

Andrias, J.P., Renwick, Freedman, Richter, JJ.

9267-	In re East 91st Street Crane	Index 117294/08
9268	Collapse Litigation	117469/08
	- - - - -	590314/10
	Donald Raymond Leo, etc.,	590739/10
	Plaintiff,	591073/10

-against-

The City of New York, et al.,
Defendants-Respondents,

Michael Carbone, et al.,
Defendants,

1765 First Associates, LLC, et al.,
Defendants-Appellants.

- - - - -
Leon D. DeMatteis Construction Corporation,
Third-Party Plaintiff,

-against-

Sorbara Construction Corp.,
Third-Party Defendant-Appellant.

- - - - -
Leon D. DeMatteis Construction Corporation,
Second Third-Party Plaintiff-Appellant,

-against-

The City of New York, et al.,
Second Third-Party Defendants-Respondents.

- - - - -
Sorbara Construction Corp.,
Third Third-Party Plaintiff-Appellant,

-against-

The City of New York, et al.,
Third Third-Party Defendants-Respondents.

[And Other Third-Party Actions]

- - - - -

In re East 91st Street Crane
Collapse Litigation

- - - - -

Xhevahire Sinanaj, et al.,
Plaintiffs,

-against-

The City of New York, et al.,
Defendants-Respondents,

Michael Carbone, et al.,
Defendants,

Sorbara Construction Corp., et al.,
Defendants-Appellants.

- - - - -

Leon D. DeMatteis Construction Corporation,
Third-Party Plaintiff-Appellant,

-against-

The City of New York, et al.,
Third-Party Defendants-Respondents.

- - - - -

Sorbara Construction Corp.,
Second Third-Party Plaintiff-Appellant,

-against-

The City of New York, et al.,
Second Third-Party Defendants-Respondents.

[And Another Third-Party Action]

Nicoletti Hornig & Sweeney, New York (Scott D. Clausen of
counsel), for 1765 First Associates, LLC, appellant.

Cartafalsa, Slattery, Turpin & Lenoff, New York (B. Jennifer
Jaffee of counsel), for Sorbara Construction Corp., appellant.

Smith, Mazure, Director, Wilkins, Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for Leon D. DeMatteis Construction Corporation, appellant.

Michael A. Cardozo, Corporation Counsel, New York (Kenneth Sasmor of counsel), for respondents.

Orders, Supreme Court, New York County (Paul G. Feinman, J.), entered October 5, 2011, which, upon reargument, granted so much of defendants-respondents' (the City) motion to dismiss as sought dismissal of defendants-appellants' (the Construction Defendants) cross claims seeking indemnification and contribution, unanimously affirmed, without costs.

In this wrongful death action arising from a crane collapse during construction of a building, the court correctly dismissed the cross claims, as the construction defendants have not shown a special relationship between themselves and the City that gave rise to a special duty (see *Garrett v Holiday Inns*, 58 NY2d 253, 261-262 [1983]). A municipality is not liable for negligent performance of a governmental function unless there exists a

special duty to the injured party, as opposed to a general duty owed to the public (*McLean v City of New York*, 12 NY3d 194, 199 [2009]). Here, nothing in the record indicates that the City assumed an affirmative duty, either through promises or acts, to ensure the safety of the crane on the construction defendants' behalf (see *id.* at 201-202). Rather, the City took steps to ensure the safety of the crane as an exercise of its duty to the general public (*id.*). There is also no evidence that the City directed and controlled the subject crane in the face of known, blatant, and dangerous safety violations (*cf. Garrett*, 58 NY2d at 262; *Smullen v City of New York*, 28 NY2d 66, 70-71 [1971]). Rather, the record shows that at the time the City authorized the crane's operation on the site, it was not aware of the faulty weld condition that caused the accident.

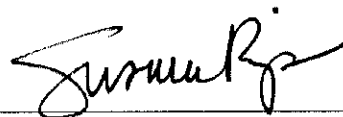
Given the absence of a showing of a special duty, we need not determine whether the City's authorization of the use of the crane was discretionary or ministerial (see *Valdez v City of New York*, 18 NY3d 69, 80 [2011]). In any event, given the record, we would find that the City's authorization was discretionary, as it

was based on the exercise of reasoned judgment (see *Tango v Tulevech*, 61 NY2d 34, 41 [1983]).

We have reviewed the construction defendants' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 19, 2013

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK