

<b>Henehan v New York State Dormitory Auth.</b>
2013 NY Slip Op 30203(U)
February 1, 2013
Supreme Court, Albany County
Docket Number: 7886-08
Judge: Joseph C. Teresi
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STATE OF NEW YORK  
SUPREME COURT  
JOHN HENEHAN, JR.,

COUNTY OF ALBANY

Plaintiff,

-against-

NEW YORK STATE DORMITORY AUTHORITY;  
TURNER CONSTRUCTION COMPANY;  
PRIME CONTRACTORS, INC.; B&B CONCRETE,  
INC. and B&B CONSTRUCTION, INC.,

Defendants,

NEW YORK STATE DORMITORY AUTHORITY,

Third Party Plaintiff,

-against-

ANDREW R. MANCINI ASSOCIATES, INC.,

Third Party Defendant,

TURNER CONSTRUCTION COMPANY,

Third Party Plaintiff,

-against-

ANDREW R. MANCINI ASSOCIATES, INC.,

Third Party Defendant,

ANDREW R. MANCINI ASSOCIATES, INC.,

Fourth Party Plaintiff,

-against-

CHENANGO CONCRETE CORP. d/b/a B&B READY MIX,

Fourth Party Defendant.

Supreme Court Albany County All Purpose Term, January 22, 2013  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

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**TERESI, J.:**

On June 28, 2007, Plaintiff alleges that he tripped and fell over hardened waste concrete, while working as a welder on the construction of a New York State Veterans' Home. Based upon the injury he sustained in the fall, he commenced this action to recover his damages.

As is relevant here, the alleged site owner, New York State Dormitory Authority (hereinafter "NYSDA"), and construction manager, Turner Construction Company (hereinafter

“Turner”), both joined issue. Both also commenced third party actions against NYSDA’s contractor for the project’s concrete work, Andrew R. Mancini Associates, Inc. (hereinafter “Mancini”). Mancini likewise joined issue and commenced a fourth party action against its concrete supplier, Chenango Concrete Corp. d/b/a B&B Ready Mix (hereinafter “B&B”). Issue was joined by B&B, discovery has been conducted, a note of issue filed and a trial date certain set (April 15, 2013).

Both NYSDA and Turner now move for summary judgment dismissing Plaintiff’s complaint, and for summary judgment granting their third party complaints against Mancini. Plaintiff opposes the motions. Mancini too opposes the motions, and also moves for summary judgment on its fourth party complaint against B&B. B&B opposes Mancini’s motion and cross moves for summary judgment dismissing two of Mancini’s claims. Mancini opposes B&B’s motion. Because NYSDA, Turner and Mancini all failed to establish their entitlement to summary judgment, each of their motions are denied. B&B, however, demonstrated its entitlement to summary judgment dismissing Mancini’s breach of contract cause of action, but not Mancini’s contractual indemnification claim.

It is well established that “[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, and [t]he evidence produced by the movant must be viewed in the light most favorable to the nonmovant, affording the nonmovant every favorable inference.” (Rought v Price Chopper Operating Co., Inc., 73 AD3d 1414 [3d Dept 2010], quoting Walton v Albany Community Dev. Agency, 279 AD2d 93 [3d Dept 2001]).

Considering first Plaintiff’s Labor Law §200 / negligence causes of action, neither

NYSDA nor Turner met their prima facie burden.

“Labor Law § 200 [represents] a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work.” (Edick v General Electric Company, 98 AD3d 1217, 1218 [3d Dept 2012], quoting Weinberg v Alpine Improvements, LLC, 48 AD3d 915 [3d Dept 2008]). Contrary to NYSDA’s contentions, “this is not a ‘means and methods’ case; rather, this is a ‘hazardous condition’ case.” (Harrington v Fernet, 92 AD3d 1070, 1071 [3d Dept 2012]; White v Vil. of Port Chester, 92 AD3d 872, 876 [2d Dept 2012]; Cook v Orchard Park Estates, Inc., 73 AD3d 1263 [3d Dept 2010]). Because Plaintiff’s fall was not caused by “the manner in which the work was being performed but, rather, as a result of allegedly tripping on a dangerous condition at the work site” (Mott v Tromel Const. Corp., 79 AD3d 829, 830 [2d Dept 2010]), NYSDA’s “ability to supervise or control plaintiff’s work is irrelevant.” (Edick v Gen. Elec. Co., supra 1219).

“To meets its initial burden on the motion for summary judgment, [NYSDA] was required to establish, as a matter of law, that it did not create the allegedly dangerous condition or have actual or constructive notice thereof.” (Edick v Gen. Elec. Co., supra 1218).

On this record, NYSDA failed to make the requisite showing. In support of its motion, NYSDA submitted the affidavit of Andrew Hathaway (hereinafter “Hathaway”), its project manager, along with an excerpt of his deposition.<sup>1</sup> Because he did not “really know who the

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<sup>1</sup> Although submitted in excerpt form, Hathaway’s deposition transcript was signed and is therefore admissible. NYSDA also submitted excerpts of deposition testimony given by Plaintiff, representatives of Andrew R. Mancini Associates, Inc. and a non-party witness (Bruce Braman). However, not one of them is signed. Nor did NYSDA demonstrated their admissibility pursuant to CPLR §3116(a). As such, these deposition transcript excerpts are inadmissible and not considered. (Marks v Robb, 90 AD3d 863 [2d Dept 2011]; Marmer v IF USA Exp., Inc., 73 AD3d 868 [2d Dept 2010]; McDonald v Mauss, 38 AD3d 727, 728 [2007]; Pina v Flik Intl. Corp., 25 AD3d 772 [2006]).

actual owner of the property” was, NYSDA failed to demonstrate that it did not own the project site at the time of Plaintiff’s injury. Hathaway stated that he was personally on site once per week, and another NYSDA representative was there daily. He explicitly denied observing the tripping hazard that caused Plaintiff’s fall, and stated that he was not “aware of any complaints concerning job site safety.” He failed to explain, however, his efforts to discover if NYSDA had been notified of the alleged dangerous condition or the process by which he would have been informed. Simply put, his personal lack of awareness is of limited probative value. It fails to demonstrate, as a matter of law, NYSDA’s lack of actual knowledge. Moreover, Hathaway wholly failed to address NYSDA’s “constructive notice” as he explained neither NYSDA’s inspection procedures nor how it “maintained the premises in a reasonably safe condition.” (Coleman v Crumb Rubber Mfrs., 92 AD3d 1128, 1131 [3d Dept 2012]). Despite NYSDA’s presence at the site, non-party John Flora estimated that the hardened waste concrete was there for about one month.<sup>2</sup> Viewing such proof in a light most favorable to Plaintiff, NYSDA “did not establish its entitlement to summary judgment dismissing these claims.” (Weinberg v Alpine Improvements, LLC, supra 919).

Additionally, neither NYSDA nor Turner<sup>3</sup> are entitled to summary judgment due to the

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Additionally, to the extent the parties supported their respective motions with their attorney’s affidavits/affirmations, because they are not based upon “personal knowledge of the operative facts [they are of no]... probative value.” (2 North Street Corp. v Getty Saugerties Corp., 68 AD3d 1392 [3d Dept 2009]; Groboski v Godfroy, 74 AD3d 1524 [3d Dept 2010]).

<sup>2</sup> Because it was signed, Flora’s deposition transcript excerpt is admissible and considered.

<sup>3</sup> Not one of the deposition transcripts Turner submitted in support of its motion were signed. Nor did Turner demonstrate their admissibility pursuant to CPLR §3116(a). As such, only its own Project Manager’s unsigned deposition, necessarily adopted as accurate, is admissible and will be considered. (Ashif v Won Ok Lee, 57 AD3d 700 [2008]; Rodriguez v

“readily observable” nature of the hardened waste concrete. Similar to NYSDA’s failure to demonstrate that it was not the project site’s owner, Turner too failed to offer any proof that it was not the project’s construction manager in charge of site safety. Instead, Turner’s Project Manager, Warren Dowling, affirmatively stated that it had “drawn up” “site safety guidelines” and that it was “Turner’s responsibility to monitor site safety.” He also stated that when Turner employees walked the site they would address safety issues with the contractors involved. Moreover, Hathaway testified that Turner was “responsible for daily safety requirements of all the contractors.” Considering these respective roles in a light most favorable to Plaintiff, both NYSDA and Turner had a duty “to furnish workers [such as Plaintiff] with a reasonably safe place to work.” (England v Vacri Const. Corp., 24 AD3d 1122, 1124 [3d Dept 2005]). Contrary to both NYSDA and Turner’s assertions, “an injured person’s knowledge of a readily observable dangerous condition does not, standing alone, necessarily obviate a landowner’s duty to maintain his or her property in a reasonably safe condition... [a] readily observable [dangerous condition]... merely negate[s] any duty... to warn of potentially dangerous conditions.” (Coleman v Crumb Rubber Mfrs., supra 1131 [internal quotation marks and citations omitted]; MacDonald v City of Schenectady, 308 AD2d 125 [3d Dept 2003]). Plaintiff’s “awareness of the [hardened waste concrete] raises triable issues of fact as to his comparative negligence, but does not relieve [either NYSDA or Turner of their] duty to maintain the premises in a reasonably safe condition as a matter of law.” (Coleman v Crumb Rubber Mfrs., supra at 1131).

Accordingly, neither NYSDA nor Turner demonstrated their entitlement to judgment as a matter of law dismissing Plaintiff’s Labor Law §200 / negligence causes of action. Such failure

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Ryder Truck, Inc., 91 AD3d 935, 936 [2d Dept 2012]).

of proof renders irrelevant “the adequacy of plaintiff[s] opposition.” (Coleman v Crumb Rubber Mfrs., supra at 1130, quoting Bonse v Katrine Apt. Assoc., 28 AD3d 990 [3d Dept 2006]; Anderson v Skidmore Coll., 94 AD3d 1203 [3d Dept 2012]).

Turning next to NYSDA and Turner’s motions for summary judgment seeking dismissal of Plaintiff’s Labor Law §241(6) cause of action, although both Defendants demonstrated their entitlement to summary judgment, Plaintiff raised a triable issue of fact.

Preliminarily, contrary to NYSDA’s contention, because Labor Law §241(6) “imposes a nondelegable duty on property owners... supervision or control over the work site” is irrelevant to NYSDA’s section 241(6) liability. (St. Louis v Town of N. Elba, 16 NY3d 411, 413 [2011]).

As conceded by Plaintiff, his Labor Law §241(6) cause of action is premised solely upon an alleged violation of Industrial Code §23-1.7(e)(2).<sup>4</sup> Such code section is explicitly applicable to “[t]he parts of floors, platforms and similar areas where persons work or pass.” (Gavigan v Bunkoff Gen. Contractors Inc., 247 AD2d 750, 751 [3d Dept 1998][citing 12 NYCRR 23-1.7(e)(2)]). It does not apply to “an out-of-doors worn dirt pathway” (Id.), an “open area between [a] sidewalk and building” (Cook v Orchard Park Estates, Inc., supra 1266), a “temporary roadbed” (Lawyer v Hoffman, 275 AD2d 541, 542 [3d Dept 2000]), an “open, unpaved area” between that plaintiff’s car and a work trailer (Raffa v City of New York, 100 AD3d 558, 559 [1st Dept 2012]) or to an “open concrete area between an equipment trailer and [a] building under construction.” (Scotfield v Trustees Of Union Coll., 288 AD2d 807, 809 [3d Dept 2001]).

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<sup>4</sup> Due to such concession, NYSDA and Turner’s motions seeking dismissal of Plaintiff’s Labor Law §241(6) claim based upon violations of 12 NYCRR 23-1.7(d), “12 NYCRR Part 23, 29 CFR Part 1910, and various OSHA violations” are granted, and will not be addressed further.

On this record, NYSDA and Turner established that the area where Plaintiff allegedly fell was not part of a “floor[], platform[ or] similar area[] where persons work or pass.” (12 NYCRR 23-1.7(e)(2)). Plaintiff’s complaint and bill of particulars explained that his fall occurred when he was walking “from the port-a-john to the main entrance area.” He further described the hardened waste concrete as being left in an area “where persons [/workers] were known to walk” and in “walking areas.” Neither his complaint nor his bill of particulars described the location of his fall as occurring in a working area. Moreover, Flora described the area where Plaintiff fell as “a courtyard... an area that was open” and Dowling described it as an “exterior gap” between buildings. Based upon Plaintiff’s ambiguous description along with Flora and Dowling’s more detailed accounts, NYSDA and Turner demonstrated that the area where Plaintiff fell did not come within the purview of 12 NYCRR 23-1.7(e)(2). They both thereby met their prima facie burdens on this portion of their motions.

With the burden shifted, Plaintiff raised a triable issue of fact. At his deposition<sup>5</sup> Plaintiff described, using photographs that are part of this record, the area where he fell. He recalled that his employer’s “gang box,” the supply of pipe he was using and his welder were all located in such area. The area also contained other construction material, such as “foam siding and roofing parts.” Moreover, on the day he fell Plaintiff recalled roofers installing roof sections with a “big Lull truck” in the area of his fall. He and other construction site workers were “working in that yard.” On these assertions and the related photographs, Plaintiff raised a triable issue of fact as

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<sup>5</sup> Turner submitted Plaintiff’s unsigned deposition transcript, and Plaintiff’s opposition incorporated such testimony. Again, because Plaintiff adopted his own deposition transcript as accurate, it is admissible and will be considered. (Ashif v Won Ok Lee, supra; Rodriguez v Ryder Truck, Inc., supra).

to whether the area where he fell constituted a “‘working area’ under 12 NYCRR 23-1.7(e)(2).” (Maza v Univ. Ave. Dev. Corp., 13 AD3d 65, 66 [1st Dept 2004], quoting Canning v Barneys N.Y., 289 AD2d 32 [2001]; Torres v Forest City Ratner Companies, LLC, 89 AD3d 928, 929 [2d Dept 2011]; Smith v Hines GS Properties, Inc., 29 AD3d 433 [1st Dept 2006]).

Turning next to NYSDA and Turner’s motions for summary judgment granting their indemnification claims against Mancini and Mancini’s motion for summary judgment granting its indemnification claims against B&B, each movant failed to demonstrate their entitlement to judgment as a matter of law.

“Unless the proposed indemnitee is found to be free from active negligence, conditional summary judgment for either common-law or contractual indemnification against a proposed indemnitor is premature.” (Husted v Central N.Y. Oil & Gas Co., LLC, 68 AD3d 1220, 1223 [3d Dept 2009]; Harrington v. Fernet, supra; Cook v. Orchard Park Estates, Inc., supra).

On this record, because Plaintiff’s common law negligence / Labor Law §200 claims against NYSDA and Turner remain viable neither demonstrated their entitlement to contractual or common law indemnification as a matter of law. (Miranda v Norstar Bldg. Corp., 79 AD3d 42 [3d Dept 2010]).

Similarly, Mancini did not demonstrate its freedom from active negligence as a matter of law. In support of its motion Mancini properly submitted Hathaway’s deposition transcript, its Field Supervisor’s, Mark Colwell, deposition transcript along with the affidavit and deposition of its President, Americo DiCamillo.<sup>6</sup> Hathaway testified that Mancini was the project’s concrete

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<sup>6</sup>Although neither Colwell nor DiCamillo’s transcripts were signed, both are deemed adopted as accurate. As such, they are admissible and will be considered. (Ashif v Won Ok Lee, supra; Rodriguez v Ryder Truck, Inc., supra).

contractor, and agreed that Mancini was “responsible for safety within the scope of its work.” The Mancini representatives stated that its concrete supplier was “B&B Concrete.” Pursuant to a purchase order, B&B delivered all of the concrete Mancini required for the project directly to the site. Although his affidavit now states otherwise, at his deposition DiCamillo confirmed that B&B was less than a subcontractor; it merely supplied the necessary concrete. Moreover, again contrary to the DiCamillo affidavit, the purchase order contains no provision requiring B&B to take concrete away from the site. For B&B’s deliveries, Colwell recalled that Mancini would either direct B&B to the applicable location for their pour or meet B&B’s truck at the site’s gate and “take them where we wanted them.” DiCamillo too stated that Mancini directed the amount of concrete B&B poured and its placement. Neither Mancini representative could affirmatively establish that its supplier did not leave waste concrete in the area where Plaintiff fell, as neither was solely responsibility for such task. Nor did they establish that Mancini took reasonable measures to ensure that any of their waste concrete left in the area where Plaintiff fell was removed. Considering this record in a light most favorable to B&B, Mancini failed to demonstrate its freedom from active negligence as a matter of law. Accordingly, it is not entitled to summary judgment on either of its indemnification claims against B&B.

B&B similarly failed to demonstrate its entitlement to summary judgment dismissing Mancini’s contractual indemnification claim. B&B properly submitted the purchase order whereby it supplied concrete to Mancini for this project. It correctly notes that the purchase order’s “Indemnification” provision is unlimited. The provision may be read to extend B&B’s indemnification obligation to indemnify Mancini for its own negligence. Such a requirement is void under General Obligations Law §5-322.1. (Brooks v Judlau Contr., Inc., 11 NY3d 204

[2008]). Summary judgment, however, is premature because “without a finding of negligence on the part of [Mancini], the agreements as applied would not run afoul of the proscriptions of General Obligations Law §5-322.1.” (Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co., 89 NY2d 786, 795 [1997]). Because B&B has not demonstrated Mancini’s negligence as a matter of law, B&B has not established that the purchase order’s Indemnification provision, as applied here, violates General Obligations Law §5-322.1. Accordingly, B&B’s motion for summary judgment dismissing Mancini’s contractual indemnification cause of action is denied.

Lastly, B&B demonstrated its entitlement to summary judgment dismissing Mancini’s breach of contract cause of action.

“It is well settled that a contract must be definite in its material terms in order to be enforceable.” (Wilson v Ledger, 97 AD3d 1028, 1029 [3d Dept 2012], quoting Clifford R. Gray, Inc. v. LeChase Constr. Servs., LLC, 31 AD3d 983 [3d Dept 2006]). However, “[b]efore rejecting an agreement as indefinite, a court must be satisfied that the agreement cannot be rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear.” (Cobble Hill Nursing Home, Inc. v Henry and Warren Corp., 74 NY2d 475, 483 [1989]).

Here, B&B demonstrated that there is no external standard to make the purchase order’s insurance requirement clear. On this record it is uncontested that Mancini purchased concrete from B&B pursuant to a purchase order. There is no dispute about B&B’s delivery or Mancini’s payment. At issue instead is B&B’s obligation to obtain insurance. The purchase order, in pertinent part, states: “If [B&B] or its employees or agents come onto the job site in connection with this Purchase Order, [B&B] agrees to *carry* (I) Comprehensive General Liability Insurance covering personal injuries (including death) in the amount of \$ \_\_\_\_\_ per occurrence, and

Comprehensive Automobile Insurance covering bodily injuries (including death) in the amount of \$\_\_\_\_\_ per person, and \$\_\_\_\_\_ per occurrence, property damage in the amount of \$\_\_\_\_\_ per occurrence, and products liability in the amount of \$\_\_\_\_\_.” (emphasis added). It is uncontested that all of the “\$\_\_\_\_\_” notations above remained blank throughout the parties’ performance under the purchase order. The coverage amounts are simply undefined, with no reference to any external standard. Moreover, the purchase order at no point requires B&B to obtain insurance for Mancini or name Mancini as an additional insured. Read literally, the provision only requires B&B to “carry” insurance, not to provide Mancini with it. As such, B&B cannot be held to have breached the purchase order for not providing liability coverage to Mancini. Due to the foregoing, B&B duly established its prima facie entitlement to judgment as a matter of law.

With the burden shifted, Mancini raised no triable issue of fact. Conspicuously absent from Mancini’s opposition is any refutation of B&B’s showing that the purchase order did not require B&B to obtain insurance for it. Moreover, to the extent that Mancini’s attorney’s affidavit claimed that the extent of coverage is an issue for trial, such statement is of no probative value. (2 North Street Corp. v Getty Saugerties Corp., supra; Groboski v Godfroy, supra). Nor did Mancini proffer any admissible proof to establish the existence of an extrinsic standard that would make the “\$\_\_\_\_\_” notation clear.

Accordingly, B&B’s motion for summary judgment dismissing Mancini’s breach of contract cause of action is granted. Otherwise, all other motions are denied. To the extent not specifically addressed above, the parties’ remaining contentions have been examined and found to be lacking in merit.

This Decision and Order is being returned to the attorneys for Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: February /, 2013  
Albany, New York

  
JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion, dated December 3, 2012; Affirmation of Linda Clark, dated December 3, 2012, with attached Exhibits A-R; Affidavit of Andrew Hathaway, dated December 3, 2012.
2. Notice of Motion, dated November 30, 2012; Affidavit of William Greagan, dated November 30, 2012, with attached Exhibit A-L.
3. Affirmation of Andrew Spitz, dated January 4, 2013, with attached Exhibits A-F.
4. Affidavit of Kevin Westerman, dated January 9, 2013.
5. Affidavit of William Greagan, dated January 15, 2013, with attached Exhibit 1; Affidavit of William Greagan, dated January 15, 2013.
6. Notice of Motion, dated November 30, 2012; Affidavit of Kevin Westerman, dated November 30, 2012, with attached Exhibit A-V.
7. Notice of Cross Motion, dated January 9, 2013; Affidavit of Timothy Hannigan, dated January 9, 2013, with attached Exhibits A-G.
8. Affidavit of Kevin Westerman, dated January 16, 2013, with attached Exhibit A-B.