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And Urban Enterprise Zone

GREGORY P. FIORE and BERNIENA Q.	:	SUPERIOR COURT OF NEW JERSEY
FIORE, (h/w),	:	LAW DIVISION
	:	ATLANTIC COUNTY
Plaintiffs,	:	
	:	Docket No. ATL-L-2274-03
v.	:	
	:	
CITY OF PLEASANTVILLE, MARANDINO	:	
CONCRETE COMPANY, INC., MARANDINO	:	
CONSTRUCTION, INC., REMINGTON,	:	
VERNICK & WALBERG ENGINEERS,	:	
PLEASANTVILLE DEPARTMENT OF	:	
PUBLIC WORKS, URBAN ENTERPRISE	:	
ZONE, ROGER B. TEES, ALICE M. ARLAN	:	
JOHN M. BETTIS, ALFRED R. SCERNI, JR.,	:	
ESQ. and SHAFFER & SCERNI, LLC,	:	
NORMAN L. ZLOTNICK, ESQ., ABC	:	
CORPORATION 1-10 (a fictitious name) and	:	
JOHN DOES 1-10 (a fictitious name) jointly,	:	
severally and/or in the alternative,	:	
	:	<i>BRIEF IN SUPPORT OF MOTION</i>
Defendants,	:	<i>TO INDEMNIFY, HOLD</i>
	:	<i>HARMLESS AND DEFEND</i>

INTRODUCTION

This claim arises out of a trip and fall accident which occurred on August 15, 2001. The Plaintiffs, Gregory P. Fiore and Berniena Q. Fiore, have commenced this action against the City of Pleasantville, the Pleasantville Department of Public Works and Urban Enterprise Zone,

alleging that while walking on the surface of the roads known as Milan Avenue & Main Street in the City of Pleasantville, the Plaintiff, Gregory P. Fiore, was caused to fall as a result of a collapse in a small portion of the asphalt in the street due to construction work being performed in the area of Milan Avenue & Main Street in the City of Pleasantville. The Defendants, City of Pleasantville, Pleasantville Department of Public Works, and Urban Enterprise Zone, now move for Summary Judgment against Co-Defendant, Marandino Concrete Company, Inc., seeking an Order compelling Co-Defendant, Marandino Concrete Company, Inc. to indemnify, hold harmless and defend the aforementioned Defendants in this litigation. As set forth, *infra*, the basis of the relief sought is the Contract entered into between the parties which contains several provisions which clearly delineate the Co-Defendant's indemnification, hold harmless and defense obligation of the moving party.

STATEMENT OF FACTS

1. This claim arises out of an event which occurred on August 15, 2001. The Plaintiff, Gregory P. Fiore, alleges that while walking across Milan Avenue in the City of Pleasantville, a small portion of the asphalt in the street collapsed due to construction that was on going in the vicinity. *See copy of Plaintiff's Answers to Interrogatories attached hereto as Exhibit "A"*. Furthermore, Plaintiff alleges that the surface gave way and created a depression, which engulfed his foot and leg. *See copy of Plaintiff's Complaint attached hereto as Exhibit "B"*.

2. On February 13, 2004, an Answer was filed on behalf of the City of Pleasantville, Pleasantville Department of Public Works, and Urban Enterprise Zone, generally denying the allegations set forth in the Plaintiff's Complaint and filing a cross claim for indemnification

against Co-Defendants. *See copy of Answer of Defendants, City of Pleasantville, Pleasantville Department of Public Works, and Urban Enterprise Zone attached hereto as Exhibit "C".*

3. On the date of the Plaintiff's alleged accident, the Co-Defendant, Marandino Concrete Company, Inc., had been performing repair/construction work in the alleged accident area. *See copy of the Deposition Transcript of Alex Gherardi p. 23 attached hereto as Exhibit "D".* This construction work was being performed in accordance with a Construction Contract with the Defendants, City of Pleasantville, Pleasantville Department of Public Works and Urban Enterprise Zone. *See copy of Specifications for the CBD Streetscape Phase 2 in the City of Pleasantville attached hereto as Exhibit "E".*

4. The Co-Defendant, Marandino Concrete Company, Inc., was the sole general contractor for the project and they had hired many subcontractors for the underlying construction work being done at the intersection of Milan Avenue and Main Street in the City of Pleasantville. The Co-Defendant, Marandino Concrete Company, Inc., took on the responsibility of hiring the individual subcontractors for the work to be performed in accordance with the underlying Contract. *See copy of the Deposition Transcript of Alex Gherardi p. 8 attached hereto as Exhibit "D".*

5. Pursuant to the aforementioned Contract, Co-Defendant, Marandino Concrete Company, Inc., assumed responsibility for the sidewalk/roadway in and about the location of the Plaintiff's accident. In addition, Co-Defendant, Marandino Concrete Company, Inc., agreed to indemnify, hold harmless and defend the Defendants, City of Pleasantville, Pleasantville Department of Public Works and Urban Enterprise Zone for any injuries relating to the aforesaid construction work.

6. Pursuant to Paragraph 2.03, entitled "Suit or Claim":

The contractor agrees to indemnify and save harmless the Owner and the Engineer and all their agents and employees from actions and suits of every kind and description brought against them or on account of the use of patented rights, and from any damages or injuries received or sustained by any party, or parties, arising out of any act or omission of the Contractor, his workmen or agents in performance of the work under this agreement, including the furnishing of equipment, materials and supplies at the site of the proposed work. *See copy of Specifications for the CBD Streetscape Phase 2 in the City of Pleasantville Paragraph 2.03 attached hereto as Exhibit "E".*

7. Pursuant to Paragraph 2.04 entitled "Damages to Persons and Property":

Contractor shall fully and completely indemnify and (hold) same harmless the Owner from damages or injury to persons or property resulting from the performance of the work, or through negligence to the contract, or through the use of any improper or defective machinery implements or appliances or through any act of omission of the Contractor or his agents, or his employees. *See copy of Specifications for the CBD Streetscape Phase 2 in the City of Pleasantville Paragraph 2.04 attached hereto as Exhibit "E".*

8. Pursuant to Paragraph 3.08 entitled "Protection of Work and Property":

The Contractor shall continuously maintain adequate protection of his work and shall protect Owner's property from injury or loss arising in connection with his work. He shall also protect all adjacent property as provided by law, and shall be responsible for all injury to property and existing structures sustained during the prosecution of his work, including delivery to the site of the equipment, materials and supplies. He shall repair and replace any such damage, injury or loss equal or better than the condition of the item prior to the Contractor's action.

All passageways, guard fences, light and other facilities required for protection by local authorities or local conditions must be provided and maintained. *See copy of Specifications for the CBD Streetscape Phase 2 in the City of Pleasantville Paragraph 3.08 attached hereto as Exhibit "E".*

9. Pursuant to the Section entitled "Scope of Work":

The scope of work shall generally consist of the removal and replacement of the existing sanitary and storm sewer, installation of pedestrian and vehicular brick pavers, construction of concrete curb and sidewalk, construction of new bituminous pavement, installation of street furnishings, installation of landscaping items, installation of

site lighting and electrical work and all other items shown on the project plans. The scope of work shall also include improvements at four (4) municipal parking lots as shown on the plans. *See copy of Specifications for the CBD Streetscape Phase 2 in the City of Pleasantville attached hereto as Exhibit "E".*

10. The Contract further requires the Co-Defendant, Marandino Concrete Company, Inc., to maintain general liability insurance, automobile liability insurance, excess liability insurance and worker's compensation insurance to protect him against all claims for damages for personal injury, including death which may arise during prosecution of the contract, either by himself or by any Subcontractor or anyone directly or indirectly employed by either of them. *See copy of Specifications for the CBD Streetscape Phase 2 in the City of Pleasantville Paragraphs 2.01 and 2.02 attached hereto as Exhibit "E".*

11. In addition, the Contract requires the Co-Defendant, Marandino Concrete Company, Inc., to obtain comprehensive general liability insurance which coverage includes, premises-operations, products/completed operations hazard, contractual insurance (blanket coverage broad form property damage, independent contractors, personal injury..... Furthermore, the bodily injury and property damage insurance must be in the minimum amount of \$500,000.00. In addition, the Contract obligates the Co-Defendant to name the Defendant, City of Pleasantville as an additional insured on said policies of insurance.

12. The Indemnification clause contained in the Bid Specifications on the form Certificate of Insurance reads:

Supplier shall defend, indemnify and save harmless, the Owner from and against all losses, costs, damages, expense claims or arising out of or caused or alleged to have been caused in any manner by a defect in any equipment or material supplied hereunder doing the work herein provided, including all suits or actions of every kind of description brought against Owner, either individually, jointly with Supplier for or on account of any damage or injury to any person or persons or property, caused or occasioned or alleged to have been caused by or on account of the performance of any work pursuant to or in

connection with this contract or through any negligence or alleged negligence in guarding the work through any act, omission or fault or alleged act, omission or fault of the Supplier, its employees or agents, or other under Supplier's control. *See copy of Certificate of Insurance to the Specifications for the CBD Streetscape Phase 2 in the City of Pleasantville attached hereto as Exhibit "F".*

13. On January 17, 2005, the Deposition of Alex Gherardi, a representative of the Co-Defendant, Marandino Concrete Company, Inc. was conducted. The following colloquies were recorded at that deposition:

Q. With respect to the concrete work that was done on Milan Avenue, that was done by Marandino, correct?

A. Yes.

Q. What had to be done in order to do the concrete work?

A. In regard to general, the curbing and all that?

Q. Yes.

A. We would remove the existing curb and sidewalk and construct new curb and two-foot bands of sidewalk where it would be a four to five foot band of brick pavers in between the sidewalks. And we would construct the crosswalks at certain intersections throughout the project.

Q. What had to be done to construct the crosswalk?

A. It would have to be excavated down approximately eight inches from the existing road surface, and we would put down a rebar mat and pour white concrete.

Q. Would you actually dig up the entire roadway and go underneath into the dirt or would you in setting that just go down into the—.

A. The main road was total reconstruction, meaning that the whole roadway was taken up. So all that was left was dirt. And on the intersections, there would be dirt there, yes.

Q. And would that dirt be packed down at all before putting the cement?

A. Yes, it would be compacted. For the record, Marandino did not do the excavation of the roadway, that was Mount's portion of the

project. So we had established our crews on site and we were digging through dirt.

Q. So the roadway would have already been taken up where you put the crosswalk in?

A. Yes.

Q. You just would have laid the cement and the rebar?

A. Formed it out and set it up right. *See copy of the Deposition*

Transcript of Alex Gherardi pp.13-15 attached hereto as Exhibit "D".

14. In addition, the following colloquies were recorded at that deposition of Alex Gherardi:

Q. In response to one of the questions asked by Mr. DeVoto regarding the location of the sink hole, you indicated that the sink hole was within the construction zone?

A. Yes.

Q. What area of Milan Avenue where it intersected with Main Street was within the construction zone?

A. I don't understand. What do you mean? We worked on both sides. We made the proper tie-ins to the, let's say, whatever it called for, 10 to 15 feet outside the main road, Main Street, to tie into the asphalt.

Q. So when you're saying it's within the construction zone, your outer limits of the construction zone are 10 to 15 feet down Milan?

A. Each intersection varied. Each one was different as far as tie-ins went into the adjacent streets.

Q. But on Milan Avenue, you believe that the construction zone was 10 to 15 feet down Milan Avenue?

A. Approximately, yes.

Q. And the area where the sink hole occurred was within that 10 to 15 feet?

A. Yes. *See copy of the Deposition Transcript of Alex Gherardi pp.22-23 attached hereto as Exhibit "D".*

Based upon these and other provisions of the Construction Contract, it is apparent that the Co-Defendant, Marandino Concrete Company, Inc., undertook complete responsibility for the maintenance and condition of the subject premises on the date of the accident, including a duty to maintain the sidewalks and streets in the work area, undertake reasonable safety precautions and indemnify the moving party for any claims arising out of accidents attributable to its work.

LEGAL ARUGUMENT

POINT I.

PURSUANT TO ITS CONTRACT WITH THE DEFENDANTS, CITY OF PLEASANTVILLE, THE PLEASANTVILLE DEPARTMENT OF PUBLIC WORKS, AND URBAN ENTERPISE ZONE, THE CO-DEFENDANT, MARANDINO CONCRETE COMPANY, INC., UNDERTOOK RESPONSIBILITY FOR ALL SAFETY PRECAUTIONS AT THE LOCATION OF THE PLAINTIFF'S ACCIDENT AND AGREED TO INDEMNIFY, HOLD HARMLESS AND DEFEND THE DEFENDANTS, CITY OF PLEASANTVILLE, THE PLEASANTVILLE DEPARTMENT OF PUBLIC WORKS, AND URBAN ENTERPISE ZONE AGAINST ANY CLAIMS ARISING FROM ITS WORK, ACCORDINGLY, DEFENDANTS, CITY OF PLEASANTVILLE, THE PLEASANTVILLE DEPARTMENT OF PUBLIC WORKS, AND URBAN ENTERPISE ZONE, ARE ENTITLED TO SUMMARY JUDGMENT ON ITS CLAIM FOR INDEMNIFICATION, HOLD HARMLESS AND DEFENSE AGAINST CO-DEFENDANT, MARANDINO CONCRETE COMPANY, INC.

In interpreting indemnity provisions, the Courts of this State are guided by the principal that they are to be construed in accordance with general rules for the construction of contracts. Hence, the judicial task is to determine the intent of the parties from the language used, the surrounding circumstances and the objective sought to be achieved thereby. See e.g. Moore v. Nayer, 321 N.J. Super. 419, 440 (App. Div. 1999); Leitao v. Damon G. Douglas Co., 301 N.J. Super. 187, 191 (App. Div. 1997), Certif. Denied, 1512 N.J. 466 (1997); Doloughy v. Blanchard Construction Co., 139 N.J. Super. 110, 166-117 (Law Div. 1976) cited in Pepe v. Township of Plainsboro Dept. of Public Works, et al., 337 N.J. Super. 209 (App. Div. 2001). There is no essential public policy impediment to an indemnitor undertaking to indemnify the indemnitee in respect to the indemnitee's own negligence. Doloughy v. Blanchard Construction Co., 139 N.J. Super. 110, 166-117 (Law Div. 1976). Even in the context of an indemnity agreement in a Construction Contract, it is not against public policy for an indemnitor to promise to hold harmless the indemnitee for the indemnitor's own negligence as long as the indemnitee is not solely at fault. See Carvalho v. Toll Bros. and Developers, 143 N.J. at 578; Bradford vs.

Cupper Assoc., 283 Super. 556, 584 (app. Div. 1995) (Certif. Denied) 144 N.J. 586 (1996). This principle derives from the judicial recognition that ordinarily the financial responsibility for the risk of injury during the course of the construction project is shifted, in any event, by the primary parties to their insurance carriers. Doloughy v. Blanchard Construction Co., 139 N.J. Super. at 116, cited in Leitao v. Damon G. Douglas Co., et al, 301 N.J. Super. 187 (App. Div. 1997). The indemnity agreement, for all practical purposes, represents the parties' allocation between themselves of the total required insurance protection for the project. The parties ought to be free to determine how the insurance burden will be distributed between them and "who will pay for specific coverage for specific risks." *Id.* See also Jamison v. Elwood Consolidated Water Co., 420 F 2nd, 787-789 (Third Circuit) 1970). (Although a contract indemnifying the indemnitee for its own negligent acts is perhaps contrary to the policy of compelling tort-feasors to bear responsibility for conduct heedless of the risks to others, the practical reality is that, in insurance or otherwise, allocation of financial responsibilities is often part of the bargaining process).

In the case at bar, the Co-Defendant, Marandino Concrete Company, Inc., agreed to indemnify and hold the Defendants, City of Pleasantville, Pleasantville Department of Public Works and Urban Enterprise Zone, harmless from and against all liability arising out of or attributable to the performance of the work. *See copy of Specifications for the CBD Streetscape Phase 2 in the City of Pleasantville Paragraph 2.03 attached hereto as Exhibit "E"*. A substantially identical clause was addressed by the Appellate Division in Leitao v. Damon G. Douglas Co., et al, 301 N.J. Super. 187 (App. Div. 1997). That matter involved a personal injury claim brought by the employee of a subcontractor whose agreement to indemnify the general contractor was substantially identical to the one at bar. The Law Division granted the

contractor's claim for indemnity and the Appellate Division affirmed the ruling in doing so, the Court noted:

Against this backdrop, we first hold that Leitao's claim was one "arising out of or resulting from the performance of the subcontractor's work" within the meaning of the indemnity clause. In similar contracts, we have construed the words "arising out of" in accordance with the comment and ordinary meaning as referring to a claim "growing out of" or "having its origin" in the subject matter of the sub-contractors duties. (Citation omitted). Although the words "resulting from" perhaps imply some casual relationship between the subcontractor's work and the claim, we do not interpret this clause as requiring fault on the subcontractor's part as a pre-requisite to indemnification. Instead, we view these words as requiring only a substantial nexus between the claim and the subject matter of the sub-contractors work duties. See Harrah's Atlantic City, Inc. v. Harleysville Insurance, 288 N.J. Super. at 188; Franklin Mutual Insurance v. Security Indemnity, Inc., 275 N.J. Super. 335 at 340-341.

In the case at bar, it cannot be reasonably disputed that the claim as alleged arose out of the performance of Co-Defendant, Marandino Concrete Company, Inc.'s work or work that was overseen by the Co-Defendant, Marandino Concrete Company, Inc. The Plaintiff claims to have fallen as a result of a small section of the asphalt street collapsing under his foot due to construction that was ongoing in the vicinity. Co-Defendant, Marandino Concrete Company, Inc. was performing sidewalk/roadway construction work along Milan Avenue and Main Street on and around the date of the accident. In fact, the Co-Defendant, Marandino Concrete Company, Inc. had been performing work within ten to fifteen feet of the alleged sink hole. *See copy of the Deposition Transcript of Alex Gherardi pp.22-23 attached hereto as Exhibit "D"*. The scope and nature of the Co-Defendant, Marandino Concrete Company, Inc.'s work was

within the area of Milan Avenue and Main Street and revolved around the removal of the existing curb and sidewalks as well as the construction of crosswalks at certain intersections, which included Main Street. *See copy of the Deposition Transcript of Alex Gherardi pp.13-15 attached hereto as Exhibit "D"*. As previously stated the project encompassed the accident site. Furthermore, the sink hole had been located with ten to fifteen feet of where the Co-Defendant, Marandino Concrete Company, Inc. had been working. *See copy of the Deposition Transcript of Alex Gherardi pp.22-23 attached hereto as Exhibit "D"*.

The Co-Defendant, Marandino Concrete Company, Inc. agreed to assume all risks in connection with their work, and they agreed to maintain insurance to protect them and Co-Defendants, City of Pleasantville, Pleasantville Department of Public Works and Urban Enterprise Zone against all claims for damages for personal injury until the project was accepted by the Defendant, City of Pleasantville. *See copy of Specifications for the CBD Streetscape Phase 2 in the City of Pleasantville Paragraphs 2.01 and 2.02 attached hereto as Exhibit "E"*. Marandino Concrete Company, Inc. further agreed to refill all sunken ditches, perform repaving over trenches and maintain the streets and sidewalks in passable condition during the course of construction as well as during the maintenance period. *See copy of Specifications for the CBD Streetscape Phase 2 in the City of Pleasantville Paragraph 3.01 attached hereto as Exhibit "E"*.

Clearly, pursuant to the terms of the Contract, Co-Defendant, Marandino Concrete Company, Inc. assumed primary, if not exclusive control over a significant portion of Milan Avenue and Main Street including but not limited to the location of the Plaintiff's accident. There is simply no evidence whatsoever that the Defendants, City of Pleasantville, Pleasantville Department of Public Works, and Urban Enterprise Zone, caused the condition or unreasonably

relied upon Co-Defendant, Marandino Concrete Company, Inc.'s expertise to maintain the premises during the course of construction.

In addition, the Contract requires the Co-Defendant, Marandino Concrete Company, Inc., to obtain comprehensive general liability which coverage includes, premises-operations, products/completed operations hazard, contractual insurance (blanket coverage broad form property damage, independent contractors, personal injury..... Furthermore, the bodily injury and property damage insurance must be in the minimum amount of \$500,000.00. Furthermore, the Contract obligates the Co-Defendant to name the Defendant, City of Pleasantville as an additional insured on said policies of insurance. The Indemnification clause contained in the Bid Specifications on the form Certificate of Insurance reads:

Supplier shall defend, indemnify and save harmless, the Owner from and against all losses, costs, damages, expense claims or arising out of or caused or alleged to have been caused in any manner by a defect in any equipment or material supplied hereunder doing the work herein provided, including all suits or actions of every kind of description brought against Owner, either individually, jointly with Supplier for or on account of any damage or injury to any person or persons or property, caused or occasioned or alleged to have been caused by or on account of the performance of any work pursuant to or in connection with this contract or through any negligence or alleged negligence in guarding the work through any act, omission or fault or alleged act, omission or fault of the Supplier, its employees or agents, or other under Supplier's control. *See copy of Certificate of Insurance to the Specifications for the CBD Streetscape Phase 2 in the City of Pleasantville attached hereto as Exhibit "F".*

The indemnification obligation is triggered by the undisputed fact that the Plaintiff's accident resulted from the performance of Co-Defendant, Marandino Concrete Company, Inc.'s work on the project and work that was overseen by the Co-Defendant, Marandino Concrete Company, Inc. Leitao, supra. As previously stated their work included the excavation of the area within ten to fifteen feet of the sink hole, the replacement of the curbing and sidewalks of Milan Avenue and Main Street as well as the construction of crosswalks at the intersection Milan

Avenue and Main Street. *See copy of the Deposition Transcript of Alex Gherardi pp.13-15 attached hereto as Exhibit "D".* There is no question of fact which needs to be resolved by a jury. Under the prevailing and undisputed facts of this case, Co-Defendant, Marandino Concrete Company, Inc. is obligated to indemnify, hold harmless and defend the Defendants, City of Pleasantville, Pleasantville Department of Public Works, and Urban Enterprise Zone, pursuant to the contractual obligations which it voluntarily undertook.

For all of the foregoing reasons, it is respectfully urged that the Defendants, City of Pleasantville, Pleasantville Department of Public Works, and Urban Enterprise Zone, are entitled to Summary Judgment requiring Co-Defendant, Marandino Concrete, Inc., to indemnify, hold harmless and defend the Co-Defendants, City of Pleasantville, Pleasantville Department of Public Works and Urban Enterprise Zone, as a matter of law.

POINT II.

BECAUSE THERE IS NO EVIDENCE THAT ANY ACT OR OMMISSION ON THE PART OF THE DEFENDANTS, CITY OF PLEASANTVILLE, PLEASANTVILLE DEPARTMENT OF PUBLIC WORKS, AND URBAN ENTERPRISE ZONE, CAUSED OR CONTRIBUTED TO PLAINTIFF'S ACCIDENT, THE MOVING PARTY'S LIABILITY, IF ANY, IS VICARIOUS OR SECONDARY TO THAT OF CO-DEFENDANT, MARANDINO CONCRETE COMPANY, INC., ACCORDINGLY, THE MOVING PARTY IS ENTITLED TO COMMON LAW INDEMINIFICATION.

The circumstances under which a property owner may be held liable for injuries or damages caused by its contractor are limited. They occur only when the owner retains control over the manner of performing the work, the owner has knowingly hired an incompetent contractor or there is an inherent danger in the work performed by the contractor. Majestic Realty v. Toti Contracting, 30 N.J. 425, 531 (1959). See also Wolczak v. National Electric Products Corp., 66 N.J. Super. 64 (App. Div. 1961). Generally, a party that is primarily liable is obligated to indemnify a party that is only constructively or vicariously liable. Tromaulayko v. Johns Manville Sales Corp., 116 N.J. 505, 510-11 (1989).

To date, discovery has failed to produce any evidence that the Defendants, City of Pleasantville, Pleasantville Department of Public Works, and Urban Enterprise Zone, were directly responsible for the condition for which the Plaintiff complains. There is no evidence that the Defendants, City of Pleasantville, Pleasantville Department of Public Works, and Urban Enterprise Zone, were aware of the condition. In contrast, it is undisputed that the Co-Defendant, Marandino Concrete Company, Inc., assumed substantial if not exclusive control of the area in question, and undertook to perform an array of construction services including remediation of the kinds of defects of which the Plaintiff complains. Furthermore, the Co-Defendant agreed to maintain general liability, automobile liability, excess liability and worker's

compensation insurance to protect them against all claims for damages for personal injury, including death which may arise during the course of the contract, either by themselves or by any Subcontractor or anyone directly or indirectly employed by either of them, and they agreed to name the Defendant, City of Pleasantville as an additional insured. *See copy of Specifications for the CBD Streetscape Phase 2 in the City of Pleasantville Paragraphs 2.01 and 2.02 attached hereto as Exhibit "E".*

For all of the foregoing reasons, it is respectfully submitted that the Defendants, City of Pleasantville, Pleasantville Department of Public Works, and Urban Enterprise Zone, are entitled to Summary Judgment on their claim for common law indemnification against the Co-Defendant, Marandino Concrete Company, Inc.

POINT III.

THE DEFENDANTS, CITY OF PLEASANTVILLE, PLEASANTVILLE DEPARTMENT OF PUBLIC WORKS AND URBAN ENTERPRISE ZONE, ARE ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW

N.J. Court Rule 4:46-2 provides that Summary Judgment is warranted if:

[T]he pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment as a matter of law.

In Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67 (1954), our Supreme Court set forth the standards to be applied when Summary Judgment is sought. Although historically Courts seemed reluctant to grant Summary Judgment, in Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1955), trial courts were encouraged to grant Summary Judgment when there are no genuine issues of material fact. Ibid.

A moving party seeking Summary Judgment must demonstrate that he is entitled to judgment as a matter of law. Id. at 529-534, citing Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587-588 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-250 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) and Judson, supra. At 74-75. By granting Summary Judgment in appropriate cases, courts are able to eliminate those claims or allegations which are factually unsupported. Ibid.

Brill held that the trial court must evaluate, analyze and sift through the evidence in a light most favorable to the non-moving party to determine if the evidence presents a material disagreement which requires submission to a jury or whether it is so "one-sided" that one party

must prevail as a matter of law. Brill, supra at 529. The Brill Court went on to examine the definition of “substantial” and emphasized that substantial must mean having substance; not imaginary, unreal, or apparent only; true, solid; real or having real existence. Brill, supra, at 529 (quotations omitted.)

In the case at bar, it is undisputed that the Co-Defendant, Marandino Concrete Company, Inc., entered into a Contract with the Defendants, City of Pleasantville, Pleasantville Department of Public Works, and Urban Enterprise Zone, for the reconstruction of the sidewalk at Milan Avenue and Main Street in the City of Pleasantville. Pursuant to that contract, work was ongoing on the date of the Plaintiff’s accident. Moreover, Co-Defendant, Marandino Concrete Company, Inc.’s obligations under the contract included remediation of the kinds of conditions complained of by the Plaintiff, the erection of adequate safety barriers and the indemnification, hold harmless and defense of the Defendants, City of Pleasantville, Pleasantville Department of Public Works, and Urban Enterprise Zone for any personal injury claims arising out of the work. Given Co-Defendant, Marandino Concrete Company, Inc.’s contractual obligations and the complete absence of any evidence that the Defendants, City of Pleasantville, Pleasantville Department of Public Works, and Urban Enterprise Zone, were directly responsible in whole or in part, for the condition of which the Plaintiff complains, the Defendants, City of Pleasantville, Pleasantville Department of Public Works, and Urban Enterprise Zone, are entitled to Summary Judgment on its claim against the Defendant, Marandino Concrete Company, Inc., for indemnification, hold harmless and defense.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the Motion for Summary Judgment filed on behalf of the Defendants, City of Pleasantville and Pleasantville Department of Public Works, Urban Enterprise Zone, for an Order requiring Co-Defendant, Marandino Concrete, Inc., to indemnify and hold harmless and defend, as a matter of law, be granted.

STAGLIANO & DeWEESE, P.A.

Date: May 14, 2013

By. _____

David S. DeWeese, Esquire
Attorney for Defendants, City of
Pleasantville, Pleasantville Department of
Public Works and Urban Enterprise Zone