Matter of 91st St. Crane Collapse Litig. v City of New York
2014 NY Slip Op 30605(U)
March 7, 2014
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 PART 13
Justice

IN RE 91ST STREET CRANE COLLAPSE LITIGATION:

GUISEPPE CALABRO

INDEX NO. 110069/08
MOTION DATE 2-14-2013
MOTION SEQ. NO. 017
MOTION CAL. NO.

Plaintiff(s),

- v -

THE CITY OF NEW YORK, 1765 ASSOCIATES, LLC, MATTONE 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 INDEX NO. 590943/2008

Third-Party Plaintiff(s),

- 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).

AND ALL RELATED ACTIONS

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

The following papers, numbered 1 to 15 were read on this motion to/ for Summary Judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-4
Answering Affidavits — Exhibits ______cross motion	5-9, 10-12
Replying Affidavits	13 -15

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that 1765 First Associates, LLC's ("1765") Motion for Summary Judgment dismissing the plaintiff's Labor Law §200, §240(1), §241(6) and common law causes of action asserted against 1765 First Associates, LLC and for Summary Judgment on 1765 First Associates, LLC's claim for contractual indemnification against Sorbara Construction Corp. ("Sorbara"), 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. All actions related to the Crane collapse have been joined for the supervision of discovery.

A Development Agreement and ground lease were entered into beween NYCEF and 1765, as the developer of the property. 1765 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, with duties similar to a safety officer or safety supervisor. Plaintiff claims he tripped and fell over a tool lying on the floor while running from a shanty, at the time the crane collapsed, causing him to smash into a wall which resulted in severe injuries.

1765 seeks Summary Judgment dismissing the plaintiff's Labor Law §200, §240(1), §241(6) and common law negligence causes of action asserted against 1765 and granting 1765's cross-claims for contractual indemnification against Sorbara.

1765 seeks Summary Judgment contending that Labor Law §200 does not apply to it because it did not control or supervise any of the work performed at the job site. 1765 argues that Labor Law §240(1), does not apply to the facts of this action because plaintiff was not struck by a falling object or caused to fall from a height. 1765 contends that plaintiff's ground level trip and fall involving the tool lying on the ground is not the type of hazard contemplated by the statute. 1765 also argues Labor Law §240(1) does not apply because the plaintiff was not performing construction activities or work that was necessary and incidental to the project.

1765 contends that plaintiff's cause of action under Labor Law §241(6) must be dismissed because the industrial code sections cited by plaintiff as a basis for that cause of action are either too general to be enforced, or not applicable to the facts of this case.

1765 also seeks Summary Judgment on its claim for contractual indemnification against Sorbara. 1765 argues that Sorbara cannot establish its lack of negligence and that the indemnification clause of the contract between DeMatteis and Sorbara does not violate GOL §5-322.1. 1765 also argues that Sobara is liable to both The City of New York and 1765 for contractual indemnification pursuant to Article 17 of the of the contract between DeMatteis and Sorbara. 1765 asserts that in the preamble of the contract between DeMatteis and Sorbara, 1765 is identified as the "Owner." 1765 asserts that "Exhibit H" of the contract between DeMatteis and Sorbara , titled "Insurance Requirements" requires that Sorbara "hold harmless" and name it and the City of New York as an additional insured on its insurance policies.

Plaintiff, Guiseppe Calabro, opposes 1765's motion on the Labor Law §200, §240(1), §241(6) and common law negligence causes of action and argues that he was employed by Sorbara as a laborer/shop steward with duties analogous to a safety supervisor/safety officer. While working in this capacity as a laborer shop/steward, his responsibilities included being present at work sites (specially for safety reasons) addressing guidelines with the workers, safety meetings with the foremen and general contractors, and ensuring that the workers were wearing their safety equipment. The shanty was used by carpenters, steel laborers and latherers for tools and machinery, and was used by plaintiff to complete paperwork ancillary to his position. Half of the shanty was for plaintiff and the foreman, and the other half was for tools where the laborers would drop their tools onto the floor.

Plaintiff further argues that the accident arose as a result of the crane collapse. He states that he was injured as he ran from the shanty which was stationed beneath the crane, as the crane collapsed. Plaintiff contends that 1765 as the tenant of the property is liable for the work performed by the contractors. Plaintiff also argues that 1765 is liable based on its failure to make inquiries or inspect the crane to determine its condition.

New York Crane and Equipment Corp., James F. Loma, J.F. Loma, Inc. and T.E.S., Inc. (hereinafter collectively referred to as the "NY Crane Defendants") partially oppose 1765's cross-motion for summary judgment contending that there remain issues of fact as to 1765's liability pursuant to Labor Law §241(6). The NY Crane Defendants do not oppose the remainder of the relief sought in 1765's cross-motion. The New York Crane Defendants argue that Labor Law §241(6) liability may apply to 1765 based on Industrial Code sections 12 N.Y.C.R.R. §23-8.1 and 12 N.Y.C.R.R. §23-8.3 concerning maintenance, inspection and operation of the crane.

Sorbara opposes 1765's motion arguing that the indemnification provision relied upon by 1765 is void and unenforceable pursuant to GOL §5-322.1. Sorbara asserts that pursuant to the provisions of its contract with DeMatteis, Sorbara or

one of its employees, "by reason of acts or omissions...," would have to be liable for damages, for 1765 to obtain contractual indemnification. Sorbara argues that neither Sorbara or its employees were negligent or the cause of any damages and there is no basis for 1765 to obtain summary judgment.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact. *See Klein v. City of New York*, 89 N.Y.2d 883, 652 N.Y.S.2d 723 (1996); *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form sufficient to require a trial of material factual issues. *Amatulli v. Delhi Constr. Corp.*, 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 (1999).

A party seeking common law indemnification cannot recover if it is negligent beyond strict statutory liability. *Gulotta v. Bechtel Corporation*, 245 A.D. 2d 75, 664 N.Y.S. 2d 801 (N.Y.A.D. 1st Dept.,1997) and *Walker v. Trustees of the University of Pennsylvania*, 275 A.D. 2d 266, 712 N.Y.S. 2d 117 (N.Y.A.D. 1st Dept., 2000). A party seeking common law indemnification is required to prove that it is not liable for negligence other than statutorily and that the proposed indemnitor contributed to the cause of the accident. *McCarthy v. Turner Construction, Inc.*, 17 N.Y. 3d 369, 953 N.E. 2d 794, 929 N.Y.S. 2d 556 (2011).

Contractual indemnification involves the parties agreeing to shift liability from the owner or contractor to the subcontractor that proximately caused plaintiff's injuries through its negligence. It is premature to conditionally grant summary judgment on a contractual indemnification claim where there is a possible finding that the plaintiff's injuries can be attributed to the party seeking indemnification. *Picaso v. 345 East 73 Owners Corp.*, 101 A.D. 3d 511, 956 N.Y.S. 2d 27 (N.Y.A.D. 1st Dept., 2012). Conditional summary judgment is granted on a claim of contractual indemnification when the extent of each potentially liable party's negligence has yet to be determined. *Hughey v. RHM-88, LLC*, 77 A.D. 3d 520, 912 N.Y.S. 2d 175 (N.Y.A.D. 1st Dept., 2010) and *Hernandez v. Argo Corp.*, 95 A.D. 3d 782, 945 N.Y.S. 2d 662 (N.Y.A.D. 1st Dept., 2012).

An indemnification agreement is void as against public policy pursuant to GOL §5-322.1, if it contains language that indemnifies an owner or general contractor for harm caused for their own negligence. The purpose of GOL §5-322.1 is to prevent subcontractors from assuming liability for the negligence of the owner or contractor pursuant to the contract, *Brown v. Two Exch. Plaza Partners*, 76 N.Y. 2d 172, 556 N.E. 2d 430, 556 N.Y.S. 2d 991 (1990). An indemnification agreement that modifies the liability for negligence and contains language that limits indemnification to subcontractor liability for its own negligence has been found not to violate GOL §5-322.1 If it is found that plaintiff's injuries are based on the negligence of the defendant with a void indemnification provision, enforcement of the provision is

barred. *Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co.*, 89 N.Y. 2d 786, 680 N.E. 2d 1200, 658 N.Y.S. 2d 903 (1997).

Labor Law § 200 imposes a common law duty on the owner of the property or contractor to maintain a safe construction site. A precondition to a Labor Law § 200 claim is that the party charged must have authority or exercise direct supervisory control over the activity that resulted in the injury. *Esposito v. New York City Industrial Development Agency*, 305 A.D. 2d 108, 760 N.Y.S. 18 (N.Y.A.D. 1st Dept., 2003) aff'd, 1 N.Y. 3d 526, 802 N.E. 2d 1080, 770 N.Y.S. 2d 682 (2003).

The purpose of Labor Law §240[1], also known as the "scaffold law" is to protect construction workers by imposing strict liability on "owners, contractors and their agents," for violations which proximately cause injuries. Labor Law §240[1] is a strict and absolute liability statute, the comparative negligence of the worker is not a defense. *Cahill v. Triborough Bridge and Tunnel Authority*, 4 N.Y. 3d 35, 823 N.E. 2d 439, 790 N.Y.S. 2d 74 (2004). Labor Law §240[1], is to be construed liberally to accomplish its purpose, however, it is limited to "special hazards" involving elevation differentials. *Ross v. Curtis-Palmer Hydro Electric Company*, 81 N.Y. 2d 494, 618 N.E. 2d 82, 601 N.Y.S. 2d 49 (1993).

For purposes of Labor Law §240(1), a plaintiff's employment at a job site does not require the use of tools, rather the relevant inquiry is whether he took any part in the work being performed or was affiliated with the construction project. *Campisi v. Epos Construction Corp.*, 299 A.D.2d 4, 747 N.Y.S.2d 218 (N.Y.A.D. 1st Dept., 2002) and *Blandon v. Advance Construction Co.*, 264 A.D.2d 550, 659 N.Y.S.2d 36 (N.Y.A.D. 1st. Dept., 1999). There is no need to establish the plaintiff was actually struck with an item falling from an elevated height to allow recovery under the labor law. It is not unforeseeable that worker might be injured as a consequence of the falling object. *Van Eken v. Consolidated Edison Co., of N.Y.*, 294 A.D. 2d 352, 742 N.Y.S.2d 94 (N.Y.A.D. 3rd. Dept., 2002).

Labor Law §241(6), requires that the plaintiff establish a nondelegable duty of the owner and contractors to provide "reasonable and adequate protection and safety" for construction workers. *Padilla v. Frances Schervier Housing Development Fund Corp.*, 303 A.D. 2d 194, 758 N.Y.S. 2d 3 (N.Y.A.D. 1st Dept., 2003). The plaintiff is required to specifically plead and prove violations of the Industrial Code regulations, as the proximate cause of the injuries. *Ross v. Curtis-Palmer Hydro Electric Company*, 81 N.Y. 2d 494, 618 N.E. 2d 82, 601 N.Y.S. 2d 49 (1993).

1765 has failed to establish a basis to obtain summary judgment on its claims pursuant to Labor Law §240(1), there remain issues of fact as to whether plaintiff is affiliated with the construction project and should be afforded the protections of the labor law. Furthermore, there is no need that plaintiff be struck with a piece of the crane to allow him to recover under the labor law . There remain issues of fact concerning 1765's Labor Law §200 and common law negligence claims, and the extent of its knowledge and notice of the dangerous condition. 1765 has failed to meet its burden of proof to obtain summary judgment on plaintiff's Labor Law

§241(6) cause of action. The NY Crane Defendants have raised an issue of fact concerning the applicability of Industrial Code sections 12 N.Y.C.R.R. §23-8.1 and 12 N.Y.C.R.R. §23-8.3 and 1765's liability.

This Court recognizes that there is more than one theory as to what caused the Crane collapse. The theory posited by Sorbara is a failed weld caused the collapse while the alternate theory is that Crane operator error and/or a lack of proper Crane maintenance caused the collapse. There remain issues of fact regarding the proximate cause of the accident, no matter which theory is given every favorable inference.

1765 has not established its lack of negligence in this action, therefore summary judgment on its cross-claim for contractual indemnification against Sorbara in this action is denied as premature.

Accordingly, it is ORDERED that 1765 First Associates LLC's Motion for Summary Judgment on the plaintiff's Labor Law §200, §240(1), §241(6) and common law causes of action asserted against 1765, and for summary judgment on 1765 First Associates LLC's claims for contractual indemnification against Sorbora Construction Corp., is denied.

ENTER : MANUEL J. MENDEZ
J.S.C.

Dated: March 7, 2014

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE