NEW YORK APPELLATE DIGEST, LLC

Negligence
May 2020

An Organized Compilation of Selected Decisions Released in May 2020 and Posted on the New York Appellate Digest Website. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Any Page to Return There.

Contents

\

Table of Contents

Table of Contents

MEDICAL MALPRACTICE, BANKRUPTCY.

ALTHOUGH THE PARTY TWICE FILED FOR BANKRUPTCY WITHOUT LISTING THE MEDICAL MALPRACTICE ACTION AS AN ASSET, THE BANKRUPTCY PROCEEDING WAS SUBSEQUENTLY REOPENED AND THE ACTION WAS ADDED AS AN ASSET; AT THAT POINT THE BANKRUPTCY TRUSTEE BECAME THE PLAINTIFF IN THE MEDICAL MALPRACTICE ACTION AND THE DOCTRINE OF JUDICIAL ESTOPPEL, BASED UPON THE PARTY'S INITIAL FAILURE TO LIST THE ACTION AS AN ASSET, DID NOT APPLY TO THE TRUSTEE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant's motion to dismiss the medical malpractice complaint on judicial estoppel grounds should not have been granted. Vormnadiryan commenced a medical malpractice action in 2006. In two bankruptcy proceedings in 2008 and 2016 the medical malpractice action was not listed as an asset by Vormnadiryan. In 2017 Vormnadiryan opened the 2008 bankruptcy action and the medical malpractice action was added as an asset, making the bankruptcy trustee the plaintiff in that action. The Second Department determined Vormandiryan's initial failure to list the malpractice action as an asset did not subject the bankruptcy trustee, as the plaintiff in the malpractice action, to the judicial estoppel doctrine:

"The integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets. By failing to list causes of action on bankruptcy schedules of assets, the debtor represents that it has no such claims. Thus, the doctrine of judicial estoppel may bar a party from pursuing claims which were not listed in a previous bankruptcy proceeding" … . "Because the doctrine is primarily concerned with protecting the judicial process, relief is granted only when the risk of inconsistent results with its impact on judicial integrity is certain" … . …

Here, the 2008 bankruptcy proceeding was reopened by the Bankruptcy Court so that the 2006 medical malpractice action could be identified as an asset of the bankruptcy estate. Therefore, judicial estoppel cannot be predicated on Vormnadiryan's failure to list the action as an asset when she originally filed the 2008 bankruptcy petition … . Further, once a bankruptcy proceeding is commenced, all legal or equitable interests of the debtor become part of the bankruptcy estate, including any causes of action (see 11 USC § 541[a][1] …). The trustee in bankruptcy, as representative of the estate, "has capacity to sue and be sued" … . Pereira v Meisenberg, 2020 NY Slip Op 02815, Second Dept 5-13-20

MUNICIPAL LAW.

CITY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS ACTION STEMMING FROM THE POLICE-KILLING OF AN 18-YEAR-OLD BOY AFTER HIS MOTHER CALLED 911 SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the City defendants' motion for summary judgment in this negligence, wrongful death and civil-rights-violation action should not have been granted. Plaintiffs' decedent, 18 years old, was shot and killed by police after his mother called 911. The Second Department noted that Supreme Court properly granted summary judgment to defendants on the cause of action based upon defendants' alleged failure to follow the Patrol Guide for the apprehension of barricaded and emotionally disturbed persons because the relevant actions were discretionary and thus entitled to governmental immunity:

… [A] municipal defendant cannot be held liable for the negligent acts of its employee police officers where it establishes that the alleged negligent acts involved the exercise of discretionary authority … . Discretionary acts "involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" … . …

… [T]he defendants submitted the deposition testimony of each of the defendant officers who fired at the decedent, as well as the deposition testimony of a nonparty civilian who observed the incident. … [T]he testimonies of these witnesses demonstrate the existence of triable issues of fact as to whether … the decedent posed a threat of imminent death or serious physical injury to the defendant officers or others sufficient to justify the officers' use of deadly physical force against the decedent … . … [T]he City may not rely on the defense of governmental immunity because the defendant officers' actions, if negligent, would be in violation of the Patrol Guide's prohibition against the use of deadly physical force, and therefore, not discretionary … . …

… [Re: 42 USC 1983] the defendants failed to demonstrate, prima facie, the absence of triable issues of fact as to whether the defendant officers' use of deadly physical force against the decedent was objectively reasonable under the circumstances … . The defendants further failed to establish, prima facie, the absence of triable issues of fact as to whether a reasonable officer, facing the same situation, could have believed that deadly physical force was necessary to protect himself or herself or others from death or serious physical injury, and that the defendant officers are thus entitled to qualified immunity … . Owens v City of New York, 2020 NY Slip Op 03019, Second Dept 5-27-20

MUNICIPAL LAW.

MOTIONS IN LIMINE WHICH AFFECT THE SCOPE OF THE TRIAL ARE APPEALABLE; TWO-YEAR WRONGFUL DEATH STATUTE OF LIMITATIONS APPLIED TO THE MUNICIPALITIES; PRECLUDING EXPERT TESTIMONY BASED UPON DISCLOSURE DEFICIENCIES WAS AN ABUSE OF DISCRETION (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined: (1) plaintiff did not allege separate claims for personal injury and wrongful death, therefore the two-year wrongful-death statute of limitations in EPTL 5-4.1, not the one-year-ninety-days statute of limitations for negligence, applied to the actions against the municipalities; (2) motions in limine which limit the scope of the trial are appealable; and (3) preclusion of plaintiff's expert's testimony, based upon deficient disclosure pursuant to CPLR 3101 (d)(1), was an abuse of discretion. The action arose from a gas explosion at the great grandfather's house which killed plaintiff's 15-month-old son. Plaintiff sued the village, the town, the county and the New York State Electric & Gss Corporation (NYSEG). With regard to the motions in limine, the Third Department wrote:

"An order ruling on a motion in limine is generally not appealable as of right or by permission since an order made in advance of trial which merely determined the admissibility of evidence is an unappealable advisory ruling. However, an order that limits the scope of issues to be tried, affecting the merits of the controversy or the substantial rights of a party, is appealable" … . As to plaintiff's objection to that part of the order as allowed evidence of the great grandfather's negligence as a defense to the claim of res ipsa loquiter does not limit the scope of issues or impact a substantial right, such issue is not appealable … . Plaintiff also contends that Supreme Court erred in partially granting NYSEG's motion to preclude the testimony of Reiber, plaintiff's economist. Finding that the expert disclosure lacked reasonable detail as to how the value that Reiber assigned to plaintiff's lost services and support would be calculated, Supreme Court precluded his testimony with regard to said damages. … However, because this ruling restricted plaintiff's ability to prove and recover damages, this issue is appealable … . Reed v New York State Elec. & Gas Corp., 2020 NY Slip Op 03054, 5-28-20

MUNICIPAL LAW.

MUNICIPAL EMERGENCY PERSONNEL WERE ENGAGED IN A GOVERNMENTAL FUNCTION RESPONDING TO PLAINTIFFS' 911 CALL AND THERE WAS NO SPECIAL RELATIONSHIP WITH THE PLAINTIFFS; MUNICIPAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS NEGLIGENCE, WRONGFUL DEATH ACTION PROPERLY GRANTED (SECOND DEPT).

The Second Department determined the municipal police and ambulance defendants' motion for summary judgment was properly granted in this negligence, wrongful death action. Plaintiff's decedent died after his wife called 911 and the police and ambulance personnel were unable to revive him. The Second Department found that the municipal defendants were engaged in a governmental function and there was no special relationship between the plaintiffs and the municipal defendants:

… [T]he defendants were engaged in a governmental function as a provider of emergency medical services pursuant to a municipal emergency response 911 system, such that the defendants could not be held liable to the plaintiff unless they owed her a special duty … . One way to establish the existence of a special duty is by showing that the defendant assumed a "special relationship" with the plaintiff beyond the duty that is owed to the public generally … . "The plaintiff has the heavy burden of establishing the existence of a special relationship by proving all of the following elements: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) [that] party's justifiable reliance on the municipality's affirmative undertaking" … . Of the four factors, the "justifiable reliance" element is "critical" because it "provides the essential causative link between the special duty assumed by the municipality and the alleged injury" … . …

There is nothing in the record to suggest that Officer Kelly or any of the defendants' agents lulled the plaintiff into a false sense of security, or induced her to forego other avenues to transport her husband to the hospital, and therefore placed the plaintiff in a worse position than she would have been had the defendants never assumed the duty … . Marks-Barcia v Village of Sleepy Hollow Ambulance Corps, 2020 NY Slip Op 03007, Second Dept 5-27-20

MUNICIPAL LAW.

PLAINTIFFS, THE DRIVER AND PASSENGER IN THIS TRAFFIC ACCIDENT CASE, REPRESENTED BY THE SAME ATTORNEY, REFUSED TO PARTICIPATE IN THE GENERAL MUNICIPAL LAW 50-h HEARING(S) UNLESS EACH PLAINTIFF WAS PRESENT WHEN THE OTHER TESTIFIED; THE COURT OF APPEALS AFFIRMED THE DISMISSAL OF ACTION BASED UPON PLAINTIFFS' FAILURE TO APPEAR FOR THE 50-h HEARING(S) (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a concurring opinion, determined plaintiffs, the driver and passenger in this traffic accident case, did not have the right to observe each other's testimony at a General Municipal Law 50-h hearing. Both plaintiffs were represented by the same attorney. The action was dismissed because plaintiffs refused to appear for the hearing(s) after plaintiffs' counsel insisted that both plaintiffs be present during the testimony. The Court of Appeals affirmed the dismissal of the action:

As General Municipal Law § 50-h (5) makes clear on its face, compliance with a municipality's demand for a section 50-h examination is a condition precedent to commencing an action against that municipality … . A claimant's failure to comply with such a demand generally warrants dismissal of the action … . Requiring claimants to comply with section 50-h before commencing an action augments the statute's purpose, which "is to afford the city an opportunity to early investigate the circumstances surrounding the accident and to explore the merits of the claim, while information is readily available, with a view towards settlement" … . Colon v Martin, 2020 NY Slip Op 02681, CtApp 5-7-20

PRODUCTS LIABILITY.

MANUFACTURER AND SELLER OF THE PRODUCT WHICH ALLEGEDLY INJURED INFANT PLAINTIFF CANNOT SUE THE PARENTS FOR CONTRIBUTION ON A THEORY OF NEGLIGENT SUPERVISION OF THE INFANT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the third-party complaint brought by the defendant manufacturer and seller of a humidifier against the parents of the injured child, alleging negligent supervision of the child, should have been dismissed:

In March 2014, the then-10-month-old infant plaintiff allegedly was injured when she knocked over a humidifier and hot water spilled onto her foot. The infant's father had placed the humidifier on the living room floor before leaving the apartment with the infant's five-year-old sibling. The infant's mother was in the living room when the accident occurred. In August 2014, this action to recover damages for the infant's injuries was commenced against the defendants, which allegedly manufactured and sold the humidifier. In December 2015, the defendants commenced a third-party action against the parents for contribution. …

There is no legally cognizable cause of action to recover damages for injuries suffered by a minor child against his or her parent for negligent supervision … . Additionally, where a secondary right of contribution is dependent upon "the parent's alleged failure to perform a duty owing to the plaintiff child, the absence of the primary cause of action defeats the . . . third-party complaint" … . Although there is an exception when the parent's conduct implicates a duty owed to the public at large … , the acts complained of in the third-party complaint were encompassed within the intrafamily immunity for negligent supervision … . Martinez v Kaz USA, Inc., 2020 NY Slip Op 02776, Second Dept 5-13-20

RAPE SHIELD LAW, NEGLIGENT SUPERVISION.

ALTHOUGH IT IS NOT SETTLED WHETHER THE RAPE SHIELD LAW APPLIES TO A CIVIL PROCEEDING, SUPREME COURT HAD THE AUTHORITY TO PROHIBIT THE QUESTIONING OF PLAINTIFF'S DAUGHTER ABOUT HER SEXUAL HISTORY TO PREVENT EMBARRASSMENT AND HARASSMENT IN THIS NEGLIGENT SUPERVISION CASE (THIRD DEPT).

The Third Department upheld Supreme Court's protective order prohibiting plaintiff's child from being questioned about her sexual history. The complaint alleged the child was raped during a sleep over at defendants' home. The complaint alleged several theories of liability, including negligent supervision. Supreme Court held that the Rape Shield Law applied to this civil case. The Third Department determined it did not need to reach that issue, holding that the court had the authority to prohibit the testimony to protect the child from embarrassment:

… Supreme Court was required to balance plaintiff's concern that the child's sexual history is irrelevant, and that questions of this nature are nothing more than a form of intimidation and embarrassment, against defendants' argument that the child had a motive to fabricate the allegations of the assault because of a purported pregnancy. The record reveals that Supreme Court undertook a balancing of these concerns.

We find that plaintiff met her burden of showing annoyance and embarrassment. The child's sexual history, sexual conduct and pregnancies are not relevant or material to the elements of the causes of action for negligence, battery, intentional infliction of emotional distress or loss of services … . Moreover, it has been determined that there is limited value to testimony concerning the sexual past of a victim of a sexual assault; instead, it often serves only to harass the victim and confuse the jurors … . Lisa I. v Manikas, 2020 NY Slip Op 02846, Third Dept 5-14-20

RES IPSA LOQUITUR.

JUDGE SHOULD NOT HAVE SEARCHED THE RECORD AND, SUA SPONTE, GRANTED RELIEF NOT REQUESTED IN THE MOTION PAPERS, INCLUDING THE APPLICATION OF THE RES IPSA LOQUITUR DOCTRINE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the judge should not have, sua sponte, searched the record to grant relief that was not requested in this Labor Law 200, 240(1), 241(6), negligence action. Plaintiff was injured when a portion of a ceiling fell causing a scaffold to collapse on him. The judge should not have granted summary judgment on a negligence cause of action which was not included in the motions, and should not have granted summary judgment on a res ipsa loquitur theory:

While it is well settled that the Supreme Court has the authority to search the record and grant summary judgment to a nonmoving party with respect to an issue that was the subject of a motion before the court (see CPLR 3212[b] …), here, the court, in effect, searched the record and awarded summary judgment to the movant with respect to an issue that was not the subject of the motion before the court. …

The doctrine of res ipsa loquitur applies when the injury-causing event (1) is "of a kind which ordinarily does not occur in the absence of someone's negligence"; (2) "[is] caused by an agency or instrumentality within the exclusive control of the defendant"; and (3) was not "due to any voluntary action or contribution on the part of the plaintiff" … . Contrary to the Supreme Court's determination, this is not one of "the rarest of res ipsa loquitur cases" where the plaintiff's circumstantial evidence is so convincing and the defendant's response so weak that the inference of the defendant's negligence is inescapable … . Although the first and third elements may be satisfied in the plaintiff's favor, based upon the limited record, this standard was not met as to the second element. Even though courts do not generally apply the requirement of exclusive control as it is literally stated or as a fixed, mechanical or rigid rule … , the plaintiff failed to demonstrate that the plaster ceiling is "structural" and, therefore, the obligation of [defendant] Lexington to maintain pursuant to the terms of the lease it entered into with [defendant] Dover. Moreover, the papers do not establish the plaintiff's entitlement to summary judgment against Dover on this issue, which was raised by the court sua sponte as against Dover, and was not the subject of the plaintiff's motion as against Dover. Zhigue v Lexington Landmark Props., LLC, 2020 NY Slip Op 02948, Second Dept 5-20-20

SLIP AND FALL.

DEFENDANT DID NOT OFFER PROOF OF WHEN THE AREA WHERE PLAINTIFF SLIPPED AND FELL ON WATER WAS LAST CLEANED OR INSPECTED; THEREFORE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this slip and fall case should not have been granted. The defendant failed to demonstrate it did not have constructive notice of the water on the floor because it did not offer any proof of when the area had last been cleaned or inspected:

"A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it did not create the hazardous condition which allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it" … . "A defendant has constructive notice of a dangerous condition when the dangerous condition is visible and apparent, and existed for a sufficient length of time before the accident that [it] could have been discovered and corrected" … . "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" … .

Here, the defendant failed to meet its initial burden as the movant to affirmatively demonstrate that it did not have constructive notice of the condition that allegedly caused the plaintiff to fall, because the defendant did not proffer any evidence as to when the subject area was last cleaned or inspected … . Merchant v New York City Tr. Auth., 2020 NY Slip Op 02666, Second Dept 5-6-20

SLIP AND FALL.

DEFENDANT FAILED TO DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE BROKEN CURB WHICH ALLEGEDLY CAUSED PLAINTIFF'S SLIP AND FALL; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant did not demonstrate it did not have constructive notice of the broken curb which allegedly caused plaintiff's slip and fall:

… [T]he defendants failed to meet this burden. In support of their motion, among other things, they proffered the affidavit of the director of engineering of Mount Vernon Hospital who averred that there were no maintenance or complaint records for approximately three years preceding the accident, that he would inspect the premises approximately once a month, and that "the sidewalk and curbing is repaired and replaced on an as needed basis." The defendants did not proffer any evidence demonstrating when the area at issue was last inspected prior to the plaintiff's alleged accident … . Moreover, the defendants failed to make a prima facie showing that the alleged defect that caused the plaintiff to fall was not visible and apparent, and would not have been noticed upon a reasonable inspection of the area where the plaintiff alleged she tripped and fell … . Malloy v Montefiore Med. Ctr., 2020 NY Slip Op 02921, Second Dept 5-20-20

SLIP AND FALL.

DEFENDANT SNOW-REMOVAL CONTRACTOR DID NOT NEED TO DEMONSTRATE THE ESPINAL EXCEPTIONS DID NOT APPLY IN THIS SLIP AND FALL CASE BECAUSE PLAINTIFF DID NOT ALLEGE ANY OF THE EXCEPTIONS APPLIED; THEREFORE DEFENDANT WAS ENTITLED TO SUMMARY JUDGMENT ON THE GROUND PLAINTIFF WAS NOT A PARTY TO THE CONTRACT (SECOND DEPT).

The Second Department, in this slip and fall case, determined defendant snow-removal contractor, Con-Kel, did not need to demonstrate the inapplicability of any Espinal exceptions in its motion for summary judgment because plaintiff did not allege any of the exceptions applied:

"[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (Espinal v Melville Snow Contrs., 98 NY2d 136, 138). However, there are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" … .

Where the pleadings do not allege facts which would establish the applicability of any of the Espinal exceptions, a defendant is not required to affirmatively demonstrate that the exceptions do not apply in order to establish its prima facie entitlement to judgment as a matter of law … .

Here, Con-Kel demonstrated its prima facie entitlement to judgment as a matter of law by coming forward with evidence that the plaintiff was not a party to its snow removal contract … . Arnone v Morton's of Chicago/Great Neck, LLC, 2020 NY Slip Op 02997, Second Dept 5-27-20

SLIP AND FALL.

DEFENDANTS DID NOT DEMONSTRATE, PRIMA FACIE, THE UNEVEN SEWER GRATE WAS A TRIVIAL DEFECT; THEREFORE THE BURDEN OF PROOF NEVER SHIFTED TO THE PLAINTIFF; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case should not have been granted. Plaintiff allegedly tripped on an uneven sewer grate in a parking lot. The evidence did not demonstrate, prima facie, that the defect was trivial. Therefore the burden of proof on the summary judgment motion never shifted to plaintiff:

"A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact" … . In determining whether a defect is trivial, the court must examine all of the facts presented, including the "width, depth, elevation, irregularity and appearance of the defect along

with the time, place and circumstance of the injury" … . There is no "minimal dimension test" or per se rule that the condition must be of a certain height or depth in order to be actionable … . Physically small defects may be actionable "when their surrounding circumstances or intrinsic characteristics make them difficult for a pedestrian to see or to identify as hazards or difficult to traverse safely on foot" … . Bishop v Pennsylvania Ave. Mgt., LLC, 2020 NY Slip Op 02756, Second Dept 5-13-20

SLIP AND FALL.

OUT OF POSSESSION LANDLORD MAY BE LIABLE IN THIS SIDEWALK SLIP AND FALL CASE PURSUANT TO A 2019 COURT OF APPEALS DECISION; VIOLATION OF NYC ADMINISTRATIVE CODE CAN BE RAISED FOR THE FIRST TIME IN OPPOSITION TO SUMMARY JUDGMENT MOTION; QUESTION OF FACT ABOUT THE APPLICABILITY OF THE STORM IN PROGRESS DOCTRINE (FIRST DEPT).

The First Department, reversing Supreme Court in this sidewalk slip and fall case, determined: (1) a 2019 Court of Appeals decision clarified the defendant out-of-possession landlord's duty to keep sidewalks safe, notwithstanding any maintenance arrangement with a tenant; (2) although the plaintiff was required to allege the defendant violated the NYC Administrative Code and failed to do so, plaintiff could rely on the Code provision in opposition to defendant's summary judgment motion; and (3) plaintiff raised a question of fact whether the ice condition existed before the alleged storm in progress at or near the time of the fall:

… [T]he court's determination that defendant was entitled to summary judgment dismissing the complaint on the ground that he is an out-of-possession landlord is no longer sound in light of the Court of Appeals's decision in Xiang Fu He v Troon Mgt., Inc. (34 NY3d 167 [2019]). …[E]ven if … plaintiff was required to plead defendant's violation of Administrative Code of City of New York § 7-210 – which he undisputedly failed to do – plaintiff's reliance thereon for the first time in opposition to defendant's motion for summary judgment was permissible, given that doing so did not raise any new theory of liability or prejudice … . Herrera v Vargas, 2020 NY Slip Op 03082, First Dept 5-28-20

SLIP AND FALL.

QUESTIONS OF FACT RAISED ABOUT THE APPLICABILITY OF THE STORM IN PROGRESS RULE, WHETHER THE DEFECT WAS TRIVIAL AND WHETHER PLAINTIFF WAS INJURED BY A CONDITION HE WAS HIRED TO REPAIR; SLIP AND FALL OCCURRED ON DEPARTMENT OF EDUCATION, NOT NYC, PROPERTY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the Department of Education's (DOE's) motion for summary judgment in this slip and fall case should not have been granted. Plaintiff slipped and fell on an exterior step of a school. Questions of fact were raised about the applicability of the storm in progress rule, whether the defect was trivial, and whether the plaintiff was injured by the condition he was hired to repair. However, the City's motion for summary judgment was properly granted because the slip and fall occurred on DOE property, not NYC property:

… [A]lthough it is undisputed that a storm was in progress at the time of the plaintiff's accident, the defendants failed to eliminate triable issues of fact as to whether an allegedly defective condition with the step caused or contributed to the plaintiff's injuries … . … There may be more than one proximate cause of an accident, and here, the defendants failed to establish, prima facie, that the alleged unevenness of the step was not a proximate cause of the plaintiff's accident … . …

… [T]he defendants submitted the DOE's 2010-2011 building condition assessment survey for the school, which indicated that the step was in "poor" condition, described the deficiency as "stone deteriorated substrate," and noted "replace substrate and reset" as a potential action. Although "[p]hotographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable" … , the only photograph submitted by the defendants in their moving papers was a small, black-and-white photograph of the step in the building condition assessment survey for the school, which was indistinct and failed to establish that the alleged defect was trivial as a matter of law … . …

The defendants also failed to demonstrate their prima facie entitlement to judgment as a matter of law on the ground that the plaintiff was injured by the condition he was responsible for repairing … . Mejias v City of New York, 2020 NY Slip Op 03008, Second Dept 5-27-20

SLIP AND FALL.

THE EXISTENCE OF A HANDRAIL ON THE LEFT OF THE STAIRS DID NOT WARRANT GRANTING SUMMARY JUDGMENT TO DEFENDANTS IN THIS SLIP AND FALL CASE WHERE THERE WAS NO HANDRAIL ON THE RIGHT (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendants' motion for summary judgment in this stairway slip and fall case should not have been granted. The fact that there was a handrail on the left did not warrant summary judgment because there was no handrail on the right:

Plaintiff … was injured when, while descending the right side of the exterior staircase of the subject premises, she slipped and when she tried to grab onto a handrail, there was no right-sided handrail. A triable issue of fact thus exists as to whether the absence of a required handrail on that side of the staircase was a proximate cause of the accident … . Defendants' argument that the missing handrail on the right side of the staircase did not proximately cause plaintiff's fall since she chose not to use the available left-side handrail, is directed to the issue of comparative negligence … . Gil v Margis Realty LLC, 2020 NY Slip Op 03089, First Dept 5-28-20

SLIP AND FALL.

THERE WAS A QUESTION OF FACT WHETHER WATER ON THE FLOOR RESULTED FROM A RECURRING LEAK WHICH SHOULD HAVE BEEN NOTICED BY THE NYC HOUSING AUTHORITY; THERE WAS NO EVIDENCE THE ROOF-REPAIR CONTRACTORS HIRED BY THE HOUSING AUTHORITY LAUNCHED AN INSTRUMENT OF HARM; SUMMARY JUDGMENT SHOULD NOT HAVE BEEN AWARDED TO THE HOUSING AUTHORITY IN THIS SLIP AND FALL CASE BUT WAS PROPERLY AWARDED TO THE CONTRACTORS (FIRST DEPT).

The First Department, reversing Supreme Court, determined summary judgment should not have been granted to defendant NYC Housing Authority (NYCHA) in this slip and fall case. However, summary judgment was properly granted to the roof-repair contractors hired by the NYCHA to ensure the roof was watertight. There

was no evidence the contractors launched an instrument of harm causing the accumulation of water on the floor which allegedly caused plaintiff's fall. But there was evidence the water on the floor was caused by a recurring leak which should have been noticed by the NYCHA:

… [T]he Ruiz [eyewitness] affidavit established that leaks had existed in the ceiling for a long period of time before the accident, and that water from the ceiling had caused the accident. The photographs of the ceiling show discoloration and peeling paint that could be suggestive of a longstanding, "visible and apparent" condition — dripping water – that NYCHA's practices and procedures unreasonably failed to observe … . May's testimony that had he seen a leak he would have placed a bucket underneath it and notified his supervisor fails to account for why he or anybody at NYCHA did not notice the obvious condition of the ceiling, nor does the evidence that there were no complaints regarding leaks on the 20th floor explain why NYCHA's maintenance staff did not notice it.

… [T]he fact that NYCHA completed the roof replacement before the accident does not absolve it of liability as a landowner. NYCHA failed to establish, through an expert affidavit or otherwise, that any condition that may have caused the leaks discussed in the Ruiz affidavit was actually addressed by the project. However, because [defendants] Liro and Corbex are not landowners but rather mere contractors hired by NYCHA to replace the roofs, they owed no direct duty to plaintiff, but could only be liable to the extent that they launched an instrument of harm, that plaintiff detrimentally relied on their performance of their respective contracts with NYCHA, or that they entirely replaced NYCHA's obligation to maintain the premises in a safe condition (see Espinal v Melville Snow Contrs., 98 NY2d 136, 140 [2002]). There is no evidence to suggest that either of those three conditions existed here. Williams v New York City Hous. Auth., 2020 NY Slip Op 03063, First Dept 5-28-20

TRAFFIC ACCIDENTS.

ALTHOUGH THE CAR DEALER, DUE TO AN ERROR, DID NOT SUBMIT THE CORRECT REGISTRATION DOCUMENTS TO THE DEPARTMENT OF MOTOR VEHICLES WITHIN THE MANDATED FIVE-DAY PERIOD, THAT DEFECT DID NOT INVALIDATE THE TRANSFER OF OWNERSHIP OF THE CAR TO THE DRIVER INVOLVED IN THE ACCIDENT; THE DEALER WAS NOT THE OWNER OF THE CAR AT THE TIME OF THE ACCIDENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the dealer (Zaki's) which sold a car to the hit-and-run driver (Marcial) in this pedestrian traffic accident case demonstrated it was not the owner of the car at the time of the accident. The transaction was complete and the driver was insured. When the dealer submitted the title paperwork to the Department of Motor Vehicles (DMV) a mistake was discovered requiring that the dealer submit corrected paperwork. Therefore, technically, the dealer was not in compliance with requirement that the title paperwork be submitted to the DMV within five days. That technical defect did not affect the validity of the transfer of ownership to the driver:

Vehicle and Traffic Law § 420-a authorizes qualified automobile dealers to issue a temporary vehicle registration to a person to whom the dealer has sold or transferred a vehicle … . The temporary registration is valid for a period of 30 days after the date of issuance (see Vehicle and Traffic Law § 420-a[1]). Before issuing the temporary registration, the dealer must comply with certain statutory requirements, and, upon issuing the temporary registration, the dealer must send the permanent vehicle registration application to the commissioner of the DMV within five calendar days … . A dealer who fails to comply with the statutory requirements regarding vehicle registration procedures may be estopped from denying ownership of the vehicle and be held liable as if it were, in fact, the owner of the vehicle … .

It is not disputed that Zaki's complied with all of the statutory requirements before issuing the temporary registration, and that Marcial had obtained insurance on the vehicle before being issued the temporary registration and taking the vehicle into his possession … . Further, Zaki's evidence established that Zaki's was diligent in its efforts to comply with the statutory requirements concerning the permanent registration, and that its failure to do so within the statutory five days was because of an error in the title that required correction, and not any negligence by Zaki's in its statutory obligations … . In addition, there is no evidence that Zaki's engaged in any act whereby it held itself out as the owner of the vehicle on the date of the accident or that it gained any financial advantage by failing to submit the permanent registration application within the five days following

the issuance of the temporary registration … . Gonzalez v Zaki's Auto Sales Corp., 2020 NY Slip Op 02644 Second Dept 5-6-20

TRAFFIC ACCIDENTS.

PLAINTIFF BICYCLIST WAS ENTITLED TO SUMMARY JUDGMENT IN THIS TRUCK-BICYCLE COLLISION CASE; THE TRUCK DRIVER BREACHED HIS DUTY TO SEE WHAT SHOULD BE SEEN (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff bicyclist was entitled to summary judgment in this traffic accident case based upon the video taken from inside defendants' truck (which collided with plaintiff):

The video footage taken from inside defendants' truck shows plaintiff bicycling on the right side of the lane in front of Ortiz [the truck driver] before being struck … . Ortiz thus failed to exercise due care to avoid colliding with a bicyclist (Vehicle and Traffic Law § 1146[a]), and breached his duty "to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" … . Moreover, plaintiff was not required to demonstrate his own freedom from comparative negligence nor to show that defendants' negligence was the sole proximate cause of the accident to be entitled to summary judgment … . Fernandez v Ortiz, 2020 NY Slip Op 02856, Second Dept 5-14-20