

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

BRE PROPERTIES, INC., LEASE)	
CRUTCHER LEWIS, LLC,)	No. 64199-9-I
)	(consolidated with
Appellants/)	No. 64609-5-I and No. 64351-7-I
Cross-Respondent)	
v.)	
)	
NORTHWEST TOWER CRANE)	
SERVICE, INC., a Washington)	DIVISION ONE
Corporation,)	
)	
Respondent)	
Cross-Appellant.)	
<hr/>		
IN RE: TOWER CRANE COLLAPSE,)	
LEASE CRUTCHER LEWIS, LLC,)	
)	UNPUBLISHED OPINION
Appellant)	
v.)	
)	
NORTHWEST TOWER CRANE)	
SERVICE, INC., a Washington)	
Corporation,)	
)	
<u>Respondent.</u>)	FILED: <u>February 22, 2011</u>

spearman, j. — A tower crane used in the construction of a commercial complex collapsed, causing the death of one individual and extensive property damage. In this consolidated appeal of orders dismissing claims against Northwest Tower Crane Service, Inc. in two separate lawsuits stemming from that collapse, we affirm the trial courts' orders of dismissal.

FACTS

On November 16, 2006, a tower crane used in the construction of the Tower 333 Project, a commercial complex in Bellevue, Washington, collapsed causing the death of a resident of an adjacent apartment complex and extensive property damage. This is a consolidated appeal of orders dismissing claims in two lawsuits arising from that collapse.

A. Lawsuits.

In Re Tower Crane Collapse: In April and May of 2007, four lawsuits were filed relating to the crane collapse on the Tower 333 Project: one by the estate of the person killed (Estate of Ammons); two by owners of property damaged by the collapsing crane (Brickman Civica and Plaza 305); and one by a tenant in one of the damaged buildings (Intelligent Results). These four plaintiffs sued the general contractor, Lease Crutcher Lewis (hereinafter LCL) and the structural engineer on the project, Magnusson Klemencic Associates (hereinafter MKA).

LCL filed a third-party complaint against five subcontractors: Bureau Veritas, Caliper Inspections, Leibherr, S&S Welding, Inc., and Northwest Tower Crane (hereinafter NWTC). NWTC was a construction subcontractor hired by LCL to provide labor necessary to assemble and disassemble the tower crane. MKA named these five subcontractors, plus two others, as potential non-parties at fault. As a result, the four plaintiffs amended their complaints, sued the seven subcontractors directly, and moved to consolidate the four actions. The cases were consolidated in King County Superior

Court under cause number 07-2-33136-1 SEA, In re: Tower Crane Collapse

BRE Properties v. Northwest Tower Crane. In April of 2008, BRE Properties, Inc. (hereinafter “BRE”), an apartment building owner that suffered property damage from the collapse, filed another action, directly suing LCL, MKA, and NWTC. LCL again brought third-party claims against NWTC. BRE eventually settled with LCL and, as part of the settlement agreement, assigned the rights to its claim against NWTC to LCL.

B. Construction of the Tower Crane.

Tower cranes are traditionally erected upon concrete bases. The location of the crane for the Tower 333 project, however, was on the top of floors of an underground garage which were too weak to support the weight of a traditional concrete base and tower crane. After consulting with MKA, LCL decided to use a lighter, atypical, H-shaped, steel crane base. The lighter base, as designed by MKA, was sufficient to support a tower crane so long as the tower was braced with three “tie-ins” to an adjacent structure. According to MKA’s design, the first, or initial, tie-in was to connect the base tower to the new building’s concrete elevator core with two additional tie-ins on upper elevations as the building progressed.

LCL claimed that the idea of an initial tie-in was rejected because the building core was not high enough to provide a tie-in position for the crane’s base tower. MKA, however, claimed it believed the building core would be built up by LCL and the initial tie-in would be implemented. Accordingly, MKA designed a crane base that required

the installation of an initial tie-in to the base tower to safely support the tower crane.

LCL contracted with NWTC to erect and dismantle the tower crane on the Tower 333 Project according to plans provided by LCL and the crane owner, Morrow. It is undisputed that the contract did not require NWTC to assist in designing or manufacturing the steel crane base and it did not do so. Rather, NWTC was responsible for assembling the crane on the already manufactured base, which was provided by LCL. According to Grant Willman, the LCL supervisor who worked with MKA in deciding on the type of crane to be used, NWTC had nothing to do with building the crane base. Instead, LCL was responsible for providing NWTC with the crane base on which the tower crane was to be assembled.

Willman also testified that according to the plans provided to NWTC, and incorporated into NWTC's bid, the configuration of the crane would be "freestanding on foot anchor," meaning that it called for no initial tie-in to the base tower. It is undisputed that NWTC erected the crane according to these plans, which were provided by LCL and Morrow.

As part of the crane assembly, it needed to be rotated 180 degrees. While the crane was rotating, it made a loud "popping" sound at the base. LCL's assistant site superintendent No.2, Kyle Kragseth, ordered NWTC employees to come down from the crane and halt the assembly. LCL's assistant site superintendent No. 1, Craig Harr, inspected the steel crane base and could see no problems. According to NWTC employee Buford Phillips, Harr told him "nothing was found to be wrong" with the crane

base, so they went back to work. An LCL supervisor called to have an MKA structural engineer inspect the crane base the following week. According to Craig Harr, site superintendent, Jon Hagwood decided to continue assembly of the crane that day.

Two days later, crane owner Morrow conducted a "load test" on the crane. According to LCL's Craig Harr, a Morrow technician performed and certified the test. The certification does not note any problems with the crane, and indicates that LCL confirmed the crane was adequately installed on the base. Doug Loesch from MKA inspected the base the following week. According to Kragseth, MKA did not call for further tests on the base, and recommended only that broken grout around the crane base be repaired. Additionally, Loesch failed to notice that the base tower had no tie-in to the building.

After assembly, NWTC left the site and had no further involvement. The crane was used for nine weeks, after which it collapsed.

C. Procedural History.

In February 2009, NWTC moved for summary judgment dismissal of all claims, arguing there was no evidence NWTC breached any standard of care or contractual duties. LCL was the only party that opposed the motion. At the March 25, 2009 hearing, the trial court denied the motion on only one ground: the declaration of MKA's expert metallurgist John Barson, which stated Barson believed a five-inch crack existed in the crane base the day it was erected by NWTC. The court concluded if the jury believed that crack existed on the day the crane was erected, they could believe

NWTC should have noticed the crack:

So I think that there is a material question of fact under the contract whether or not there is sufficient inspection going on, as the crane was erected to see this five-inch crack. I think that LCL can rely on the MKA expert.

I think that resolv[ing] all inferences in the favor of non-moving party that is enough to defeat the summary judgment, barely.

After this hearing, one of the other subcontractors conducted additional metallurgical testing on the crane base, and the testing showed there was no crack in the base on the day the crane was erected. As a result, LCL's expert John Barson withdrew his opinion, and LCL withdrew him as a testifying witness. NWTC filed a motion asking the court to reconsider its ruling on the summary judgment motion. The court granted the motion and dismissed all claims against NWTC. LCL appeals.

In June 2009, NWTC moved for summary judgment dismissal of all claims, making the same arguments made in the Tower Crane Collapse case, but also arguing that BRE's and LCL's suits were barred by claim preclusion and that LCL and MKA's failure to provide a tie-in was a superseding cause of the collapse. On August 25, 2009, the trial court granted the motion. LCL and BRE have appealed that order. Additionally, NWTC filed its own appeal of various trial court orders relating to motions to strike expert testimony.

DISCUSSION

Standard of Review

Summary judgment is appropriate when the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that even when viewed in the light most favorable to the nonmoving party, the facts establish that the moving party is entitled to judgment as a matter of law. CR 56; Marks v. Washington Ins. Guar. Ass'n, 123 Wn. App. 274, 277, 94 P.3d 352 (2004). In opposing summary judgment, a party may not rely merely upon allegations or self-serving statements, but must set forth specific facts showing that genuine issues of material fact exist. CR 56; Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989).

Negligence Claims

LCL and BRE argue NWTC breached a standard of care by failing to conduct a “360-degree load test” on the crane during the erection process, and by continuing to erect the crane after hearing the “popping” noise. We disagree.

Regarding the 360-degree load test, LCL and BRE claim their expert Gary Campbell opined that “NWTC had the professional duty . . . to make sure that the 360-degree test was conducted.” However, Mr. Campbell did not give such an opinion in either his declaration or his deposition. In fact, Mr. Campbell testified that NWTC was not a “qualified person” able to carry out the 360-degree load test as is required by industry standards, and that the 360-degree load test was the responsibility of LCL and the Morrow technicians.

LCL and BRE also cite Mr. Campbell’s declaration, offered in opposition to summary judgment in both the Tower Crane and BRE cases, for the proposition that continuing to erect the crane was negligent. But as NWTC correctly points out, this

declaration contradicts Mr. Campbell's deposition testimony, and nowhere in the declaration does Mr. Campbell say that NWTC violated any standard of care. Rather, he claims that NWTC's failure to not stop work on the project was "error." Likewise, he does not state anywhere in the declaration that the alleged errors he identified on the part of NWTC caused the collapse of the crane on a more probable than not basis. Moreover, Judge Trickey struck this declaration for purposes of LCL's response to summary judgment in the Tower Crane case.

In sum, no questions of fact exist regarding LCL and BRE's negligence claims, and they were properly dismissed.

Breach of Contract Claims

LCL and BRE also claim that NWTC breached its subcontract with LCL. We disagree. LCL and BRE contend that NWTC breached a promise in the subcontract to comply with all laws and regulations applicable to the erection of the tower crane. Specifically, LCL and BRE argue NWTC failed to conduct a 360-degree load test on the crane, which they claim is required by WAC 296-155-525(5)(f). That regulation reads as follows: "Tower cranes erected on a new foundation shall be tested in accordance with ANSI B30.3-1990 Chapter 3-1." But again, as appellants acknowledge, the ANSI standard requires the testing to be carried out by "a qualified person." Here, LCL's own expert testified that NWTC was not a "qualified person" able to carry out the 360-degree load test set forth in the ANSI B30.3 standard, and that the 360-degree load test was the responsibility of LCL and the Morrow technicians.

The subcontract between NWTC and LCL makes it clear that NWTC was merely to provide the labor necessary to assemble and disassemble tower cranes. (NWTC to “[p]rovide all erect and dismantle of Tower Crane per the attached quote by Northwest Tower Crane Service, Inc.”). Under the contract, NWTC was not obligated to provide the plans for the assembly of the crane, nor was it responsible for the design, manufacture or quality of the design and manufacture of the steel crane base. Indeed, LCL hired technicians from crane owner Morrow to conduct the “load test” on the crane after the “popping” sound was heard, and Morrow provided the post-test certification of the base. Likewise, it was Doug Loesch from the crane base designer MKA that inspected the crane base the following week.

In short, NWTC did not have a contractual duty to conduct a 360 degree load test on the crane.

LCL also contends NWTC breached the portion of the subcontract requiring NWTC to name LCL as an additional insured on NWTC’s general liability policy. LCL is simply mistaken; NWTC did name LCL as an additional insured.

LCL next claims that NWTC breached the portion of the subcontract requiring NWTC to defend LCL. We disagree. “The duty to defend is determined by the facts known at the time of the tender of defense.” Knipschild v. C-J Recreation, Inc., 74 Wn. App. 212, 216, 872 P.2d 1102 (1994). “[T]he facts at the time of the tender of defense must demonstrate that liability would eventually fall upon the indemnitor, thereby placing it under a duty to defend.” George Sollitt Corp. v. Howard Chapman

Plumbing & Heating, Inc., 67 Wn. App. 468, 472, 836 P.2d 851 (1992) (quoting Dixon v. Fiat-Roosevelt Motors, Inc., 8 Wn. App. 689, 693-94, 509 P.2d 86 (1973)).

Here, not only has LCL failed to designate for review any information as to when or if it tendered defense to NWTC, it has not indicated whether or how NWTC responded to such a tender. More importantly, as is described above, the facts at the time of a tender would have shown that liability would not fall upon NWTC, given NWTC did not breach any duties in assembling the crane. To the extent NWTC declined to defend LCL, NWTC did not breach its subcontract.

LCL also claims that NWTC breached the portion of the subcontract requiring NWTC to indemnify LCL. We disagree. As LCL admits, NWTC is required to indemnify LCL only to the extent LCL's damages were caused by NWTC's negligence. Here, NWTC was not negligent, and as such, it has no obligation to indemnify LCL for any of its damages.

LCL further argues that NWTC breached the portion of the subcontract requiring NWTC to provide LCL with written notice of safety hazards. We disagree. On this issue, NWTC's subcontract with LCL reads as follows:

Subcontractor shall take all necessary safety precautions pertaining to its work and the conduct thereof, including but not limited to, compliance with all applicable laws, ordinances, rules, regulations and orders issued by a public authority, whether federal, state, local or other, the federal Occupational Safety and Health Act, the Washington Industrial Safety and Health Act, and any safety measures requested by Contractor. Subcontractor shall, at all times, be responsible for providing a safe work site and be responsible for the safety of all personnel, equipment, and materials within Subcontractor's care, custody, or control. Subcontractor shall promptly provide Contractor with written notice of any safety hazard or violation found anywhere on or adjacent to the construction site.

LCL claims NWTC breached this portion of the subcontract by failing to report its “concerns” about the “popping” noise on the day erection of the crane started. But the subcontract does not require written notice of “concerns.” Rather, it requires written notice of “any safety hazard or violation[.]” Here, there is no evidence NWTC knew about any safety hazard or violation to put into a written report. In fact, LCL inspected the crane on the day of the “popping” sound and informed NWTC that the crane was working properly. LCL’s Craig Harr inspected the steel crane base and could see no problems right after the popping sound. Harr told NWTC that “nothing was found to be wrong” with the crane base. LCL’s site superintendent Jon Hagwood, then decided to continue assembly of the crane. In short, there was nothing for NWTC to put in a written report. Additionally, even if NWTC should have generated a written report about the “popping” noise, LCL cannot demonstrate the lack of a written report caused any damage, given LCL had actual notice of NWTC’s concerns, and acted upon them.

In sum, no questions of fact exist regarding LCL’s and BRE’s breach of contract claims, and they were properly dismissed.

Claim Preclusion

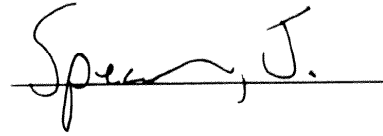
NWTC argued in its motion for summary judgment in the BRE case that LCL’s claims were precluded under the doctrine of *res judicata*. We agree that claim preclusion applies here. Claim preclusion bars the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action. Loveidge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898 (1995). For claim preclusion to apply, a prior

judgment must have the same (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made (identity of interest). Id.; Rains v. State, 100 Wn.2d 660, 663, 674 P.2d 165 (1983). The doctrine does not apply if the claims are not the same. Civil Serv. Comm'n of City of Kelso v. City of Kelso, 137 Wn.2d 166, 171, 969 P.2d 474 (1999).

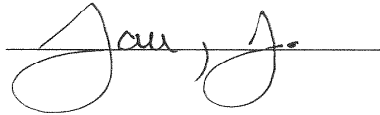
Here, the elements of claim preclusion are met. LCL filed the same third-party complaints alleging the same facts and causes of action against NWTC in both the Tower Crane and BRE lawsuits. LCL nevertheless contends that the causes of action differ because the damages LCL allegedly suffered were not the same in both actions. We disagree. LCL's damage was not the issue determined in the Tower Crane case. Rather, it was NWTC's liability to LCL that was determined in the Tower Crane case. The factual and legal basis for this alleged liability is exactly the same in both the Tower Crane and BRE lawsuits.

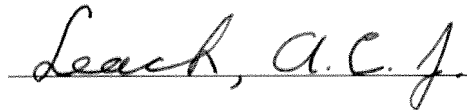
LCL also contends that claim preclusion does not apply because the prior case did not include all of the same parties; specifically, BRE was not a party to the first lawsuit. But BRE's presence in the first lawsuit is not required to bind LCL. Rather, the general rule is that "a judgment is res judicata, and therefore binding, on all parties to the original litigation, plus all persons in privity with such parties." 14A Karl B. Tegland, Washington Practice: Civil Procedure § 35.27, at 534 (2d ed. 2009). (Emphasis added.) Here, both LCL and NWTC were parties, and LCL is bound by the decision in the original Tower Crane case.

Affirmed.¹

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WE CONCUR:

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Handwritten signature of Leach, a.c.j. written over a horizontal line.

¹ NWTC appealed orders denying its motion to exclude the testimony of various witnesses to be called by BRE. NWTC's motion was based on grounds that BRE failed to name any of its own expert witnesses in its preliminary witness disclosure, and instead simply reserved the right to call any other witnesses named by other parties. As such, NWTC argues BRE should have been precluded from calling any expert witnesses at trial under King County local rules, and the trial court should have dismissed on these grounds. In light of our decision, we need not decide this issue.