

**Erickson v Cross Ready Mix, Inc.**

2009 NY Slip Op 30930(U)

April 17, 2009

Supreme Court, Nassau County

Docket Number: 11947/05

Judge: Daniel Martin

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

S

**SHORT FORM ORDER**  
**SUPREME COURT OF THE STATE OF NEW YORK**

**PRESENT: HON. DANIEL MARTIN**  
**Acting Supreme Court Justice**

**TRIAL/IAS, PART 30**  
**NASSAU COUNTY**

\_\_\_\_\_  
**Richard J. Erickson.**

**Plaintiff.**

*- against -*

**Cross Ready Mix, Inc., and "JOHN DOE", an agent, servant and/or employee of Cross Ready Mix, Inc., Turner Construction Company, Elite Ready Mix Corporation and "JOHN DOE", an agent, servant and/or employee of Elite Ready Mix Corporation.**

**Defendants.**

**Sequence No.: 013, 014 & 015**  
**Index No.: 011947/05**

\_\_\_\_\_  
**Turner Construction Company.**

**Third-Party Plaintiffs.**

*- against -*

**Commodore Construction Corp.**

**Third-Party Defendant.**

**The following named papers have been read on this motion:**

	<b>Papers Numbered</b>
<b>Notice of Motion and Affidavits Annexed</b>	<b>X</b>
<b>Notice of Cross-Motions and Affidavits Annexed</b>	<b>X</b>
<b>Answering Affidavits</b>	<b>X</b>
<b>Replying Affidavits</b>	<b>X</b>

Motion [Seq. 013] is brought by defendant/third-party plaintiff, Turner Construction Company, and seeks an Order: (1) pursuant to CPLR 2221(d), partially vacating and/or clarifying and/or modifying of this Court's Order dated September 22, 2008; (2) pursuant to CPLR 2221, granting it leave to reargue the portions of its prior motion for summary judgment which sought a dismissal of all cross claims asserted against it and indemnification from the third-party defendant, Commodore Construction Corp.; and (3) upon reargument, granting it a dismissal of all cross claims asserted against it and summary judgment as to the contractual indemnification claim against the third-party defendant; Cross-motion [Seq. 014] is brought by defendant, Elite

Ready Mix Corporation, seeks an Order: (1) pursuant to CPLR 2221, granting renewal and reargument of a prior order of this Court dated September 22, 2008; and (2) upon renewal and reargument, granting it's motion to vacate the Order dated September 22, 2008, which granted summary judgment to defendant/third-party plaintiff, Turner Construction Company; and (3) denying Turner Construction's motion for summary judgment; and, Cross-motion [Seq. 015] is brought by plaintiff, Richard J. Erickson, and seeks an Order, pursuant to CPLR 3025(b) permitting the plaintiff to serve an amended bill of particulars, and ordering the defendants to accept the amended bill of particulars;

The motion and cross-motions are determined as herein set forth below.

This personal injury action arises out of an accident which occurred on November 4, 2003, at a construction site located at 177 Cantiague Rock Road, Hicksville, New York (the "job site"). The facts have been established, as follows: Plaintiff, Richard J. Erickson ("Erickson"), employed by third-party defendant, Commodore Construction Corp. ("Commodore") as a concrete laborer, was pouring sidewalk curbs and light pole bases in the parking lot at the job site on the date of the accident. Plaintiff was preparing a wooden form for a light pole base. The form had been set in a hole that was four feet wide and five feet deep (*Erickson Tr.*, p. 35). Plaintiff Erickson prepared the form, and noticed that there was a concrete truck in the vicinity (*Id.*, p. 40). The truck was stopped about twenty feet away from the hole where plaintiff and his colleague Michael Schutt were working and the rear of the truck was closest to them (*Id.*, pp. 41-42). Plaintiff testified that he was standing and bending over the hole with his back to the concrete truck when he was then struck from behind by "something" that made contact with the upper part of his back and knocked him off balance (*Id.*, pp. 53-55). Plaintiff fell into the hole (*Id.*, p. 55). He did not know what struck him, but other witnesses indicated that he had been struck by the chute from the cement truck (*Id.*, p. 53).

To the extent that there is any question as to the identity of the owner of the offending cement truck the following is pertinent. Defendant/third-party plaintiff, Turner Construction Company ("Turner"), as general contractor, contracted with third-party defendant, Commodore Construction Corp. ("Commodore") to perform concrete and masonry work for and at the job site. Commodore, in turn, entered into a verbal agreement with defendant, Cross Ready Mix, Inc. ("Cross") to deliver the concrete to the job site (*Id.*, p. 13). Cross's dispatcher, Patrick Deacitis, explained at his deposition, that Cross, on occasion, hired trucks from other concrete companies to make deliveries for it and recalled dispatching two trucks hired from Elite Ready Mix, one of which was sent to the subject job site.

On January 22, 2005, plaintiff commenced suit by filing a summons and complaint against defendant Cross Ready Mix. Plaintiff then commenced a second action based on the same occurrence on or about June 28, 2005 against Elite Ready Mix and Turner Construction. On September 28, 2005, defendant Turner commenced a third party action against Commodore Construction, plaintiff's employer. On January 25, 2006, this Court granted plaintiff's motion and consolidated the above matters for all purposes.

On January 10, 2007, plaintiff served a bill of particulars in which he alleged violations of the Labor Law §§200, 240, 241(6) and common law negligence, asserted his injuries, and advanced his theories as to causation. On March 27, 2007 plaintiff filed the Note of Issue certifying that discovery in this matter was complete and that the case was ready to be placed on the trial calendar. Thereafter, on May 9, 2007, plaintiff served a supplemental bill of particulars where he asserted additional claims of bodily injury. Subsequently, all defendants, together with the third-party defendant, filed motions for summary judgment seeking dismissal of the plaintiff's causes of action pursuant to Labor Law §§200, 240, 241(6) and common law negligence. Specifically, the basis of the motion seeking dismissal of plaintiff's Labor Law §241(6) cause of action was plaintiff's failure to cite any specific Industrial Code violations that support this cause of action.

On June 9, 2008, plaintiff served a "second supplemental" bill of particulars where he articulated specific Industrial Code violations and OSHA violations as well as additional injuries that he allegedly sustained as a result of his accident. Specifically, the second supplemental bill of particulars alleged:

"6. Violations of the statutes, rules, laws, regulations, customs, usages and contracts include, *inter alia*, of NYCRR 23-1.23(a-c), 23-1.5(a-b), 23-1.5(c)(1, 3), 23-1.7(b)(1)(i), 23-4.2(a, f-g), 23-9.7(d), 23-9.11(a); US Dept of Labor, Occupational Safety and Health Administration §§1926.601(b)(4), 1226.651(a) and 1926.702(b)."

Moreover, plaintiff asserted additional conditions which contributed to the alleged occurrence. Specifically, plaintiff alleged, *inter alia*:

"9. Defective, Dangerous and Unsafe Conditions: (i) the earth ramp and runway surface on which the parties were working was not free of potholes, soft spots, excessive unevenness and/or surface encumbrances. (ii) the hazardous opening into which Plaintiff fell was not adequately protected. (iii) The motor vehicle whose cement chute struck the Plaintiff, was not properly equipped with safety devices so as to alert pedestrians when said vehicle would reverse."

All defendants rejected plaintiff's supplemental bill of particulars. Plaintiff then moved for an Order compelling the defendants to accept service of his second supplemental bill of particulars. In an Order dated September 22, 2008, this Court ordered that "(1) paragraphs 9 and 11 of supplemental bill of particulars are struck and (2) that the remainder of the bill of particulars is deemed served upon the Defendant(s) and the third party Defendant herein." **This Order, dated September 22, 2008, shall be referred to in this decision as "Court Order I."**

With respect to defendants' motions for summary judgment seeking dismissal of plaintiff's complaint, in a second order also dated September 22, 2008, this Court granted each defendants, Cross, Turner and Elite's motions for summary judgment dismissing the plaintiff's

Labor Law §240(1) claim because the court ruled the accident was not attributable to the kind of extraordinary height related risk governed by that section of the Labor Law.

The general contractor, Turner's motion for summary judgment seeking dismissal of plaintiff's Labor Law §200 and common law negligence claims were also granted. Turner had "submit[ted] ample evidence to establish that it did not direct, supervise, or control the plaintiff's work, the work area where the accident occurred, or direct the concrete truck that was making a delivery of concrete at the time of the incident [nor did it] provide plaintiff with his tools, materials and equipment [or] determine the means, methods and/or procedures used by plaintiff to perform his job". The plaintiff failed to submit evidence in admissible form raising a triable issue of fact. Additionally, neither Cross nor Elite proffered evidentiary proof in admissible form that was sufficient to create any issues of fact. Defendants, Elite and Cross's theory, was that the property owner was partially responsible as a result of a defect upon the property to wit: a pile of debris which caused the cement chute to swing into the plaintiff. That issue was addressed and dismissed as neither defendant, Elite nor Cross submitted any proof that either the property owner or his GC (Turner) had actual or constructive notice of, or created, the dangerous condition, to wit: the large pile of debris. Thus, plaintiff's Labor Law §200 and common law negligence claims against Turner were also dismissed.

Defendant, Cross's motion for summary judgment for dismissal of plaintiff's Labor Law §200 and common law negligence claims was also granted. Based on the fact that the truck which struck the plaintiff was simply not owned by Cross, that Cross could not be found to be held vicariously liable for any alleged negligence of Elite's driver (an independent contractor it hired), and that Cross had no authority or control over the driver or the work he was performing, the court granted the defendant's motion for summary judgment.

Defendant Elite's motion for summary judgment seeking dismissal of plaintiff's Labor Law §200 and common law negligence claims was, however, denied as this Court found issues of fact as to Elite's actual or constructive knowledge of the condition or the work site and practices at the site or its ability/authority to correct it.

Finally, with regards to each defendants' (Cross, Turner and Elite) motion for summary judgment dismissal of plaintiff's Labor Law §241(6) claims, based upon their theory that plaintiff did not identify specific Industrial Code provisions and thus, there was no predicate for sustaining a Labor Law §241(6) claim was denied, as said application had been rendered moot by Court Order I dated September 22, 2008 in which the court directed the defendants to accept plaintiffs proffered second supplemental bill of particulars alleging specific violations of the Industrial Code. Because the court did not rule on the merits on each alleged violations of the Industrial Code, the moving defendants have sought leave to renew and reargue the court's prior order (hereinafter referred to as "**Court Order II**") which had dismissed the plaintiff's other claims and left unclear the status of plaintiff's Labor law 241(6) claims.

Plaintiff's Cross-Motion [Sequence 015]

Upon the instant motion, pursuant to CPLR 3025(b), plaintiff seeks leave to serve a further amended bill of particulars, and an Order, compelling the defendants to accept said amended bill of particulars. In support of his previous motion for an Order compelling defendants to accept service of his supplemental bill of particulars, plaintiff's theory was that the proffered bill of particulars (dated June 9, 2008) is a "supplemental" bill of particulars, and thus, plaintiff was permitted to serve same at least 30 days prior to trial as of right pursuant to CPLR 3043. Plaintiff's motion to compel was granted to the extent that the supplemental bill of particulars on June 9, 2008 alleged violations of various statutes on defendants' part in connection with plaintiff's Labor Law 241(6) claims. To the extent plaintiff set forth alleged code violations in the supplemental bill of particulars, plaintiff's motion was granted. However, in the same Order, this Court denied the amendment or supplementation of the bill of particulars with respect to the assertion of new injuries and new theories of liability.

In his present motion the plaintiff's attempts to resurrect theories previously analyzed and rejected by the Court. The supporting affidavits fail to set forth any factual or legal basis for this modification of the court's prior determinations. Pursuant to the doctrine of "law of the case", which is in essence a doctrine of intra-action res judicata, once an issue is decided, it cannot again be litigated at trial level (State of New York Higher Educ. Servs. Corp. v. Starr, 158 A.D.2d 771 [3<sup>rd</sup> Dept. 1990]). With regards to the "new" and additional theories of liability, i.e., the purported "Defective, Dangerous and Unsafe Conditions," this Court cannot overlook the fact that the plaintiff has been on notice for years of all facts pertinent to the proposed further amendments and yet has failed to offer an adequate explanation or a reasonable excuse for his delay in moving to amend the bill of particulars to include said theories of liability (Danne v. Otis Elevator Corporation, 276 A.D.2d 581 [2<sup>nd</sup> Dept. 2000]; Fuentes v. City of New York, 3 A.D.3d 549 [2<sup>nd</sup> Dept. 2004]).

As to plaintiff's allegations of new and additional injuries, plaintiff has failed to submit sufficient foundational proof to support these claims. The conclusory assertions offered by the plaintiff's counsel are speculative, inadmissible and insufficient to satisfy the burden of proof to demonstrate that plaintiff has sustained new, additional injuries, not previously ascertainable at the time the initial bill of particulars were framed. No evidence in admissible form has been submitted to support these claims; no medical records, reports or diagnostic test results are included, nor does plaintiff provide an affirmation from plaintiff's examining physicians to affirm the merit and accuracy of the additional claimed injuries. The affirmation of plaintiff's counsel cannot serve as the only proof that any additional injuries were sustained by the plaintiff.

Thus, under these circumstances, plaintiff, Richard Erickson's cross-motion, *inter alia*, pursuant to CPLR 3025(b) for an Order permitting him to serve a further amended bill of particulars is denied.

Elite's Cross-Motion [Sequence 014]

Defendant, Elite moves pursuant to CPLR 2221(d) and (e), for an Order, *inter alia*

granting it renewal and reargument of Court Order II; and upon renewal and reargument, denying that portion of the court's prior order that dismissed the complaint against the defendant Turner. Although Elite, does not specify whether it seeks to reargue this Court's prior Order or to renew it (CPLR 2221[f]). pursuant to CPLR 2221(f), this Court will determine each part of the combined motion as if it were separately made.

In so far as the motion seeks leave to reargue it is untimely made, having been interposed more than 30 days after entry of the order in question. See, CPLR 2221. Thus, that part of the motion which seeks leave to reargue is denied. Turning to that branch of Elite's motion which seeks leave to renew, such motion is granted because the court having permitted the amendment of the bill of particulars did not address each provision of the Industrial Code set forth therein in rendering its decision on the motion for summary judgment.

Notwithstanding the foregoing, Elite does not advance any arguments to overturn the complete dismissal of plaintiff's Labor Law § 240(1), 200 and common law negligence claims as to it or the other defendants. Thus, these causes of action other than the Labor Law 241(6), claims are not the subject of Elite's motion and cannot be effected by the decision to be rendered. The Court is left to determine only whether the dismissal of plaintiff's Labor Law §241(6) claim (based upon the Industrial Code allegations) should have been granted or denied.

In addition to the requirement that a plaintiff plead and prove that a specific provision of the Industrial Code was violated, it is further incumbent upon the claimant to establish that such a violation was the proximate cause of the accident (Ross v. Curtis Palmer Hydro Electric Co., 81 N.Y.2d 494 [1993]; Ares v. State of New York, 80 N.Y.2d 959 [1992]; Lindstedt v. 813 Associates, 238 A.D.2d 386 [2<sup>nd</sup> Dept. 1997]). Provisions of the Industrial Code that reiterate general common law standards and that do not "mandat[e] compliance with concrete specifications" cannot be used as a basis for liability under Labor Law § 241(6) (Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 N.Y.2d 343 [1998]; Ross v. Curtis-Palmer Hydro Elec. Co., supra).

In this case, plaintiff alleges violations of the following Industrial Code regulations: 12 NYCRR §§ 23-1.23(a-c); 23-1.5(a-b); 23-1.5(c)(1,3); 23-1.7(b)(1)(I), 23-4.2(a, f-g); 23-9.7(d); 23-9.11(a). Elite claims that these all apply and render Turner liable. For the sake of clarity, this Court will address each violation separately, and in turn.

#### 23-1.23(a-c): Earth Ramps and Runways

Notably, in his reply affirmation in partial support of Elite's motion for leave to renew and reargue and in reply to Commodore's opposition, counsel for plaintiff concedes that "Earth Ramps" do not exist in this matter (*Reply Aff. In Partial Support of Elite's Motion for Leave to Renew and Reargue and in Reply to Commodore's Opp.*, p. 9, ¶12). Thus, this Industrial Code regulation clearly is not applicable to the facts of this case and said regulation does not form a basis for liability under Labor Law §241(6).

### 23-1.5(a-b) and 23-1.5(c)(1.3): General Responsibility of Employers

Subsection "a" deals with "Health and safety protection required;" subsection "b" deals with "General requirement of competency;" and, subsection "c" deals with "Condition of equipment and safeguards." These are all (as indicated by the section heading) *general* responsibilities of employers and thus cannot be a basis for liability under §241(6) of the Labor Law (Ross v. Curtis-Palmer Hydro-Elec. Co., supra; see also, Sparkes v. Berger, 11 A.D.3d 601, 602 [2<sup>nd</sup> Dept. 2004]; Maday v. Gabe's Contracting, LLC., 20 A.D.3d 513 [2<sup>nd</sup> Dept. 2005]). Any claim under Labor Law §241(6) must refer to a violation of a specific standard (not general), established by the Commissioner of Labor, and there must be proof that the violation of such provision was a proximate cause of the claimed injury (Albert v. Williams Lubricants, Inc., 35 A.D.3d 1115 [2<sup>nd</sup> Dept. 2006]). This rule relates to general safety standards, and as such, does not provide a basis for a claim under Labor Law §241(6).

### 23-1.7(b)(1)(I): Protection from General Hazards. (b) Falling Hazards (I) Hazardous Openings

It is noted at the outset that this regulation does not define what constitutes a "hazardous opening" (Messina v. City of New York, 300 A.D.2d 121 [1<sup>st</sup> Dept. 2002]). The interpretation of an Industrial Code regulation and determination as to whether a particular condition is within the scope of the regulation present questions of law for the Court (Penta v. Related Companies, L.P., 286 A.D.2d 674 [2<sup>nd</sup> Dept. 2001]). In this case, it is clear that immediately preceding his accident, plaintiff was in the process of checking and preparing a wooden form for the pouring of concrete for the base of a light pole. Moreover, this incident occurred when the cement truck was backing up to pour concrete into the hole housing the form. The evidence in this case plainly establishes that the necessity of immediate access to the opening for the light pole base prevented compliance with this regulation. Access was needed to the opening at the time of the accident, as the pour was about to begin, and the work could not have been accomplished with barricades present or a "substantial cover" over the opening. Thus, clearly this section does not apply to the fact at hand (Cunha v. City of New York, 18 Misc. 3d 1104(A) [Sup. Ct. New York 2007]).

### 23-4.2(a, f-g): Trench and area type excavations

Subsection "a" of this regulation requires sheeting or shoring for a trench or an excavation more than five feet deep for protections against cave-ins or a collapse of the trench or excavation. Subsection "f" requires excavated materials and other loads to be placed two feet back from the edge of the open excavation so that no part will slide, fall or roll into the excavation. Subsection "g" requires sides, banks, slopes and areas in and adjacent to any excavation to be stripped and cleared of loose rock and other materials which could slide, fall or roll or be pushed upon any person in such excavation.

This section is not applicable to the matter at hand since plaintiff's accident did not occur as a result of a slide and/or a cave in. The hole in this case was not a trench nor was it an

excavation. It is a hole that housed the form for light pole and it was about to be filled with concrete.

Plaintiff has alleged that he was struck by the chute of a cement truck and pushed into a hole containing a form for the base of a light pole. Plaintiff was not working or standing within a trench. His accident did not involve a cave-in or a collapse of an excavation, nor did any material fall upon the plaintiff while he was in an excavation. Therefore, it is clear that the cited subsection are inapplicable to the facts at hand.

#### 23-9.7(d): Motor Trucks (d) Backing

This section refers to power equipment at job sites and provides requirements concerning motorized trucks. Subsection "d" prescribes safety practices to be observed by construction workers with respect to backing up of trucks. The plaintiff's reliance upon this provision is misplaced. This section is not applicable to Turner as the cement truck was not owned, operated or directed by Turner. Additionally there was another Commodore employee in place, Michael Schutt, who was responsible for observing, guiding, and signaling the driver of the cement truck when it was backing up to make the pour of concrete. Moreover, this rule does not contemplate someone standing off to the side getting hit by the chute.

#### 23-9.11(a): Mixing Machines. Charging skips

This section concerns power operated equipment at job sites and provides requirements concerning mixing machines. Subsection "a" requires the operator of a mixing machine to make sure that no person is in the area when raising or lowering a charging skip. Additionally, a safety rail should be constructed to prevent persons from passing underneath the charging skip. This section is inapplicable as the incident did not involve a charging skip. There is no claim that the plaintiff was injured as he was walking under a raised charging skip. The device involved herein is a chute, not a charging skip. Moreover, the cement chute was not being lowered into place when the alleged incident occurred. There was no raising or lowering of any device and in any event the directives in this rule would not be applicable since it requires a safety railing to prevent passage.

Under these circumstances, where plaintiff's allegations as to violations of Industrial Code regulations are not specific or are otherwise not applicable to the facts of this case, this Court finds that plaintiff's Labor Law § 241(6) claim was properly dismissed.

Plaintiff's failure to submit any admissible evidence that the large pile of debris was or could have been the unsafe condition that proximately caused plaintiff's injury is fatal to any application to reconsider the court's dismissal of that claim. Plaintiff's new theory that the alleged debris at the worksite was the proximate cause of plaintiff's injuries is entirely meritless and unsupported by the facts of this case. Even assuming the truth of plaintiff's argument, had the site been kept "debris-free," there is nothing to support the fact that the truck would not have

backed up and would not have struck and injured the plaintiff but for the debris on the site.

Neither the plaintiff nor Elite have demonstrated these NYCRR regulations are applicable to the facts of this case, Elite's motion for leave to renew is granted and upon renewal, this Court adheres to its original determination - i.e., plaintiff's Labor Law §241(6) claim is properly dismissed because he has failed to establish that an applicable rule or regulation of the Industrial Code which gives specific, positive command has been breached (Rizzuto v. L.A. Wenger Contracting Co., Inc., supra; Vernieri v. Empire Realty Co., 219 A.D.2d 593 [2<sup>nd</sup> Dept. 1995]; Singleton v. Citnalta Const. Corp., 291 A.D.2d 393 [2<sup>nd</sup> Dept. 2002]).


Turner's Motion [Sequence 013]

Defendant/Third-party plaintiff, Turner moves for an Order, pursuant to CPLR 2221, to partially vacate and/or clarify and/or modify this Court's Order dated September 22, 2008 (Court Order II) upon the grounds that although it was not explicitly stated in the decision that all cross claims asserted against it were dismissed, it appears from the above analysis that it was the Court's intention to dismiss all claims asserted against Turner. Pursuant to CPLR 2221, when a Court's decision is ambiguous and/or possibly subject to misinterpretation on a given issue, a party may file a motion for clarification or modification directly with the Judge who signed the order (In re Reality Rashida, 206 A.D.2d 315 [1<sup>st</sup> Dept. 1994]; Fowler v. Parks, 675 N.Y.S.2d 278 [1<sup>st</sup> Dept. 1998]; Urtis v. Urtis, 181 A.D.2d 1001 [4<sup>th</sup> Dept. 1992]). The clear language in Court Order II stating that the adverse parties failed to raise any evidentiary proof in admissible form that was sufficient to create a material issue of fact as to Turner's liability on any of the claims asserted against Turner, warrants a clarification that the co-defendants' cross claims were likewise dismissed. Thus, Turner's motion in so far as it seeks leave to reargue the portion of its motion for summary judgment which sought a dismissal of all cross claims against the defendant/third-party plaintiff is therefore denied as moot as those claims have already been deemed dismissed.

In so far as Turner's motion seeks leave to reargue its prior motion seeking an order granting it summary judgment on its contractual indemnification claim against the third-party defendant Commodore, that motion is denied. As stated previously, Turner's motion for summary judgment had been granted and all claims against Turner had already been dismissed. Therefore, in so far as Turner seeks reconsideration of that portion of its prior motion that sought dismissal of the indemnification claims that branch of the motion is also denied as moot.

So Ordered.

Dated: April 17, 2009

  
A.J.S.C.

**ENTERED**

APR 21 2009