Kenny v Turner Constr. Co.
2015 NY Slip Op 30349(U)
March 16, 2015
Supreme Court, New York County
Docket Number: 603387/06
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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PATRICIA KENNY,

Plaintiff,

-against-

TURNER CONSTRUCTION COMPANY, RICHARD MEIER & PARTNERS, MICHAEL HARRIS SPECTOR, AIA, P.C. a/k/a and d/b/a THE SPECTOR GROUP, SPECTOR ASSOCIATES LLP, THE CORPORATE SOURCE INC., YSRAEL A. SEINUK, P.C., SYSKA & HENNESSY, INC., NELSON & POPE,LLP, KINGS COUNTY WATERPROOFING INC., L. MARTONE & SONS, INC., MACEDOS CONSTRUCTION CO., INC., FRANCIS BROTHERS SEWER AND DRAINAGE, INC., and COKEN COMPANY, INC.,

Defendants.

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Index №.: 603387/06
Motion Seq. Nos. 005, 006, 007, 008, 009, 010, 011, 012, 013, 014, 015, 016, 017, 018, 019, and 020

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TURNER CONSTRUCTION COMPANY,

Third-party Plaintiff,

-against-

THE CORPORATE SOURCE, INC.,

Third-Party Defendant.

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Third-party index No. 603387/06

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MACEDOS CONSTRUCTION CO., INC. OF NEW JERSEY N/K/A FLEMINGTON CONSTRUCTION INC. AND S/H/A MACEDOS CONSTRUCTION CO., INC.,

Second Third-party Plaintiff,

-against-

J & A CONCRETE CORP.,

Second third-party defendant

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Second Third-party index No. 590556/10

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THE CORPORATE SOURCE, INC.,

Third Third-party plaintiff,

-against-

LEHRER McGOVERN BOVIS, INC., BOVIS LEND LEASE LMB, INC., HIGH CONCRETE STRUCTURERS, INC., HIGH CONCRETE GROUP LLC and MUESER RUTLEDGE CONSULTING ENGINEERS,

Third Third-party defendants.

Third third-party index No. 590556/10

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The Corporate Source, Inc.

Fourth Third-party plaintiff,

-against-

MUESER RUTLEDGE CONSULTING ENGINEERS,

Fourth Third-party defendant

Fourth third-party index No. 590243/11

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HIGH CONCRETE STRUCTURES, INC. and HIGH CONCRETE GROUP,

Fourth Third-party Plaintiffs,

-against-

PRECAST SERVICES, INC.,

Fourth Third-party Defendant.

Fourth-party index No. 590243/11

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HIGH CONCRETE STRUCTURES, INC. and HIGH CONCRETE GROUP,

Fifth Third-party Plaintiffs,

-against-

A.H. SAMPLE, INC.,

Fifth Third-party Defendant.

Second fourth-party index No. 590243/11

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CAROL R. EDMEAD, J.:

This action arises from plaintiff Patricia Kenny's slip and fall in a parking garage at the Alfonse M. D'Amato United States courthouse in Central Islip (the courthouse). This decision and order consolidates and resolves 15 motions.

The owner of the land, the US government, is not a party. The general contractor for the construction of the parking garage, defendant/third-party plaintiff Turner Construction Company (Turner), moves, pursuant to CPLR 3212, for summary judgment dismissing all claims, cross claims and counterclaims as against it; Turner also seeks summary judgment on its indemnification claims against defendant/third and fourth third-party plaintiff/third-party defendant The Corporate Source Inc. (Corporate Source), defendant Kings County Waterproofing, third third-party defendant High Concrete Structures, Inc. (High Concrete), and fourth-party defendant Precast Services, Inc. (Precast) (motion seq. No. 012).

Various subcontractors involved in the parking garage project also move for summary judgment dismissing all claims and cross claims against them: defendant Coken Company, Inc. (Coken) (motion seq. No. 005); defendant L. Martone & Son's Inc. (Martone)(motion seq. No. 006); second third-party defendant J & A Concrete Corp. (J & A Concrete) (motion seq. Nos. 007 and 015); defendant Nelson & Pope, LLP (Nelson & Pope) (motion seq. No.

008); Precast (motion seq. No. 010); Kings County (motion seq. No. 011); defendant/second third-party Macedos Construction Co., Inc. of New Jersey (Macedos)(motion seq. No. 013); second fourth-party defendant A.H. Sample Inc. (Sample) (motion seq. No. 014); third-party defendants/fourth-party and second fourth-party plaintiffs High Concrete Structures, Inc. and High Concrete Group, LLP (together, High Concrete) (motion seq. No. 016).

Members of the design team also move for summary judgment seeking dismissal of all claims and cross claims as against them: defendant Ysrael A. Seinuk, P.C. (Seinuk)(motion seq. No. 017); defendants Michael Harris Spector, AIA, P.C. a/k/a and d/b/a The Spector Group, Spector Group Home, LLC and Spector Associates LLP (collectively, the Spector Group) (motion seq. No. 018); Richard Meier & Partners, LLP (Meier & Partners) (motion seq. No. 019). The construction quality managers -- third third-party defendants Lehrer McGovern Bovis, Inc. and Bovis Lend Lease LMB, Inc. (together, Bovis) -- also move to have all claims and cross claims as against them dismissed (motion seq. No. 009).

Finally, the company in charge of maintenance of the parking garage, defendant the Corporate Source (Corporate Source) moves for summary judgment dismissing all claims and cross claims as against it (motion seq. No. 20). All of the motions are consolidated for disposition.

BACKGROUND

In 1992, the Spector Group and Meier & Partners contracted with the General Services Administration (GSA) to provide architectural services for the courthouse project, which included the parking garage where plaintiff fell. In 1995, Turner entered into an agreement with GSA to serve as the general contractor. The project was completed in 2000. On January 19, 2005, plaintiff, a GSA employee, was injured when she slipped and fell on ice in the lower level of the courthouse's two-story parking garage.

The accident took place on the lower level of the garage. Plaintiff alleges that the ice she slipped on formed as a result of precipitation that leaked from joints in the top level of the garage and froze on the lower level, which is not heated. Plaintiff brings negligence claims against the general contractor, various subcontractors, as well as members of the design team, and Corporate Source, the company responsible for maintaining the garage. The various cross claims and third-party actions primarily involve claims for indemnification and contribution.

DISCUSSION

"Summary judgment must be granted if the proponent makes '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 the opponent fails to rebut

that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

I. Turner (motion seq. No. 012)

A. Negligence

Turner, the general contractor on the construction of the courthouse parking garage, seeks dismissal of all claims, cross claims, and counterclaims as against it.

Turner cites to *Diaz v Vasques*, 17 AD3d 134 (1st Dept 2005), in which the appellate division reversed a denial of summary judgment to a contractor that performed road work for New York City's Department of Transportation. In *Diaz*, the plaintiff argued that the contractor had been negligent for failing to install additional safety devices, but the court noted that it "is well settled that a contractor is justified on relying upon the plans and specifications which he has contracted to follow unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury" (*id.* at 135 [internal quotation marks and citation omitted]). The Court in *Diaz* found that the roadwork plans were not so apparently defective (*id.* at

136).

Here, Turner submits the deposition transcript of its project engineer, George Shovlin (Shovlin), who testified that Turner had nothing to do with the design of the project (Shovlin tr at 70) and that it had no authority to deviate from the plans and specifications provided to it without express written approval from GSA or GSA's design team (*id.* at 110-111; 204). Moreover, Turner argues that there is no evidence that it deviated from the plans and specifications, citing to the testimony of Bovis's James Stawniczy (Stawniczy), who stated that, before payment was made to the contractors, many parties, including GSA, the architects and the design engineers, agreed that the work conformed to the plans and specifications (Stawniczy tr at 133).

More broadly, Turner argues that, as a matter of law, it does not owe a duty to plaintiff. Under *Espinal v Melville Snow Contrs.* (98 NY2d 136 [2002]), a contractor does not owe a duty to a third-party except in three circumstances: (1) the contractor negligently launches an instrument of harm; (2) the plaintiff detrimentally relied on the continued performance of the contractor's duties; or (3) the contractor has entirely displaced the owner's obligation to safely maintain the premises. Turner argues that there is no evidence that it launched an instrument of harm or displaced the owner's obligation to maintain a safe

premises. Nor, Turner argues, is there any evidence that plaintiff detrimentally relied on Turner's continued performance.

Plaintiff does not argue reliance or displacement, but instead maintains that Turner owes her a duty because it launched an instrument of harm. More specifically, plaintiff contends that Turner launched several instruments of harm.

First, plaintiff argues that Turner launched leaky joints in the level above the accident site. In support of this argument, plaintiff submits the affidavit of Thomas Fernandez (Fernandez), a facility manager for GSA. While Fernandez did not manage any of the courthouse facilities, he did park at the garage, as he managed commercial buildings nearby (Fernandez aff, ¶ 1). Additionally, he filled in for the manager of the courthouse garage for short periods during 2006, 2011, and 2012, all of which was after Turner had finished the project and vacated the garage in 2000. Fernandez stated that the garage "always had many problems, including water leaking through the sealant joints between the double tees from the upper level parking lot to the level below" (*id.*, ¶ 4).

Second, plaintiff argues that Turner launched another harm by installing lights that were insufficiently weatherproofed and prone to burnouts. Fernandez averred that "[t]he lights and fixtures that had been installed were not sufficiently weather resistant for the conditions that existed in the garage causing

constant blown bulbs and often the fixtures would catch fire" (*id.*). Fernandez added that while he found that the specifications called for "wet rated" lights, the light fixture he personally checked was "damp rated" (*id.*, ¶ 5).

Fernandez does not mention Turner in his affidavit. Instead of maintaining that Turner caused these problems, Fernandez suggests that it was a maintenance issue: "Corporate Source, who was in charge of maintenance of the property and parking garage, did not repair these bulbs or fixtures in a timely manner" (*id.*). Fernandez also stated that "caulking or sealing the leaks was part of routine maintenance that was covered under (the Corporate Source's) contract" (*id.*, 12).

As to the issue of whether or not Turner deviated from the plans and specifications of the design team, plaintiff submits the expert affidavit of Richard Robbins (Robbins), an architect. Robbins states that "the design calls for a watertight airtight continuous seal across the joint between the double Tee's yet it is clear that there was leaking and water was coming through the joints at the parking garage as early as 1998" (Robbins aff, ¶ 6). Robbins points to the original application of sealant by Turner's subcontractor, King's County, the day after a heavy rainfall as a possible cause for the leakiness (*id.*, ¶ 19).

Robbins concludes broadly that "the design team including the Architect and Engineer as well as the General Contractor were

responsible for all products installed in the building. Further the general Contractor and subcontractors did not provide adequate workmanship and proper supervision" (*id.* at 22). However, Robbins also concludes that Corporate Source "did not properly maintain the property and keep the area free from ice accumulation nor maintain the caulking and joints between the double T's" to prevent leaks, despite the fact that "[t]his dangerous condition had been reoccurring every year for every rainfall and every snowstorm" (*id.*, ¶ 21-22).

Here, Turner, a contractor, does not owe plaintiff, a third party, a duty and none of the *Espinal* exceptions are applicable. Even if plaintiff were correct that Turner's subcontractor, Kings County, failed to properly seal the joints above the accident and even if plaintiff were correct that Turner's lighting subcontractor failed to install lights that were sufficiently water resistant, the link between these allged failures of oversight and the defect that caused plaintiff's accident are too remote and attenuated to create a duty between Turner and plaintiff.

In applying the *Espinal* exception for launching an instrument of harm, the Court of Appeals has evaluated whether the harm was "remote or attenuated" (*Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1 [2013]). Turner finished its work on the project in 2000 and plaintiff was injured in 2005. In the

meantime, as plaintiff herself alleges, Corporate Source had exclusive responsibility to repair and maintain the premises. Moreover, plaintiff alleges that Corporate Source was on notice of these problems. In these circumstances, the *Espinal* exception for launching a harm is not applicable.

Cases cited by plaintiff are either inapposite or support this outcome. In *Anastasio v Berry Complex, LLC* (82 AD3d 808 [2d Dept 2011]), the general contractor, unlike Turner, was still on the job site when the plaintiff's accident occurred, instead of five years removed from it. Similarly, *Edick v General Elec. Co.* (98 AD3d 1217 [3d Dept 2012]) involved Labor Law claims stemming from an ongoing construction project. In *Zibro v Saratoga Natl. Golf Club, Inc.* (55 AD3d 998 [3d Dept 2008]), the Court discusses whether a defect existed rather than whether the contractor had a duty to plaintiff.

In *Church v Callanan Indus., Inc.* (99 NY2d 104 [2002]), a contractor failed to install the full length of guard rail it had been hired to place along a highway and plaintiff's decedent died in a car crash along the stretch of road where the shortfall was located. Even so, the Court of Appeals held that the contractor had not launched an instrument of harm, it had only failed to make the road safer (*id.* at 112). Thus, instead of supporting plaintiff's position, *Church* shows that the *Espinal* exception for launching a harm is narrow and requires a direct connection

between the harm and the contractor's alleged negligence.

As the connection between the ice that plaintiff slipped on and Turner's performance of its contractual duties as general contractor is remote and attenuated, Turner did not owe plaintiff a duty. As such, the branch of Turner's motion that seeks dismissal of plaintiff's complaint is granted.

B. Indemnification

Turner seeks summary judgment on its contractual indemnification claims against High Concrete Structures, Inc. and Precast, while it seeks common-law indemnification against Kings County and Corporate Source. As to the contractual claims, the provision Turner relies on requires a showing of negligence that Turner does not make. Thus, Turner is not entitled to summary judgment on its contractual indemnification claims (for further discussion of these claims, see sections VII and XI below). As to common-law negligence, because Turner is not liable to plaintiff, these claims are moot (*see generally McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 375 [2011]).

II. Coken (motion seq. No. 005)

Coken was the electrician that mounted the lighting fixtures. Plaintiff testified at her deposition that the area where she fell, the lower level of the parking garage, was dark because water dripping from expansion joints had shorted out the lights (plaintiff tr at 50).

In moving for summary judgment, Coken argues that (1) plaintiff did not plead that a problem with the lights caused her accident; (2) that Coken had nothing to do with the leaking joints; and (3) it had no duty to plaintiff.

The first two points are not contested by plaintiff. As to duty, Coken notes that it finished installing the lights in 1998 and that, as a contractor, it owes no duty to plaintiff unless one of the *Espinal* exceptions is applicable. As to the issue of whether "UL Wet Rated," or "UL Damp Rated" lights were used, Coken argues that it had no discretion as to which lights it installed. In support, Coken, which is no longer in business, offers the deposition testimony of its former employee, Robert Rynar (Rynar), who testified that Coken had no responsibility for selecting the lights or selecting where they were placed (Rynar tr at 73).

In opposition, plaintiff contends that Coken was negligent in failing to install "UL Wet Rated" lights. Plaintiff argues that this caused the lights to burn out when the ceiling leaked onto them and that the burned-out lights made it difficult for plaintiff to see, causing her accident. In support, plaintiff again submits the affidavits of Fernandez and Robbins that were discussed above in the context of plaintiff's opposition to Turner's motion for summary judgment. Finally, plaintiff argues that Coken owes her a duty because it launched an instrument of

harm through its installation of the lights.

In reply, Coken contends that plaintiff improperly raises the issue "UL Damp" versus "UL Wet" lights for the first time in opposition to its motion for summary judgment. Coken argues that under *Park v Kovachevich* (116 AD3d 182, 193 [1st Dept 2014] [declining to consider a new theory of liability raised for the first time plaintiff's expert affirmation]) and *Price-Linden v State of New York* (119 AD3d 1192 [3d Dept 2014] [holding that the introduction of a new theory of liability in opposition to a motion for summary judgment bars "relief which is otherwise appropriate"] [internal quotation marks and citation omitted]), this theory should be given no probative force.

Coken also argues that plaintiff's opposition is based on speculation. Specifically, speculation as to whether "UL Wet" lights would have burned out as a result of the persistent leaking and as to whether Coken chose the "UL Damp" lights. Finally, Coken emphasizes that plaintiff did not plead or litigate the theory that Coken negligently installed the wrong grade of light. For example, Coken points out that plaintiff did not question its witness, Rynar, on this subject.

Here, Coken makes a *prima facie* showing of entitlement to judgment by showing that it did not own or control the parking garage and that, as a contractor who did work there seven years before plaintiff's accident, it did not have a duty to plaintiff.

Plaintiff fails to raise an issue of fact as to whether Coken owes her a duty because it launched an instrument of harm.

Coken is also correct that the court should give no probative value to a theory that plaintiff did not plead or litigate. It is also correct that plaintiff failed to provide any non-speculative evidence to support her theory. However, even if plaintiff had pled and litigated this theory, Coken would still be entitled to summary judgment as the alleged conduct is too remote in time and attenuated by subsequent events, such as the service contract which required Corporate Source to replace burned out lights.

Once again, the cases plaintiff cites in support of her harm-launching theory are inapposite. In *Brown v Simone Dev. Co., L.L.C.* (83 AD3d 544 [1st Dept 2011]), for example, the Court denied summary judgment to a company that was responsible--at the time of the accident--for maintenance at the subject building and that was alleged to have left the floor wet after a mopping. While *Brown* did not discuss the question of duty or the *Espinal* exceptions, it is clearly uninstructive here. Similarly, in *Campbell v Barbaro Elec. Co., Inc.* (116 AD3d 728), there was a question of fact as to whether the contractor, four days before the accident, left out the piece of threaded rod that caused the plaintiff to trip. In *Campbell*, unlike here, the alleged launching was neither remote nor attenuated.

As Coken had no duty to plaintiff, and as plaintiff is the only party opposing, Coken's motion is granted in full and all claims and cross claims are dismissed as against it.

III. Martone (motion seq. No. 006)

Martone is also entitled to dismissal of all claims and cross claims as against it. Martone submits the testimony of Bovis's Stawniczy, Turner's Shovlin, and its own president, Nicholas Martone, all of whom stated that Martone had no role in the sealing of the expansion joints above the site of plaintiff's accident (Stawniczy tr at 36) (Shovlin tr at 232) (Martone tr at 88). Instead, Martone's duties included insulating the roof of the courthouse, roofing and insulation work at the top of the stairwell bulkheads of the parking garage, waterproofing the elevator pit in the garage, and damp proofing at certain below grade surfaces (Martone tr at 22-23, 138-139).

Martone argues that it did not owe plaintiff a duty of care and has not launched an instrument of harm, as its work was not related to the leaky expansion joints that plaintiff points to as the cause of her accident. In her opposition, plaintiff concedes that it appears as if Martone is not responsible for the conditions that caused her accident. Turner nominally opposes Martone's motion, but its affirmation only offers arguments relating to other parties.

Here, it is clear that Martone was not negligent and owed no

duty to plaintiff. Moreover, this action did not arise out of any of Martone's work on the project. As such, Martone's motion for summary judgment dismissing all claims and cross claims as against it is granted.

IV. J & A Concrete (motion seq. No. 007)

Macedos, in the second third-party complaint brings four causes of action against J & A Concrete: contribution, common-law indemnification, contractual indemnification and failure to procure insurance.

As to failure to procure, J & A notes that it took out an insurance policy with QBE Insurance Company Corp. that named Macedos as an additional insured for actions arising out of its work. Additionally, J & A notes that Macedos brought a declaratory judgement action against QBE Insurance Corp. in this county under index No. 103349/09 that was discontinued without prejudice upon the resolution of this action. Thus, J & A argues that it is plain that the failure to procure claim is without merit.

As to the other causes of action, J & A submits the testimony of Macedos's Michael Szubiak (Szubiak) and its own Antonio Martins (Martins) to show that it performed work on the foundation walls, footings, and the elevator pit, all of which were below the level of the actual driving surface of the garage (Szubiak tr at 53-54, 157) (Martins tr at 36, 39).

Thus, as the evidence indicates that J & A Concrete's work on the project was unrelated to plaintiff's accident, plaintiff's negligence claim against J & A Concrete is without merit. As a result, J & A Concrete cannot be liable for common-law negligence and contribution or common-law negligence (*see McCarthy*, 17 NY3d 369; *Crespo v HRH Const. Corp.*, 24 Misc 3d 1246(A) [Sup Ct, New York County 2009]).

Macedos submits an affirmation in partial opposition, in which it joins J & A Concrete's argument that foundational concrete work had nothing to do with plaintiff's accident. However, in the event that the court finds that work J & A performed may have contributed to plaintiff's accident, then, Macedos argues, the second third-party complaint should not be dismissed. Macedos does not make any reference to contractual indemnification.

Here, as it is clear that the accident was unrelated to its work on the project, and as it procured insurance, J & A Concrete's motion for summary judgment is granted and all claims and cross claims as against it are dismissed.

V. Nelson & Pope (motion seq. No. 008)

Nelson & Pope, an engineering firm, moves to have all remaining cross claims as against it dismissed, as the court has already dismissed plaintiff's claims against it.

In support, Nelson & Pope submits, among other things, its

contract with the Spector Group and the deposition transcript of its principal, Robert Nelson (Nelson). Both the contract and Nelson indicate that the work Nelson & Pope did relating to the courthouse did not involve the parking garage.

It is plain that Nelson & Pope is entitled to relief it seeks, as it makes an unrebutted showing that it did not provide any services relating the parking garage where plaintiff fell. As such, its motion is granted and all remaining claims as against Nelson & Pope are dismissed.

VI. Bovis (motion seq. No. 009)

Bovis contracted with GSA to serve as the construction quality manager. Corporate Source seeks contribution from Bovis in the third third-party complaint. Bovis argues that it was not negligent and did not have a duty to plaintiff, Corporate Source or any other party.

Among other things, Bovis submits the deposition testimony of its own Stawniczy, who testified that Bovis's role was limited to observing and informing GSA whether the plans and specifications were followed; Stawniczy also testified that unless there was a safety issue, Bovis had no authority to instruct contractors about the means and methods of their work (Stawniczy tr at 25, 30). Instead, if the work deviated from the plans and specifications, Bovis would issue a non-conforming work order; while Bovis issued about 600 of these during the course of

the project, none of them involved the accident area (*id.* at 33-34). Finally, Stawniczy stated that Turner, GSA, and Bovis had to inspect the premises and agree that the work had been completed according to the plans and specifications before any final payments were made to contractors (*id.* at 133).

Bovis makes a showing that it did not owe a duty to plaintiff or Corporate Source. Corporate Source served its opposition four days after the deadline set by the court. In any event, Corporate Source fails to rebut Bovis's showing. While it argues that there is a question of fact as to whether Bovis launched an instrument of harm, it fails to provide any admissible evidence supporting its theory. While Corporate Source refers to the affidavits of plaintiff's experts, none of those affidavits state that a negligent act by Bovis created the defect that caused plaintiff's injuries.

There is no evidence here that Bovis launched an instrument of harm while carrying out its contractual obligations to GSA. As such, Bovis is not liable to plaintiff. As Bovis is not liable to plaintiff for her injuries, it is not liable to Corporate Source for contribution (*see Mas v Two Bridges Assoc.*, 75 NY2d 680, 689-690 [holding that in contribution, defendants with "common liability to plaintiff" are obliged to pay their "ratable part of the loss"]); *see also* Lopez *v New York Life Ins. Co.*, 90 AD3d 446. 449 [1st Dept 2011, DeGrasse, J. dissenting]

["(c)ontribution is available only where the party seeking contribution and the party from whom contribution is sought are liable for the same injury"]).

As Bovis does not owe contribution to Corporate Source and as no other party opposes, the motion is granted and all claims and cross claims as against Bovis are dismissed.

VII. Precast (motion seq. Nos. 010 and 015)

Precast is a subcontractor that erected prefabricated concrete forms. High Concrete brought a fourth-party complaint against it alleging that Precast is liable for failure to procure insurance, indemnity, and contribution.

As to failure to procure, Precast submits a certificate of insurance. As High Concrete fails to rebut this showing, High Concrete's claim for failure to procure insurance is dismissed.

As to the other claims, Precast submits, among other things, the deposition transcript of its employee Bohdan Kusznir (Kusznir) who testified that Precast's only role was to erect prefabricated concrete pieces which Precast had no role in designing or manufacturing (Kusznir tr at 22). Moreover, Kusznir testified that Precast had no role in waterproofing the concrete (*id.* at 43-44).

Thus, Precast makes an unrebutted showing that it was not negligent in plaintiff's accident. Accordingly, High Concrete's common-law indemnification and contribution claims against

Precast must be dismissed.

As to contractual indemnification, the provision in the contract between High Concrete and Precast limits Precast's obligation to indemnify to losses "arising out of or resulting from performance of [Precast's] Work under the Subcontract . . . but only to the extent caused in whole or in part by negligent acts or omissions of [Precast]." Here, as Precast was not negligent in plaintiff's accident, it does not owe High Concrete indemnification.

Turner was also named as a possible indemnitee under the indemnification provision in the High Concrete-Precast contract and has a cross claim against Precast for contractual indemnification. In opposing Precast's motion, Turner simply submits a portion of Kusznir's deposition transcript which suggests that Precast worked to join double tees in its erection work (Kusznir tr at 37). However, Turner points to no evidence that Precast was negligent in that work. As such, Turner fails to raise a question of fact as to whether Precast owes indemnification to Turner or any other party.

As the claims against it are without merit, Precast's motion for summary judgment dismissing all claims and cross claims as against it is granted.

VIII. Kings County (motion seq. No. 011)

Kings County was the subcontractor responsible for sealing

the joint between the precast double tees. For the reasons discussed above in the discussion of Turner's motion for summary judgment, Kings County does not owe a duty to plaintiff. As such, King's County is entitled to dismissal of all claims and cross claims as against it.

IX. Macedos (motion seq. No. 013)

Macedos argues that it did not owe plaintiff a duty as it does not own, control, or make special use of the building and none of the *Espinal* exceptions are applicable to it. In support, Macedos, submits, among other things, the deposition testimony of its estimator, Szubiak, who testified that Macedos was the contractor responsible for pouring concrete (Szubiak tr at 23). Macedos also points to the deposition transcript of Turner's Shovlin, who stated that Macedos's work was approved by the design team, Turner and Bovis.

In these circumstances, it is clear that Macedos did not launch an instrument of harm such that it would owe a duty to plaintiff. In fact, in plaintiff's opposition, she concedes that it can offer no evidence of negligence by Macedos. Turner nominally opposes Macedos's motion, but offers no specific reasons why it should be held in this case.

As Macedos did not owe plaintiff a duty, and was not negligent, it is entitled to dismissal of all claims and cross claims as against it.

X. Sample (motion seq. No. 014)

Sample worked under High Concrete, providing engineering calculations and shop drawings, which convert the architectural drawings into smaller units. High Concrete brought the second fourth-party complaint against Sample alleging that it is liable for indemnification and contribution.

Sample submits an affidavit from its principal, Alan Sample, in which he stated that Sample was hired by High Concrete to determine internal components of the precast elements, perform structural calculations, and create erection drawings of the particular elements (Sample aff, ¶ 6). Alan Sample also stated that Sample was not involved in cualking, drainage, or expansion joints (*id.*, ¶ 7). Sample also submits an expert affidavit from engineer Harald Greve (Greve), who opined that Sample did not depart from accepted standards of engineering (Greve aff, ¶ 15) and that Sample's work could not have caused plaintiff's injuries (*id.*).

Neither High Concrete nor any of the parties with cross claims against Sample rebuts this showing that Sample was not negligent and thus is not liable for common-law indemnification or contribution. Nor has High Concrete come forward with a contractual provision for indemnification against Sample. As such, Sample's motion is granted and all claims and cross claims as against it are dismissed.

XI. High Concrete

High Concrete provided prefabricated concrete pieces used for the parking garage. It argues that the third third-party complaint and all cross claims should be dismissed as against it as High Concrete owed no duty to Corporate Source or plaintiff.

High Concrete submits the deposition transcript of Kevin Eddings (Eddings), its director of operations. Eddings described High Concrete's role in fabricating concrete pieces for the parking garage and stated that it did not do erection, caulking or drainage work on the garage (Eddings tr at 41-43, 68).

Turner opposes, however it does not submit any evidence that the double tees that High Concrete fabricated were somehow defective. As the indemnification provision in the contract between Turner and High Concrete is triggered by negligence, Turner fails to raise an issue of fact as to whether it is entitled to indemnification. Corporate Source also filed an untimely opposition which fails to raise any issues of fact as to whether High Concrete owed it a duty.

As High Concrete has demonstrated that it did not owe plaintiff a duty and was not negligent in plaintiff's accident, it is entitled to dismissal of Corporate Source's third third-party complaint and all cross claims as against it.

XII. Seinuk (motion seq. No. 17)

Seinuk provided structural engineering services on the

project. Seinuk submits an affidavit from Jeffrey Smilow (Smilow), an engineer that worked for Seinuk, who opines that Seinuk carried out its obligation in accordance with accepted engineering standards.

No party raises a question as to whether Seinuk launched an instrument of harm. As Seinuk had no duty to plaintiff, all claims and cross as against Seinuk are dismissed.

XIII. The Spector Group (motion seq. No. 018)

Along with Meier & Partners, the Spector Group provided architectural services for the project between 1992 and 1996. It submits an affidavit from its shareholder, Michael Harris Spector (Spector), who states that Spector Associates and Spector Group were both formed after this work was complete, and therefore do not belong in this action (Spector Aff at 3 and 4).

In support of its motion for summary judgment, the Spector Group submits an affidavit from James Feurborn (Feurborn), an engineer. Feurborn opines, after reviewing the record, that the Spector Group's work "met the professional standard of care" and that the parking garage "was designed in accordance with governing codes, standards and the state of the practice" (Feurborn aff, ¶ 17). More specifically, Feurborn opines in detail that the Spector Group's choices with regard to sealants, drainage spacing and slope, as well as lighting, met with all applicable codes and standards (*id.*, ¶¶ 12, 13, and 14).

In opposition, plaintiff relies on Robbins' affidavit. However, Robbins fails to specifically detail how the Spector Group's designs were negligent. Instead, Robbins offers general conclusions of blame, such as:

> "If the structure was properly designed, if the right sealant was used, if the sealant was applied correctly and if the garage and sealant was properly maintained there would not have been continuous water infiltration into the lower level of the parking garage every time there was precipitation and/or snow."

(Robbins aff, ¶ 10).

Here is another example of Robbins' failure to specify his opinion as to negligent design: "There can be no question that whether due to faulty installation, faulty choice of sealant, faulty design of the joint itself, that the sealant did not function as required by the specifications -- continuous watertight and airtight seal" (*id.*, ¶ 13). Robbins also opines that the design team's inspections of the parking garage were deficient (*id.*, ¶ 12). In reply, the Spector Group submits an expert affidavit from architect Richard Vivenzio (Vivenzio aff, ¶ 5), who states, among other things, that the Spector Group met its inspection obligations (Vivenzio aff, ¶ 5).

Here, the Spector Group is entitled to summary judgment as it does not owe a duty to plaintiff and there is no evidence in the record that any of the *Espinal* exceptions are applicable to it (*see 87 Chambers, LLC v 77 Reade, LLC.*, 122 AD3d 540, 541 [1st Dept 2014] [in a case involving a partial building collapse

allegedly caused by neighboring construction, the court held that the "plaintiffs' negligence claim against [the architect] should have been dismissed because [the architect's] contractual obligations to [the owner of the neighboring building] do not give rise to tort liability in favor of plaintiffs"). As such, the Spector Group's motion is granted and all claims and cross claims as against it are dismissed.

XIV. Meier & Partners (motion seq. No. 19)

Meier & Partners, served as the design architect on the project, while the Spector Group served as the architect of record. Meier & Partners submits an expert affidavit from architect Raymond Irrera (Irrera), who opines that:

> "[Meier & Partner's] design of the Garage met, if not exceeded, the applicable standard of care for architects in the State of New York as the architectural services rendered for the Project were consistent with applicable standards including BOCA National Building Code 1995 Edition, National Fire Prevention Code No. 101, 1991 Edition, Life Safety Code, Uniformed Building Code 1991 Edition and with accepted practices for the architectural profession of the state of New York"

(Irrera aff, ¶ 13).

Plaintiff again relies on Robbins' expert affidavit, but, as with the Spector Group, it is insufficient to defeat Meier & Partners' motion. Meier & Partners do not owe plaintiff a duty and there is no question of fact as to whether any of the *Espinal* exceptions are applicable (*see 87 Chambers*, 122 AD3d at 541 [1st Dept 2014]). As such, Meier & Partners motion is granted and all

claims and cross claims as against it are dismissed.

XV. Corporate Source

The Corporate Source's motion for summary judgment is untimely. On February 20, 2014, the court ordered that all motions for summary judgment "shall be filed within 60 days after the note of issue is filed." Plaintiff filed the note of issue on May 1, 2014. Corporate Source filed its motion for summary judgment on July, 2, 2014, two days after the deadline on June 30, 2013. In its moving papers, Corporate Source fails to seek leave to file late or to offer good cause for the delay.

Plaintiff argues, citing to *Doe v Madison Third Bldg. Cos., LLC*, 121 AD3d 631[1st Dept 2014]) that the court should deny Corporate Source's motion for its untimeliness. In *Doe*, the Court noted that it was "uncontroverted that [the party moving for summary judgment's] motion was not filed within 60 days after the note of issue was filed, as required by the court's part rules" and held that the "the court providently exercised its discretion in determining that [the moving party's] did not show good cause for the delay" (*id.* at 632).

Here, Corporate Source has not even tried to show good cause in its moving papers. Under *Brill v City of New York* (2 NY3d 648 [2004]), a showing of good cause is required in order for a court to accept an untimely motion for summary judgment. As there is no such showing here, Corporate Source's motion must be denied.

CONCLUSION

Accordingly, it is

ORDERED that defendant Coken Company, Inc.'s motion for summary judgment dismissing all claims and cross claims as against it (motion seq. No. 005) is granted; and it is further

ORDERED that defendant L. Martone & Son's Inc.'s motion for summary judgment dismissing all claims and cross claims as against it (motion seq. No. 006) is granted; and it is further

ORDERED that second third-party defendant J & A Concrete Corp.'s motions for summary judgment dismissing the second third-party complaint and all cross claims as against it (motion seq. No. 007 and 015) are granted; and it is further

ORDERED that defendant Nelson & Pope, LLP's motion for summary judgment dismissing all claims and cross claims as against it (motion seq. No. 008) is granted; and it is further

ORDERED that third third-party defendants Lehrer McGovern Bovis, Inc. and Bovis Lend Lease LMB, Inc.'s motion for summary judgment dismissing all claims and cross clams as against them (motion seq. No. 009) is granted; and it is further

ORDERED that fourth-party defendant Precast Services, Inc.'s motion for summary judgment dismissing the fourth-party complaint and all cross claims as against it (motion seq. No. 010) is granted; and it is further

ORDERED that defendant Kings County Waterproofing Corp.'s

motion for summary judgment dismissing all claims and cross claims as against it (motion seq. No. 011) is granted; and it is further

ORDERED that the branch of defendant/third-party plaintiff Turner Construction Company's motion for summary judgment seeking dismissal of all claims, cross claims, and counterclaims as against it is granted, while the branch seeking summary judgment on its indemnification claims is denied (motion seq. No. 012); and it is further

ORDERED that defendant/second third-party plaintiff Macedos Construction Co., Inc.'s motion for summary judgment dismissing all claims, cross claims and counterclaims as against it (motion seq. No. 013) is granted; and it is further

ORDERED that second fourth-party defendant A.H. Sample Inc.'s motion for summary judgment dismissing the fourth-party complaint and all cross claims (motion seq. No. 014) is granted; and it is further

ORDERED that third-party defendants/fourth-party plaintiffs High Concrete Structures, Inc. and High Concrete Group, LLP's motion for summary judgment dismissing all claims and cross claims as against them (motion seq. No. 016) is granted; and it is further

ORDERED that defendant Ysrael A. Seinuk, P.C.'s motion for summary judgment dismissing all claims and cross claims as

against it (motion seq. No. 017) is granted; and it is further

ORDERED that defendants Michael Harris Spector, AIA, P.C. a/k/a and d/b/a The Spector Group, Spector Group Home, LLC and Spector Associates LLP motion for summary judgment dismissing all claims and cross claims as against them (motion seq. No. 018) is granted; and it is further

ORDERED that defendant Richard Meier & Partners, LLP's motion for summary judgment dismissing all claims and cross claims as against it (motion seq. No. 019) is granted; and it is further

ORDERED that defendant The Corporate Source's motion for summary judgment dismissing all claims and cross claims as against it (motion seq. No. 020) denied.

Dated: March 16, 2015

ENTER:

Hon. CAROL R. EDMEAD, J.S.C.

HON. CAROL EDMEAD