

Calabro v City of New York

2013 NY Slip Op 33778(U)

July 9, 2013

Supreme Court, New York County

Docket Number: 110069/08

Judge: Manuel J. Mendez

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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),

INDEX NO. 110069/08
MOTION DATE 7-1-2013
MOTION SEQ. NO. 012
MOTION CAL. NO. _____

- v -

THE CITY OF NEW YORK, 1765 ASSOCIATES, LLC,
MATTONI 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),

THIRD-PARTY INDEX NO. 590943/2008

- v -

SORBARA CONSTRUCTION CORP.,

Third-Party Defendant(s).

1765 FIRST ASSOCIATES, LLC, DEMATTEIS CONSTRUCTION
and LEON D. DEMATTEIS CONSTRUCTION CORPORATION,

SECOND THIRD-PARTY INDEX NO. 590956/2008

Second Third-Party Plaintiff(s),

- v -

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).

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

AND ALL RELATED ACTIONS

The following papers, numbered 1 to 9 were read on this motion and cross-motion to/ for Vacate the Note of Issue:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 5
Answering Affidavits — Exhibits _____ cross motion _____	6
Replying Affidavits _____	7 - 9

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant's, Leon D. DeMatteis Construction Corp. ("DeMatteis"), Motion to Renew DeMatteis' prior Motion to compel further discovery, to vacate the Note of Issue and Certificate of Readiness, to keep this case from the Trial Calendar, and to extend the time to file for summary judgment is granted in part and denied in part as detailed herein.

This case relates to the collapse of Kodiak Tower Crane (#84-052) (the "Crane") on May 30, 2008, at East 91st Street, New York County. All actions related to the Crane collapse have been joined for the supervision of discovery.

At the time of the Crane collapse, Plaintiff was an employee of Third-Party Defendant/Third Third-Party Plaintiff, Sorbara Construction Company ("Sorbara"). Sorbara was the company responsible for the operation of the Crane at the construction site where the Crane collapse occurred.

DeMatteis was the general contractor at the construction site where the Crane was operating at the time of the collapse.

Plaintiff claims to have been injured while fleeing the site after hearing the Crane collapse.

On or about March 22, 2013, Plaintiff filed a Note of Issue and Certificate of Readiness.

DeMatteis made the instant motion on or about April 9, 2013.

DeMatteis seeks leave pursuant to CPLR Section 2221(e) to renew DeMatteis's prior Motion to compel further discovery (Motion Sequence number 10) which was previously denied by the Court in a Decision and Order dated February 25, 2013.

CPLR Section 2221 (e)(1) requires motions to renew to be specifically

identified as such. DeMatteis has specifically identified this Motion as seeking leave to renew, making constant reference to this Motion to Renew throughout its papers.

In support of its Motion to Renew, DeMatteis argues that this Court misapprehended fact and law in deciding the previous Motion. While either of these might be a basis for a Motion to Reargue, neither is a valid basis for a Motion to Renew.

In the interest of addressing DeMatteis' legal arguments, it should also be noted that the misapprehension of fact DeMatteis argues about was caused by DeMatteis' statement in its papers on that prior Motion that, "[s]ubsequent to the service and filing of DeMatteis' motion to compel, [P]laintiff's counsel and [DeMatteis' counsel] have reached partial and tentative agreements regarding some, but not all issues raised by DeMatteis' discovery motion." After making this statement in its Reply Affirmation to the prior Motion, DeMatteis argued for only three items of discovery. The Court concluded from DeMatteis' statements that the only items of discovery outstanding were those that DeMatteis continued to argue for.

The misapprehension of law that DeMatteis argues about seems to be a result of DeMatteis misapprehending the ruling of the Court on the prior Motion. The Court found that "[t]he fact that Plaintiff is barred from future employment with LIUNA is material to the question of Plaintiff's claim of loss of future earnings. However, [DeMatteis has] not convinced this Court that the discovery sought by way of this Motion is material or necessary." The explanation of the distinction which followed this statement was apparently not understood by DeMatteis. The fact that Plaintiff was barred from future employment is material, but DeMatteis already had documentation establishing this fact. However, the Court denied the further discovery sought by DeMatteis because discovery aimed solely at divulging the possibly sordid circumstances leading to Plaintiff being barred from future employment was deemed prejudicial rather than probative by the Court.

DeMatteis' third argument in support of its Motion to Renew is the existence of evidence not available at the time of the prior Motion. On April 4, 2013, Plaintiff uploaded medical records related to injuries claimed in this case. DeMatteis seeks discovery related to those medical records and authorizations. This is a valid basis to renew DeMatteis' prior Motion for discovery. However, the Court is once again unsure of all discovery outstanding because DeMatteis does not provide a concise list in its papers. DeMatteis is entitled to the discovery it has notified the Court of, including proper authorizations executed by Plaintiff.

DeMatteis is entitled to properly executed authorizations for Plaintiff's medical records. DeMatteis notified Plaintiff of defects in previously provided authorizations by way of two separate letters, both dated April 4, 2013. One letter detailed twenty six defective authorizations, the other letter detailed five defective authorizations.

DeMatteis is also entitled to depose Plaintiff based on the recently provided medical discovery as well as the discovery that is produced by way of the above authorizations.

Finally, DeMatteis is entitled to IME's of Plaintiff. DeMatteis delayed conducting IME's because of all of the outstanding discovery. Once the above mentioned discovery is complete, DeMatteis can proceed with IME's of the Plaintiff.

DeMatteis' Motion also seeks to vacate the Plaintiff's Note of Issue and Certificate of Readiness, keep the case from the Trial Calendar, and extend the time to file motions for summary judgment.

22 NYCRR 202.21(e) provides that, "[w]ithin 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial."

This case is one of many cases stemming from the Crane collapse. Since being assigned all of the Crane collapse cases, this Court has endeavored to move the cases forward. To facilitate this, the Court has had to set strict discovery deadlines to get cases, that for whatever reason had languished, progressing again. For this reason, the Court is of the opinion that it is better to establish a firm schedule to accomplish the discovery outstanding rather than vacate the Note of Issue and allow this case to fall behind the other Crane collapse cases to which it is supposed to be bound.

DeMatteis also seeks to extend the time for dispositive motions. However, the Court already extended the time for such motions for all Crane collapse cases by way of Case Management Order Number 26, dated May 22, 2013. Based on the discovery schedule set herein, the Court is of the opinion that the deadlines set for all Crane collapse cases are still appropriate for this case. Therefore, the Court will not extend the time for dispositive motions in this case any further.

Accordingly, it is the decision and order of this Court that the portion of DeMatteis' Motion seeking to vacate the Note of Issue and the Certificate of Readiness, to keep this matter from the Trial Calendar, and to extend the time for dispositive motions is denied. The portion of DeMatteis' Motion seeking to Renew DeMatteis' previous Motion to compel outstanding discovery is granted as detailed herein.

Accordingly, it is ORDERED that DeMatteis' Motion seeking to vacate the Note of Issue and the Certificate of Readiness and to keep this matter from the Trial Calendar is denied, and it is further


ORDERED that on or before July 19, 2013, Plaintiff shall provide DeMatteis with properly executed authorizations as requested in DeMatteis' two deficiency letters both dated April 4, 2013, and it is further

ORDERED that on or before September 9, 2013, Plaintiff shall appear for further depositions, which shall continue from day to day until completed, and it is further

ORDERED that on or before October 9, 2013, Plaintiff shall appear for IME's. Such IME's shall be noticed on or before September 13, 2013.

ENTER :

Dated: July 9, 2013



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