it is further,

ORDERED that within thirty days of service of a copy of this Order with Notice of Entry pursuant to e-filing protocol, plaintiff shall respond to 1765 First Associates, LLC's demands by providing the HIPPA compliant authorizations for medical records pertaining to treatment of a left arm fracture suffered prior to the incident that is the subject of this litigation, and it is further,

ORDERED that the remainder of the of the relief sought in 1765 First Associates, LLC's motion pursuant to CPLR §3119 and the Uniform Interstate Deposition Discovery Act, to serve subpoenas and conduct depositions of plaintiff's treating doctors and health care providers in Kentucky, Indiana and Illinois, is denied.

ENTER :

Dated: April 18, 2017

  
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MANUEL J. MENDEZ  
J.S.C. MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION X NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE