

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

2013 NY Slip Op 32271(U)

September 23, 2013

Sup Ct, NY County

Docket Number: 117294/08

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:

MARIA LEO, ADMINISTRATIX OF THE ESTATE OF HER SON, DONALD CHRISTOPHER LEO, deceased May 30, 2008,

INDEX NO. 117294/08
MOTION DATE 9-19-2013
MOTION SEQ. NO. 073
MOTION CAL. NO.

Plaintiff(s)

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF BUILDINGS, MICHAEL CARBONE, PATRICIA J. LANCASTER, ROBERT LIMANDRI, NEW YORK CRANE & EQUIPMENT CORP., JAMES F. LOMMA, LOMMA TRUCKING & RIGGING, JF LOMMA RIGGING AND SPECIALIZED SERVICES, BRADY MARINE REPAIR CO., TESTWELL, INC., BRANCH RADIOGRAPHIC LABORATORIES INC., CRANE INSPECTION SERVICES, LTD., SORBARA CONSTRUCTION CORP., 1765 FIRST ASSOCIATES, LLC, LEON D. DEMATTEIS CONSTRUCTION, MATTONE GROUP CONSTRUCTION CO., LTD., MATTONE GROUP LTD., MATTONE GROUP LLC, CITY OF NEW YORK SCHOOL CONSTRUCTION AUTHORITY, CITY OF NEW YORK SCHOOL CONSTRUCTION FUND, HOWARD I. SHAPIRO & ASSOCIATES CONSULTING ENGINEERS, P.C., NEW YORK RIGGING CORP., TOWER RIGGING CONSULTANTS, INC., TOWER RIGGING, INC., UNIQUE RIGGING CORP., LUCIUS PITKIN, INC., MCLAREN ENGINEERING GROUP, M.G. MCLAREN, P.C. and JOHN/JANE DOES 1 THROUGH 10,

Defendant(s)

AND ALL RELATED ACTIONS

The following papers, numbered 1 to 6 were read on this motion and cross-motion to/ for Dismiss:

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

Table with 2 columns: PAPERS NUMBERED, and values 1-3, 4-6

Cross-Motion: X Yes No

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

Upon a reading of the foregoing cited papers, it is Ordered that Defendant's,

**New York City Educational Construction Fund (“NYCECF”), Motion is granted. Plaintiff’s Cross-Motion 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 (the “Premises”). All actions related to the Crane collapse have been joined for the supervision of discovery.**

**Plaintiff, Maria Leo, Administratrix of the Estate of her son, Donald Christopher Leo (“Leo”) commenced this action to recover damages as a result of personal injuries suffered by and death of Donald Christopher Leo on May 30, 2008, when the Crane collapsed.**

**NYCECF seeks to dismiss Leo’s punitive damages claims as well as to dismiss Leo’s Complaint altogether.**

**NYCECF seeks to dismiss Leo’s punitive damages claim based on caselaw which establishes that punitive damages cannot be assessed against a government entity. “Damages awarded for punitive purposes are not sensibly assessed against the governmental entity itself.” *Sharapata v. Town of Islip*, 56 N.Y.2d 332, 437 N.E.2d 1104 (1982).**

**NYCECF identifies itself as a public benefit corporation created by the New York State Legislature in 1966, pursuant to Education Law Article 10, Section 450. NYCECF functions as a financing and development vehicle of the New York City Department of Education. NYCECF sponsored projects build combined occupancy structures on New York City-owned land conveyed to NYCECF by the City of New York. The projects use monies generated by the residential and commercial portions of the project(s) to pay for the construction of New York City public school facilities on the other portion of the project(s).**

**Leo does not dispute the assertion that NYCECF is a government entity, nor does Leo challenge the argument that punitive damages cannot be assessed against government entities.**

**More broadly, NYCECF’s present Motion seeks to dismiss Leo’s Complaint in its entirety for Leo’s failure to properly and timely serve a Notice of Claim on NYCECF as required by the New York State Legislature in the applicable provisions of the Education Law and other statutes.**

**N.Y. Education Law Section 467 states that, “[a]n action against [NYCECF] for wrongful death shall be commenced in accordance with the notice of claim and**

time limitation provisions of title eleven of article nine of the public authorities law.”

Title Eleven of Article Nine of the Public Authorities Law states that, “[n]o wrongful death action against a public authority or public benefit corporation shall be commenced unless a notice of claim has been served on the authority or corporation in accordance with the provisions of section fifty-e of the general municipal law.”

Section Fifty-e of the General Municipal Law states that, “[t]he notice shall be served on the public corporation against which the claim is made by delivering a copy thereof personally, or by registered or certified mail, to the person designated by law as one to whom a summons in an action in the supreme court issued against such corporation may be delivered, or to an attorney regularly engaged in representing such public corporation.”

NYCECF asserts that Leo did not properly serve it with a Notice of Claim and therefore Leo has failed to meet a condition precedent to commencing an action against NYCECF. Therefore, argues NYCECF, Leo’s Complaint must be dismissed as against NYCECF.

Leo opposes NYCECF’s Motion arguing that it did serve a Notice of Claim in these proceedings sufficient to give NYCECF notice. Alternatively, Leo Cross-Moves seeking leave to correct/supplement/amend the Notice of Claim served.

Leo’s Cross-Motion seeks leave to correct/supplement/amend the Notice of Claim served pursuant to the General Municipal Law. General Municipal Law Section Fifty-e (6) states that, “[a]t any time after the service of a notice of claim and at any stage of an action or special proceeding to which the provisions of this section are applicable, a mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section, not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby.”

Unfortunately, as the below analysis of the Motion will elicit, this remedy is not available to Leo as it is the manner of service of the Notice of Claim that Leo would have to cure, which is specifically excepted above.

Leo’s opposition to NYCECF’s Motion asserts that Leo did serve a Notice of Claim.

As with all other NYCECF projects, the construction project at the Premises consisted of a combined occupancy structure on New York City-owned land conveyed to NYCECF by the City of New York.

On or about August 19, 2008, Leo served a Notice of Claim upon the New

York City Law Department, Corporation Counsel.

In its May 14, 2009 Verified Answer, NYCECF asserted many affirmative defenses to Leo's Complaint.

Affirmative Defense # 14 stated, "[t]hat [Leo] failed to serve/file a legally sufficient Notice of Claim as a condition precedent to the commencement of this action as against NYCECF."

Affirmative Defense # 16 stated "[t]hat the Complaint fails to set forth that [Leo] met a condition precedent to the commencement of this action as against NYCECF and is therefore defective."

N.Y. Education Law Section 467 states that "[i]n every action against [NYCECF] for damages, for injuries to real or personal property, or for the destruction thereof, or for personal injuries or death, the complaint shall contain an allegation that at least thirty days have elapsed since the demand, claim or claims upon which such action is founded were presented to a trustee or officer of [NYCECF] and that [NYCECF] has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment."

Leo's Complaint contains assertions similar to the above, but those assertions reference only the City of New York, not NYCECF.

Following up on NYCECF's Affirmative Defenses, Leo's May 18, 2010 Demand for a Bill of Particulars asked NYCECF to "[s]tate specifically whether or not the NYCECF is an agency of the City of New York; state specifically the deficiencies, if any, of Plaintiff's Notice of Claim."

Leo alleges that NYCECF never "particularized the alleged deficiencies, if any, in [Leo's] Notice of Claim, and also failed to answer whether or not it was an agency/agent of the City."

Leo argues that NYCECF should be collaterally estopped from raising a notice of claim defense under a theory that either NYCECF's boilerplate denials were insufficient to alert Leo as to the deficiency of the Notice of Claim served, and/or that the Notice of Claim served upon the City of New York should be deemed sufficient as to NYCECF because of the interconnected nature of NYCECF and the other New York City Defendants.

The Court is not convinced by either of Leo's arguments.

Leo's argument relies upon caselaw established in *Padilla v. Dep't of Educ. of City of New York*, 90 A.D.3d 458, 934 N.Y.S.2d 139 (N.Y.A.D. 1<sup>st</sup> Dept. 2011). However, *Padilla* can be distinguished from the instant case by significant factual differences. *Padilla* addressed the confusion that resulted during the transition in the City of New York from the old Board of Education to the current

Department of Education. The Court in *Padilla* specifically relied upon the fact that at that time, Corporation Counsel posted notice in the *New York Law Journal* indicating it was the proper entity for service of both NYC educational entities.

There has not been any change in agency designation or authority during the present proceedings, and as indicated below, Leo was clearly on notice that Corporation Counsel was not the proper entity for service against NYCECF.

Although by no means persuasive on its own, this Court first notes that in Leo's Second Amended Summons With Notice, dated March 11, 2009, Leo aggregate claims against groups of related Defendants. Leo does not group NYCECF with "The City Defendants", but instead with the "Sponsor, Developer, Project Manager & General Contractor Defendants."

NYCECF's response to that Summons is persuasive on the merits of the instant Motion. In its May 14, 2009 Verified Answer, NYCECF challenged deficiencies in Leo's Notice of Claim by asserting the aforementioned Affirmative Defenses.

That the Affirmative Defenses put Leo on notice is confirmed by the fact that in response to NYCECF's Affirmative Defenses, Leo sent out the previously mentioned May 18, 2010 Demand for a Bill of Particulars wherein Leo specifically asked whether NYCECF was a New York City Agency.

As to Leo's assertion that NYCECF failed to particularize the deficiency in response to that Demand, Leo neglects to mention that all of the Defendants upon which the Demand(s) was served refused, rather than failed, to respond. This is because the Demand(s) sent by Leo violated Case Management Order Number 1, dated April 5, 2010, and was disregarded by all parties.

Leo's follow-up to the disregarded Demand to NYCECF is significant for two reasons.

First, following the requirement of Case Management Order 1, First Notice(s) for Discovery and Inspection was served on several Defendants by Wrongful Death Plaintiff as a group. Again NYCECF was not included within the designation of the City of New York Defendants. On May 18, 2010 a Notice was served on the "City of New York Defendants", while on May 21, 2010, a separate Notice was served on NYCECF.

Second, Wrongful Death Plaintiffs served an identical Notice to Admit on all Defendants on May 24, 2010. Paragraphs 21 through 24 of the Notice to Admit pertained to NYCECF. However, the Notice to Admit questioned NYCECF's role in the construction project, but failed to seek any clarification as to NYCECF's Affirmative Defenses.

If the issue of the Notice of Claim were to end there, the Court might be more receptive to Leo's arguments. Unfortunately for Leo, the issue did not end there.

On February 16, 2011, Jamie Alexander Smarr ("Smarr") appeared to be deposed in these proceedings as a representative of NYCECF.

During Smarr's deposition, Counsel for Leo questioned Smarr about the contracts executed pursuant to the various projects that NYCECF was involved in, which resulted in the following exchange:

Smarr: No. The only, sort of, addition I would add to that is that if there is an issue pertaining to the Ground Lease, I could refer it to Counsel, who can then advise me.

Leo: And that would be Corporation Counsel for the City of New York?

Smarr: No, [NYCECF]...

[Objections made by Attorneys]

Leo: Who is the attorney?

Smarr: Corporation Counsel for the City of New York is not [NYCECF's] Counsel.

Leo: Who is...

Smarr: [NYCECF] is not an agency of the City of New York. It is a State agency, and we have our own outside counsel...

*Smarr Deposition, Page 53, Lines 5-25.*

If Leo had served a Notice of Claim on NYCECF following Smarr's deposition, the Court might have been receptive to an argument to extend the time to file a Notice of Claim against NYCECF. However, the Court was not made aware of any Notice of Claim served by Leo on NYCECF, even now, more than two years after that deposition.

In light of the specific statutory requirements regarding Notice of Claim being served on NYCECF and the circumstances detailed above, there is no basis to estop NYCECF from asserting a Notice of Claim defense or deeming Leo's Notice of Claim, served on the City of New York, as sufficient as to NYCECF.

Accordingly, it is the decision and order of this Court that NYCECF's Motion seeking to dismiss Leo's punitive damages claims against NYCECF is granted. More broadly, NYCECF's Motion seeking to dismiss Leo's Complaint as against

NYCECF is granted. Consequently, Leo's Cross-Motion seeking leave to amend is denied.

Accordingly, it is ORDERED that NYCECF's Motion seeking to dismiss Leo's punitive damages claims against NYCECF is granted, and it is further,

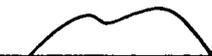
ORDERED that NYCECF's Motion seeking to dismiss Leo's Complaint as against NYCECF is granted, and it is further,

ORDERED that Leo's claims against NYCECF are severed and dismissed, and it is further,

ORDERED that Leo's Cross-motion seeking leave to amend is denied.

ENTER :

Dated: September 23, 2013

  
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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