NEW YORK APPELLATE DIGEST, LLC

Negligence
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LEGAL MALPRACTICE.

DEFENDANTS-ATTORNEYS' MOTION TO DISMISS THE LEGAL MALPRACTICE ACTION BASED UPON UNDENIABLE DOCUMENTARY EVIDENCE, AS WELL AS OTHER GROUNDS, SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendants-attorneys' motion to dismiss the legal malpractice complaint based upon documentary evidence should have been granted. The plaintiffs-insurers' alleged the defendants negligently advised them to disclaim insurance coverage:

… [P]laintiffs allege that they sustained damages when they relied on defendants' negligent advice that they could disclaim coverage of their insured in an underlying malpractice action. In support of their motion to dismiss, defendants properly relied on documentary evidence, including the challenged disclaimer letter and the relevant policy, since their authenticity is undisputed and their contents are "essentially undeniable" (… CPLR 3211[a][1]). The disclaimer letter sets forth an analysis of plaintiffs' right to refuse coverage to their insured on two independent bases. Plaintiffs' failure to allege with specificity or argue that one of the two bases for defendants' advice was incorrect, requires dismissal of this legal malpractice action.

Aside from this, defendants' alleged malpractice concerning other issues is subject to the attorney-judgment rule … . Since plaintiffs failed to show that the issues were elementary or subject to settled authority, defendants could not be liable for malpractice based on their prediction of how a court would interpret the policy … .

Further, plaintiffs' failure to explain how it was that any alleged error by defendants prejudiced their defense in the subsequent coverage action also mandates dismissal of the malpractice claim … . Lloyd's Syndicate 2987 v Furman Kornfeld & Brennan, LLP, 2020 NY Slip Op 02365, First Dept 4-23-20

MEDICAL MALPRACTICE.

EXTRINSIC COLLATERAL DOCUMENTARY EVIDENCE SHOULD NOT HAVE BEEN ADMITTED TO IMPEACH DEFENDANT DOCTOR'S CREDIBILITY IN THIS MEDICAL MALPRACTICE TRIAL; DEFENDANT'S MOTION TO SET ASIDE THE $400,000 VERDICT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court in this medical malpractice action, determined the defendant doctor's motion to set aside the plaintiff's $400,000 verdict should have been granted. The trial court should not have allowed extrinsic documentary evidence on collateral matters to impeach defendant's credibility:

"A motion pursuant to CPLR 4404(a) to set aside a verdict and for a new trial in the interest of justice encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise" … . "In considering such a motion, [t]he Trial Judge must decide whether substantial justice has been done, whether it is likely that the verdict has been affected and must look to his [or her] own common sense, experience and sense of fairness rather than to precedents in arriving at a decision'" … .

Here, the Supreme Court should not have permitted the plaintiff to introduce extrinsic documentary evidence concerning collateral matters solely for the purpose of impeaching the defendant's credibility … . In view of the importance of the defendant's testimony and the emphasis given to the improperly admitted credibility evidence by the plaintiff's counsel during summation, the errors were sufficiently prejudicial to warrant a new trial … . Rudle v Shifrin, 2020 NY Slip Op 02487, Second Dept 4-29-20

NEGLIGENT ENTRUSTMENT.

QUESTIONS OF FACT WHETHER DEFENDANT WAS THE OWNER OF THE SCOOTER, WHETHER DEFENDANT KNEW DECEDENT WAS NOT COMPETENT TO OPERATE THE SCOOTER, AND WHETHER DEFENDANT GAVE DECEDENT PERMISSION TO TEST DRIVE THE SCOOTER; THE NEGLIGENT ENTRUSTMENT ACTION SHOULD NOT HAVE BEEN DISMISSED (THIRD DEPT).

The Third Department, reversing Supreme Court in this negligence entrustment action, determined there were questions of fact whether defendant had dominion and control over a scooter which was for sale at a car dealership and therefore "owned" the scooter, whether defendant knew decedent was not competent to operate the scooter, and whether defendant gave the decedent permission to take the scooter for a test drive. Decedent was killed in an accident when she was taking the test drive:

"An owner of a motor vehicle . . . may be liable for negligent entrustment if he or she was negligent in entrusting it to one who he or she knew, or in the exercise of ordinary care should have known, was incompetent to operate it" … . … The [dealership] owner stated in an affidavit that neither his father nor defendant [dealership] owned the scooter. Nevertheless, the scooter was displayed for sale on defendant's front lot and the owner stated in his deposition testimony that he would push the scooter from the garage to the lot each morning. The keys for the scooter would be in the scooter when it was on display in the lot and then was kept in a separate box behind the owner's desk when it was not on display. The helmet was likewise kept in the office of the owner's father. Viewing the foregoing evidence in the light most favorable to plaintiff, we conclude that a question of fact exists as to whether defendant exerted dominion and control over the scooter so as to be its owner … . …

Defendant alternatively argues that it did not have knowledge that decedent was incompetent to operate the scooter. The owner stated that he thought decedent had a motorcycle permit, but he did not confirm this fact with decedent nor did he inquire as to whether she knew how to drive the scooter. The owner also did not check decedent's driver's permit or have her sign anything prior to when she drove the scooter. Other than knowing that decedent had ridden a two-wheel Yamaha Enduro road bike in the past, the owner had never seen decedent operate a scooter prior to the accident. In view of this evidence, we find that there is an issue of fact regarding whether the owner should have known that decedent was incompetent to ride the scooter … .

… The owner … admitted that, other than verbally telling decedent to wait for his father, he did not do anything else to try to stop decedent from taking the scooter. Indeed, when asked what he did when decedent walked into his father's office and took the helmet for the scooter, the owner responded, "Nothing." A customer who was with the owner when decedent arrived testified that it appeared that decedent did not take the scooter against the

owner's will and that "it look[ed] like . . . there was some sort of agreement because she did go." Maguire v Upstate Auto, Inc., 2020 NY Slip Op 02226, Third Dept 4-9-20

SLIP AND FALL, LANDLORD-TENANT.

OUT-OF-POSSESSION LANDLORD MAY BE LIABLE FOR PLAINTIFF'S SLIP AND FALL ON ICE WHICH FORMED ON THE STEP LEADING TO HER APARTMENT, DESPITE IT BEING PLAINTIFF'S RESPONSIBILITY TO REMOVE ICE AND SNOW FROM THE AREA (THIRD DEPT).

The Third Department, reversing Supreme Court, determined there was a question of fact whether defendant out-of-possession landlord is liable for plaintiff's slip and fall on ice on a step leading to her apartment, despite it being plaintiff's responsibility to remove ice and snow from the area. Plaintiff alleged the ice formed because of a leak in the porch roof:

… [P]laintiff contends that the condition that led to the formation of the ice patch was present and ascertainable for at least several days. …

… "[A] landlord has a duty to use ordinary care to keep those areas which are reserved and intended for the common use of the tenants and owner of the building and subject to the landlord's control, i.e., the common areas, in a reasonably safe and suitable condition" … .

The roof here was not accessible or available for use by the tenants … , but the record indicates that the exterior of the building may have been within defendants' control. Since purchasing the building in 1994, defendants had replaced the roof, replaced the gutter system along at least one side of the building and recoated part of the roof with tar. Defendant Timothy J. Charest, who was responsible for managing the property, testified that the gutter system was on the building when defendants purchased the property, but also testified that "if there were problems with a gutter" on the side of the building containing the apartment entrances, "there were repairs made," though he could not remember when any such repairs had been made. Charest testified that he inspected the property approximately weekly, as well as after every storm. He did not keep records of his inspections but would do them on a weekday; plaintiff's accident occurred on a Friday evening. Neither defendant could specifically identify when he had last inspected the property. Harkins v Tuma, 2020 NY Slip Op 02145, Third Dept 4-2-20

SLIP AND FALL, MUNICIPAL LAW, LANDLORD-TENANT.

NOTWITHSTANDING THE TENANT'S LEASE-OBLIGATION TO KEEP THE SIDEWALK FREE OF ICE AND SNOW, THE LANDLORD HAD THE NONDELEGABLE DUTY TO KEEP A RAMP LEADING TO THE SIDEWALK IN A SAFE CONDITION IN THIS SLIP AND FALL CASE (FIRST DEPT).

The First Department, reversing Supreme Court, determined the defendant owner of the property leased by a restaurant had a nondelegable duty to keep a metal ramp leading from the restaurant to the sidewalk (a special use of the sidewalk) in a safe condition, notwithstanding the restaurant's lease-obligation to remove ice and snow from the sidewalk. Plaintiff, a restaurant employee, slipped and fell on snow and ice on the ramp:

Plaintiff, an employee of the restaurant owned by third-party defendant, slipped and fell on snow and ice on a metal ramp leading from the side door of the restaurant to the sidewalk. Third-party defendant leases the ground floor and basement space from defendant landowner. The evidence shows that the ramp was erected over the public sidewalk alongside defendant's building, and is not included in the diagram of the leased space. Further, the director of leasing for defendant's property manager testified that the ramp was built for use by people with disabilities.

Notwithstanding any lease provisions obligating the restaurant to remove snow and ice from the sidewalk, defendant, as owner of the property abutting the sidewalk, had a nondelegable duty to keep the sidewalk, and any special uses made of the sidewalk, in a safe condition, including the removal of snow and ice … . Dembele v 373-381 Pas Assoc., LLC, 2020 NY Slip Op 02256, First Dept 4-9-20

SLIP AND FALL.

DEFECT WHICH CAUSED PLAINTIFF TO SLIP AND FALL WAS TRIVIAL AS A MATTER OF LAW (SECOND DEPT).

The Second Department determined the defect which caused plaintiff's slip and fall was trivial as a matter of law:

The plaintiff testified that he stopped by one of the benches and when he started to walk away, "[his] foot got caught under the bench leg." The plaintiff further testified that he returned to the site of the accident later that

day and observed that the bench leg, which had allegedly caught his foot, was bent and protruding outward approximately two inches into the pedestrian walkway. The plaintiff, who had frequented that mall more than 100 times and had previously been to the area of the mall where the accident had occurred, had never noticed the bent bench leg. No one, including the plaintiff, had ever complained about the bent bench leg to the defendants. Nor had any prior accidents involving the bent bench leg been reported to the defendants. The plaintiff's engineering expert opined that the defendants were negligent in permitting the bench leg to protrude into the pedestrian walkway so as to create a tripping hazard. * * *

"[A] property owner may not be held liable for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes or trip" … . Photographs which fairly and accurately represent the accident site may be used to establish whether a defect is trivial and not actionable … .

Here, the evidence that the defendants submitted in support of their motion, including several photographs of the alleged defect, established prima facie that, as a matter of law, under all the circumstances, including the lighting conditions at the time of the accident, the plaintiff's unobstructed view of the alleged defect, and the condition and location of the bench leg, the alleged defect was trivial and, therefore, not actionable … . Reich v Alexander's, Inc., 2020 NY Slip Op 02486, Second Dept 4-29-20

THIRD PARTY ASSAULT.

QUESTIONS OF FACT WHETHER PLAINTIFF-NURSE WHO WAS ASSAULTED BY A PATIENT WAS A THIRD-PARTY BENEFICIARY OF THE SECURITY-COMPANY CONTRACT AND WHETHER PLAINTIFF DETRIMENTALLY RELIED UPON A SECURITY GUARD'S PROMISE TO RESPOND TO HER CALL FOR HELP (FIRST DEPT).

The First Department determined defendant security company's (Sera's) motion for summary judgment in this patient-assault case was properly denied. Plaintiff, a nurse at a healthcare facility, was assaulted by a patient. Sera argued it was only responsible for providing protection against intruders, not patients. Because the contract with Sera was ambiguous the court properly considered extrinsic evidence (deposition testimony) which indicated Sera responded to staff's calls for help dealing with patient "altercations" or "fighting." There were questions of fact whether plaintiff was a third-party beneficiary of the Sera's contract with the facility and whether plaintiff detrimentally relied on Sera to protect her from the assault. Questions of fact about Sera's duty to plaintiff and the foreseeability of the assault were raised:

Given [the] testimony and the contractual language, the motion court properly denied summary judgment on the issue of whether defendant is liable to plaintiff as a third-party beneficiary of the contract.

Similarly, the motion court also properly concluded that plaintiff raised questions of fact sufficient to overcome summary judgment as to whether Sera is liable to plaintiff under a theory of detrimental reliance based on plaintiff's allegation that the Sera security guard promised to respond to plaintiff's call for assistance, but failed to do so in a timely manner or failed to call the police promptly or at all (see Espinal, 98 NY2d at 140). Defendant's security guard testified that he could not recall when he received the call from his colleague directing him to go to the floor where plaintiff worked, whether he was advised of any details of what was occurring, or how long it took him to get there. He further testified that he was trained to investigate calls prior to determining whether to call the police, and that, if a staff member called the security station about an incident, it was the Sera security guards' responsibility to call 911 or the police when warranted. Kuti v Sera Sec. Servs., 2020 NY Slip Op 02153, First Dept 4-2-20

THIRD-PARTY ASSAULT, MUNICIPAL LAW.

PLAINTIFF SOCIAL WORKER WAS MENACED BY A TENANT IN CITY HOUSING WIELDING A KNIFE AND SUED THE CITY; THE CITY WAS ACTING IN A GOVERNMENTAL CAPACITY; THERE WAS NO SPECIAL DUTY OWED TO PLAINTIFF BY THE CITY; THE ATTACK WAS NOT FORESEEABLE; SECURITY WAS ADEQUATE; THE COMPLAINT WAS PROPERLY DISMISSED (FIRST DEPT).

The First Department determined plaintiff social worker's suit against the city based on a tenant's menacing her with a knife was properly dismissed. The incident happened at city housing for mentally ill and homeless persons:

The court correctly concluded that the City defendants were acting in a governmental capacity when they provided funding for the facility and its services. A party seeking to impose liability on a municipality acting in a governmental capacity must establish the existence of a special duty to plaintiff, which is more than the duty owed to the public generally … . Here, plaintiff presented no evidence that would provide a basis for finding that a special duty was owed to her by the City defendants.

Regarding defendants owner and managing agent of the premises, a landowner must act as a reasonable person in maintaining the property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk … . The owner and managing agent demonstrated that the incident was not reasonably foreseeable in that the tenant was a resident in the facility for nine years and had no record of violent behavior or threats of violence to others … . Plaintiff asserts that the tenant was an unsuitable tenant for the facility because of his mental illness and prior criminal conduct. However, the tenant's criminal conduct took place 15 years before the incident.

Plaintiff argues that the facility lacked adequate security given its "high risk" population. However, surveillance cameras controlling building access and functioning locks on office doors, which were present here, have been found to be sufficient to satisfy the "minimal precautions" standard … . Furthermore, since the incident was over in less than a minute and security personnel were alerted and responded, additional security could not have prevented the incident … . Musano v City of New York, 2020 NY Slip Op 02368, First Dept 4-23-20

TOXIC TORTS.

THE ISSUES ADDRESSED IN THIS COMPREHENSIVE ASBESTOS-MESOTHELIOMA OPINION INCLUDE: GENERAL CAUSATION; SPECIFIC CAUSATION; WHETHER THE CLOSING PREJUDICED THE JURY; AND THE APPORTIONMENT OF DAMAGES (FIRST DEPT).

The First Department, in a comprehensive opinion by Justice Gische, over a dissent, determined there was sufficient evidence of causation to raise a jury question in this asbestos-mesothelioma action. The issues addressed included: (1) general causation; (2) specific causation; (3) whether plaintiff's counsel's closing required a new trial; and (4) the apportionment of damages. The opinion is far too detailed and comprehensive to fairly summarize here:

The Court of Appeals recognized that precise information and exact details are not always available in toxic tort cases and they may not be necessary so long as there is "evidence from which a reasonable person could conclude" that the defendant's offending substance "has probably caused" the kind of harm of which the plaintiff complains … . * * *

After each sides' attorney highlighted the weaknesses in the other sides' expert's scientific evidence and authorities, it then became the province of the jury to weigh the evidence and decide which opinion was more credible … . There is no legal basis to disturb the jury's findings and verdict in favor of plaintiff … . * * *

There is no basis, in this record, for a finding that the weight of the evidence presented at trial preponderated in favor of finding no specific causation. * * *

Plaintiff's counsel's summation comments were isolated remarks during a very lengthy summation. They were not pervasive, egregious or an obdurate pattern of remarks that inflamed the jury into believing that the focus of plaintiff's exposure to asbestos contaminated talc was other than airborne particulants that she had breathed in for many years … . * * *

Issues raised by plaintiff on its cross appeal regarding the court's calculation of offsets for payments made by the settling defendants … do have merit. General Obligations Law § 15-108 requires that a judgment be adjusted by subtracting the greater of other tortfeasors' equitable share of the damages or the amount actually paid by them. Nemeth v Brenntag N. Am., 2020 NY Slip Op 02261, First Dept 4-9-20

TRAFFIC ACCIDENTS, PASSENGERS.

PLAINTIFF-PASSENGER DID NOT RAISE A QUESTION OF FACT ABOUT DEFENDANT-DRIVER'S NEGLIGENCE; DEFENDANT-DRIVER WAS STRUCK FROM BEHIND WHEN HE STOPPED QUICKLY AFTER AN SUV MERGED INTO DEFENDANT'S LANE (THIRD DEPT).

The Third Department, over a dissent, determined plaintiff-passenger did not raise a question of fact about defendant-driver's negligence in this traffic accident case. Plaintiff alleged defendant failed to keep a proper lookout when an SUV merged into defendant's lane and stopped. Defendant was able to stop without hitting the SUV but was struck from behind by the Robbins vehicle:

"Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" … . "[W]here the lead driver is forced to brake and stop suddenly without striking the vehicle in front due to that vehicle coming to a sudden stop, there is no basis for imposing liability on that driver" … . Defendant testified at his deposition that he was driving in the right lane on a highway and that he saw the SUV move from the left lane to the middle lane. Defendant testified that, as the SUV was in the middle lane, he looked to his right to see if he "had an out to go" because there was a vehicle to the left of him. The SUV suddenly

"jumped in front" of defendant without flashing a turning signal, hit the brakes and came to a complete stop. … Defendant braked and avoided hitting the SUV. Shortly thereafter, however, Robbins struck defendant's vehicle in the rear. In view of the foregoing, defendant satisfied his moving burden by establishing that he was not negligent … . Guerin v Robbins, 2020 NY Slip Op 02511, Third Dept 4-30-20

TRAFFIC ACCIDENTS, RECKLESS DISREGARD, EMERGENCY VEHICLES.

POLICE OFFICER DID NOT VIOLATE THE RECKLESS DISREGARD STANDARD BY MAKING A U-TURN IN RESPONSE TO A CALL FOR ASSISTANCE; THE STATE'S MOTION FOR SUMMARY JUDGMENT IN THIS TRAFFIC ACCIDENT CASE WAS PROPERLY GRANTED (SECOND DEPT).

The Second Department determined the "reckless disregard" standard applied to a police making a u-turn. Plaintiff motorcyclist alleged he lost control of the motorcycle because he was forced to brake when the officer (Balletto) pulled out from the shoulder to make the turn. Believing it was safe to do so, the officer made the u-turn to respond to another officer's call for assistance. The state's (defendant's) motion for summary judgment was properly granted:

"[T]he reckless disregard standard of care in Vehicle and Traffic Law § 1104(e) only applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104(b). Any other injury-causing conduct of such a driver is governed by the principles of ordinary negligence" … . "Conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104(b) includes disregarding regulations governing the direction of movement or turning in specified directions" (… see Vehicle and Traffic Law § 1104[b][4]).

Here, the defendant established, prima facie, that by attempting to execute a U-turn in response to another trooper's radio call for assistance, Balletto's conduct was exempted from the rules of the road by section 1104(b)(4), and that, as a result, his conduct was governed by the reckless disregard standard of care in section 1104(e) … . The defendant also established, prima facie, that Balletto did not operate the emergency vehicle in reckless disregard for the safety of others … . Cable v State of New York, 2020 NY Slip Op 02453, Second Dept 4-29-20