

SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: SMITH  
Justice

PART 62

DELLA PONTA, JOHN, ETAL.

INDEX NO.

104427/08

MOTION DATE

9/11/08

MOTION SEQ. NO.

03

MOTION CAL. NO.

EAST 51<sup>ST</sup> STREET DEVELOPMENT  
COMPANY, LLC, ETAL

The following papers, numbered 1 to 4 were read on this motion for a preliminary injunction

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

1-2

Answering Affidavits -- Exhibits

3

Replying Affidavits including marant's engineer's affidavit

4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order

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

**FILED**  
SEP 30 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 9/22/08

Karen S. Smith J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 62

-----X  
JOHN DELLA PORTA and DEBRA DELLA PORTA,  
Plaintiff,

-against-

EAST 51<sup>ST</sup> STREET DEVELOPMENT COMPANY, LLC.,  
RELIANCE CONSTRUCTION GROUP, RCG GROUP, INC.,  
JOY CONTRACTORS, INC. NEW YORK CRANE &  
EQUIPMENT CORPORATION and STROH  
ENGINEERING SERVICES, P.C.

Defendants.

index No.: 104427/2008  
Motion Seq.: 003  
Motion Date: 09/11/2008

**DECISION AND ORDER**

-----X  
EAST 51<sup>ST</sup> STREET DEVELOPMENT COMPANY, LLC.,  
Defendant/ Third-Party Plaintiff,

-against-

FAVELLE FAVCO CRANES (USA), INC., THE CITY OF  
NEW YORK, CONSOLIDATED EDISON COMPANY  
OF NEW YORK, INC., CIVETTA COUSINS JV LLC,  
RAPETTI RIGGING SERVICES INC., LIFT-ALL  
COMPANY, INC., LIFTEX CORPORATION, WEINSTOCK  
BROTHERS CORPORATION, C.S. MECHANICAL &  
EQUIPMENT COPORATION, CRANE INSPECTION  
SERVICES, INC., BRADY MARINE REPAIR COMPANY,  
INC., LANGAN ENGINEERING & ENV'T SERVICES,  
INC. and JOHN DOE 1 - 10 (fictitious),

Third-Party Defendants.

**FILED**  
SEP 30 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
**PRESENT: KAREN S. SMITH, J.S.C.:**

Defendant, East 51<sup>st</sup> Street Development Company, LLC ("East 51<sup>st</sup> Street")'s motion, for a preliminary injunction restraining the Third-Party Defendant, City of New York ("CNY") from painting crane parts relating to the March 15, 2008 crane collapse at 303 East 51<sup>st</sup> Street, New York, New York with a clear acrylic paint in order to preserve the parts as evidence, is denied.

This is a personal injury action stemming from a construction crane collapse which occurred on March 15, 2008 at 303 East 51<sup>st</sup> Street in Manhattan. CNY has retained custodial

possession of certain of the parts of the crane which collapsed. CNY has notified East 51<sup>st</sup> Street and various other interested parties that CNY intends to paint certain portions of the metal crane parts with a clear acrylic based paint in order to prevent deterioration from exposure to atmospheric moisture and other potential corrosives. CNY contends that the painting will not effect the integrity of the metal crane components in any fashion whatsoever. East 51<sup>st</sup> Street opposes the painting arguing that it will cause irreparable alterations to the metals in the crane components and make it difficult or impossible for engineering testing to be undertaken in order to conclusively determine the cause of the failure of the crane components. East 51<sup>st</sup> Street now moves for a temporary injunction to prevent the painting from proceeding.

At the original oral argument on this motion, the court directed the parties to present affidavits from their experts to support their respective positions and, after reviewing the affidavits, the Court would advise the parties if additional argument or a hearing would be required. Upon reviewing the affidavits, the court has determined that no additional useful information is likely to be developed by further argument on the motion.

As the party seeking a preliminary injunction, East 51<sup>st</sup> Street has the burden of showing, *inter alia*, that it will be irreparably harmed if the requested injunction is not granted. In support of the motion, East 51<sup>st</sup> Street's expert offers only his opinion that the paint and/or its subsequent removal will have an adverse effect upon the metal crane components. In contrast, CNY's expert refers to a forensic engineering text to confirm his opinion that clear acrylic paint is an appropriate means to preserve metal components from exposure to atmospheric conditions without any impact on the structure of the metal components themselves. Therefore, the Court finds that East 51<sup>st</sup> Street's expert's conclusion constitutes nothing more than *ipse dixit* and is

insufficient to meet East 51st Street's burden of persuasion on this motion. Accordingly, it is;

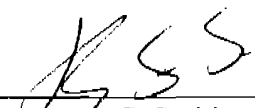
ORDERED that East 51<sup>st</sup> Street's motion is denied and it is, further;

ORDERED that the Temporary Restraining Order granted by the court on August 25, 2008 is hereby vacated to the extent that it precludes CNY from painting the crane parts within its possession and shall be of no further force or effect in this regard. However, this determination does not vitiate the orders of the court made September 8, 2008 with respect to inspection and testing of the crane parts.

The foregoing constitutes the decision and order of this court.

Dated: September ~~29~~ 2008

ENTER:

  
\_\_\_\_\_  
Hon. Karen S. Smith, J.S.C.

**FILED**  
SEP 30 2008  
COUNTY CLERK'S OFFICE  
NEW YORK