NEW YORK APPELLATE DIGEST, LLC

Negligence
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CONTRACT LAW.

A CAUSE OF ACTION FOR SUB-PAR PERFORMANCE OF A CONTRACT SOUNDS IN CONTRACT LAW, NOT NEGLIGENCE; NEGLIGENCE CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined that the negligence cause of action was really a breach of contract action and therefore the negligence cause of action should have been dismissed. The underlying contract was for demolition and construction work and the complaint alleged damage by the diversion of water:

… [W]e agree with J. Luke [defendant demolition-construction contractor] that [the negligence cause of action] should have been dismissed. Town Homes [defendant property owner] denominated that claim as one for negligence, alleging that J. Luke deviated from accepted standards of care by failing to perform contracted-for demolition and construction work "in a good workmanlike manner." Supreme Court correctly categorized those assertions as a claim for negligent performance of contract; the problem is "that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" … . A failure to plead a cognizable claim would not warrant summary judgment if Town Homes subsequently made out a viable cause of action … . Town Homes never suggested that J. Luke owed it a duty of care independent from the contract, however, and confirmed in its opposition to J. Luke's motion that the issue was whether J. Luke rendered subpar performance under the contract. Accordingly, in the absence of any indication that J. Luke owed an independent duty to Town Homes arising "from circumstances extraneous to, and not constituting elements of, the contract" … . 517 Union St. Assoc. LLC v Town Homes of Union Sq. LLC, 2019 NY Slip Op 07461, Third Dept 10-17-19

ELEVATORS.

RES IPSA LOQUITUR DOCTRINE MAY APPLY IN THIS ELEVATOR MALFUNCTION CASE (FIRST DEPT).

The First Department determined the res ipsa loquitur doctrine may apply to this elevator malfunction case and defendant's motion for summary judgment was properly denied:

Summary judgment was properly denied in this action where plaintiff was injured when the elevator door in defendant's building closed unexpectedly on her hand as she attempted to exit. Defendant has failed to establish, as a matter of law, that res ipsa loquitur is inapplicable to this case … . In order for the doctrine to apply, three elements must be established: 1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; 2) it must be cause by an agency or instrumentality within the exclusive control of defendant; and 3) it must not have been due to any voluntary action or contribution on the part of the plaintiff … . The rule has the effect of creating a prima facie case of negligence sufficient for submission to the jury, and the jury may -— but is not required to -— draw the permissible inference … . Here, plaintiff claims that she was injured while attempting to exit an elevator in defendant's building, and that the elevator which malfunctioned was within the exclusive control of defendant. Elevator malfunctions are circumstances giving rise to the possible application of res ipsa loquitur to prove negligence … . Carter v New York City Hous. Auth., 2019 NY Slip Op 07722, First Dept 10-29-19

ESPINAL, 'LAUNCH AND INSTRUMENT OF HARM,' CONTRACT LAW.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED IN THIS CRANE-ACCIDENT CASE; THE ESPINAL 'LAUNCHED AN INSTRUMENT OF HARM' CAUSE OF ACTION AGAINST THE COMPANY WHICH REFURBISHED AND MAINTAINED THE CRANE SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law 240 (1) cause of action should have been granted in this crane-accident case. The First Department also held that the negligence action against the company (Hoffman) which refurbished and maintained the crane, based upon the Espinal "launched an instrument of harm" theory, should not have been dismissed:

The collapse of a crane constitutes a prima facie violation of Labor Law § 240(1) … . A plaintiff need not be directly injured by a portion of the crane for the Labor Law to apply — injuries that occur while trying to avoid being struck during a hoisting accident may qualify … . While plaintiff's testimony at his deposition varied somewhat from his 50-h testimony, he repeatedly cautioned that the accident happened so fast it was difficult

for him to describe exactly how it occurred. In any event, no matter which version is accepted, Labor Law § 240(1) applies to the … defendant … .

Hoffman refurbished the subject crane one year before the accident and performed maintenance on it several times thereafter. Although a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third person … , an exception exists where a contractor who undertakes to perform services pursuant to a contract negligently creates or exacerbates a dangerous condition so as to have "launched a force or instrument of harm" (Espinal v Melville Snow Contrs., 98 NY2d 136, 141-142 [2002] …). Hoffman failed to adequately address the findings of the independent crane company that conducted the post-accident investigation, which concluded that several maintenance and repair issues contributed to over wear on the crane's wire ropes … . DeGidio v City of New York, 2019 NY Slip Op 07218, First Dept 10-8-1

MEDICAL MALPRACTICE, USUAL CUSTOM AND PRACTICE.

SURGEON, WHO HAD NO MEMORY OF PLAINTIFF'S PROCEDURE, SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY ABOUT HIS USUAL CUSTOM AND PRACTICE IN PERFORMING A HERNIA REPAIR, DEFENSE JUDGMENT REVERSED IN THIS MEDICAL MALPRACTICE ACTION (SECOND DEPT).

The Second Department, reversing the defense verdict in a medical malpractice case, determined the trial court should not have allowed the defendant doctor, who had no independent memory of the hernia surgery he performed on plaintiff, to testify about his usual custom and practice, or habit. The surgery involved placement of a mesh patch on the abdominal wall. In this case a portion of the patch had come off the wall and adhered to internal organs:

"Custom and practice evidence draws its probative value from the repetition and unvarying uniformity of the procedure involved as it depends on the inference that a person who regularly follows a strict routine in relation to a particular repetitive practice is likely to have followed that same strict routine at a specific date or time relevant to the litigation" … . To justify the introduction of habit evidence, "a party must be able to show on voir dire, to the satisfaction of the court, that the party expects to prove a sufficient number of instances of the conduct in question" … . …

Although habit evidence may be admissible in a medical malpractice action where the defendant physician makes the requisite showing, here, the evidence did not demonstrate that the defendant's suturing of the Kugel

Composix mesh patch represented a deliberate and repetitive practice by a person in complete control of the circumstances … . …

Although the defendant testified that he had performed hundreds of hernia repairs using mesh patches, he could not remember how many times he had used the Kugel Composix mesh patch before he performed the injured plaintiff's surgery. He testified at his deposition that he had used the Kugel Composix mesh patch at least "a couple times" before he performed the injured plaintiff's procedure. Although the defendant contends that the procedure for suturing the Kugel Composix mesh patch was the same as for other mesh patches, the Kugel Composix mesh patch had features that were different from other mesh patches, including a "pocket" intended to protect the intestines. Martin v Timmins, 2019 NY Slip Op 07391. Second Dept 10-16-19

MEDICAL MALPRACTICE.

PLAINTIFF'S EXPERT'S AFFIDAVIT, ALTHOUGH POORLY DRAFTED, RAISED A QUESTION OF FACT WHETHER DEFENDANTS DEPARTED FROM THE STANDARD OF CARE FOR A SPINAL FUSION PROCEDURE, SUPREME COURT REVERSED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the expert affidavit submitted in opposition to defendants' motion for summary judgment, although not well-drafted, raised a question of fact whether defendants' departed from the standard of care for the placement of hardware in a spinal fusion procedure:

… [P]laintiff submitted the expert affidavit of a board-certified orthopedic surgeon, who opined, based upon his review of the relevant medical records and radiological images, including a CT scan taken shortly after the surgery, that Pedersen had improperly positioned the L4 pedicle screws into the L3-L4 facet joint and that such improper placement constituted a deviation from the standard of care that ultimately caused Yerich to develop spinal and foraminal stenosis at L3-L4. Plaintiffs' expert asserted that placing pedicle screws through the facet joints causes "damage[to] the joint, reduces movement, [and] makes the spine unstable[,] which results in . . . spinal stenosis and foraminal stenosis requiring fusion," as happened here. Although plaintiffs' expert affidavit is not a model of precise drafting, when viewed in the light most favorable to plaintiffs …, we find that plaintiffs' expert affidavit raises a question of fact as to whether Pedersen improperly positioned the L4 pedicle screws through the facet joint, thereby causing injury. Yerich v Bassett Healthcare Network, 2019 NY Slip Op 07466, Third Dept 10-17-19

MUNICIPAL LAW, SPECIAL RELATIONSHIP.

ALLEGATION THAT FIREFIGHTERS TOLD PLAINTIFFS THE FIRE WAS EXTINGUISHED AND IT WAS SAFE TO REENTER WAS SUFFICIENT TO DEMONSTRATE A SPECIAL RELATIONSHIP BETWEEN PLAINTIFFS AND THE FIRE DEPARTMENT; THE COMPLAINT ALLEGED THE FIREFIGHTERS TURNED OFF THE WATER AND LEFT, AFTER WHICH THE BUILDING BURNED TO THE GROUND (SECOND DEPT).

The Second Department determined the complaint sufficiently alleged the formation of a special relationship with plaintiffs by the Fire District of New York (FDNY):

When they arrived, FDNY personnel observed a fire on storage shelves approximately 50 feet into the building. Upon concluding that the fire was being controlled by the building's sprinkler system, FDNY personnel wet down the debris, then turned off the main water valve that controlled the flow of water to the entire sprinkler system, rendering it inoperable. After certifying to warehouse personnel that the building was safe to re-enter, FDNY personnel left the premises. Within minutes, a warehouse employee observed an orange glow toward the center of the warehouse, and a second fire alarm was activated at 6:32 a.m. However, because the sprinkler system had been disabled by FDNY personnel, the fire spread quickly and destroyed the entire building and its contents. * * *

A municipality may not be held liable for the negligent performance of a governmental function, such as police and fire protection, absent a duty born of a special relationship between the injured plaintiff and the defendant municipality … . A special relationship may arise in three situations: (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of person; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when it assumes positive direction and control in the face of a known, blatant, and dangerous safety violation … .

Here, the plaintiffs' allegations that FDNY personnel, upon arriving at the scene and assuming control over the ongoing fire, shut off the main water supply valve to the warehouse's sprinkler systems, then certified to warehouse employees that it was safe to reenter the building when in fact the fire was still at risk of rekindling—which it did within minutes after FDNY personnel left the premises—are sufficient to establish a special relationship … . Zurich Am. Ins. Co. v City of New York, 2019 NY Slip Op 07640, Second Dept 10-23-10

MUNICIPAL LAW.

CITY OF NEW YORK CAN SUE IN NEGLIGENCE FOR DAMAGE TO CITY SIDEWALKS (CT APP).

The Court of Appeals, reversing Supreme Court, determined that the city has the capacity to sue for the negligent destruction of city property. The city sought money damages for injury to trees caused by the sidewalk repairs performed by defendants for the adjacent property owner:

The City has the general capacity to sue for the negligent destruction of its property (see General City Law § 20 [1]; New York City Charter § 394 [c]). Moreover, the provisions upon which defendants rely do not abrogate the City's claim for damage to its property (see generally Assured Guar. [UK] Ltd. v J.P. Morgan Inv. Mgt. Inc., 18 NY3d 341, 351 [2011]). Defendants have not established that the City lacks a cognizable common law claim. City of New York v Tri-Rail Constr., Inc., 2019 NY Slip Op 07478, CtApp 10-17-19

SLIP AND FALL, LANDLORD-TENANT.

A REGULATORY AGREEMENT ENTERED INTO BY THE OUT-OF-POSSESSION LANDLORD IN CONNECTION WITH AN FHA MORTGAGE, WHICH REQUIRED THAT THE LANDLORD KEEP THE PROPERTY IN GOOD REPAIR, DID NOT CHANGE THE TERMS OF THE LEASE WHICH MADE THE TENANT RESPONSIBLE FOR REPAIRS; THE OUT-OF-POSSESSION LANDLORD THEREFORE IS NOT LIABLE FOR A SLIP AND FALL CAUSED BY A ROOF LEAK (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a two-judge dissenting opinion, determined the owner of a nursing home, Hamilton Inc., as an out-of-possession landlord, was not liable to plaintiff who slipped and fell on the premises. It was alleged the pool of water which caused plaintiff to slip and fall was the result of a leak in the roof. The lease had made the tenant, Grand Manor, responsible for repairs. However a HUD regulatory agreement subsequently entered into by Hamilton Inc in connection with an FHA mortgage required that the property be kept in good repair by Hamilton. The Court of Appeals held that the regulatory agreement did change the terms of the lease:

… [T]he HUD regulatory agreement, as incorporated into the 1978 amendment to the lease, did not alter the contractual relationship between the Hamilton defendants and Grand Manor regarding control of the premises or replace Grand Manor's contractual duty to perform maintenance and repairs at the facility. Although the terms of the HUD agreement were to supersede all other requirements in conflict therewith, the regulatory agreement did not conflict with, or absolve Grand Manor of, its responsibilities under the original lease. Indeed, as previously noted, the amendment continued all terms from the lease that did not conflict with the regulatory agreement. Given the absence of a conflict on the issue of Grand Manor's duties to make repairs, the HUD agreement, as incorporated into the lease amendment, was not a covenant that could be said to displace Grand Manor's duties or alter the relationship between landlord and tenant … . * * *

… [T]he "exception to the general rule" set forth in Putnam is inapplicable to the regulatory agreement, and the general rule applies — that is, the "landlord is not liable for conditions upon the land after the transfer of possession" (38 NY2d at 617). Indeed, adoption of plaintiff's proposed rule — that would require us to extend the exception set forth in Putnam to any agreement made by the lessor to make repairs — would mean that lessees could assume the sole obligation in a lease to maintain premises in good repair but avoid making repairs in reliance on a covenant later discovered between the land owner and a third party, a result not intended or supported by Putnam. Henry v Hamilton Equities, Inc., 2019 NY Slip Op 07642, CtApp 10-24-19

SLIP AND FALL, LANDLORD-TENANT.

OUT-OF-POSSESSION LANDLORD DEMONSTRATED IT WAS NOT RESPONSIBLE FOR REPAIR OF THE DANGEROUS CONDITION; LANDLORD'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that defendant landlord's motion for summary judgment in this slip and fall case should have been granted. Although there was a dangerous condition, defendant, as an out-of-possession landlord, was not responsible for its repair:

… [D]efendant submitted the lease between defendant and plaintiff's employer, which provided that the lessee was responsible for all maintenance and repair of the premises except for "Major Improvements," which the lease defined as "any major repair (repairs that are not of the nature of ordinary maintenance such as local patches, caulking, flashing)" including "replacement of the roof, replacement of load-bearing walls and

foundations, [and] repairs to the concrete floor." We conclude that maintenance of the allegedly bent or defective metal strip was not a "Major Improvement[]" under the lease … .

Further, the record established that defendant relinquished control of the premises. The fact that, under the lease, defendant reserved the right to enter the leased premises for purposes of inspection and performing "Major Improvements," is " insufficient to establish the requisite degree of control necessary for the imposition of liability with respect to an out-of-possession landlord' " … . "[A]n out-of-possession landlord who reserves that right may be held liable for injuries to a third party only where a specific statutory violation exists" … , and plaintiff failed to allege a specific statutory violation pertaining to the metal strip … . Addeo v Clarit Realty, Ltd., 2019 NY Slip Op 07163, Fourth Dept 10-4-19

SLIP AND FALL, MUNICIPAL LAW, LANDLORD-TENANT.

PURSUANT TO THE NYC ADMINISTRATIVE CODE, OUT-OF-POSSESSION LANDLORDS ARE RESPONSIBLE FOR THE REMOVAL OF ICE AND SNOW FROM THE ABUTTING CITY SIDEWALKS, NOTWITHSTANDING AN AGREEMENT MAKING THE TENANT RESPONSIBLE; THE OUT-POSSESSION-LANDLORDS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED BY THE APPELLATE DIVISION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, reversing the Appellate Division, determined that the NYC Administrative Code provision which requires the abutting landowners to maintain the city sidewalks applies to out-of-possession landlords, even where the tenant is responsible for maintaining the sidewalks under the lease:

Section 7-210 of the Administrative Code of the City of New York unambiguously imposes a nondelegable duty on certain real property owners to maintain City sidewalks abutting their land in a reasonably safe condition. Under this duty of care, a subject owner is liable for personal injury claims arising from the owner's negligent failure to remove snow and ice from the sidewalk (id. § 7-210 [b]). The Code makes no exception for out-of-possession landowners and so we hold that the duty applies with full force notwithstanding an owner's transfer of possession to a lessee or maintenance agreement with a nonowner. Thus, defendants are not entitled to summary judgment as a matter of law due solely to the owners' out-of-possession status. Xiang Fu He v Troon Mgt., Inc., 2019 NY Slip Op 07643, CtApp 10-24-19

SLIP AND FALL, MUNICIPAL LAW.

ALTHOUGH THE EXCUSE WAS INADEQUATE, THE CITY HAD ACTUAL NOTICE OF THE HOLE PETITIONER STEPPED IN AND DELAY IN FILING THE NOTICE OF CLAIM DID NOT PREJUDICE THE CITY, PETITIONER'S MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined petitioner's motion for leave to file a late notice of claim in this slip and fall case should have been granted. Although the excuse was inadequate, the city had actual notice and was not prejudiced by the delay:

Petitioner's assertion that he was unaware of the requirement that he file a notice of claim within 90 days of his accident is not a reasonable excuse for failing to file a timely notice … . His contention that his injuries prevented him from timely filing a notice of claim is not an acceptable excuse, because he failed to provide any medical documentation to support his claimed incapacity … . Notwithstanding, his failure to establish a reasonable excuse for not timely filing a notice of claim is not fatal … .

The City obtained actual notice of the accident within a reasonable time after the 90-day period expired … . It does not contest petitioner's assertion that the condition of the hole remained unchanged at the time he sought leave … . Although petitioner does not address whether anyone saw the accident, the bare claim that the delay would make it difficult for the City to locate witnesses is insufficient to establish prejudice … . Matter of Montero v City of New York, 2019 NY Slip Op 07732, First Dept 10-29-19

SLIP AND FALL, MUNICIPAL LAW.

THE COMPLAINT IN THIS SLIP AND FALL CASE WAS BASED UPON A THEORY NOT DESCRIBED IN THE NOTICE OF CLAIM; THE COMPLAINT WAS PROPERLY DISMISSED (SECOND DEPT).

The Second Department determined the complaint in this slip and fall case was properly dismissed. The complaint alleged a theory of liability which was not described in the notice of claim:

"A notice of claim which, inter alia, sufficiently identifies the claimant, states the nature of the claim and describes the time when, the place where, and the manner in which the claim arose, is a condition precedent to asserting a tort claim against a municipality" … . Although "the statute does not require those things to be stated with literal nicety or exactness'" … , a notice of claim must provide " information sufficient to enable the city to investigate'" … and "must at least adequately apprise the defendant that the claimant would seek to impose liability under a cognizable theory of recovery" … . A plaintiff may not later add a new theory of liability that was not included in the notice of claim … .

Here, the City established its prima facie entitlement to summary judgment dismissing the complaint by submitting evidence that the notice of claim contained no allegation that the City caused or created the icy condition where the accident occurred by negligently maintaining a nearby sewer and failing to repair an alleged "recurring flooding condition from the sewer backup" … . Rubenstein v City of New York, 2019 NY Slip Op 07633, Second Dept 10-23-19

SLIP AND FALL.

PLAINTIFF SLIPPED AND FELL ON PAINTED AREAS OF A CROSS-WALK IN DEFENDANT'S PARKING LOT; QUESTION OF FACT WHETHER THE PAINTED AREAS WERE SLIPPERY WHEN WET BECAUSE SAND HAD NOT BEEN ADDED TO THE PAINT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff had raised a question of fact whether the painted areas of a cross-walk in a parking lot constituted a dangerous condition in this slip and fall case. Plaintiff's expert presented evidence the painted areas were very slippery when wet and sand should have been added to the paint:

… [T]he plaintiff raised a triable issue of fact as to whether the painted lines constituted a dangerous or defective condition … . The plaintiff submitted the affidavit of his expert, who opined that the painted surface was "non-slip" when dry, but became very slippery when wet. The plaintiff's expert further opined that when coatings are applied in an area where people are expected to walk, particularly areas exposed to wet conditions, either sand is added to provide traction or a coating that is slip resistant under wet conditions is used. He also noted that in other areas of the parking lot where the accident occurred, a different coating was used, and that coating was slip resistant under wet conditions. Rojecki v Genting N.Y., LLC, 2019 NY Slip Op 07431, Second Dept 10-2019

SLIP AND FALL.

THE TRACKED IN WATER WAS NOT ACTIONABLE; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE WAS PROPERLY GRANTED (THIRD DEPT).

The Third Department determined defendant's motion for summary judgment in this slip and fall case was properly granted. Plaintiff was unable to demonstrate that the source of the water on which she slipped and fell was not simply tracked in rain, which was not actionable. The floor in question was temporary flooring used in a tent set up for a graduation ceremony:

We reject plaintiff's contention that defendant failed to properly inspect the premises, or that its use of rubber mats on some portions of the flooring demonstrates that it failed to maintain its premises in a reasonably safe condition. Although defendant placed rubber mats on the flooring near the stage toward the front of the tent, the security director explained that those mats were intended to assist the graduates in approaching, crossing and leaving the stage, which was elevated and located on an incline. Plaintiff further notes that defendant chose to use two tent walls and to leave the other sides open, but she did not demonstrate that any water allegedly present on the walkway originated from those open sides, rather than having been tracked in. Nor did plaintiff establish that the subsequent placement by defendant's staff of a mat in the area of her fall constituted notice of a dangerous condition. Property owners are not "'required to cover all of [their] floors with mats, nor to continuously mop up all moisture resulting from tracked-in rain'" … . Further, even assuming that water was present on the temporary flooring at issue, "the mere fact that a floor or walkway becomes slippery when wet does not establish a dangerous condition" … . Van Duser v Mount St. Mary Coll., 2019 NY Slip Op 07824, Third Dept 10-31-19

TRAFFIC ACCIDENTS, PUBLIC AUTHORITIES LAW.

POST-VERDICT INTEREST IN THIS ACTION AGAINST THE NEW YORK CITY TRANSIT AUTHORITY SHOULD HAVE BEEN CALCULATED AT THREE PERCENT PURSUANT TO THE PUBLIC AUTHORITIES LAW (SECOND DEPT).

The Second Department noted that the Public Authorities Law allows only three percent interest from the date of the verdict in this action against the New York City Transit Authority. Plaintiff was injured while driving

when a piece of metal fell from elevated tracks through the windshield. The nearly two-million dollar verdict was affirmed:

After a trial on the issue of damages, the jury returned a verdict in favor of the plaintiff and against the defendants in the principal sums of $800,000 for past pain and suffering and $1,000,000 for future pain and suffering over a 15-year period. The defendants appeal from a judgment in favor of the plaintiff and against them in the total sum of $1,967,633.08, including interest in the sum of $64,249.90. * * *

… [T]he judgment incorrectly applied an interest rate in excess of the maximum legal rate of three percent per annum to the plaintiff's award against the defendants (see Public Authorities Law § 1212[6] …). We therefore remit the matter … for recalculation of interest at the rate of three percent per annum from the date of the verdict … . Rojas v New York City Tr. Auth., 2019 NY Slip Op 07430, Second Dept 10-16-19

TRAFFIC ACCIDENTS.

PEDESTRIAN PLAINTIFF WAS STRUCK BY DEFENDANT'S VEHICLE AS SHE WAS CROSSING THE ENTRANCE TO A PARKING LOT; DEFENDANT TESTIFIED HE NEVER SAW THE PLAINTIFF; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND HER MOTION TO DISMISS DEFENDANT'S AFFIRMATIVE DEFENSE ALLEGING PLAINTIFF WAS COMPARATIVELY NEGLIGENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff-pedestrian's motion for summary judgment in this traffic accident case should have been granted, and defendant's affirmative defense alleged plaintiff was comparatively negligent should have been dismissed. Plaintiff was halfway through the entrance to a parking lot when defendant turned to enter the parking lot:

The injured plaintiff testified at her deposition, a transcript of which was also submitted in support of the plaintiffs' motion, that she had been walking on the sidewalk along Ardsley Road. She intended to cross the entrance to the parking lot to continue walking on the sidewalk along Ardsley Road. She testified that, before attempting to cross the entrance to the lot, she stopped and looked in both directions to check for approaching vehicles, and that she did not see any vehicles before she stepped into the entrance to the lot.

The plaintiffs also submitted a transcript of the deposition testimony of a nonparty witness who testified that, just before impact, he observed the injured plaintiff turn her body to face the defendants' vehicle and put her

hands up in front of her. He then saw the vehicle strike the injured plaintiff and launch her into the air. The photographs, in conjunction with the testimony of the defendant driver and the nonparty witness, demonstrated that the injured plaintiff was struck after she had already walked more than halfway across the entrance to the parking lot.

A driver is bound to see what is there to be seen with the proper use of his or her senses … . Here, the plaintiffs established their prima facie entitlement to judgment as a matter of law on the issue of liability by submitting evidence that the defendant driver never saw the injured plaintiff before striking her … . Higashi v M&R Scarsdale Rest., LLC, 2019 NY Slip Op 07240, Second Dept 10-9-19

TRAFFIC ACCIDENTS.

THERE WAS NO CONFLICT BETWEEN NEW YORK AND PENNSYLVANIA LAW IN THIS PERSONAL INJURY CASE, THEREFORE NEW YORK LAW APPLIES AND THERE IS NO NEED FOR A CHOICE OF LAW ANALYSIS (FOURTH DEPT).

The Fourth Department determined New York applies in this action stemming from an accident in Pennsylvania:

New York law controls the resolution of its motion and this appeal. "[B]ecause New York is the forum state, i.e., the action was commenced here, New York's choice-of-law principles govern the outcome of this matter' " … . "The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved" … . Here, defendant failed to establish the existence of any conflict between New York and Pennsylvania law with respect to the issues raised in the motion, and therefore we need not engage in any choice of law analysis … . Farnham v MIC Wholesale Ltd, 2019 NY Slip Op 07178, Fourth Dept 10-4-19

TRAFFIC ACCIDENTS.

VEHICLE WHICH STOPPED BEHIND A DISABLED VEHICLE FURNISHED THE CONDITION FOR THE SUBSEQUENT REAR-END COLLISION BUT WAS NOT THE PROXIMATE CAUSE OF THE COLLISION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the Perez defendants' motion for summary judgment in this rear-end collision case should have been granted. Perez stopped his vehicle in the left lane behind a disabled vehicle when the driver of the disabled vehicle flagged him down. Plaintiff came to a stop behind the Perez vehicle and was attempting to go around the Perez vehicle when plaintiff's vehicle was struck from behind by the Chen vehicle. The Second Department held that the Perez vehicle furnished the condition for the traffic accident but did not cause the accident. The accident was caused by Chen's failure to maintain a safe distance:

This evidence demonstrated that Perez's conduct of stopping his vehicle in the left lane of travel with its hazard lights engaged was not a proximate cause of the collision between Chen's SUV and the plaintiff's vehicle, but rather merely furnished the condition or occasion for it … . Since the plaintiff was able to safely bring his vehicle to a complete stop behind Perez's vehicle, where it remained stopped for approximately two minutes prior to the accident, any purported negligence on Perez's part was not a proximate cause of the collision between Chen's SUV and the plaintiff's vehicle or of the plaintiff's injuries … . The sole proximate cause of the accident was Chen's failure to maintain a safe driving speed and distance behind the plaintiff's vehicle … . Kante v Tong Fei Chen, 2019 NY Slip Op 07390, Second Dept 10-16-19

ZONE OF DANGER.

EDUCATION-SCHOOL LAW. THE ZONE OF DANGER THEORY OF LIABILITY IS AVAILABLE ONLY TO THE IMMEDIATE RELATIVES OF THE INJURED PARTY; PETITIONERS' CHILDREN WITNESSED THE FATAL INJURY TO ANOTHER STUDENT WHO WAS NOT RELATED; PETITIONERS' REQUEST FOR LEAVE TO FILE A LATE NOTICE OF CLAIM AGAINST THE SCHOOL DISTRICT ALLEGING INTENTIONAL AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petition for leave to file a late notice of claim against the school district should not have been granted. The petitioners are the parents of students who were participating in football training when the pole or log they were carrying dropped and fatally injured another student. The late notice of claim asserted intentional and negligent infliction of emotional distress based upon the petitioners' children being in the "zone of danger." However, the "zone of danger" theory can be raised only by the immediate relatives of the injured party:

"The zone-of-danger rule . . . allows one who is himself or herself threatened with bodily harm in consequence of the defendant's negligence to recover for emotional distress resulting from viewing the death or serious physical injury of a member of his or her immediate family" … . Here, the petitioners's children were not immediate family members of the decedent. Thus, they have no legally cognizable claim to recover damages for emotional distress they allegedly sustained from witnessing the accident … , or based upon the District's alleged refusal to provide continued counseling and maintain the coaching staff support system, as such damages are a financial consequence of their emotional trauma … . Moreover, the District demonstrated that, under the circumstances presented, it was not authorized to pay for continued outside counseling services for the petitioners' children, and the record reflects that the District provided ongoing counseling from mental health professionals employed by the District. Under the circumstances, the proposed claim against the District is patently meritless … . Matter of Kmiotek v Sachem Cent. Sch. Dist., 2019 NY Slip Op 07583, Second Dept 10-23-19