

**Kenny v Turner Constr. Co.**

2012 NY Slip Op 33889(U)

March 12, 2012

Supreme Court, New York County

Docket Number: 603387/06

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

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

-----X

PATRICIA KENNY,

Plaintiff,

-against-

1

Index № 603387/06

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

Defendants.

-----X

TURNER CONSTRUCTION COMPANY,

Third-Party Plaintiff,

-against-

Third-Party

Index № 590746/07

THE CORPORATE SOURCE, INC.,

Third-Party Defendant.

-----X

MACEDOS CONSTRUCTION CO., INC. of NEW  
JERSEY n/k/a FLEMINGTON CONSTRUCTION INC.  
and s/h/a MACEDOS CONSTRUCTION CO., INC.,

Second Third-Party Plaintiffs,

-against-

Second Third-Party

Index № 590556/10

J & A CONCRETE CORP.,

Second Third-Party Defendant.

-----X

THE CORPORATE SOURCE, INC.,

Third Third-Party Plaintiff,

-against-

Third Third-Party  
Index № 590556/10

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

Third Third-Party Defendants.

-----X  
HIGH CONCRETE STRUCTURES, INC. and  
HIGH CONCRETE GROUP, LLC,

Fourth Fourth-Party Plaintiffs,

-against-

Fourth Fourth-Party  
Index № 590243/11

PRECAST SERVICES, INC.,

Fourth Fourth-Party Defendants.

-----X  
CAROL R. EDMED, J.:

In this personal injury action, plaintiff Patricia Kenny (Kenny) moves for an order, pursuant to CPLR 3025 (b), granting her leave to amend her complaint to add Lehrer McGovern Bovis, Inc. and Bovis Lend Lease LMB, Inc. (hereinafter, Bovis/LMB) as direct defendants in this personal injury action. The motion is opposed by both Bovis/LMB and defendant Turner Construction Company (Turner).

Kenny, a building manager for the General Services Administration (GSA),<sup>1</sup> alleges that on January 19, 2005, she was caused to slip, fall and injure her spine due to the presence of black

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<sup>1</sup>The GSA is an agency of the United States government which, among other things, provides facilities management services for federal courthouses ([www.gsa.gov/portal/category](http://www.gsa.gov/portal/category)).

ice in the parking garage (Garage) located at the United States Federal Courthouse in Central Islip, New York (Courthouse). Both the Courthouse and the Garage were constructed in the 1990's (the Courthouse/Garage Project), and it is Kenny's contention that ongoing problems with the expansion joints in the upper level of the Garage caused water to drip down to the lower level, which, in January 2005, accumulated and presented as difficult-to-see black ice.

Claiming that her injuries were serious, as defined in section 5102 of the Insurance Law, Kenny commenced an action sounding in negligence, by filing a summons and complaint in the office of the New York County Clerk on or about September 26, 2006, naming Turner as the defendant based her contention that Turner, and its agents and employees, was the party responsible for the construction, reconstruction, repairs and renovations (hereinafter, construction/renovations) which took place in the Garage either prior to, or at or about the time of her accident. Issue was joined by service of Turner's answer, on or about October 31, 2006. In addition to boilerplate denials, Turner asserted nine separate defenses to plaintiff's claims, including its defense "[t]hat the plaintiff has failed to join all necessary parties" (Turner Answer, ¶ 12).

In or about September 2007, Turner commenced a third-party action sounding in contribution and indemnification against The Corporate Source, Inc. (Corporate Source), under third-party index No. 590746/07. In its third-party complaint, Turner asserts that prior to plaintiff's accident, the Corporate Source had been retained by the General Services Administration (GSA) to perform janitorial, grounds, mechanical, maintenance and repair services at the Courthouse and Garage.

In or about 2008, Kenny added Richard Meier & Partners, Michael Harris Spector, AIA,

P.C. a/k/a and d/b/a The Spector Groups and Spector Group Home, LLC and Spector Associates, LLP, The Corporate Source, Inc., Ysrael Al Seinuk, P.C., Syska & Hennessy, Inc., Nelson & Pope, LLP, Kings County Waterproofing Inc., L. Martone & Sons Inc., Macedos Constructions Co., Inc., Francis Brothers Sewer and Drainage, Inc., and Coken Company, Inc., as direct defendants in the original action.

In their efforts to obtain contribution and/or indemnification, some of these newly added defendants impleaded additional parties into the action under second-, third-, and fourth-party actions. Bovis/LMB was impleaded by Corporate Source pursuant to the third third-party complaint served and filed on or about November 11, 2010. Corporate Source's demand for contribution from Bovis/LMB stems from its allegations that, prior to January 19, 2005, Bovis/LMB entered into a written contract with GSA pursuant to which it would perform services at the Courthouse and Garage (Third Third-Party Complaint, ¶ 21) and that it served as the Construction Quality Manager (CQ Manager) during the construction phase of the Garage.

The parties have been engaged in oral and documentary discovery that has, periodically, required the court's guidance. At this juncture, plaintiff seeks to add Bovis/LMB as a direct defendant despite the fact that New York's three-year statute of limitations to add a defendant in a personal injury action has passed (CPLR 214). It is her position that Bovis/LMB and Turner are united in interest, and that based upon the relation-back doctrine, as codified in CPLR 203, leave of court should be granted permitting her to amend her complaint to add Bovis/LMB as a co-defendant (CPLR 3025 [b]).

Plaintiff explains that the discovery, which was disclosed prior to the expiration of the statute of limitations, did not reveal evidence of Bovis/LMB's involvement, as the contracts

produced by Turner neither mentioned, nor made reference to, Bovis/LMB. It was not until the April 12, 2010 examination before trial of Turner's senior project engineer, George Shovlin (Shovlin), that plaintiff first learned that Bovis/LMB was the "owner's representative" on the Courthouse/Garage Project. Shovlin testified that Bovis/LMB, in its role as the owner's representative, was responsible for "review[ing] all changes that were submitted. They made recommendations to the design team to help to bring the job down on a certain budget for value engineering purposes" (Shovlin Dep. at 45). Shovlin also testified that Bovis/LMB was involved with GSA, Turner and the entire "design team" (which he defined as defendants Richard Meier and Spector) in a "partnering agreement," and that there might be an actual partnering agreement reflecting that arrangement (*id.* at 63). Plaintiff's counsel immediately demanded a copy of the "partnering agreement" (*id.*), which, as of submission of this motion, had yet to be produced.

Kenny contends that she has been diligent in her efforts to uncover the extent of Bovis/LMB's involvement and possible culpability, but has been frustrated by its failure to produce demanded discovery. Plaintiff points out that, less than two months after Corporate Source impleaded Bovis/LMB, she notified the court, at the conference held on January 4, 2011, that she was seeking certain discovery in order to determine whether it would be proper to add Bovis/LMB as a co-defendant. Yet, despite multiple demands for discovery and direction from the court, neither Bovis/LMB, nor some or all of the other defendants, have produced the documents and/or deposition witnesses needed by plaintiff to, among other things, properly evaluate whether and/or to what extent Bovis/LMB was involved in her underlying claims of negligence (*see* so-ordered transcript of the status conference held on May 23, 2011, and so-ordered stipulation, dated July 1, 2010). Concerned about delaying any longer, plaintiff moves at

this juncture, pursuant to CPLR 3012 (b), based on her supposition that Bovis/LMB's failure to provide the disclosure (including, but not limited to, the "partnering agreement") is indicative of possible culpability "or they would have responded to the discovery demanded" (Plaintiff's Aff. ¶ 8).

Plaintiff argues that, even without the missing discovery, the conditions for applying the relation-back doctrine are met, entitling her to leave to amend her pleadings to add Bovis/LMB as a defendant in the original action. The relation-back doctrine, as set forth in *Brock v Bua* (83 AD2d 61, 69 [2<sup>nd</sup> Dept 1981]) and clarified by the Court of Appeals in *Buran v Coupal* (87 NY2d 173, 178, 181 - 182 [1995]), requires that plaintiff establish that: "(1) both claims arose out of the same conduct, transaction or occurrence;" "(2) the new party is 'united in interest' with the original defendant," such that the new defendant "can be charged with . . . notice of the institution of the [original] action [and] will not be prejudiced in maintaining [a] defense on the merits;" "and (3) the new party knew or should have known that, but for [a] [] mistake by plaintiff as to the identity of the proper parties, the action would have been brought against [it] as well."

To this end, Kenny asserts that the claims against both Bovis/LMB and Turner arise from the same occurrence, namely, her January 19, 2005 slip and fall at the Garage. She contends that Bovis/LMB and Turner are united in interest based upon their relationship with each other with respect to the Courthouse/Garage Project, as evidenced by the "partnering agreement" between Bovis/LMB, Turner, GSA and the entire design team. Therefore, having partnered with Turner from the beginning of the Courthouse/Garage Project, Bovis/LMB cannot deny having had knowledge of this action from its commencement, nor can it claim prejudice by having to offer a

defense on the merits. As for the third prong of the relation-back test, plaintiff contends that, based upon its involvement with the job and its relationship with Turner, Bovis/LMB knew or should have known that, but for a mistake (caused and/or exacerbated by incomplete discovery production) concerning its identity as a proper party, she would have named it as a defendant in the original action (*id.*).

Neither Bovis/LMB nor Turner deny that the claims stem from Kenny's alleged accident in the Garage. For its part, Bovis/LMB acknowledges that it was retained by the GSA to provide construction quality management services for construction of the new Courthouse/Garage, and Turner, similarly, acknowledges that it was retained by GSA to act as general construction contractor (General Contractor) for the same construction project. Both, however, deny the existence of a "partnering agreement," and both deny having a relationship with each other such that they were, or are, united in interest within the meaning of the relation-back doctrine.

It is well settled that in an action sounding in negligence, defendants can be considered to be united in interest for purposes of the relation-back doctrine when, due to the nature of the relationship between them, "their defenses will be the same and they will either stand or fall together with respect to plaintiff's claim" (*Connell v Hayden*, 83 AD2d 30, 41 [2<sup>nd</sup> Dept 1981]). It is not enough that they share a common interest in the outcome (*Matter of 27<sup>th</sup> St. Block Assn. v Dormitory Auth. of State of N.Y.*, 302 AD2d 155, 165 [1<sup>st</sup> Dept 2002]). Unity of interest, as provided for under CPLR 203, can only occur when the relationship between the parties is such that one is vicariously liable for the acts or omissions of the other (*Connell v Hayden*, 83 AD2d at 45). If, for example, one defendant may assert a defense which is not available to the other, or if it is possible that one defendant will seek to show that it was not at fault and that the other



defendant caused or contributed to the plaintiff's injury, then they are not united in interest for the purpose of the relation-back doctrine (*id.* at 41 - 42, 45). This lack of vicarious liability, which defeats a claim of unity of interest, is the position advanced by the opponents to the motion.

Both Turner and Bovis/LMB offer documents in support of their opposition to Kenny's motion. They each submit a copy of (selected portions of) the Specification and Bid Form (Specification Form) provided to each of them by GSA on or about July 21, 1992, with respect to the Courthouse/Garage Project. Turner's Specification Form pertains to its responsibilities as General Contractor and Bovis/LMB's Specification Form pertains to its responsibilities as CQ Manager. A review of these documents fails to reveal language indicating that either Bovis/LMB or Turner can be held vicariously liable for the acts or omissions of the other, and plaintiff fails to point to any language contained in either of these documents to the contrary. Plaintiff also fails to submit, through reply papers, other sections of the respective Specification Forms, or other documents, which establish that either Bovis/LMB or Turner was vicariously liable for the other with respect to the Courthouse/Garage Project.

While plaintiff relies chiefly on the above referenced deposition testimony of Shovlin to establish unity of interest, Bovis/LMB submits, as evidence of the differences between these entities, a portion of Shovlin's testimony in which he states that "Bovis performed no work on the site, they represented the owners as construction quality manager" (Shovlin Dep., at 733).

Turner, in its own effort to dispel any notion that there was a partnership agreement between it and Bovis/LMB, submits a copy of its Specification Form, "Section 01050 - Partnering," and copies of two documents purportedly prepared by nonparty FMI, a management

consultant within the construction industry, to explain Shovlin's earlier reference to a "partnering agreement." According to Turner, the word "partnering," set forth in Section 01050, refers to the process used by the Government to unify the various entities involved in the project, and not, as urged by plaintiff, to a legal arrangement involving vicarious liability between Turner and Bovis/LMB. Section 01050, subsection 1.01 provides, in relevant part:

A. 1. Partnering is a structured process developed to produce a profitable and high quality project of the entire 'construction team.' This will result in the evolution of a cohesive, cooperative construction leadership team with a single set of goals . . . This . . . approach will foster relationships among the team members based on trust and open communication . . .

2. The objectives are effective and efficient contract performance . . . The Government shall require the foundation of a cohesive partnership among the key management representatives of the various entities involved in the project. These include representatives of the Government (including the [GSA] and the Federal Judiciary), the contractor and its major subcontractors, representatives of the Architect-Engineer design team and representatives of the [CQ] Manager.

B. 1. . . . participation in the Partnering Process is mandatory . . .

2. . . . a facilitator, which is a company or individual specializing in the conducting of partnering process . . . will develop the steps, procedures and guidelines for implementing the partnering systems.

3. (A) (2) The Partnering Retreat - the partnering retreat will require two days at an off site location to properly establish the discovery process of individual versus team values and to ultimately formulate mutual team goals and objectives, as well as issue identification and resolution processes.

(3) . . . The facilitator will monitor the ongoing partnering process to help ensure continued implementation of the plan . . .

(Turner, Exhibit A).

The documents submitted as Turner's Exhibits C and D are entitled "Proposal for a Project Partnering Process - Lehrer McGovern Bovis" and "Building a Partnership for Success - U.S. Courthouse & Federal Building Islip, New York Summary Notes," dated September 5, 1996 and October 16-17, 1996, respectively. The Proposal for a Project Partnering Process - Lehrer

McGovern Bovis, sets forth the topics to be covered during the workshop for Bovis/LMB, including such areas as defining leadership roles, the process of issue resolution, problem solving and building effective teams. "Building a Partnership for Success - U.S. Courthouse & Federal Building Islip, New York Summary Notes," sets forth the topics to be covered by each participant at the "Values and Objectives Workshop." None of the six topics listed as values for Bovis/LMB overlap with any of the four topics listed as values for Turner, and only one of the five topics listed as performance objectives for Bovis/LMB (profitability) overlap with the seven topics listed as performance objectives for Turner.

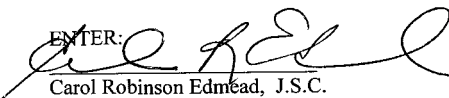
Inasmuch as the "partnering agreement" appears to be little more than an effort by the Government to instill in all participants involved in Courthouse/Garage Project, the fundamentals and spirit of working seamlessly together toward a common goal, plaintiff's contention that a "partnering agreement" exists and is being withheld in order to avoid a finding that the parties are united in interest, is unavailing. Having failed to demonstrate that all three prongs of the relation-back doctrine have been satisfied, it is

ORDERED that plaintiff's motion for leave to amend her complaint to add Lehrer McGovern Bovis, Inc. and Bovis Lend Lease LMB, Inc. as direct defendants is denied. And it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel.

Dated: March 12, 2012

ENTER:

  
Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMED**